

THE HIGH COURT

[2011 No. 222 EXT]

BETWEEN

THE MINISTER FOR JUSTICE AND EQUALITY

Applicant

- AND -

LADISLAV KLIER

Respondent

JUDGMENT of Mr Justice Edwards delivered on the 27th day of November, 2012

Introduction

The respondent is the subject of a European arrest warrant issued by the Czech Republic on the 4th September, 2006. The warrant was endorsed by the High Court for execution in this jurisdiction on the 22nd June, 2011 and it was duly executed on the 22nd August, 2011. The respondent was arrested by Garda Stephen Dunne on that date, and then on the following morning he was brought before the High Court pursuant to s. 13 of the European Arrest Warrant Act, 2003 (hereinafter the "Act of 2003"). In the course of the s. 13 hearing a notional date was fixed for the purposes of s. 16 of the Act of 2003 and the respondent was remanded on bail to the date fixed. Thereafter the matter was adjourned from time to time, ultimately coming before the Court on the 3rd October, 2012 for the purposes of a surrender hearing.

The respondent does not consent to his surrender to the Czech Republic. Accordingly, this Court is now being asked by the applicant to make an order pursuant to s. 16 of the Act of 2003 directing that the respondent be surrendered to such person as is duly authorised by the issuing state to receive him. The Court must consider whether the requirements of s. 16 of the Act of 2003, both controversial and uncontroversial, have been satisfied and this Court's jurisdiction to make an order directing that the respondent be surrendered is dependant upon a judicial finding that they have been so satisfied.

Uncontroversial s. 16 Issues

The Court has received an affidavit of Garda Stephen Dunne sworn on the 15th March, 2011 and has received and scrutinised a true copy of the European arrest warrant in this case. It has also inspected the original European arrest warrant which is on the Court's file and which bears this Court's endorsement. In addition, counsel for the respondent has confirmed that no issue arises as to either the arrest or identity.

The Court is satisfied following its consideration of these matters that:

- (a) the European arrest warrant was endorsed for execution in this State in accordance with s. 13 of the 2003 Act;
- (b) the warrant was duly executed;
- (c) the person who has been brought before the Court is the person in respect of whom the European arrest warrant was issued;
- (d) the warrant is in the correct form;
- (e) the warrant is a conviction type warrant and the respondent is wanted in the Czech Republic to serve a balance of 10 months imprisonment remaining to be served out of a sentence of 22 months imprisonment imposed upon him by the District Court of Plzeň-North in respect of the single offence particularised in Part E of the warrant;
- (f) Correspondence does not require to be demonstrated in respect of the offence particularised within Part E of the warrant, because (a) paragraph 2 of article 2 of Council Framework Decision J.H.A./584/2002 of 13 June, 2002 on the European arrest warrant and the surrender procedures between Member States, O.J. L 190/1 18.7.2002 (hereinafter the "Framework Decision") has been invoked in respect of that offence by the ticking of the box in Part E. I of the warrant relating to Fraud (described in the English translation of the European arrest warrant in this case as "*Frauds incl. deceits affecting concerns of European Communities in sense of the Treaty dated 26th July 1995 on Protection of European Communities Financial Interests*"); and (b) the offence in question attracts a penalty of three years imprisonment under the law of the issuing state, thereby satisfying the requirements of s. 38(1)(b) of the Act of 2003.
- (g) No issue as to trial *in absentia* arises in the circumstances of this case and so no undertaking is required under s. 45 of the Act of 2003.
- (h) There are no circumstances that would cause the Court to refuse to surrender the respondent under ss. 21A, 22, 23 or 24 of the Act of 2003, as amended.

In addition the Court is satisfied to note the existence of the European Arrest Warrant Act 2003 (Designated Member States) Order 2005 (S.I. No. 27 of 2005) (hereinafter the "2005 Designation Order"), and duly notes that by a combination of s. 3(1) of the Act of 2003, and article 2 of, and the schedule to, the 2005 Designation Order, "the Czech Republic" is designated for the purposes of the Act of 2003 as being a state that has under its national law given effect to the Framework Decision.

