

THE HIGH COURT

[2014 No. 247 EXT]

[2014 No. 248 EXT]

[2014 No. 249 EXT]

BETWEEN

MINISTER FOR JUSTICE AND EQUALITY

APPLICANT

AND

VASILE PLECANCIUC

RESPONDENT

JUDGMENT of Mr. Justice McDermott delivered on the 25th day of March, 2015

1. This is an application for the surrender of the respondent to Romania pursuant to three European Arrest Warrants which had been endorsed by the High Court for execution.

The First Warrant – European Arrest Warrant No. 3/2008 dated 9th January, 2008

2. This is a warrant issued by the District Court of Campulung, Moldovenesc, Romania, requesting that the respondent be arrested and surrendered to the competent judicial authority for the purpose of the execution of a sentence of three years imprisonment. No issue arises concerning the identification of the respondent as the person named in the warrant. The warrant (File No. 324/206/2006) classified the offence as one of swindling contrary to Article 215 paras. 1 and 4 of the Romanian Criminal Code. The description of the circumstances in which the offence was committed was set out in the warrant as follows:-

“In fact it was retained (sic) that on February 2006, he took the goods from the civil plaintiff S.C. “Cadis Communication” SRL using the documents of the trading company administered by the co-defendant Sordoc Andrei.”

Extradition was sought in respect of one offence only. In para. (e)(I) the requesting authority has ticked “swindling” as the appropriate description of the offence from the list of offences as per Article 2.2 of the Framework Decision. That being so, it was not necessary to show correspondence once the box was ticked. However, a further description of the offence was set out at para. (e) (II) which provides the opportunity for the issuing authority to give “full descriptions of offence(s) not covered by s. 1 above”. Under that heading the offence is described as “forgery in deeds by private signature”. Once the requesting authority includes the offence under this heading, it is necessary to establish correspondence between the offence described and an offence contrary to Irish law.

3. Section 25 of the Criminal Justice (Theft and Fraud Offences) Act 2001, provides that a person is guilty of forgery if he or she makes a false instrument with the intention that it shall be used to induce another person to accept it as genuine and by reason of so accepting it, to do some act or make some omission, to the prejudice of that person or any other person. The person guilty of forgery is liable to a conviction on indictment to a fine or imprisonment to a term not exceeding ten years, or both.

4. In *Minister for Justice, Equality and Law Reform v. Paulauskas* [2009] IEHC 32, the issuing judicial authority had ticked a box in para. (e)(I) of the warrant to indicate that a stabbing offence was within a category of offence referred to in Article 2.2 of the Framework Decision as “grievous bodily harm”. However, in para (e)(II) of the warrant it purported to give a full description of the offence not covered by para (e)(I) and described it as “violation of public order; serious health impairment”. The Minister submitted that the facts which gave rise to the alleged stabbing offence would if committed in this State give rise to an offence under either s. 3 or s. 4 of the Non-Fatal Offences against the Person Act 1997. The learned judge accepted that the offences advanced as corresponding offences to those contained in the warrant, corresponded. Peart J. was not satisfied that the fact that the stabbing offence had been marked and included in para. (e)(II) of the warrant constituted an error such that surrender was prohibited. He stated:-

“What the issuing judicial authority has done in that regard does not offend against Article 2 of the Framework Decision or the provisions of s. 38 of the Act, even if it would be more correct for that authority to have simply marked that offence as an Article 2.2, or not to have done so and simply included it in paragraph E.II.”

5. Section 38(1) of the European Arrest Warrant Act 2003, provides, *inter alia*:-

“38.—(1) Subject to subsection (2), a person shall not be surrendered to an issuing state under this Act in respect of an offence unless—

(a) the offence corresponds to an offence under the law of the State, and—

(i) under the law of the issuing state the offence is punishable by imprisonment or detention for a maximum period of not less than 12 months, or

(ii) a term of imprisonment or detention of not less than 4 months has been imposed on the person in respect of the offence in the issuing state, and the person is required under the law of the issuing state to serve all or part of that term of imprisonment, or

(b) the offence is an offence to which paragraph 2 of Article 2 of the Framework Decision applies or is an offence that consists of conduct specified in that paragraph, and under the law of the issuing state the offence is

punishable by imprisonment for a maximum period of not less than 3 years.”

