Neutral Citation Number [2008] IEHC 411

THE HIGH COURT

Record Number: 2007 149 Ext

BETWEEN

MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

APPLICANT

AND
FERENC HORVATH

RESPONDENT

Judgment of Mr Justice Michael Peart delivered on the 25th day of November 2008:

1. The surrender of the respondent is sought by a judicial authority in Hungary under a European arrest warrant which issued there on the 12th June 2007.That warrant having been duly transmitted to the Central Authority here was endorsed by the High Court for execution on the 5th September 2007.The respondent was duly arrested on foot of same on the 24th September 2007 and brought before the Court on the following day, when a date for hearing was fixed and the respondent was remanded from time to time thereafter pending the determination of the present application for surrender.

2. I am satisfied that the respondent is the person in respect of whom this European arrest warrant has been issued. No issue to the contrary has been raised.

3. The offences for which the respondent is sought for the purposes of being prosecuted are seventeen in number. The issuing judicial authority has indicated in the warrant that each offence comes within the list of offences contained in Article 2.2 of the Framework Decision and are offences therefore in respect of which double criminality or correspondence does not have to be made out. Three of these categories of offence set forth in Article 2.2 have been so marked, covering all seventeen offences the subject of the warrant. Those categories are: *corruption; swindling; and forging of administrative documents and trafficking therein.*

4. No issue is raised against the presumptions provided for in respect of sections 21A, 22, 23 and 24 of the Act, and there is therefore no reason why the Court must refuse to order surrender under any of these sections.

5. I am also satisfied that there is no reason under Part III of the Act or the Framework Decision by which surrender is prohibited. No issue has been raised in that regard.

6. Two points of objection are raised:

1. Failure to implement Article 26 (2) of the Framework Decision:

7. This Article provides:

> *"Article 26 Deduction of the period of detention served in the executing Member State:*
>
> > *1. The issuing Member State shall deduct all periods of detention arising from the execution of a European arrest warrant from the total period of detention to be served in the issuing Member State as a result of a custodial sentence or detention order being passed.*
> >
> > *2. To that end, all information concerning the duration of the detention of the requested person on the basis of the European arrest warrant shall be transmitted by the executing judicial authority or the central authority designated under Article 7 to the issuing judicial authority at the time of the surrender."*

8. Remy Farrell BL for the respondent submits that the Oireachtas has not given effect to this Article by any provision contained in the European Arrest Warrant Act, 2003, as amended, and that while this Court is entitled to presume, as stated in s. 4A of the Act, that the issuing state will comply with the requirements of the Framework Decision unless the contrary is shown, the fact that Article 26 (2) requires that all necessary information concerning the duration of a respondent's detention here on foot of the European arrest warrant be transmitted to the issuing judicial authority, and the Act fails to allocate this function to either the Central Authority or the High Court as the judicial authority here, there is a lacuna and that a respondent is entitled to certainty as to the manner in which this necessary information will be furnished to the issuing judicial authority. It is submitted that this Article has not been given effect, and that it does not enjoy direct effect. In these circumstances it is submitted that this Court has no power to order surrender, since s. 10 of the Act provides that a respondent "*…shall, subject to and in accordance with the provisions of this Act and the Framework Decision, be arrested and surrendered to the issuing state*".

9. First of all, there is nothing to suggest that the respondent will not be given credit upon surrender for any period of time which he spends in prison here against any sentence of imprisonment which may be imposed upon him in Hungary. Secondly, there is no evidence or other information which indicates that in any case since the 1st January 2004, when the European arrest warrant arrangements under the Framework Decision commenced, the Central Authority has not provided to an issuing state the required information as to any time a respondent has spent in prison awaiting the conclusion of an application for surrender. Mr Farrell submits that the failure by the Oireachtas to designate the task of providing such information either to the High Court or the Central Authority is fatal to the power of the High Court to order surrender. I cannot agree. It is true that the Framework Decision does not enjoy direct effect. But it is relevant to advert to Article7 thereof, which provides:

> Article 7 *Recourse to the central authority*
>
> > *1. Each Member State may designate a central authority or, when its legal system so provides, more than one central authority to assist the competent judicial authorities.*
> >
> > *2. A Member State may, if it is necessary as a result of the organisation of its internal judicial system, make its central authority(ies) responsible for the administrative transmission and reception of European arrest warrants as well as for all other official correspondence relating thereto.*
> >
> > *Member State wishing to make use of the possibilities referred to in this Article shall communicate to the General Secretariat of the Council information relating to the designated central authority or central authorities. These indications shall be binding upon all the authorities of the issuing Member State.*

10. The Central Authority here communicates with an issuing judicial authority in cases where a respondent has spent time in custody here pending an order for surrender being made, for the purposes of informing that judicial authority of how long the respondent has spent in custody. Recital (9) of the Framework Decision provides:

> *"(9) The role of central authorities in the execution of a European arrest warrant must be limited to practical and administrative assistance."*

11. The communication by the Central Authority with the issuing judicial authority as to the length of time spent in custody here by a respondent pending surrender is within this concept of "*practical and administrative assistance*".