The Points of Objection

The respondent has filed a number of points of objection but in fact only one point of substance was proceeded with at the hearing. That objection may be summarised as follows:

The issuing state previously sought the surrender of this respondent for the same matter as is the subject of the present European arrest warrant in the following circumstances. On the 1st January, 2004, the European Arrest Warrant Act, 2003 came into operation to give effect to the Framework Decision. The Czech Republic was not a member of the European Union at that time. On the 22nd April, 2004, the Minister for Justice received a request from the Czech Republic pursuant to Part II of the Extradition Act, 1965 (hereinafter the "Act of 1965") seeking the extradition of the respondent for the purpose of serving the prison sentence to which the present European arrest warrant also relates. On the 1st May, 2004, the Czech Republic became a member of the European Union, but it was not immediately designated by Ireland for the purposes of the Act of 2003 as being a state that has under its national law given effect to the Framework Decision. On the 25th January, 2005, for the purposes of the Act of 2003, the Minister for Foreign Affairs, by order (contained in S.I. No. 27 of 2005 hereinbefore referred to), and pursuant to s. 3 of the Act of 2003, designated the Czech Republic as a member state that had under its national laws given effect to the Framework Decision.

Notwithstanding this, the Attorney General proceeded with the extradition proceedings under Part II of the Act of 1965. On the 15th March, 2005, a warrant for the arrest of the respondent was granted by the High Court (Hanna J.) pursuant to s. 26 of the Act of 1965 on foot of the said extradition request. When the matter ultimately came on for hearing in the High Court before Peart J., counsel for the respondent argued that the matter should be dealt with under the European arrest warrant scheme and that the court should refuse to make the order sought under Part II of the Act of 1965 as it no longer applied at the relevant date. The High Court agreed and refused to grant the required certificate under s. 29 of the Act of 1965 to allow the extradition to proceed. Accordingly, the respondent was discharged. See *Attorney General v. Klier* [2005] IEHC 254, [2005] 3 I.R. 447.

The Czech authorities now seek to come again, this time by means of the present European arrest warrant. The respondent contends that it would be fundamentally unfair and unjust to surrender him on foot of the present request, and he invokes s. 37 of the Act of 2003 and contends that it would breach his rights under the Constitution of Ireland and under the European Convention on Human Rights, although the particular rights relied upon are not specified. He argues, however, that so much time has been allowed to elapse that it would now be fundamentally unfair, and a disproportionate measure in all the circumstances of the case, to surrender him at this point. Counsel for the respondent emphasises that he does not rely upon delay as a standalone ground in its own right, and in the sense found in *Minister for Justice, Equality and Law Reform v. Stapleton* [2007] IESC 30, [2008] 1 I.R. 669, but as an aspect of the overall circumstances of the case.

Additional Information

By a letter dated the 18th January, 2012 from the central authority in this state to the issuing judicial authority, an explanation was sought as to the reason for the fact that the European arrest warrant with which the Court is now concerned was issued in 2006 but was only transmitted to the Irish Central Authority in 2011.

An undated reply in English from the issuing judicial authority was subsequently received under cover of a note from what the Court presumes to be the Czech Central Authority dated 18th May, 2012 (the two and a half line covering note is unfortunately in Czech with no translation). The reply itself is in the following terms:-

"The European Arrest Warrant in the case of the convicted Ladislav Klier was issued by this court on September 4, 2006 as a follow-up to the International Arrest Warrant dated November 20, 2003. This European Arrest Warrant was sent in compliance with the national procedures to the SIRENE National Bureau, the European police authority. The National Bureau was repeatedly contacted every six months in order to establish the status of the case."

The Court was informed by counsel for the applicant that SIRENE stands for Supplementary Information Request at the National Entry. SIRENE Bureaux are established in all states that participate in the Schengen Information System (hereinafter the "SIS") to provide supplementary information on alerts and coordinate measures in relation to alerts in the SIS. The acronym outlines the main task of the SIRENE Bureaux, which is the exchange of additional or supplementary information on alerts between the participating states.

While the Czech Republic is a full member of the Schengen *acquis* since 21st December, 2007, Ireland is not. However, Ireland is a participating state in the SIS and has been since 28th February, 2002. Although not wishing to be a full member of the Schengen *acquis*, Ireland requested to be allowed to participate in some aspects of Schengen in accordance with a protocol to the Treaty of Amsterdam *i.e.*, those relating to police and judicial cooperation in criminal matters, the fight against drugs and the SIS. On 28th February, 2002 the EU Council adopted Decision 2002/192/EC approving Ireland's request.

