

THE HIGH COURT

[2017 2 EXT]

BETWEEN

THE MINISTER FOR JUSTICE AND EQUALITY

APPLICANT

AND

KRZYSZTOF ANDRZEJCZAK

RESPONDENT

JUDGMENT of Ms. Justice Donnelly delivered the 15th day of December, 2017**Introduction**

1. The applicant's surrender to Poland for prosecution of two offences is sought by a Polish judicial authority pursuant to a European Arrest Warrant ("EAW") dated 9th September, 2016. As defined by Polish law, the first offence is an offence of participation in an organised criminal group, whereas the second offence is an offence related to the facilitation of prostitution.

2. At the hearing of the application for surrender, counsel on behalf of the respondent raised two separate objections. His first point of objection was that the first offence was an extraterritorial offence and surrender was prohibited as the Court could not be satisfied that Ireland also exercised extraterritorial jurisdiction over such an offence. The second point, more strongly argued, was that, there was no unambiguous clarity about the nature of the offences for which he was charged. This ground arose in light of a response given by the issuing judicial authority to the respondent's claim that he had been in Ireland during part of the time frame in which the offences were charged. The response stated that as soon as information received from the respondent could be verified, it would be possible to modify the periods during which the respondent is suspected of committing the offence of which he is charged with.

A Member State that has given effect to the 2002 Framework Decision

3. The surrender provisions of the European Arrest Warrant Act, 2003, as amended ("the Act of 2003") apply to member states of the European Union ("E.U.") that the Minister for Foreign Affairs has designated as having, under their national law, given effect to the Council (EC) Framework Decision of 13th June, 2002 (2002/584/JHA) on the European Arrest Warrant and the surrender procedures between member states ("the 2002 Framework Decision"). By the European Arrest Warrant Act, 2003 (Designated Member States) (No. 3) Order, 2004 (S.I. 206 of 2004), the Minister for Foreign Affairs designated Poland as a member state for the purposes of the Act of 2003.

Section 16 (1) of the Act of 2003

4. Under the provisions of s. 16(1) of the Act of 2003, the High Court may make an order directing that a requested person be surrendered to the issuing state provided that;

- (a) The High Court is satisfied that the person before it is the person in respect of whom the EAW was issued,
- (b) The EAW has been endorsed in accordance with s. 13 for execution of the warrant,
- (c) The EAW states, where appropriate, the matters required by s. 45 of the Act of 2003,
- (d) The High Court is not required under ss. 21A, 22, 23 or 24 of the 2003 Act as amended to refuse surrender,
- (e) The surrender is not prohibited by Part 3 of the 2003 Act.

Identity

5. The Court is satisfied on the basis of the information contained in the EAW, the additional information and the affidavit of Oisín Cotter, member of An Garda Síochána, that Krzysztof Andrzejczak, who is before the Court, is the person in respect of whom the EAW has issued.

Endorsement

6. I am satisfied that the EAW was endorsed in accordance with s. 13 of the Act of 2003 for execution in this jurisdiction.

Sections 21A, 22, 23 and 24 of the Act of 2003

7. The Court is satisfied that it is not required to refuse to surrender the respondent under any of the above sections in relation to the European arrest warrant.

Part 3 of the Act of 2003

8. Subject to further consideration of s. 37, s. 38 and s. 45 of the Act of 2003, the Court is satisfied that it is not required to refuse the surrender of the respondent under any other section contained in Part 3 of the 2003 Act.

Section 45 of the Act of 2003

9. The EAW seeks the respondent's surrender for prosecution and therefore point (d) of the EAW was not completed by the issuing judicial authority. In these circumstances, the Court is satisfied that his surrender is not prohibited under s. 45 of the Act of 2003 which deals with trials in *absentia*.

Section 38 of the Act of 2003

10. The first offence, i.e. the offence of participation in an organised criminal group is an offence which carries a maximum penalty of five years in Poland. The issuing judicial authority has ticked the box at point E.1 of the European Arrest Warrant. This is a designation by the issuing judicial authority that this offence comes within the list of offences set out in Article 2, para. 2 of the 2002 Framework Decision, thereby obviating the necessity to prove double criminality. I am satisfied that this designation is not manifestly incorrect. In those circumstances, where the provisions of minimum gravity have been met, I am satisfied that his surrender on this offence is not prohibited by the provisions of s. 38 of the Act of 2003.

