

## THE HIGH COURT

[2013 No. 126 EXT]

BETWEEN

THE MINISTER FOR JUSTICE AND EQUALITY

APPLICANT

AND

AB

RESPONDENT

**JUDGMENT of Ms. Justice Donnelly delivered the 19th day of May, 2015**

1. The surrender is sought of the respondent in respect of two separate European Arrest Warrants ("the EAW") issued by Hungarian judicial authorities. This judgment only relates to that EAW which was issued second-in-time. This particular EAW was issued on the 19th September, 2012, by a judicial authority in Hungary and endorsed by the High Court on the 4th June, 2013. Under that EAW, the respondent's surrender was sought under what are described at section (b) of the said EAW as two enforceable judgments ("judgment one" and "judgment two").

2. In relation to judgment one, as detailed under the EAW, it is stated that he was convicted and sentenced to five months in jail for failure to pay child support. Counsel for the Minister for Justice and Equality ("the Minister") has not been able to identify any possible corresponding offence in this jurisdiction. I have considered the matter and I too am not in a position to find a corresponding offence. Therefore, surrender must be refused on this enforceable judgment i.e. judgment one.

3. Judgment two is said to be a judgment dated the 10th October, 2006, of the Enes city court (as a court of first instance) and final operative judgment dated the 19th April, 2007, of the Miskolc court (as a court of second instance). In relation to judgment two, part (c) of the EAW says that the respondent received a custodial sentence of one year in prison and that eleven months in prison remain as he had the custodial term reduced by one month having regard to his pre-trial detention.

**Correspondence**

4. Judgment two concerns a total of four offences of which the EAW states that he has been convicted. Essentially, the EAW details two offences of false imprisonment of his former spouse and his son in their own home, an offence of criminal damage to a phone belonging to his wife and an assault on his wife which resulted in injuries to her nose, knees, temple, thigh, shin and left ear. It is clear from the face of the warrant that the offences correspond with an offence in this jurisdiction and it is also clear that the minimum gravity provisions have been complied with as he is required to serve all or part of a term of imprisonment of not less than 4 months. Moreover, if these are offences for which his prosecution is sought, minimum gravity would also be satisfied in respect of each of those offences as they are each punishable by imprisonment or detention in Hungary for a maximum period of not less than 12 months.

**Change in the purpose for which surrender is sought**

5. Issues were raised by the central authority in this case concerning the matter of a trial *in absentia*. Initially, the issuing judicial authorities confirmed that the respondent would have the right of retrial in this case if he were to be surrendered. It appears that the respondent himself made representations to the courts in Hungary regarding the possibility of a retrial. That retrial appears to have been ordered in the case of judgment two. By letter dated the 14th January, 2015, the Hungarian central authority replied to the central authority in this jurisdiction confirming that a review of the criminal case had been ordered in connection with the first and second instance judgments under judgment two in the second EAW. That letter indicated that the execution of the relevant EAW is still requested in connection with the offences under the judgment two of the warrant for "conducting criminal prosecution".

6. In the course of the hearing before this court, counsel for the respondent raised the issue that surrender was now prohibited in circumstances where the original warrant was a conviction warrant and that by additional information there was an attempt to change this to a warrant for the purposes of prosecution. Counsel relied upon the decision in *Minister for Justice Equality and Law Reform v. Kavanagh*, an *ex tempore* decision of the Supreme Court of the 23rd October, 2009, and referred to in Farrell and Hanrahan *The European Arrest Warrant in Ireland* (Clarus Press, 2011). In that case, the Supreme Court expressed the view that an EAW ought not to have been endorsed in the absence of an express reference to an underlying arrest warrant having been issued or to a judicial decision having the same affect as an arrest warrant. Counsel also referred to the case of *Minister for Justice Equality and Law Reform v. Ostrowski* (unreported, [2010] IEHC 200, 19th March, 2010) where Peart J. considered that an EAW that contained incorrect details in relation to the underlying domestic warrant was fatally flawed even though the authorities in the issuing state had provided additional information explaining the error and providing the correct details in respect of the domestic warrant. In *Ostrowski* the domestic warrant on foot of which the EAW had been issued related to somebody else entirely. Counsel also referred to the case of *Minister for Justice and Equality v. Horváth* [2013] IEHC 534.