6. The court is satisfied that in this instance it is necessary to look for correspondence in respect of the description of the offence set out at para. (e)(II). The description given as “forgery in deeds by private signature” must be read in the context of the overall terms of the warrant and the factual description of the circumstances in which the offence was committed. The offence is described as the taking of goods from an injured party using the documents of a trading company administered by the proposed extraditee’s co-defendant. It appears therefore to correspond when considered under s. 30(d) of the 2001 and to be a forgery of documents purporting to be in terms made on the authority of a person or company who or which did not in fact authorise their making in those terms and inducing the injured party to accept them as genuine, thereby enabling the offender to obtain goods from the injured party. The use of such an instrument is also an offence under s. 26 which provides that a person who dishonestly, with the intention of making a gain for himself or another, or of causing loss to another by any deception, induced another to do or refrain from doing an act, is guilty of an offence. It is clear that the description of the offence at para. (e)(II) when combined with the description of the circumstances of the offence also corresponds with an offence under s. 6 of the Act of making gain or causing loss by deception. I am, therefore, satisfied that correspondence has been established in respect of this warrant.

7. It is also submitted that additional information furnished by the Romanian authorities following a request from the Irish Central Authority in respect of the respondent’s trial *in absentia* is insufficient to enable this Court to order his surrender. Section 45 provides that:-

“A person shall not be surrendered under this Act if he or she did not appear in person at the proceedings resulting in the sentence or detention order in respect of which the European Arrest Warrant was issued, unless the European Arrest Warrant indicates the matters required by points 2, 3 and 4 of point (d) of the form of warrant in the annex to the Framework Decision as amended by Council Framework Decision 2009/299/JHA as set out in the table to this section.”

8. The information provided indicates that the respondent was summonsed in person to appear in court on 7th November and 15th December, 2006, 19th January, 23rd February, 16th March, 22nd April, 23rd May, 31st May and 27th June, 2007 and was informed of the scheduled date and place of his trial which resulted in the conviction and sentence imposed, and was informed that a decision “may be handed down if he did not appear for the trial”. Furthermore, a box was ticked in the table which indicated that being aware of the scheduled trial, the respondent had given a mandate to a legal counsellor who was either appointed by him or by the State to defend him at his trial, and was defended by that counsellor at the trial. It was clear that the applicant did not attend the trial which resulted in his conviction and sentence. It is further indicated by a ticking of the relevant box that the respondent did not request a retrial or appeal within the applicable timeframe in respect of the conviction and sentence. Paragraph 4 of the table indicates that he was represented by a publicly appointed attorney, though not present at the time of the ruling made in his case. It was confirmed that he did not avail of a right of appeal provided by law.

9. I am satisfied that the additional information provided in respect of the European Arrest Warrant indicates that all of the matters required by points 2, 3 and 4 and of point (d) were properly and adequately addressed and that the respondent’s surrender would not be contrary to the provisions of section 45.

The Second Warrant- European Arrest Warrant No. 4/08 from 6th February

10. This is also a warrant issued by the District Court of Campulung, Moldovenesc for the purpose of the execution of a sentence of three years imprisonment imposed on the respondent. The respondent’s identification as the person the subject of the warrant is established and is not in issue. The judicial decision in respect of which the European Arrest Warrant issued concerned an Imprisonment Order No. 291/07 from 16th January, 2008, following the imposition of sentence No. 189 on 30th May, 2007, by the District Court. This was affirmed by a decision of the Court of Appeal Suceava in criminal decision 31/16/01 2008, file reference No. 2043/206/2006.

11. The warrant is in respect of a single offence, its nature and legal classification is described as a “swindling offence stipulated by Article 215 para. 1 and 4” of the Romanian Criminal Code. The description of the circumstances in which the offence was committed, including the time place and degree of participation by the respondent, is stated as follows:-

“In fact it was retained (sic) that on the days of 27.01.2006 and respectively 01.02.2006 he issued three bank cheques CEC with no cover in the bank.”

12. The offence of swindling is nominated as the offence under Article 2.2 of the Framework Decision and the relevant box is ticked. However, once again, the requesting authority has also completed para. (e)(II) of the warrant which allows for the provision of a “full description of offence(s) not covered by s. (I) above”, and describes the offence as:-

“Swindling – the misleading of a person by presenting a lie as the truth or presenting the truth as a lie, in order to obtain a material benefit for oneself of (sic) a third party.”

13. As is the case with the first warrant, having completed para (e)(II), I am satisfied that the court must look for correspondence between the offence described at (e)(II) and an offence in this State. I am satisfied that the offence corresponds with s. 6 of the Criminal Justice (Theft and Fraud Offences) Act 2001, which provides that a person who dishonestly, with the intention of making a gain for himself or herself or another or of causing loss to another by any deception or induces another to do or refrain from doing any act is guilty of an offence and is liable to a fine or imprisonment for a term not exceeding five years or both. I am also satisfied it qualifies as theft in the broader definition of the Act under section 4. Correspondence has therefore been established.

