

THE HIGH COURT

Record Number: 2006 No. 125 Ext.

BETWEEN

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

APPLICANT

AND
MAREK ŠTER

RESPONDENT

Judgment of Mr Justice Michael Peart delivered on the 24th day of January 2008

1. The surrender of the respondent is sought by a judicial authority in the Czech Republic on foot of a European Arrest Warrant dated 3rd July 2006 which was endorsed by the High Court here by order dated 22nd September 2006. The respondent was duly arrested on foot of this warrant on the 14th November 2006 and brought before the High Court on that date. Thereafter he was remanded from time to time pending the hearing of the present application for his surrender under section 16 of the European Arrest Warrant Act 2003 as amended ("the Act").

2. No issue arises as to the respondent being the person in respect of whom this European arrest warrant has been issued. In any event, I am satisfied in this regard by the evidence contained in the affidavit of Sergeant Martin O'Neill, the arresting officer, which has been sworn by him.

3. The surrender of the respondent is sought on foot of this warrant so that he can serve a sentence of imprisonment imposed upon him in respect of two offences which are set forth in the warrant. The conviction for these offences and the sentence of four years and six months imposed in respect of them occurred in the Czech Republic in the absence of the respondent. An issue has been raised by the respondent in respect of the undertaking for the purpose of section 45 of the Act which is contained in the warrant in order to satisfy the requirements of that section, and I will consider that objection in due course when considering all the points of objection which are raised by the respondent against surrender.

4. No issue has been raised by the respondent in relation to correspondence. In any event, one of the offences has been ticked within the warrant as being an offence within the categories of offences set forth in Article 2.2 of the Framework Decision and in respect of which, therefore, double criminality is not required to be verified. That offence is one of causing grievous bodily injury. The second offence is an offence of theft and I am satisfied that the alleged actions of the respondent which give rise to that offence would, if committed in this jurisdiction, be an offence of theft under section 4 of the Criminal Justice (Theft and Fraud Offences) Act, 2001.

5. The minimum gravity requirement under the Framework Decision is satisfied given that a sentence of more than four months' imprisonment remains to be served in respect of these offences.

6. Subject to addressing the issue raised by the respondent in relation to s. 45 of the Act, and the other objections raised by him, I am satisfied that there is no reason under sections 21A, 22, 23 or 24 of the Act to refuse to order surrender, and I am satisfied also that his surrender is not prohibited by any provision of Part III of the Act or the Framework Decision.

Points of Objection**1. Section 45 undertaking in respect of retrial following surrender**

7. Section 45 provides that in certain circumstances set out therein, a person who was tried and convicted in absentia shall not be surrendered "*unless the issuing judicial authority gives an undertaking in writing that the person will, upon being surrendered, (i) be retried for that offence or be given the opportunity of a retrial in respect of that offence, (ii) be notified of the time when, and place at which any retrial in respect of the offence concerned will take place, and (iii) be permitted to be present when any such retrial takes place.*"

8. The European arrest warrant contains the following undertaking in Annex 4 thereof:

"Undertaking regarding conviction in absentia

I, JUDR. Jirina Rihova, the issuing judicial authority undertake that [the respondent] in relation to offences in respect of which he/she has been convicted in absentia, and in respect of which he/she is surrendered pursuant to the European Arrest Warrant issued on the third of July 2006, will:

(i) be retried for that offence/those offences or be given the opportunity of a retrial in respect of that offence/those offences, and

(ii) be notified of the time when, and place at which any retrial in respect of the offence(s) concerned will take place, and

(iii) be permitted to be present when any such retrial takes place."

9. This undertaking conforms precisely to what is required to be contained in an undertaking for the purpose of section 45 of the Act. However, Kieran Kelly B. L. on behalf of the respondent submits that this undertaking ought not in the present case be considered adequate, since there is no guarantee contained therein that the respondent will be retried by a different judge to that who has already tried and convicted him in his absence, and that therefore justice cannot be seen to be done. It is submitted, firstly, that in such circumstances there will necessarily be a perception of bias, and that the respondent's right to natural and constitutional justice will thereby be infringed if surrendered.

10. The respondent in his grounding affidavit has stated that he is advised by his Czech lawyer and believes that the provisions for retrial under Czech law permits an appeal only in circumstances where the person is deemed guilty and is required to deal with the prior finding made in his absence. He states that he will be required to do that and that this is unfair given that he was not present at his trial, was not aware of it, and did not instruct any lawyer to represent him at that hearing. However, I am not satisfied that such an averment is in any way sufficient to detract from the undertaking which has been given.