11. In respect of the second offence, the allegation is that in a period from at least 2005 until September 2009, acting within an organised criminal group led by a particular person, the purpose of which was to commit crimes consisting of instigating other persons to prostitution in order to gain material benefits, the respondent facilitated some identified and unidentified women to work as prostitutes. In the details of that offence, it indicates that during certain periods he caused a particular woman to work as a prostitute (between at least 2005 and 2007) and that he facilitated another woman to work as a prostitute (between at least 2008 and September 2009). This offence carries a maximum period of ten years imprisonment.

12. I am satisfied that the acts set out in the European Arrest Warrant also amount to an offence of participating in or contributing to the activity of a criminal organisation contrary to s. 72 of the Criminal Justice Act 2006 as amended. The details of the offence also amount to an offence contrary to s. 9 of the Criminal Law (Sexual Offences) Act 1993 of organisation of prostitution. It is clear from the allegations that he controlled or directed the activities of a prostitute in respect of prosecution. I am satisfied that his surrender is not prohibited by the provisions of s. 38 of the Act of 2016 insofar as there is correspondence with an offence in this jurisdiction and the requirements of minimum gravity have been met.

Section 44 of the Act of 2003

13. Section 44 states:

"A person shall not be surrendered under this Act if the offence specified in the European arrest warrant issued in respect of him or her was committed or is alleged to have been committed in a place other than the issuing state and the act or omission of which the offence consists does not, by virtue of having been committed in a place other than the State, constitute an offence under the law of the State."

In the present case, the details of offence no. 1 began "[i]n the period between 2005 and the end of September 2009, in Kolo and the areas near Kolo, including the village of Dabrowice and in the territory of the Kingdom of Denmark, he participated in an organised criminal group...". The respondent submits that the reference to the territory of the Kingdom of Denmark makes this an extraterritorial offence. He thereafter submits that there is no evidence as to whether such an extraterritorial offence would also be prosecutable in this jurisdiction as there is no evidence that this kind of activity is prohibited in Denmark as would be required under the relevant provisions of s. 71 of the Criminal Justice Act 2006 as amended.

14. In the view of the Court this submission falls at the first hurdle. The offence is clearly based in part in the territory of Poland and to that extent it is not an extraterritorial offence. Therefore, when translated to this jurisdiction, the offence must be considered as one committed in the territory of Ireland as well as in another jurisdiction. Therefore, it is not an extraterritorial offence but an offence which has been committed in the territory of Ireland.

15. Even if the Court is incorrect in reaching that conclusion, it is clear from the additional information provided by the authorities in Poland that the participation of this man in the organisation was because of his alleged activity in Poland. The additional information shows that the details of his alleged participation are the facilitation of the prostitutes as set out in detail in the second charge. Those alleged offences occurred in Kolo situated in Poland. In those circumstances, the acts alleged against this respondent cannot be considered to have been committed in a place other than the state. The acts of participation in the criminal organisation allegedly committed by this respondent took place in Poland. Having completed the transposition of the offence as required by virtue of the decision in *Minister for Justice and Equality v. Bailey* (2012) IESC 16, the act and omission can be seen to have taken place in Ireland. Therefore, there is no basis for concluding that his extradition is prohibited under the provisions of s. 44 of the Act of 2003.

Specificity

16. The respondent's main contention was that the nature of the charge which he faces is no longer clear and unambiguous because of the response of the issuing judicial authority when asked for comment on his affidavit. This issue arises because the respondent swore an affidavit in which he set out a variety of matters concerning himself and his family in this jurisdiction. In particular, he claimed that he had been living in Ireland since 2007 and, save for three or four short trips home to visit his family since 2007, he had been permanently living in Cork since that time. He also made a claim that he had previously been subjected to very similar proceedings in Poland, and that while some of the allegations were different, he was concerned that there was a crossover between the facts of the previous offence and the present offence. Initially, the respondent claimed that his surrender was prohibited under the provisions of s. 41 of the Act of 2003, i.e. on the grounds of double jeopardy, but in light of subsequent information, that was not pursued at the hearing.

