

THE HIGH COURT

[2017 2 EXT]

BETWEEN

THE MINISTER FOR JUSTICE AND EQUALITY

APPLICANT

AND

KRZYSZTOF ANDRZEJCZAK (No. 2)

RESPONDENT

JUDGMENT of Ms. Justice Donnelly delivered the 16th day of January, 2018

Introduction

1. This Court delivered judgment on 14th October, 2016 in *The Minister for Justice and Equality v. Andrzejczak* [2017] IEHC 766 wherein the Court ordered the surrender to Poland of the respondent who was sought for prosecution of two offences pursuant to a European Arrest Warrant ("EAW") dated 9th September, 2016. Counsel on behalf of the respondent had raised two separate points of objections to the surrender. Only one of those points is of relevance to this application for leave to appeal pursuant to s. 16(11) of the European Arrest Warrant Act, 2003 as amended ("the Act of 2003"). Under this point the respondent asserted that there was no unambiguous clarity in the EAW about the nature of the offences for which he was charged.

2. The point 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 timeframe in which the offences were charged. The response of the issuing judicial authority stated:

"[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."

3. This point of objection was rejected by this Court primarily on the basis that "the reply by the issuing judicial authority does not affect the position of the charges that this respondent faces at present." The reasoning of the Court is set out at paras 28 – 34 of the judgment.

4. An appeal against a decision of the High Court can only be taken if the High Court certifies that the order involves a point of law of exceptional public importance, and that it is desirable in the public interest that an appeal should be taken. There was no dispute in this case on the law to be applied by the High Court when assessing whether the legal test has been met. This Court's judgment in the case of *Minister for Justice and Equality v. A.M. and Donovan* [2016] IEHC 798 was accepted as representing the law to be applied in the case of applications for leave to appeal concerning European Arrest Warrants. Of particular importance, therefore, is that the Court must give a broad interpretation to any issue regarding EAWs, as the High Court has been the only legal authority addressing the issue of surrender. It is also important to remember that the test to apply is not whether there is a chance of success of the appeal, but whether it raises a point of law of exceptional public importance and an appeal on that point is desirable in the public interest

5. Six questions were drafted by counsel for the respondent for this Court to consider:

1. Whether the European arrest warrant and additional information comply with the provisions of Section 11(1A)(f) of the Act of 2003, in circumstances where the issuing authority has stated that upon further information being verified, it shall be possible to modify the period during which the respondent is said to have committed the offences with which he is to be charged;

2. Whether the stated modification of the period during which the respondent is said to have committed the offences is, in fact, merely a modification to dates rather than a substantive modification to the nature and number of the offences alleged;

3. Whether it is permissible for an issuing state, upon surrender, to *reconsider the extent of the charges and the period of time over which the period of offending extended* and to what extent this is permissible;

4. Whether the European arrest warrant and additional information can be said to comply with the judgment of the Supreme Court *Minister for Justice v Connolly* [2012] IEHC 575 that this Honourable Court should have *unambiguous clarity about the number and nature of the offences for which the respondent is sought*;

5. Whether the stated modification to the offences the respondent is said to have committed, infringe his ability to exercise his rights as regards specialty once surrendered;

6. Whether, as a matter of principle, the law governing the European arrest warrant in the State allows for a system whereby a person might be surrendered to face charges which the issuing state has indicated may be subject to modification, and the extent to which same is permissible – having regard to the European arrest warrant and additional information in this case.

6. It was accepted at the oral hearing that these were somewhat repetitive questions and Counsel focused his submission on question number six which he submitted encapsulated the issue subject to elucidation of the details in this case. In essence, Counsel identified the point of law of exceptional public importance as one raising the issue of whether an amendment made to the details of an EAW, even if related to the time of the offence, could amount to a fundamental change to the offences for which the respondent is sought, of which would be impermissible in accordance with s. 11(1A) of the Act of 2003 or the rule of unambiguous clarity as defined in *Connolly*.

7. The respondent's submission is premised on the basis that the details of both counts in the EAW are interlinked. The details set out in the second offence form the basis of the first offence, ie. the substantive facilitation of prostitution offence forms the basis of the

participation in the organised crime group. In particular, counsel points to the possible change in date (which it must be remembered was triggered by the information akin to an "alibi" that was provided by the respondent in his affidavit in these proceedings), and submits that a change in the date of the offence would mean that the details regarding the second woman in both offences would no longer apply to this respondent. That, counsel submits, is a fundamental change to the nature of the offence and is contrary to the provisions of s. 11(1A) of the Act of 2003.

8. In my view, the first consideration must be whether this application raises an issue of law at all, given the manner in which this issue was dealt with in the judgment. Specifically, in para. 28 and 29 I state:

"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.

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."

9. From the foregoing, it was established in the judgment that no fundamental changes have been made to the content of the European arrest warrant. The issuing judicial authority has only indicated that a change to the dates in the charges will be possible, once they can verify the whereabouts of the respondent during the periods of which the offences against him are alleged. All that the Polish authorities have acknowledged is that they will consider the information proffered and if accepted they would make changes to the charges which would reflect the new information. This would not affect the legal classification of the offences.