11. I am satisfied, as was submitted by Patrick McGrath BL. on behalf of the applicant, that this is not a ground for refusing to order surrender, since there is no requirement under either the Framework Decision, or section 45 of the Act, that any retrial to which a person convicted in absentia is entitled must be a retrial before a different judge. It is not the function of this Court to make any adjudication upon the nature of the retrial to which the respondent is entitled upon surrender. Given the adoption of the Framework Decision by this State, and the express terms thereof as to mutual trust and confidence in the judicial systems of Member States, it is to be presumed by this Court on the hearing of an application under section 16 of the Act for surrender, that the fundamental rights of the respondent will be respected, and that the issuing state will comply with its obligations under the Framework Decision and under the Treaty on European Union in relation to fundamental rights.

12. Mr Kelly has also submitted in this case that the Court cannot be satisfied to presume that the Czech Republic will comply with its obligations under the Framework Decision in respect of the respondent, should an order for surrender be made, and that the undertaking cannot be relied upon and considered a sufficient protection for the respondent. This is a reference to the presumption contained in section 4A the Act which provides;

"4A. It shall be presumed that an issuing state will comply with the requirements of the Framework Decision, unless the contrary is shown."

13. The basis for his seeking to rebut that presumption is an averment contained in the respondent's grounding affidavit to the effect that in another case dealt with by this Court arising from an application for surrender to the Czech Republic on foot of a European arrest warrant, and in which an order for surrender to the Czech Republic was made, that person was tried upon surrender, not only for the offence for which is surrender was sought in that warrant, but in respect of another offence not referred to in the warrant. The respondent has exhibited in his grounding affidavit a record from the court in question in the Czech Republic which appears to confirm what he states in his affidavit, namely that that person was dealt with in respect of an offence other than that contained in the European arrest warrant in that case. This is put forward as evidence to support the respondent's submission that if surrendered, he cannot be certain that he will be afforded his right to re-trial upon surrender in spite of the undertaking contained in the warrant. As I understand the submission it is not to the effect that, if surrendered, the specialty provisions of the Framework Decision, as given effect to in s. 22 of the Act, will be breached in the case of the respondent. No point of objection has raised the issue of specialty. Rather, the respondent is relying on the alleged breach of specialty in the other case referred to as evidence that it cannot be presumed that the issuing state will comply with its undertaking contained in the warrant.

14. In my view, however, this is not sufficient to rebut the presumption that he will be afforded his right to re-trial. The person referred to by the respondent in this regard may well have a grievance that in his case the Czech Republic has not complied with its obligations under the Framework Decision. However, it is evident from the material exhibited by this respondent, that the person concerned has taken steps in the Czech Republic in this regard and that there is a procedure for redress available in that regard, which that respondent has availed of. I am also of the view, however, that even if the Czech Republic in that case is found to have not obtained the consent of the High Court before proceeding against that person in respect of an offence which was not the subject of the European arrest warrant in question, the issue as to whether the Czech Republic is in breach of an obligation under the Framework Decision is one which it is not open to the present respondent to rely upon. There is no evidence so far that that incident is other than an isolated one. The Framework Decision provides that only in the case of a persistent and serious breach of obligations under the Framework Decision might the arrangements under the same to be suspended, and that is a matter which would, in any event, have to be dealt with at Council of Europe level, and is not a matter which can be raised in opposition now by this respondent against his surrender taking place.

15. The existence of the undertaking contained in this warrant is a strong presumption, and the evidence of a single possible breach of an obligation in another case, is insufficient to displace this presumption in the respondent's case.

3. Delay

16. The respondent submits that there has been unreasonable, unconscionable and unexplained delay on the part of the issuing state in issuing the warrant in this case, given that the date of his conviction in the Czech Republic is the 12th November 2002 and that the warrant seeking his surrender was not issued until the 3rd and July 2006.

17. It is submitted by the respondent in this regard that order is surrender on foot of that warrant would be *"unconscionable, invidious, unjust, unreasonable, oppressive or unfair in all the circumstances."* In his grounding affidavit dated the 11th January 2007 the respondent has sworn that towards the very end of December 1999 he had decided to flee the Czech Republic with his mother, his wife and his son, as he had concerns for his safety as a result of unwelcome attention from members of what he describes as "the Russian Mafia". At Paragraph 13 of that affidavit he states that he stayed in the house of his cousin for a period of approximately five to seven weeks thereafter. That would mean that sometime around the middle of February 2000 he left that house. He goes on to say that they at that stage travelled to the United Kingdom via Germany and Belgium, and claimed asylum there. There is no information as to whether that application was granted or refused.