12. Section 10 of the Act relates to the jurisdiction of the High Court to order surrender. The deduction of time by the issuing judicial authority after surrender is something which the issuing judicial authority is obliged to do after this Court has performed its function, and the fact that the Act has not specifically empowered the Central Authority to communicate the information to the issuing judicial authority is not something which must result in the Court refusing to order surrender. It does not deprive the Court of its jurisdiction.

13. The obligation to deduct time spent by a respondent in detention pending surrender is an obligation on the issuing State, and this Court must presume that this will be done. If it is not done, the issuing state, and not the executing state would be in breach of its obligations under the Framework Decision. If the executing state was to fail to give the required information to the issuing state, then the latter also would be complicit in that breach. Perhaps certain consequences would flow from that, such that if there was to be a persistent breach of obligation to provide the information, steps would have to be taken at Council of Europe level to suspend the surrender arrangements in respect of this State, but there is no reason for concern simply because the Act here is silent as to whether it is the High Court here as the judicial authority, or the Central Authority, which must provide the information. That is a purely administrative matter arising under the Framework Decision, and not one which requires specific transposition under the Act, before this Court can exercise its functions under the Act in relation to the ordering of surrender.

2. Article 2.2 of the Framework Decision:

14. Article 2.2 of the Framework Decision is relevant to one of the points of objection raised by the respondent on this application. It states:

> *"2. The following offences, if they are punishable in the issuing Member State by a custodial sentence or a detention order for a maximum period of at least three years and as they are defined by the law of the issuing Member State, shall, under the terms of this Framework Decision and without verification of the double criminality of the act, give rise to surrender pursuant to a European arrest warrant: ……" (my emphasis)*

15. Section 38 of the Act provides:

> *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. (my emphasis)*

16. It is paragraph (b) above which is relevant on this application.

17. It is submitted by the respondent that while the issuing judicial authority has stated in paragraph (c) of the warrant that the punishment attracted by all the offences set forth in the warrant is "imprisonment between 5 and 10 years", it is not clear from the warrant that all the individual offences set forth in the warrant and for which surrender is sought for the purpose of prosecution in fact meet that minimum gravity requirement, and secondly that it is unclear which offences are intended to be covered by each of the categories of offence which have been marked by the issuing judicial authority.

18. As I have already set forth, there are seventeen separate offences for which the respondent is sought to be prosecuted. All have been marked as being Article 2.2 offences. That denotes that the issuing judicial authority considers that each offence is an offence coming within the marked categories of offences. It also denotes that in the opinion of the issuing judicial authority each offence meets the minimum gravity requirement for such offences, namely that each carries potentially carries a penalty of not less than three years imprisonment under the law of the issuing state, as specified in Article 2.2. It is to be presumed that when an issuing judicial authority marks an offence or offences as being offences within Article 2.2 that this minimum gravity requirement is met. Normally, this Court will not look behind the fact that the offences have been so designated by the issuing judicial authority. As has been often stated in judgments of this Court and of the Supreme Court in matters of this kind, the arrangements for surrender between Member States of the European Union are underpinned by a high level of mutual trust and confidence, and it would require very clear evidence to the contrary before this Court would find that an offence so marked in the warrant was not appropriately marked.

19. Mr Farrell on the respondent's behalf, submits, however, that according to the contents of the warrant itself under the heading "*Nature and Classification of the offence(s) and the applicable statutory provision/code*", it is clearly stated that in respect of at least some of these marked offences, the possible punishment which the respondent faces is a maximum of less than the three years specified in Article 2.2 as the minimum gravity requirement under that Article. He also makes the point that the warrant in the way that it has been prepared and worded fails to make it clear which of the offences for which surrender is sought comes within each category, and that it is therefore not possible to ascertain which offences charged meet and which do not meet this minimum gravity requirement. He submits that this Court may order surrender of the respondent only in respect of an offence which meets the three

year minimum gravity requirement.

20. In paragraph (e) of the warrant, the issuing judicial authority has set forth an extensive narrative of how the seventeen offences have been committed. However, this narrative does not state which particular facts from this narrative give rise to any particular offence for which the respondent is sought for prosecution. Rather, under the said heading: "*Nature and Classification of the offence(s) and the applicable statutory provision/code*", the issuing judicial authority has set forth the various sections of the Hungarian Criminal Code which the respondent is said to have offended against. Some of those sections provide offences which carry a penalty which meets the minimum gravity, such as Section 225 – Abuse of Authority - which carries a punishment of "up to three years"; Section 250 – bribery – which carries a punishment of "one to five years"; Section 256 – Trafficking in Influence – which carries a punishment of "one year to five years; and Section 275 (1) – Forgery of public documents" – which carries a punishment of "up to five years".