10. Therefore, I am satisfied that the point of law raised by the respondent does not actually arise on the facts of this case. There has been no change in the details of the EAW; there has simply been an indication that in the course of the proceedings in Poland his "alibi" will be considered and, if verified, a change will be made accordingly. It was also confirmed that any such change based upon the information provided would not change the legal classification. Where the point of law does not arise from the decision of the Court there can be no appeal. Indeed, it is striking that none of the six questions that have been posed by the respondent deal specifically with the finding of the Court. In the absence of a challenge to that finding, which could result in setting aside that finding, the question posed is entirely theoretical because, even if the question is answered in the respondent's favour, it would not result in his surrender being prohibited. In those circumstances, even if the point were to be considered one of exceptional public importance, it could not be desirable in the public interest to have an appeal.

11. While it is unnecessary to engage in this matter any further, I am of the view that it is important to make a number of points in this case. In the application for leave to appeal, the decision of the Court of Justice of the European Union ("CJEU") in *Leymann and Pustovarov* (Case C-388/08 (PPU), Third Chamber, 1st December, 2008) was a central feature of both submissions. This case had not featured at the original hearing. The explanation for that was because that case was initially viewed as covering issues of speciality rather than being central to the issue in the present case. The CJEU judgment concerned the criteria for determining when a person is being prosecuted for an "offence other" than the offence for which they have been surrendered i.e. when the rule of speciality would be breached if there is a change to the details of the offence for which they were surrendered. In essence, the court in the issuing state must consider if there is sufficient correspondence between the details given in the EAW and the indictment/charge sheet. In particular;

"[m]odifications concerning the time or place of the offence are allowed, in so far as they derive from evidence gathered in the course of the proceedings conducted in the issuing State concerning the conduct described in the arrest warrant, do not alter the nature of the offence and do not lead to grounds for non-execution under Article 3 and 4 of the Framework Decision".

Furthermore, a modification of the description of the offence concerning the kind of narcotics at issue was not an "offence other" than that for which the person had been surrendered.

12. The decision of the CJEU in *Leymann and Pustovarov* has been applied in the Central Criminal Court by Eager J. where an amendment to the time in which the offences were alleged to have been committed was permitted (See *People (DPP) v. CC* [2016] IECCC 1).

13. In my view, counsel for the minister was perhaps correct in submitting that the issuing judicial authority in this case may have been mindful of the criteria set out in *Leymann and Pustovarov* by their answer and were assuring this Court that the rule of speciality would be applied. That is not something I have to consider because the respondent's challenge in this case was not based upon an anticipated breach of the rule of speciality, but upon the fact that the answer indicated a change to the offence set out in the European arrest warrant. In my view, it is of some note that the respondent did not consider the response of the issuing judicial authority as a *prima facie* indication that the rule of speciality (and the presumption set out in s.22 regarding that rule) would be violated on his surrender. Instead, the respondent sought, as he was entitled to do, to make the response the focus of a submission concerning a fundamental change to, and ambiguity in, the European arrest warrant.

14. The reality is that the *Leymann and Pustovarov* decision, although concerning speciality, by analogy would apply to a consideration of what amounts to a change in the nature and legal classification of the offence. To that extent, the Court of Justice of the European Union has spoken on this issue and it is not desirable in the public interest that an appeal be granted to the Court of Appeal as there is no contention that the Act of 2003 requires a different interpretation. Counsel for the respondent has accepted that the *Leymann and Pustovarov* decision would in principle cover the wider point at issue in these proceedings. Instead, he has focused on what he identifies as the critical issue, namely "one of degree" i.e. is the modification to the charges simply a temporal

one or does it go further?

15. Although a question of degree might usually be considered a question of fact and not of law, a situation might conceivably arise where "time is of the essence" in respect of the charge at issue in the proceedings. For example, there might only be correspondence with an offence in this jurisdiction if a person did something within a particular time frame. A change to the time in which the person is alleged to have done something might not result in those acts alleged corresponding with an offence in this jurisdiction. That situation did not arise here. Indeed, no specific reason was raised as to why "time was of the essence" in this case other than the submission that the facts surrounding the other woman would not be encompassed within the changes. As this Court said at paragraph 31 of the judgment: "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."

16. It also can be observed that there is a potential overlap in the timeframe regarding the second woman as the respondent says he left Poland in 2007 whereas the activities alleged against the respondent involving this woman include "at least" 2007. More importantly, the nature of the offence has not changed, he is sought in respect of facilitation of prostitution and participation in an organised criminal group, the details of which are set out in the European arrest warrant. Finally, the respondent has not set out or provided evidence or even claimed that the removal of the details in respect of one of the women would in law affect his liability to be found guilty of one or both offences if the other ingredients of the charges are proven. Furthermore, no specific issues that would affect his liability to surrender were identified by the respondent arising from the potential change in the charges that he relied upon. Indeed, the *Leymann and Pustovarov* decision specifically envisages that a change to a charge which would affect liability to surrender would not be allowed (as per the reference to non-execution on Article 3 and 4 grounds).

17. In the circumstances, there is nothing in the present case that shows that it would be desirable in the public interest to give leave to appeal even if it could be established that the question of "degree" of the modification amounted to a point of law of exceptional public importance. The question posed by the respondent does not arise on the facts and the issue is in any event covered by the decision of the CJEU in *Leymann and Pustovarov*.

18. Primarily however, this Court finds that in all the circumstances, the question raised by the respondent does not arise in this case because there has been no amendment to the EAW at all concerning the offences for which he is sought. Accordingly, the Court rejects the application for a certificate of appeal under s. 16(11) of the Act of 2003.