18. He goes on to say that he separated from his wife during this period due to the stress of the situation that they all found themselves in, including the fact that they had fled from their home. In the following paragraph he states that while in the United Kingdom he met another lady, and that she became pregnant and that they both moved to this country in the year 2000. He says that he applied for asylum here. Although not referred to in that affidavit, Counsel, having taken instructions, has informed the court that following the birth of an Irish born child, his application for asylum here was withdrawn and he was granted leave to remain.

19. However, in a further affidavit sworn by the respondent on the 22nd January 2008, the respondent states that he went to the United Kingdom in 1999, rather than in February 2000. Patrick McGrath BL for the applicant has pointed to the conflict of evidence in this regard. Mr McGrath has also stated that there has been no documentation produced to support any government in relation to applying for asylum either here or in the United Kingdom, and submits that these matters go against the overall credibility of the respondent.

20. The objection grounded upon any delay which has occurred from the date of his conviction in 2002 to the date of issue of the European arrest warrant in this case is not made out to any extent at all. In the absence of any relevant averment by the respondent, or any other evidence, it is safe for this court to infer or presume that the respondent did not inform the authorities in the Czech Republic of his departure, and that they were not in a position to issue the warrant until such time as they became aware of the respondent's whereabouts. There is also a heavy onus of proof upon a respondent if he wishes to assert that any delay which has occurred has caused him prejudice, and in the present case, the respondent has not set forth any possible prejudice that may have occurred due to any delay or passage of time from the date of his conviction to the date of issue of the warrant.

4. Risk to health and life if surrendered:

21. Under this point of objection, the respondent is submitting that an order of surrender would place his life and his health at risk given the circumstances and facts which he has sworn to in his grounding affidavits. He submits that his constitutionally protected right to life, liberty and bodily integrity is likely to be infringed and that this is both a breach of his constitutional rights and his rights under the European Convention on Human Rights and Fundamental Freedoms. He has stated in his points of objection that the Russian Mafia has a strong presence in the Czech Republic. In his first grounding affidavit sworn in January 2007 he has stated that in or around December 1999 he was approached by some men who demanded money from his employer through him and that these men made it quite clear that if the money was not paid to them they would perpetrate violence both upon him and his employer, and that this threat was later repeated in his presence to his employer. He describes the money sought as being "protection money". He goes on to say that his employer made complaints to the local police force and that they were told that the police could not help some unless actual violence had taken place. He states that shortly thereafter he made a complaint to the police that a nightclub premises which he managed had been destroyed by fire and that it is his view that the fire was not started accidentally. He believes that it was started by the same men who had sought the protection money referred to. He also states that the local police confirmed to him and his employer that the men who were threatening them were members of the Russian Mafia. He gives details also of another incident which took place after the date on which the said premises were set fire to, when two cars stopped in front of him as he was walking with his young son and that both were grabbed and pulled into one of the cars and taken to a small wooded area and that he was beaten around the head and body on that occasion. He states also that a gun was placed to the head of his son and that the men threatened to kill his son if they were not paid the money in question. He says that these men placed a noose around his neck and told him that they were going to hang him if he refused to pay. After the respondent pleaded with these men not to hurt his son, he states that they eventually released him. He gives further details of making complaints to the police and that one officer informed him that the police would be able to help them if he co-operated with the police by agreeing to bring the sum of money in question to a pre-arranged location and that he agreed to do this. He goes on to say that he met the men who had abducted him outside a nightclub and that this meeting was observed by the police and that he handed over the money sought, whereupon the police attempted to arrest the men. He states that a number of these men ran away when they saw the police, but that a number of them were arrested also. He gives details of having been able to identify two of the men from this group and that they were arrested and taken away. He gives further details of assistance which he gave to the police.

22. In this first grounding affidavit the respondent goes on to state that he agreed to assist the police and identify these men provided that he would be afforded protection both for himself and for his family afterwards. He states that he was informed by the police that "there was no witness protection plan in operation". He went on to identify four of these men and says that he again requested protection but was informed that there was no witness protection plan in place but that if he agreed to give evidence in the trial against the Russian Mafia the police would clear his own police record. He believes that he had only one previous conviction, and informed the police that if they could not offer him any protection, he was not prepared to give evidence against the Russian Mafia.

23. In this affidavit he goes on to state that having spoken to the police, and having returned home, was informed by his mother that an attempt had been made to burn down his apartment. It was at this stage, he says, that he decided to flee the Czech Republic with his mother, his wife and his son, as I have already stated. Later in that affidavit at paragraph 15 thereof he states that since coming to this jurisdiction, his cousin, in whose house he stayed from the end of December 1999 to the middle of February 2000, was murdered and that he believes that this was directly as a result of his cousin's efforts to help him while he was still living in the Czech Republic. He is convinced that if he is forced to return to the Czech Republic he will also be killed. This is the basis for his submission that an order of surrender would breach his constitutional and Convention right to life and bodily integrity.

