Neutral Citation: [2013] IEHC 531

2012 No. 214 EXT

THE HIGH COURT

IN THE MATTER OF THE EUROPEAN ARREST WARRANT ACT 2003 AS AMENDED

Between:

The Minister for Justice and Equality

Applicant

-and-

Wojciech Kasprowicz

Respondent

JUDGMENT of Mr. Justice Edwards delivered on the 14th November, 2013.

Introduction

The respondent is the subject of a European arrest warrant issued by the Republic of Poland on the 23rd November, 2009. The warrant was endorsed by the High Court for execution in this jurisdiction on the 17th July, 2012, and it was duly executed on the 6th June, 2013. It is an accusation case and relates to a single offence based upon an alleged deception involving the use of a forged document and in respect of which a box is ticked in Part E. I of the warrant relating to "fraud". The matter was the subject of a surrender hearing on the 9th September, 2013, in accordance with s. 16 of the European Arrest Warrant Act 2003 as amended (hereinafter "the Act of 2003")in the course of which the respondent sought to resist surrender on two substantive grounds.

The first such ground was a contention that the presumption contained in s. 22(3) of the Act of 2003 was to be regarded as having been rebutted in all the circumstances of the case and that the Court could not be satisfied that if the respondent were returned on foot of the present warrant that the issuing state would not seek to execute a sentence for another offence which was previously the subject of another European arrest warrant issued by the issuing state against the respondent and on foot of which this Court had ordered the respondent's surrender, in circumstances where, notwithstanding that this Court had ordered the respondent's surrender, he was not in fact surrendered within the time then permitted by the statute and the time was not capable of being extended.

The second ground relied upon for resisting surrender was that the respondent was entitled to rely upon unexplained delay by the issuing state in transmitting the present warrant to the authorities in this state as being sufficient in itself to justify this Court in refusing to surrender the respondent. As a subset to this general proposition it was argued that the delay in the case operated to effect a breach of what was characterised as the respondent's "unenumerated constitutional right not to be oppressed".

In an *ex tempore* judgment delivered on the 13th September, 2013, this Court rejected both grounds of objection and, having resolved or determined all other formal issues in favour of the applicant, ordered the respondent's surrender pursuant s.16(1) of the Act of 2003.

The respondent now seeks an order pursuant to s. 16(11) of the Act of 2003 (as now substituted by s.10 of the European Arrest Warrant (Application to Third Countries and Amendment) and Extradition (Amendment) Act 2012) certifying that the Court's order or decision involves a point of law of exceptional public importance and that it is desirable in the public interest that an appeal should be taken to the Supreme Court.

The Court has been asked to certify the following three questions:

> 1. Does the Rule of Specialty/Section 22 of the European Arrest Warrant Act 2003, as amended, prohibit the surrender of a person under a European arrest warrant in circumstances where the issuing State pursuant to a European arrest warrant had previously sought the surrender of the person to serve sentences of imprisonment in that state in respect of different offences, and where the High Court surrender Order made in relation to the previous warrant has lapsed but where the sentences remain extant in the issuing State.
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> 2. Is an unexplained delay of almost three years between the issue and the transmission of a European arrest warrant a sufficient reason of itself to ground a refusal of surrender and/or is such a delay a sufficient reason to refuse surrender in circumstances where the issuing State has not explained why it transmitted only one of two European arrest warrants that issued that from state in or about the same period and where the requested person was arrested and detained and the subject of a surrender order on the warrant that was transmitted?
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> 3. Is there an unenumerated constitutional right of "freedom from oppression" such that section 37 of the European Arrest Warrant Act 2003 might be invoked to prohibit surrender in such circumstances?

I am not disposed to certify any of the three questions posed, and this judgment contains my reasons for refusing to do so.

The applicable legal principles

The Court has received helpful legal submissions from counsel on both sides, and there is no controversy as to the applicable principles.

The relevant statutory provision is s. 16(11) of the Act of 2003 (as now substituted by s.10 of the European Arrest Warrant (Application to Third Countries and Amendment) and Extradition (Amendment) Act 2012), which states:

> "An appeal against an order under subsection (1) or (2) or a decision not to make such an order may be brought in the Supreme Court if, and only if, the High Court certifies that the order or decision involves a point of law of exceptional public importance and that it is desirable in the public interest that an appeal should be taken to the Supreme Court."