14. It is clear from the body of the warrant that the defendant did not attend his trial, but it is stated that “he was publicly appointed an attorney. He was not present at the ruling of the decision but he used the means of appeal provided by the law. The defendant was provided with the complete exercise of his rights and guarantees regulated by Article 6, paras 1, 171, 172, 175, 177 and following from the Criminal Procedure Code”.

15. Following a request from the Central Authority in Ireland, further information was provided in respect of the respondent’s trial *in absentia*. It was confirmed that he had not appeared in person at the trial which resulted in the decision. In the information provided which was in the form of the table set out in s. 45 of the Act, it is stated that he was summonsed in person to court on 6th January, 13th February, 3rd April and 15th May, 2007, and was thereby informed of the scheduled date and place of trial which resulted in the conviction and sentence, and informed that a decision may be handed down if he did not appear for the trial. The box was ticked which indicated that being aware of the trial he had given a mandate to a legal counsellor appointed in his case by the state to defend him, and was defended at his trial. The details provided at para. 4, stating how the relevant conditions in respect of trial *in absentia* had been met, state that he did not attend the trial but was represented by a state appointed attorney but was not present

at the time of the court's ruling. The statement in the additional information that he did not use the means of appeal provided by law appears to be incorrect having regard to the information contained in the body of the warrant that he did exercise his right of appeal, but that it was unsuccessful. I do not consider that this is sufficient to vitiate the warrant and, indeed, the box in respect of not requesting a retrial or appeal was not ticked in the additional information. The respondent does not contradict this summary of events. The court is satisfied that the respondent was fully aware of the dates and progress of his criminal trial and had fully instructed and was represented by a lawyer provided at the expense of the state for the conduct of his case, up to and including the appeal stage. The respondent's surrender in respect of this warrant would not be contrary to the provisions of section 45.

The Third Warrant – European Arrest Warrant No. 4/2010 dated 16th December, 2010

16. This warrant was also issued by the District Court of Campulung, Moldovenesc for the purpose of seeking the respondent's surrender to serve a three year sentence of imprisonment imposed in respect of two offences. The warrant arose from a judicial decision resulting in an order of imprisonment No. 57/08 of 26th February, 2008, in respect of criminal sentence No. 45/06.02/2008. The sentence of three years imprisonment was imposed following a trial to which the applicant had been summonsed in person and given notice of the date and place of the hearing. He had not attended during the course of the trial, though he was granted a state appointed counsellor. He was not present at the ruling of the decision and did not avail of his right of appeal. The warrant states that he "was provided with the complete exercise of his rights and guarantees regulated by Article 6, para. 1, 171, 172, 175, 177 and the following from the Criminal Procedure Code".

17. In respect of the two offences the facts are described as follows:-

"In fact it was retained (sic) that the defendant filled in one bank CEC, taken from the co-defendant Sorodoc Andrei, and used it to pay the equivalent value of the goods delivered by the civil party SC MONDO PLAST SRL – without having banking availability, forging the signature of Sorodoc Andrei on fiscal invoice."

18. The nature and legal classification of the offences and the applicable statutory provisions were described as follows:-

"1. Swindling – stipulated and punished by Article 215 para. 1, 2 and 4 from the Penal Code respectively:

- the misleading of a person by presenting a lie as the truth or by presenting the truth as a lie, in order to obtain a material benefit for oneself of a third party and if a damage was caused;
- use of false names or qualities or of another fraudulent means;
- use of a bank cheque to a credit institution or to a person, knowing that for its cashing there is no necessary provision or coverage, and also the deed to withdraw, after issue, the provision, total or partially, or to forbid the withdrawal for payment before the expiration of the presentation term.

2. Forgery in deeds under private signature stipulated by Article 290 para. 1 from the Criminal Code respectively:

- forgery of a deed under private signature by forging the writing or signature or by otherwise its altering, in order to cause legal consequences, if the doer uses the forged deed or gives it to another person to be used, in order to cause legal consequences"

19. In respect of both offences the box for "swindling" in a list of offences relevant to the Framework Decision under Article 2.2 was ticked. However, once again, para (e)(II) was completed in respect of "full description of offence(s) not covered by s. 1 above: as follows:-

"Accordingly to Art. 33 letter "A" and Art. 34 letter "B" from the Criminal Code, the two punishments were merged and it was decided that the defendant execute the largest punishment of 3 (three) years in prison.