7. Counsel further relied upon the *Minister for Justice and Equality v. Gherine* [2012] IEHC 535. In that case, the obverse to the present situation existed. The warrant had been issued and was endorsed by the High Court as a warrant for the purposes of prosecution. Between the time of the endorsement and the subsequent execution of the warrant in this jurisdiction, it later transpired that the respondent had been convicted in Italy. The High Court (Edwards J.) at para. 13 held as follows:-

*"The European arrest warrants in these cases were issued for the purposes of seeking the rendition of the respondents so that they might be prosecuted for the offences set out in those warrants. It now turns out that they are each both convicted and acquitted persons, and the fact that they have now been tried in the issuing state undermines this Court's ability to act on the warrants now before it. Even though the respondents are now convicted persons in respect of one of the offences covered by their respective warrants, the jurisdiction of the Court to surrender them is still undermined. A person cannot be surrendered for the purpose of serving a sentence in relation to an offence on foot of a warrant that seeks his or her rendition for the purpose of prosecuting him or her for that offence."*

8. Counsel for the Minister submitted that those judgments were not relevant. In particular, he referred to the *Kavanagh* case above and submitted that in fact what had been endorsed in that case was not an EAW but was another document entirely. He submitted in relation to *Ostrowski* that the domestic warrant had issued in respect of another person. He said that it was as if the warrant contained no information regarding the domestic warrant. He had been arrested on the basis of a warrant which was significantly

defective. Counsel distinguished *Horváth*.

9. Counsel also relied upon the High Court decision in the case of *S.M.R. v. The Governor of Cloverhill Prison* [2009] IEHC 442. The facts of *S.M.R.* were that the Supreme Court had ordered the surrender of *S.M.R.* to the United Kingdom ("U.K.") thereby overturning the High Court's decision to refuse surrender. Subsequent to the decision of the Supreme Court, it became apparent that the domestic warrant in the U.K. had been withdrawn. An application for *habeas corpus* was brought by *S.M.R.*.

10. In the course of the Article 40 hearing in *S.M.R.*, there was conflicting evidence as to the effect of the withdrawal of the domestic warrant in the U.K.. This may have been due to a misunderstanding by the U.K. authorities of the situation in Ireland. The U.K. authorities confirmed that *S.M.R.* could have been arrested in the U.K. at common law for the offence and that they always intended to prosecute him in relation to the matter. The High Court (McKechnie J.) held that the court did not have to decide any issues of U.K. law as the EAW, when validly issued, is a separate and distinct document from the underlying domestic warrant. McKechnie J. at para. 67 held with respect to s. 10 of the European Arrest Warrant Act, 2003 ("the Act of 2003") that:

*"Once satisfied that the European arrest warrant has been 'duly issued' I cannot see how that part of s. 10 has any further application. Whilst I have no doubt but that the court when making a s. 13 order (endorsement to execute) or a surrender order under s. 16, can operate the provisions of s. 10, it is still confined by the recited wording to the same event; namely validity at date of issue. As that inquiry has no relevance to this case I cannot, therefore, find an entry point via this route."*

11. The decision in *S.M.R.* is not mentioned in the judgment in *Gherine*. It is important to consider whether the judgments are consistent with each other or indeed if either judgment sets down a principle which this court is bound to follow in the absence of compelling reasons to reject same. Apart from *Gherine* being the obverse situation to that which pertains in the present case, there is another important distinction apparent on the facts. In *Gherine* the central authority of Italy had replied to the request for further information to the effect that the office had no jurisdiction in relation to the two respondents in confirming that both respondents in that case had been convicted and sentenced to a penalty. In those particular circumstances, the court made its ruling as referred to above. In other words, there had been no indication by the Italian judicial authorities that they were now seeking his extradition on a different basis. Therefore, the High Court had been left with the central authority of the issuing state saying it had no jurisdiction in relation to the respondents.

12. On the other hand, the facts giving rise to the *S.M.R.* decision are not the same as those which exist in the present case. In that case, the nature of the request by the issuing Member State had never changed. The EAW sought surrender on a certain basis. The enquiry that the court was carrying out under s. 10 of the Act of 2003 related to the validity of the EAW at the time of issue. Section 10 has been amended since the decision in *S.M.R.* by the deletion of the word "duly" before the word "issues" in the first sentence of section 10. This amendment does not affect the principle behind the decision in *S.M.R.*

13. *S.M.R.* is a decision which emphasised the singular procedure set up under the scheme established to give effect to the Framework Decision on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA) ("the Framework Decision"). It is a procedure based upon mutual respect and recognition of judicial decisions between Member States. In *S.M.R.* the court held that the Framework Decision did not permit the executing judicial authority to make a determination as to whether the EAW was valid or not due to a withdrawal of the domestic warrant. It was in that context that McKechnie J. also decided that the Act of 2003 did not provide a ground for challenging the validity of the EAW.