The general approach to be taken is that identified by Clarke J. in *Arklow Holidays v. An Bord Pleanala* [2007| 4 I.R. 112 as being appropriate in considering, as in that case, whether to grant leave to appeal a decision of the High Court to the Supreme Court under s. 50(4) (f) of the Planning and Development Act, 2000, but also bearing in mind the remarks of Murray J. (*nem diss*) in the Supreme Court in *Minister for Justice and Equality v. Tokarski* [2012] IESC 61 (Unreported, Supreme Court, 6th December, 2012) concerning particular considerations that arise under s. 16(11) of the Act of 2003 that do not arise in some other areas of the law where there are similar restrictions on an appeal, such as in asylum and planning and development law, and which therefore create the imperative for a broad approach to the interpretation of that provision.

The Rule of Specialty issue – proposed question number one
The Court rejected the substantive argument advanced at the s. 16 hearing on the basis that there was simply no evidence before it to suggest that if the respondent were to be surrendered to the issuing state that state would seek to execute sentences imposed upon him for offences other than those to which the present European arrest warrant relates. The Court rejected the specialty objection because it considered that there was an evidential deficit. In this Court's view the mere fact that there are other sentences extant and unexecuted in the issuing state was not sufficient to rebut that which is presumed by virtue of s.22 (3), namely that the issuing state will respect the rule of specialty, nor, without more, could it justify an inference that the issuing state intended to disregard the rule of specialty. They had never expressed an intention to do so, nor was there any circumstantial evidence to suggest they intended to do so.

That was particularly true in circumstances where the issuing state had in fact issued an earlier European arrest warrant to secure the respondent's surrender in order to execute those sentences, had secured an order for the respondent's surrender based upon that warrant, but had not ultimately secured the physical transfer of the respondent due to the expiry of a time limit that was not in any sense the fault of the issuing state. The issuing judicial authority in respect of the former warrant may be presumed to have been made aware by the Irish Central Authority of the technicality which had prevented actual surrender on foot of its warrant and it could not but be aware that there was nothing to inhibit it from issuing a second warrant identical to the first and that it could with a high degree of confidence anticipate likely surrender on foot of that second warrant. As it happens, that has not occurred and it is not appropriate to speculate as to why that might be so.

The respondent had opened to the Court the decision of the Supreme Court in *Minister for Justice, Equality and Law Reform v. Gotszlik* [2009] 3 I.R. 390. However, the Court took the view that there was nothing in that decision to support the proposition being advanced that the mere fact that there were other sentences extant and unexecuted in the issuing state was sufficient to rebut the s.22 (3) presumption and, further, justify an inference that the issuing state intended to disregard the rule of specialty. What the *Gotszlik* decision did do, however, was emphasise that in some member states, and Poland happens to be one of them, there may be multiple authorities falling within the definition of "issuing judicial authority." There was no evidence before the Court that the same issuing judicial authority had issued both warrants in the respondent's case. In fact the evidence was to the contrary. The present warrant was issued by the Regional Court in Gliwice. As is apparent from the information contained in Part F of the warrant, the former warrant was issued by the Regional Court in Poznań. The issuing judicial authority in the present case very properly acknowledged in part F of the warrant their awareness of the fact that another European arrest warrant had previously issued in respect of the respondent. However, their mere acknowledgment of that fact could not in this Court's view be regarded as evidence sufficient to rebut the s.22(3) presumption and to justify an inference that the issuing state intended to disregard the rule of specialty. In circumstances where this Court is obliged to have trust and confidence in the issuing state, and its judicial authorities, much more than that would be required to displace that which is presumed. The Court also made the point at the hearing that in the event that the respondent is surrendered on foot of the present warrant, and that which is presumed is in fact borne out, namely no attempt is made to require the respondent to serve the other extant sentences without the consent of this Court, there would, however, be nothing to prevent the other issuing judicial authority, i.e., the Regional Court in Poznań, from requesting in writing the consent of this Court pursuant to s. 22(7) of the Act of 2003 to proceedings being brought in the issuing state for the purpose of executing the extant sentences or detention orders which were the subject matter of the earlier warrant.