24. Mr Kelly has placed considerable emphasis on the respondent's belief that there is no witness protection programme available in the Czech Republic. Following the delivery of points of objection and the swearing of the first affidavit by the respondent, the Central Authority here sought further information from the issuing judicial authority in the Czech Republic. The information obtained from the issuing judicial authority has been exhibited in an affidavit on behalf of the applicant. That information makes a number of points. Firstly it states that it is not known to the court in the Czech Republic whether the respondent provided the assistance which he says he provided to the police, that it is not known either whether the respondent was a potential witness in any criminal case as alleged, and also that it is not known whether the respondent was in danger as a result of not being included in the witness protection programme. It is stated that the court which heard the case against the men referred to was aware that the respondent was a person who had complained about a criminal act, and "was a witness and an aggrieved party in that case". It goes on to state that the respondent had notified that "two foreigners, not citizens of the Czech Republic, who had come from the former Soviet Union, had committed a criminal act of blackmail towards him." It goes on to state that those men were convicted by the court and expelled from the Czech Republic, and that "no witness protection was provided to [the respondent] in the case concerned as from the very beginning [the respondent] was the person that had notified the criminal act, and the convicted men had known about it; and the criminal motive was the fact that [the respondent] had owed them lots of money. It was not necessary to provide [the respondent] any witness protection as from the very beginning his name was known as the aggrieved party as he himself had notified criminal act and at the same time he was the only aggrieved party in the criminal case concerned."

25. It is also stated that *"it was not found out during the criminal proceeding that the convicts were members of the Russian Mafia"*. It further states *"it is generally known to the District Court in Kladno that it is without sense to provide protection to a witness who is simultaneously the aggrieved party who are notified to the criminal act committed by other person that a nose from the very beginning who are notified to the criminal act to the police and who is the aggrieved party and a witness"*.

26. The information provided states that the court in Kladno believes that the reason for which the respondent fled the Czech Republic is the criminal proceedings which resulted in his conviction, and the sentence of imprisonment imposed upon him.

27. Even though this Court is considering this information in its translated form, and while this translation is perhaps less than perfect or clear in every respect, I am satisfied that there is sufficient information in order to demonstrate that the respondent's statement that there is no witness protection programme available in the Czech Republic is not correct, and that it can be seen that there was simply a decision made that the respondent was not a person to whom the benefit of a witness protection programme should be made available. In any event, it is not for this Court to reach any conclusion as to the respondent ought to have been provided with witness protection. That is a matter within the discretion of the judicial authority in question, or the police in the Czech Republic. In any event, this Court could not possibly conclude that the normal protection which any citizen is entitled to seek and be provided with by the police in the Czech Republic is not available to the respondent should it be required.

28. I am not satisfied by any evidence which has been adduced that any reason exists for refusing to order surrender on the basis that there is a real risk to the life and bodily integrity of the respondent upon surrender.

5. Exposure to a mandatory sentence for the offences

29. In the points of objection filed, the respondent has stated that under section 222 of the Czech Criminal Code pursuant to which it

is intended to proceed against the respondent herein it is provided that a mandatory term of imprisonment of between two years and eight years will be imposed upon conviction for the offences in question. It is submitted that in such circumstances, the provision fails to have regard to the circumstances and fears of the respondent. This point of objection was not strenuously relied upon in submissions on behalf of the respondent on this application, but in so far as it is contained in the points of objection, I should refer to it. However, even though there may be a mandatory requirement that a sentence of imprisonment be imposed for the offence in question, it is clear even from the section of the Czech Criminal Code in question that a range of sentence is available to be imposed, namely between two years and eight years. This is clear evidence in my view that there is indeed a discretion on the part of the sentencing judge as to what term of imprisonment is imposed, and there is no room for argument by the respondent that this is a form of mandatory sentence which might, and I emphasise "might" be considered unconstitutional in this jurisdiction in some circumstances.

6. Unlawful deprivation of liberty if ordered to be surrendered

30. Under this heading of objection the respondent submits that any order for his surrender which might be made by this Court will unfairly and unlawfully deprive the respondent of his liberty, since any such order must be accompanied by an order committing him to prison pending the implementation of his surrender in accordance with the provisions of section 16 (4) of the Act. This point has already been the subject of at least one decision by this Court. I am aware that my finding in relation to this point is the subject of an appeal as yet undecided by the Supreme Court. However, in the absence of any decision to the contrary by the Supreme Court I find no reason to reach a different conclusion in the present case.