17. The central authority sent that affidavit to the issuing judicial authority and invited comment upon it. The issuing judicial authority replied by stating that they wished to inform as follows:

"[a]s soon as the information about K. A. actually leaving the country permanently in 2007 is verified, it shall be possible to modify the period during which the suspect committed the offences he was charged with, without the need to make any further adjustments or corrections in the decision on presenting charges; the above facts shall not affect the assumed legal classification of the offences."

18. In the submission of counsel for the respondent, the reply of the issuing judicial authority causes a significant problem. He submits that there is now a huge change in the charges that the respondent is now facing. He submitted that both charges are now effectively tainted by this response as both charges had incorporated the details of the alleged offence insofar as they related to the period of time in which he states that he was in Ireland. Therefore, there is no "unambiguous clarity" in the charges he is facing.

19. Counsel relied upon the decision in *Minister for Justice Equality and Law Reform v. Connolly* [2014] 1 IR 720. Counsel acknowledged that the *Connolly* decision was not on all fours with the current facts. The facts in *Connolly* reveal that there was a discrepancy in the EAW as to the number of charges that the respondent was facing and also differences in the classification of the offence or offences that he was facing. However, counsel relied upon the statement of principle as set out by Hardiman J. that:

"I consider it to be an imperative duty of a court asked to order the compulsory delivery of a person for trial outside the State to ensure that it is affirmatively and unambiguously aware of the nature of the offences for which it is asked to have him forcibly delivered, and for which he may be tried abroad, and of the number of such offences."

20. Counsel submitted that a change in the dates of the offence was a significant change in the nature of the offence and one which the respondent was entitled to know with unambiguous clarity.

21. Counsel for the applicant submitted that what the issuing judicial authority referred to was the potential for the modification of the time period relating to the charge. Modifying the period of time within which a person was charged was not the same as modifying

the nature of the charge. Counsel pointed to the reference in the charges to the period being a period of time from at least 2005 to 2009 in relation to the second charge. Furthermore, there was a reference in the second charge and the second part thereof to the period between at least 2008 and September 2009. These details were effectively incorporated into the provisions of the first charge and therefore, even within the charges themselves, there was recognition that the time period was not necessarily a fixed one.

22. Counsel characterised the response of the issuing judicial authority as one in which it was being stated that they would take this information into account and commented that if they had said they would not take it into account, no doubt a different complaint would have been made in court. In her submission, the issuing authority were simply reserving the position as to the dates of the offences. She distinguished the *Connolly* case and submitted that all the relevant matters that were required to be provided were provided here.

23. In reply, the respondent relied upon the fact that what was at issue in the charge here was that a different woman was the subject matter of that part of the charge which lay in the disputed timeframe.

Analysis and determination of the court

24. An important starting point is s. 11(1A)(f) of the Act of 2003. That subsection provides that the EAW shall specify:-

“the circumstances in which the offence was committed or is alleged to have been committed, including the time and place of its commission or alleged commission, and the degree of involvement or alleged degree of involvement of the person in the commission of the offence”.

25. In the *Connolly* decision, the Supreme Court gave judgment in respect of a warrant in which there was internal inconsistency. That EAW did not make clear whether one offence or two offences were being alleged against the respondent. Furthermore, part of the EAW had referred to two offences which appeared to be quite distinct in nature from the details of the offence set out in the warrant. Hardiman J. stated that “[i]t is a mandatory requirement of the European arrest warrant procedure that there be unambiguous clarity about the number and nature of the offences for which the person sought is so sought.”

26. In the present case there is no ambiguity about the number of offences for which this respondent is sought. He is sought for two distinct offences, but which it has been clarified stem from the same factual allegations. The nature of the offences are clearly set out in the EAW and indeed the additional information in the papers.

27. In its reply, the issuing judicial authority may well be answering a question that was never asked of them. They may well have thought they were being asked to comment on the substantive issue of guilt or innocence in respect of the charge because the respondent’s affidavit was sent to them and their comments requested. Regardless of whether this information had been requested, it is important that this Court take into account what is now being said. It is vital that the Court considers all information before it from the issuing judicial authority so as to ensure clarity about the charges this respondent faces if surrendered.