In circumstances where the Court's refusal to uphold the specialty objection was on the basis of an evidential deficit, and not because of the rejection of a legal proposition advanced by the respondent, there is no point of law in controversy that could be certified and sent forward for the opinion of the Supreme Court. I am not therefore disposed to send forward draft question number one nor, indeed, any question in relation to the objection based upon the rule of specialty.

The delay issue – proposed question number two
I am also not disposed to send forward question number two in relation to the delay issue. Not a single authority, constitutional provision, treaty or convention provision, or statutory provision was advanced to support the proposition that delay on a stand alone basis can operate to prevent surrender. The Court at all stages indicated that it was open to the proposition that delay can sometimes be a relevant consideration in determining whether some recognised right, be it a constitutional right enumerated or unenumerated, or a right arising under the European Convention on Human Rights (hereinafter the "ECHR") or a right arising under the Charter of Fundamental Rights of the European Union, has been, and/or may prospectively be, prejudiced. The Court readily accepts that prejudice, or potential prejudice, to such recognised rights which is caused by delay can possibly form the basis of an objection based upon s. 37 of the Act of 2003.

I say "possibly" because it is not always true that delay can be relied upon in this way. Thus, in *Minister for Justice, Equality and Law Reform v. Stapleton* [2008] 1 I.R. 669, it was held that a delay issue raised in the context of a respondent's right to an expeditious trial arising under Article 6 of the ECHR can (in most cases) be more efficiently and conveniently decided and debated before the courts of the country where the respondent is to be tried. By the same token, delay is routinely relied upon in this Court in the context of objections to surrender based upon Article 8 ECHR as a factor that may have the effect of diluting an otherwise strong public interest in surrender by tending to contradict any suggestion that there exists a "pressing social need" for the respondent's surrender. Delay can also serve to amplify or intensify the impact of a proposed extradition measure on the respondent and his family, a matter of which account must be taken by the Court in the balancing exercise that it must conduct in such cases between the public interest in extradition on the one hand and the private rights of the respondent and his family on the other hand. In this case, however, delay was not put forward as a factor enuring to the prejudice of any recognised legal right. Rather, it was put forward on the basis that the period of delay that exists in this case, in circumstances where it is unexplained, is something which per se should move this Court to refuse surrender.

I consider that the mere assertion of a proposition without any authority to support it, or without basing it on solid argument deriving from first principles, does not a *bona fide* legal controversy make. I am not satisfied that any tenable legal proposition was advanced that could represent either a point of exceptional public importance or one that it is desirable to have clarified in the public interest.

Those are of course conjunctive requirements. They are not alternatives. However, neither of them is satisfied in the present case.

The oppression issue – proposed question number three
Similar considerations arise in relation to this proposed question. Once again, it was asserted without reference to any authority, constitutional provision, treaty or convention provision, or statutory provision that there is a stand alone right to "freedom from oppression". Again, the Court acknowledged that it could readily accept that circumstances that tended to inhibit or prevent the enjoyment of some recognised right could be characterised as oppressive, and that that possible prejudice could be relied upon as a basis for seeking to resist surrender. However, what was in fact being contended for was "the right to enjoy another right". If the respondent had identified some recognised right as being oppressed, e.g., that because of delay he was experiencing unnecessary and additional stress, worry and anxiety to the prejudice of his right to bodily integrity, the Court would have no difficulty in at least entertaining an objection of that type within the scope of s. 37 of the Act of 2003. However, the respondent, although pressed to do so, was not prepared to link the alleged oppression to the enjoyment of any of his recognised rights. Rather, counsel for the respondent persisted with the proposition, wholly untenable in this Court's view, that there exists in the abstract, and unlinked to the enjoyment of any recognised personal or fundamental right, an unenumerated constitutional "right to freedom from oppression". I reiterate my view that mere assertion of a novel proposition without any authority or principled argument to support it does not a *bona fide* legal controversy make. Once again I am not satisfied that any tenable legal proposition was advanced in regard to this matter that could represent either a point of exceptional public importance or one that it is desirable to have clarified in the public interest.

Conclusion
The Court is not therefore disposed to certify any of the three questions proposed.