Evidence on behalf of the Respondent

The Court has before it two affidavits sworn by the respondent. The first is dated the 21st December, 2011 and the second is dated the 31st August, 2012.

The relevant paragraphs from the affidavit sworn on the 21st December, 2011 state:-

"3. I am a forty year old Czech national born at Kraslice and I have resided in Ireland since 2002. I do not have family in the Czech Republic, my parents are dead and I have not had contact with my brothers and sisters for fifteen years. I have settled in Ireland and this is where my life and friends are. I am married here since November 2006, although we are presently going through divorce proceedings and I have a six year old daughter residing here.

4. I note that my surrender is being sought by the Czech authorities in respect of an alleged 22 month sentence that they say is outstanding against me arising from an incident that occurred in September 2000, more than eleven years ago.

5. I was the subject of a previous extradition request in respect of this offence but in 2005 the High Court refused to surrender me. I beg to refer to the judgement of this Court in relation to that request, when produced. I believe it to be very unfair to again seek my surrender after such a delay where my life has moved on considerably.

6. I was not informed and I was unaware that another European arrest warrant had issued in my case and I am not responsible for any delay in any processing of that warrant.

7. I believe I served that sentence in prison in the Czech Republic between September 2001 and September 2002 and it is unfair and inappropriate for the Czech authorities to seek my surrender to serve the full 22 months again.

8. I have been here in Ireland for the past nine years and I have lived openly here and received social welfare. I have had quite a number of court appearances and other warrants have issued and been executed against me. I served time in prisons here and I believe the Applicant herein has access to my prison and arrest record.

9. I do not wish to return to the Czech Republic and I am very concerned at the unexplained delay that has occurred in this matter. I will be greatly prejudiced by my surrender to the Czech Republic at this late stage."

The relevant paragraphs from the affidavit sworn on the 31st August, 2012 state:-

"3. I was in a relationship with Vera Matiova between 2003 and 2005. I believe she is a Czech national. We had one daughter together, Sofie, who is now seven years old and resides in Drogheda. My relationship with Vera came to an end in 2005 but over the years I have visited Sofie as often as possible.

4. I formed a new relationship with Ann Marie Enow in early 2005 and on 4th November 2005 we were married, not November 2006 as I indicated by mistake in my earlier affidavit, I believe Ann Marie is from the Cameroon. After we married we resided together as a couple in Ennis, County Clare. We did not have any children. Our relationship has since finished and we were divorced in February of this year. We remain in contact with one another and we are on good terms.

5. I since entered a relationship with Andrea Wonerth and we resided together in Ennis. Andrea is from Romania. She has two children from a previous relationship but arising from our relationship she is now pregnant and she is expecting our twins. I am very happy. I believe the due date for delivery of the twins is on or about the end of October 2012. However our relationship has become strained and we no longer reside together but I want to be here for them.

6. In light of my lacke (*sic*) of any real family contact in the Czech Republic and the length of time I have been in Ireland and all that has happened in my life since I came here in 2002 I believe Ireland is my real home, I have put down good roots here and it would be unfair to upset my life after such a delay, none of which was caused or contributed to by me.

7. At all times I have lived openly and transparently and I have been known to the social welfare authorities, the Gardaí and the Courts. In light of my successful defence of the previous extradition proceedings in 2005 and the refusal by this Honourable Court to order my surrender, a decision which I believe gave rise to the issue of this latest set of proceedings, I believe it must also have been readily apparent to the Czech authorities that I was residing in Ireland such that I cannot understand and I believe there is no reasonable explanation for the delay in proceeding against me if such was the intention.

8. I put this matter behind me in 2005 when the High Court ruled in my favour and I moved on with my life. The offence occurred twelve years ago. A lot has happened in my life since then and I do not wish to return to the Czech Republic. I believe the delay is absolutely inexcusable. I believe my surrender would be greatly prejudicial."

Decision

The circumstances of this case bear many similarities to the circumstances of *Minister for Justice and Equality v. Staniak* [2012] IEHC 133, (Unreported, Edwards J., 22nd November, 2012) in which this Court recently gave judgment. Counsel for the respondent in the present case was also counsel for the respondent in the *Staniak* case, and it is unsurprising that broadly similar arguments should have been advanced in both cases. Therefore it will also be unsurprising to those concerned that I am not disposed to uphold the objections to surrender advanced in the present case for essentially the same reasons as are set out in my judgment in *Staniak*.