14. In the circumstances of the present case, the central authority of the issuing state has stated that the respondent is no longer being sought for the enforcement of the judgment but he is being sought for the purposes of prosecution. The domestic court's decision which granted him a re-trial, was produced to this court and to the central authority by the respondent. That court's decision does not mention that a warrant for the arrest of the respondent has been issued for the purposes of prosecution. It appears that the investigation may be ongoing and this is apparent from the affidavit of the lawyer for the respondent in Hungary. It may be apposite to note that in the first EAW referred to above, a prosecution warrant is at issue. That EAW states on its face that the domestic warrant being relied upon is the EAW as it applied within the territory of Hungary as well as to other Member States.

15. The decision in *S.M.R.* establishes that the role of the High Court as an executing judicial authority is to give effect to an EAW as a stand alone instrument capable of securing the arrest and surrender of a person. As McKechnie J. said at para. 64:

*"...whether under the recitals and/or the articles of the decision, or by virtue of s. 4A of the Act of 2003; or even indeed more broadly on the basis of mutuality, it ought to be accepted that the relevant judicial decisions are presumptively correct, and are made within due process and in accordance with the laws of the state in question. That presumption, which involves a rule of non-inquiry, may be called into question, but only within the legal scaffolding upon which the system stands. This system involves a new dawn and with it, a new approach. Therefore, the former mindset which drove extradition law must yield and give way: respect and confidence replacing distrust and misgiving."*

That conclusion was arrived at because the EAW is the "essential basis" of the system.

16. In the *S.M.R.* case, the court was being asked to give effect to the judicial decision issued by the U.K. with a view to the arrest and surrender of *S.M.R.* for the purposes of conducting a criminal prosecution. The High Court had endorsed that warrant as having being duly issued by the United Kingdom. The U.K. authorities still required his surrender on foot of that warrant for prosecution. Thus, the issuing state was still relying on the EAW as a judicial decision which was deserving of mutual recognition by the Irish courts. In this case, the central authority has stated clearly that the judicial decision upon which the respondent was sought for execution of a custodial sentence is no longer relied upon. Instead, the surrender of the respondent is requested for conducting a criminal prosecution under the same EAW.

17. Section 10 of the Act of 2003 provides for the duty of the High Court to arrest and surrender to an issuing state a person in respect of whom an issuing state has issued an EAW provided that person comes within one of four categories set out therein. That section must be seen in the context of the definition of the EAW and the obligation to execute it as set out in Article 1 of the Framework Decision. Article 1 para. 1 defines the EAW as "...a judicial decision issued by a Member State with a view to the arrest and surrender by another Member State of a requested person, for the purposes of conducting a criminal prosecution **or** executing a custodial sentence or detention order" (emphasis added).

18. It can be seen, therefore, that under the EAW system, a clear distinction has been made between a judicial decision on the one hand for the arrest and surrender for the purposes of conducting a criminal prosecution and on the other hand for the purposes of executing a custodial order. Section 10 implements that Article by setting out the different circumstances under which either of those

purposes may arise.

19. When the High Court considered the within EAW at the s. 13 stage (endorsement for execution), it did so on the basis that this was a warrant for the purposes of executing a sentence. In particular, the High Court endorsed the warrant on the basis that this was an EAW in respect of a person who came within s. 10(d) in that he was a person on whom a sentence of imprisonment or detention had been imposed in Hungary in respect of the offences to which the EAW relates. He is no longer a person on whom a sentence of imprisonment has been imposed in respect of these offences. He is an untried person, an accused person and is therefore neither convicted nor sentenced. In effect, the purpose for which the EAW was issued, namely execution of a custodial sentence, is no longer valid.

20. In making such a statement, it must be emphasised that this is not a situation where the Irish court is making an enquiry into the conduct of proceedings in Hungary or in any way calling into question the *bona fides* of the Hungarian judicial authorities. The Hungarian authorities themselves have told this court that the respondent is no longer sought for the execution of a custodial sentence. That was on the basis of a further judicial determination in circumstances where the respondent had made an application before the domestic court in relation to the offences the subject matter of the EAW. The Hungarian authorities now wish to seek his surrender for prosecution.

21. Our system of endorsement of EAW's reflects the Framework Decision in requiring that an EAW must be issued for one purpose or the other, namely for criminal prosecution or for the execution of sentence. In stating that, I wish to make it clear that the EAW must be issued for one purpose or the other ***in respect of an individual offence***. There is no prohibition on the EAW being issued to cover the situation where a person is wanted simultaneously for the purpose of prosecution for one or more offences and for the purpose of enforcement of a sentence or sentences relating to another offence or offences. Under the Framework Decision, the issue of the EAW is premised upon either the existence of an enforceable judgment against the requested person or a warrant of arrest or other judicial decision having the same effect being in existence against the requested person. Those are separate matters. It is only where it is established that one or other of those circumstances exist (through the four categories set out in s. 10 of the Act of 2003) that the High Court can endorse an EAW.