7. Likelihood of unfair trial, given that he has already been convicted in his absence/bias

31. Under this heading of objection, the respondent submits that since he has already been convicted in his absence, any retrial which he may be afforded upon surrender cannot be a fair trial since it is likely that any such retrial will take place before the same trial judge who has already reached conclusions in relation to his guilt. This point of objection is not made out. This Court can presume that any trial which takes place in the Czech Republic, even a retrial, will be one conducted in accordance with the laws of the Czech Republic, and it is to be presumed also that any such trial will conform with at least minimum standards of fairness in accordance with the European Convention on Human Rights. There is no evidence of anything to the contrary in this case.

8. Framework Decision has not been ratified by the Oireachtas in accordance with the requirements of Article 29 of the Constitution

32. This is a point of objection which has already been the subject of judgments of this Court, and which await the hearing of an appeal in the Supreme Court. I have already rejected the point being argued and I have no reason to decide otherwise in this case.

9. Lack of reciprocity by the Czech Republic in relation to the Framework Decision

33. This point of objection arises due to the fact that prior to an amendment to the relevant law in the Czech Republic it was the position that the Czech Republic would not surrender its own citizens to other member states under a European arrest warrant. However, as Mr McGrath has submitted, this point has already been the subject of argument in two cases heard together before me namely *Minister for Justice, Equality and Law Reform v. Sulej and Puta*, unreported, High Court, 24th April 2007 wherein I decided firstly that even if there was some disparity in the manner in which the Framework Decision was given effect to under the law of the Czech Republic, and how it was given effect to in this State, it does not constitute a reason to refuse surrender to the Czech Republic; secondly that it is not for this State to examine how another state gives effect to that Framework Decision under its law, and that it is sufficient that the Czech Republic has been designated under section 3 of the Act; and thirdly that in any event the law in the Czech Republic has been changed subsequently in that regard in 2006. I have no reason to alter that view in the present case.

10. The respondent not a person covered by s. 10 of the Act, since he asserts that the offences are alleged to have been committed at a time when he was not present in the Czech Republic

34. This point of objection was raised by Mr Kelly on behalf of the respondent only at the hearing of this application before me, and was not contained in either the original points of objection as filed herein, or the amended points of objection later filed. Under normal circumstances this would be a complete bar to the point being argued at all. Mr McGrath on behalf of the applicant urged that I should not allow the point to be argued in those circumstances. However, Mr Kelly, submitted that the factual basis for making the argument arose only as a result of information available to him in recent times following the swearing of the respondents further affidavit. Mr McGrath initially felt that the applicant ought to be given an opportunity to take further instructions in the light of the recent affidavit sworn by the respondent. However, rather than adjourn the application for surrender, I allowed argument to be put forward by Mr Kelly on the point in question, and informed Mr McGrath that if I felt that he was disadvantaged in any way, I would allow time for the applicant to respond on affidavit if necessary. I am of the view that it is unnecessary for any such adjournment given the nature of the point being argued under this heading. The applicant is not under any real disadvantage.

35. The point being made under this heading is that the respondent has stated in his affidavit that he was not present in the Czech Republic in the year 2002 when the offences for which he has been convicted in his absence are alleged to have been committed. As a result, or so it is argued, he cannot have "fled" from the Czech Republic in order to escape justice, since, according to the respondent, he was not even in that jurisdiction when the offences are alleged to have taken place. If that were the case, the respondent would not be a person who comes within the provisions of section 10 of the Act, and this court accordingly would be without jurisdiction to make an order was surrender.

36. The fact is that the respondent has been convicted of the offence in question in the Czech Republic. The fact that on this application the respondent swears as he does that he was not in the Czech Republic on the date when the offence is said to have been committed, is not something which this court is in a position to adjudicate upon. This Court is not in a position to, or required, to enter upon the merits of the prosecution's case against the respondent. The judicial authority in the Czech Republic seeks his surrender so that he can serve a term of imprisonment lawfully imposed upon him in that jurisdiction. He will be afforded the opportunity for a retrial, and he will be entitled to assert his innocence on any basis which he wishes to put forward, including that he was not present in that jurisdiction on the relevant date. No case has been made out under this heading of objection that he is not a person to whom section 10 of the Act applies.

37. For all the reasons which I have set out, I am satisfied that none of the points of objection which have been raised by the respondent should succeed. As I have already indicated, I am therefore satisfied that all the requirements of section 16 of the Act have been satisfied, and the Court is therefore required to make the order sought for the surrender of the respondent to the Czech Republic, and I will so order.