28. In my view, the issuing judicial authority have clarified by their reply that, having received information from the respondent in which he claimed that he left the country in 2007, it would be possible if that is verified to modify the period during which he is suspected of having committed the offences. They have clarified that this will not affect either the legal classification of the offences or indeed require an adjustment or a correction in the decision on presenting charges. What the issuing judicial authority have done is quite appropriately confirm that the information they receive, and which is verified, will be dealt with by them in relation to the offences.

29. The reply by the issuing judicial authority does not affect the position of the charges that this respondent faces at present. The respondent is being sought in respect of offences as set out in the European Arrest Warrant. All that has been given is an indication that, should the matter be verified, it will be possible to amend the period in which he is charged. It will ultimately be a matter for the trial (or indeed for the prosecuting authorities to reconsider the extent of the charges) of these alleged offences as to whether he committed the offences and if so, the period of time over which the offending behaviour extended. That change in time period may or may not lead to a determination that he had no involvement with any alleged facilitation of the second named woman to work as a prostitute. It will be for the Polish authorities to determine when, or if, that facilitation occurred (either before or after he left Poland for Ireland) and whether he was involved in it (either before he left Poland or during some period on his return from Ireland to Poland). It does not change the fact that at this time he is actively being sought on this EAW for the purpose of prosecution of those alleged offences.

30. At present this Court, as executing judicial authority, is dealing with an EAW which charges him with specific offences. He is still wanted by the issuing judicial authority in Poland for the purpose of prosecuting him in respect of those offences. In those circumstances, no ambiguity arises and there is no ground for refusing to surrender him.

31. Even if the Court was to accept the point, (which it does not) that this information meant that the time period in which the offence had occurred had actually changed, the Court would not be satisfied that there is a resultant ambiguity about the charges for which the respondent is sought. All that the issuing judicial authority has referred to is the period of time covered by the alleged offence, it has not referred to a change in the details of those offence. The charges laid against him by their nature cover a wide time frame and involve a number of alleged activities which have been detailed. Those dates may be subject to change but he is still being sought in respect of the details of the alleged offences.

32. Furthermore, a change in the time period is not the type of change to a fundamental element in the nature or purpose of the EAW, such as had occurred in the case of *Minister for Justice and Equality v. Herman* [2014] IESC 49 which required a fresh EAW to be issued. The type of change which is at issue in the present case is not in any way fundamental to the nature or purpose of the European arrest warrant.

33. In the present case, however, the Court does not need to look at whether the details of the offences have changed to such an extent that they are ambiguous or that there is a fundamental change to the nature and purpose of the European arrest warrant. This is because the allegations made against the respondent are clear and unambiguous. It will be a matter for the Polish court to determine in light of all of the evidence, including the evidence from the respondent, the dates of any alleged offending. The Polish prosecutor will also be alert to any evidence going towards innocence and will amend charges as information is verified.

34. Ultimately, at the time this Court has to deal with this matter, the alleged offences set out in the EAW are clear and unambiguous. I therefore reject this point of objection.

Section 37 of the Act of 2003

35. In his points of objection the respondent claimed that he should not be surrendered as this would disproportionately interfere with his family life and therefore result in a breach of Article 8 of the European Convention on Human Rights. Quite correctly, counsel for the respondent did not press this at the hearing. I have considered this issues and what is stated in his affidavit in which he refers to moving to Ireland with his fiancé and their two young children. He is working here as does his partner. He employs two others. His mother and brother also reside here.

36. In light of the serious offences for which he is sought and the lack of any evidence of any particular injurious, oppressive or harmful consequences to him on surrender, I am of the view that this is a case which may be disposed of on the basis of the *dictum* of O'Donnell J in *Minister for Justice and Equality v. JAT (No 2)* (2016) IESC 17. It is not "necessary to carry out any elaborate factual analysis or weighing of matters" as these facts do not come at least close to a case which can be said to be truly exceptional in its features. Even in such cases, which must be rare, it is important that the considerations raised are scrutinised rigorously.

37. On balancing the relevant matters in this case, there is an overwhelming public interest in surrender for the purpose of prosecuting these serious offences. This public interest outweighs the above private interests of this respondent.

Conclusion

38. Having rejected all the respondent's points of objection, and being satisfied that the provisions of the Act of 2003 have been met, I am satisfied that I may make an order for surrender of this respondent to such other person as is duly authorised by the issuing state to receive him.