Thus it was applied Art. 71 related to Art. 64 para. 1, letter "A" thesis II and letter "B" from the Criminal Code.

The defendant will execute a total punishment of three years in prison."

20. I am not satisfied that the material set out at para. (e)(II) was intended or could be regarded as a full description of an offence not covered by s. 1 above. The only description of the offences set out under para. (e)(I) or (II) is the ticked box "swindling". The material set out in para (e)(II) is simply a description of how the sentence of three years imprisonment which it is claimed the respondent is required to serve, is calculated. There was ample material set out earlier in the warrant to demonstrate the nature of the offences for the purpose of establishing correspondence with offences under section 4, 25 and 26 of the 2001 Act but it is not set out in the appropriate sub-paragraph. In any event, a further description at e(II) was unnecessary having regard to the ticking of the Article 2.2 box. Therefore, I am not satisfied that it is necessary in the circumstances to examine the warrant for correspondence having regard to the complete absence of any description under para. (e)(II) which might merit such an examination. The material inserted in that section has no relevance to a description of the offences. The two offences described in the warrant outlined the circumstances in which they were committed, the nature and classification of the offences and the applicable statutory provisions. I am, therefore, satisfied that there is sufficient description of the two offences provided by the ticking of the box "swindling" at para. (e)(I) for the purpose of authorising the respondent's extradition in that respect.

21. In addition to the information provided in the body of the warrant concerning the respondent's trial *in absentia*, further information was required by the Irish Central Authority and was supplied in the form of the table as set out in s. 45 of the Act. This information confirms that the respondent did not appear in person at the trial resulting in the decision. He states that he was summoned to appear in court on 2nd October, 6th November, and 4th December, 2007, and 9th January, and 6th February, 2008, and thereby informed of the scheduled date and place of the trial which resulted in the decision and that a decision might be handed down if he did not appear for trial. The relevant boxes ticked indicate that being aware of the scheduled trial, he had given a mandate to a legal counsellor to represent him. It is clear from the body of the warrant that an attorney was provided by the state and defended him at the trial. The box is also ticked indicating that he did not request an appeal within the applicable timeframe and further information is provided that he was not present at the handing down of the ruling and did not avail of his right to appeal. I am satisfied that no issue arises under s. 45 of the Act which would preclude the respondent's extradition to Romania.

22. However, there remains an issue concerning how the sentence of three years imprisonment is calculated. The offence of swindling under Article 215 of the Romanian Penal Code carries a maximum sentence of 12 years imprisonment. The offence of forgery contrary

to Article 290 of the Criminal Code carries a maximum sentence of two years imprisonment. It was decided in accordance with Article 33 and Article 34 of the Criminal Code that the two punishments would be "merged" and "that the defendant execute the largest punishment of three years in prison". It is not clear whether two concurrent sentences were imposed or whether the lesser offence was taken into account in imposing the three years imprisonment.

23. Under section 38(1) of the 2003 Act a person shall not be surrendered to an issuing state in respect of an offence unless *inter alia*—

" (a) the offence corresponds to an offence under the law of the State, and...

(ii) a term of imprisonment or detention of not less than 4 months has been imposed on the person in respect of the offence in the issuing state, and the person is required under the law of the issuing state to serve all or part of that term of imprisonment...."

The sentence imposed on the respondent in respect of the forgery conviction is not stated in the warrant. It is unclear whether a term of imprisonment or detention "of not less than four months has been imposed" on the respondent and incorporated into the three years, or how the sentence in respect of the forgery count was addressed. It may be that some element of the three year sentence consists of a sentence in respect of the forgery which is less than four months in respect of that count. The warrant is completely unclear as to how the sentences were merged, whether by way of concurrent sentences, consecutive sentences or the lesser offence being taken into account in imposing the greater penalty. The court is not satisfied that there is sufficient certainty provided to enable the court to order the respondent's surrender in respect of this third warrant having regard to the restriction imposed by section 38(1)(a)(ii). It would be impermissible to direct his surrender if part of the sentence includes a sentence of less than four months imprisonment in respect of the forgery count. The application in respect of this warrant is refused.

24. I am satisfied that there is no reason why the respondent's surrender must be refused under ss. 21A, 22, 23 or 24 of the 2003 Act and that his surrender is not prohibited by any provisions of Part 3 of the European Arrest Warrant Act 2003, as amended, or the Framework Decision in respect of the first and second warrant referred to above.

25. I am, therefore, satisfied that all of the requirements of s. 16(1) of the Act have been complied with and the court is required to make the order for surrender as sought in respect of these two warrants.