The Court remarked in the *Staniak* judgment on the somewhat unsatisfactory nature of the pleadings in that case. The same is true in this case. Although s. 37 of the Act of 2003 is invoked, and it is suggested that to surrender the respondent would either be incompatible with this State's obligations under the European Convention on Human Rights, alternatively, would breach the respondent's rights under the Constitution of Ireland, the respondent does not identify the right or rights concerned.

Counsel for the respondent characterises the circumstances in which the present European arrest warrant was issued, and the attempt to surrender his client on foot of it, as oppressive in all the circumstances of the case. As also happened in the *Staniak* case, counsel for the respondent in developing his oppression argument went so far as to suggest that there exists a constitutional "right to an absence of oppressive behaviour," and that this stand alone right is an unenumerated right under Article 40 of the Constitution of Ireland. This Court expressed the view in *Minister for Justice and Equality v. Staniak* [2012] IEHC 133 that no such right exists, and sees no reason to deviate from that view.

Having said that, it was open to the respondent to put forward an oppression argument to the extent that he could make the case that the circumstances, which he characterises as oppressive, impinge upon some recognised fundamental right or rights enjoyed by his client, either under the European Convention on Human Rights, or under the Constitution of Ireland, e.g. his rights under article 3 or perhaps article 8 of the European Convention on Human Rights, or any of the personal rights expressly guaranteed under the Constitution of Ireland e.g., or such additional unenumerated personal rights as have been heretofore declared, e.g., the right to bodily integrity or to be treated with human dignity. The Court reiterates, however, that no such rights were identified.

In so far as the Court could glean from the respondent's affidavits, the essence of his case is that having been lulled into a false sense of security by the dismissal of the earlier extradition proceedings, and the absence of any early indication by the issuing state of an intention to persist with the matter, he has put down roots in this country and now regards it as home. He no longer has any significant ties to the Czech Republic at this stage and it would be seriously disruptive of his family life to surrender him. Moreover, the late possibility of being returned is causing much distress and anxiety. He further contends that the oppressive nature of these circumstances is compounded by the unjustifiable and largely unexplained delay in the case. Unlike in *Minister for Justice and Equality v. Staniak* [2012] IEHC 133, the respondent in this case does not go so far as to allege an attempt by the issuing state to abuse this Court's process.

It seems fair to characterise the claim as being essentially a proportionality type argument based upon article 8 of the European Convention on Human Rights, and that he is saying that to surrender him in all the circumstances of the case, including the fact that, as he would see it, the issuing state led him into a false sense of security, the delay in the case, the anxiety and distress he is experiencing, the roots that he has put down and the likely effect on his family, would represent a disproportionate interference with his right to respect for family life.

In response to all of this the Court would reiterate the following remarks that it made in the *Staniak* case:-

"The right to come again in an appropriate case within the context of traditional extradition arrangements was established in *Bolger v. O'Toole* (Unreported, Supreme Court, 2nd December 2002), a case relied upon by the Minister in the *Tobin*

case; and, in the European arrest warrant context, in the cases of *Minister for Justice, Equality and Law Reform v. O'Fallúin* [2010] IESC 37 (unreported, Supreme Court, 19th May 2010) (see in particular the judgment of Finnegan J) and *Minister for Justice, Equality and Law Reform v. Koncis* [2011] IESC 37 (Unreported, Supreme Court, 29th July 2011).

In the *Tobin* case there had been a substantive determination in the respondent's favour that resulted in his non-surrender. The law was then changed in Ireland so as to remove, for future cases, the obstacle to surrender that had benefited the respondent. The goalposts, so to speak, were moved by an amendment to s.10 of the Act of 2003 that was effected by the Criminal Justice (Terrorist Offences) Act, 2005. The issuing state sought to take advantage of this change in the law by issuing a second warrant. This was considered, certainly by Hardiman J, to be unfair, oppressive and an abuse of the process in all the circumstances of the particular case, including, *inter alia*, the delay involved, the multiple court hearings involved, the respondent's entitlement to legal certainty and to believe that matters were at an end following a substantive ruling in his favour in the first proceedings, and his non-fugitive status."