22. In this case what was endorsed was an EAW for the purpose of execution of a sentence. There has never been an endorsement of an EAW for the purpose of the prosecution of the defendant. One of the factors of which this court must be satisfied before ordering surrender under s. 16 is that "the European arrest warrant... has been endorsed in accordance with s. 13 for execution of the warrant". This is simply not an EAW that was endorsed by the High Court for the purposes of conducting a criminal prosecution and therefore has not been so endorsed in accordance with section 13.

23. I have been asked by counsel for the Minister to apply the provisions of s. 45C if the point was reached where I was of the view that there was a defect in the warrant. Section 45C provides as follows:

"For the avoidance of doubt, an application for surrender under section 16 shall not be refused if the Court is satisfied that no injustice would be caused to the person even if—

(a) there is a defect in, or an omission of, a non-substantial detail in the European arrest warrant or any accompanying document grounding the application,

(b) there is a variance between any such document and the evidence adduced on the part of the applicant at the hearing of the application, so long as the Court is satisfied that the variance is explained by the evidence, or

(c) there has been a technical failure to comply with a provision of this Act, so long as the Court is satisfied that the failure does not impinge on the merits of the application."

16. In my view, the application of s. 45C is confined to non-substantial defects or technical failures in the warrant or the compliance with the Act of 2003 where no injustice would be caused. Counsel for the Minister says that no injustice would be caused here in circumstances where the respondent is engaging with the process back in Hungary. It is not appropriate to start with a consideration that no injustice may be seen to be done where a respondent has engaged with the process in the issuing state. The consideration of the issue of injustice is much more fundamental than that. The question is whether there has been a compliance with the rule of law as set out under the Framework Decision and in particular the Act of 2003.

17. Fundamental to the entire system of surrender is that the EAW upon which a person may be arrested and surrendered is issued either for conducting a criminal prosecution or for the enforcement of a judgment. The executing judicial authorities are obliged to give effect to that judicial decision. Within each issuing Member State, there is a process through which the EAW may be issued. Thereafter, there must be a process for execution of that warrant in another Member State. It is a fundamental right of an arrested person to know the reason for which they have been arrested. In this case, the arrest was based upon an application to execute a judgment. A particular procedure was required under the Act of 2003 before a person may be deprived of his liberty through his arrest. Furthermore, in order to continue to deprive the respondent of his liberty through surrender to the Hungarian authorities, it is a fundamental requirement that the EAW, which forms the basis for surrender, reflects the purpose for which the EAW was apparently issued in Hungary and certainly endorsed in this jurisdiction. This is not a mere insubstantial detail or a mere technical failure to comply with the provision of the Act. It is clear from both the Act of 2003 and the Framework Decision that the purpose for which an EAW is issued is central to the obligation on an executing Member State to arrest and surrender the requested person. It is central to a consideration as to whether the warrant should be endorsed in this jurisdiction.

18. While a new warrant may of course be issued to reflect a new legal reality, the opposite is not the law. A warrant cannot be re-interpreted, re-invented or re-applied to cover a new legal reality which is the exact opposite to the purpose for which the warrant was originally issued or endorsed for execution. Such an approach would be an affront to the requirement for legal certainty and due process. In all the circumstances, I therefore reject the Minister's view that this is an appropriate case to apply the provisions of s. 45C.

19. In light of the decision which I have made, this is not a suitable case in which to use the provisions of s. 20 of the Act of 2003. Section 20 subsection 1 permits the High Court, if of the opinion that the documentation or information provided to it is not sufficient to enable it to perform its functions under the Act of 2003, to require the issuing judicial authority or the issuing state as may be appropriate, to provide it with such additional documentation or information as it may specify within such period as it may state. I have considered whether I should request the issuing judicial authority or issuing state to provide a copy of the domestic arrest warrant upon which they say that the EAW is now based. In circumstances where I am satisfied that an EAW issued for one purpose is not, on the basis of a change in the legal position in an issuing state, to be considered an EAW issued for another purpose, it is

unnecessary to seek information about a domestic warrant.

20. I therefore refuse to make an order under s. 16 for the surrender of the respondent to Hungary on the particular EAW at issue in these proceedings.