There is a major difference between the circumstances of the present case and the circumstances that were regarded in *Minister for Justice, Equality and Law Reform v. Tobin* [2012] IESC 37, (Unreported, Supreme Court, 19th June 2012) as being oppressive and also abusive of the process. This is the first European arrest warrant. There has been no substantive ruling in the respondent's favour at any stage. To the extent that there were previous extradition proceedings, it is also true to say that there was no substantive consideration of the extradition request by the High Court, and no substantive ruling in the respondent's favour in those proceedings either. He achieved a successful outcome solely on a technicality. The issuing state was found to have employed the wrong procedure.

The present case does differ in the following material respect from the *Minister for Justice and Equality v. Staniak* [2012] IEHC 133. In *Staniak* the Court placed emphasis on the fact that, unlike in *Tobin*, no expectation that the matter might be at an end was encouraged in the respondent's mind following the withdrawal of the first warrant. There was in fact an early indication of the contrary. In fairness to the respondent in the present case, that is not true here. It cannot be gainsaid that the delay in the present case may indeed have encouraged an expectation in the respondent's mind that the matter might be at an end. However, be that as it may, the present case is still materially distinguishable from the *Tobin* situation in that there has been no attempt to unfairly exploit a change in the law.

The Court has fully considered the circumstances of the respondent's case, and the following remarks which it made in *Minister for Justice and Equality v Staniak* appear to be apposite to this case also:-

"In so far as article 8 considerations are concerned, this Court has noted in *Minister for Justice Equality & Law Reform v. Bednarczyk* [2011] IEHC 136 (Unreported, High Court, Edwards J., 5th April, 2011) that article 8(2) of the Convention permits interference by a public authority with the exercise of the right to respect for family life where that is "in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others".

I went on to say that:-

"It would be preposterous to suggest that persons could not, or should not, be sent to prison simply because that would interfere, and indeed significantly interfere, with their enjoyment of family life, or that the sending of persons, particularly any person with a spouse and children, to prison would amount to a failure to respect the right of those affected to family life. That is not to say that there can never be circumstances in which a person's imprisonment could amount to a failure to respect family life but such circumstances would be highly exceptional and are likely to be exceedingly rare. Before a Court would intervene in that regard it would have to be satisfied as to the existence of some truly exceptional circumstance that would render the usually permitted level of interference with family life that imprisonment normally entails unacceptable in the circumstances of the particular case and disrespectful of the right to family life as guaranteed by article 8."

These principles have most recently been applied by this Court in its judgment in *Minister for Justice Equality & Law Reform v. Machaczka* [2012] IEHC 434, (Unreported, High Court, Edwards J., 12th October, 2012), a case in which surrender was in fact refused on article 8 grounds, the Court being satisfied as to the existence of truly exceptional circumstances in that case. The respondent in that case suffered from a serious psychiatric condition which placed him at grave risk of suicide the only effective medical treatment for which, while licensed in Ireland by the Irish Medicines Board, was not licensed in the issuing state, *i.e.* Poland. Further, even with medication, maintenance of the respondent's mental stability was heavily dependent on the strong support he was receiving from his family who were based in Ireland.

In the present case, however, there is nothing approaching the level of truly exceptional circumstances that would be required to justify non-surrender on article 8 grounds. The Court has considered, and has taken account of, all of the evidence adduced by the respondent, and the submissions of counsel made on his behalf, but it does not consider that the evidence, such as it is, is sufficient to establish that the respondent's surrender would represent a disproportionate interference with his right, and the rights of his partner and child, to respect for family life.

While the delay in forwarding the present European arrest warrant was most regrettable, and the respondent might possibly have remedies elsewhere in regard to any distress and anxiety caused by it (although there is no evidence that this existed at any stage at a level constituting an illness or medical pathology), I do not consider that this delay, either in its own right, or coupled with all the other circumstances of the case, gives rise to truly exceptional circumstances sufficient to justify non-surrender in this case on article 8 grounds.

The respondent has not established a breach or a real risk of a breach of any of his other fundamental rights, whether arising under the European Convention or under the Constitution.

In all the circumstances of the case, the Court is not disposed to uphold any of the objections raised by the respondent to his surrender, and I will therefore make an order under s. 16(1) of the Act of 2003 surrendering him to the issuing state.