21. However, two other offences are shown, being Section 177A (1)(a) of the Code – Abuse of Personal Data which is described as a misdemeanour punishable with imprisonment "of up to one year, public labour or a fine"; and Section 318 (1) – fraud – punishable by imprisonment of "up to two years, public labour or a fine if the fraud causes minor damage".

22. Paragraph (e) goes on to state that among the offences which the respondent faces are three counts under Section 177A(1) – abuse of personal data, and one count under section 318(1) – bribery. It is these offences which are the focus of Mr Farrell's submission that minimum gravity under Article 2.2 of the Framework Decision is not met and that they are not therefore offences in respect of which double criminality need not be verified, even though the issuing judicial authority has stated in paragraph (c) of the warrant that the offences contained in the warrant attract a penalty of "*imprisonment between 5 and 10 years*".

23. Mr Farrell submits that the issuing judicial authority is entitled to certify the offences as being Article 2.2 offences only where "the punishment is for a maximum period of at least three years". He submits that the way in which these offences have been described and classified defeats the purpose and objective of the Framework Decision, and that this Court should exercise its power under Section 20 of the Act in order to have this matter clarified in advance of making any decision on foot of this European arrest warrant to surrender the respondent.

24. Mr Farrell accepts that it is possible that there are some aggravating factors involved in these offences which may mean that the respondent would be liable to the period of between five and ten years referred to in paragraph (c) of the warrant, but that it is not apparent from the information contained in the warrant that this is the case, and that the Court cannot simply operate on such an assumption. He submits that the principle of mutual trust and confidence underpinning the surrender arrangements under the Framework Decision could not allow the Court to go that far.

25. Ms. Farrell on behalf of the applicant submits that this Court must accept that where the issuing judicial authority has marked all the seventeen offences as coming within the list of offences set forth in Article 2.2 of the Framework Decision, those offences do in fact meet the minimum gravity requirement under that Article. She refers also to the fact that under Article 2.2 offences which come within this article are those which carry "*a custodial sentence or a detention order for a maximum period of at least three years and as they are defined by the law of the issuing Member State*". Accordingly, she submits that as the issuing member state has stated that the offences to which Mr Farrell has referred are offences within Article 2.2, this means that they are such "*as defined by the law of the issuing state*", and that the issuing judicial authority has stated in the warrant that the offences for which the respondent is sought attract a penalty of imprisonment of between 5 years and 10 years, even if some of the individual offences, taken individually carry penalties of less than three years.

Conclusions

26. First of all, I am satisfied that the fact that in paragraph (c) of the warrant it is stated that the maximum length of the sentence which may be imposed for the offences is "imprisonment between 5 and 10 years" is not sufficient of itself to indicate that the *minimum* gravity for each offence charged is met for the purpose of Article 2.2 of the Framework Decision. The information in relation to the minimum gravity requirement must be gleaned from that part of paragraph (e) thereof which is headed "Nature and legal classification of the offence(s) and the applicable statutory provision/code". That paragraph makes it clear that an offence under Section 177A (1) (a) of the Hungarian Criminal Code is a misdemeanour and carries a penalty of "up to one year, public labour or a fine. That does not meet the minimum gravity for the purpose of Article 2.2 and such an offence therefore is not one which can be included as an offence under Article 2.2 for which double criminality does not need to be verified. The same applies in respect of the offence of fraud, a misdemeanour, contrary to Section 318(1) of the Code, which carries a term of imprisonment of "up to two years, public labour or a fine".

27. Section 38 of the Act states clearly that a person shall not be surrendered unless the offence corresponds to an offence in this State or the offence is an Article 2.2 offence.

28. The fact that an offence may have been inappropriately marked as an Article 2.2 offence does not preclude this Court from finding that such an offence corresponds to an offence under the law of this State under the provisions of s. 5 of the Act. That question has not been addressed in argument before me. Indeed it is not immediately clear from the narrative of the actions of the respondent which are alleged to give rise to all the offences charged, what exactly is alleged in respect of the offences under section 177A and Section 318(1) of the Hungarian Code. To that extent the warrant is not crystal clear.

29. I am satisfied that this Court is not obliged by virtue of the issuing judicial authority having marked all the offences as Article 2.2 offences, to not look behind that marking, when the warrant itself makes it clear that one or more of the offences do not in fact meet the minimum gravity requirement for the purpose of that Article. This Court's powers to order to surrender are circumscribed by provisions of the Act by which the Framework Decision is given effect. It is true that under the Pupino decision the national legislation must be interpreted in conformity with the aims and objectives of the Framework Decision, but only so far as to do so is not *contra legem*. In the present case, it would be *contra legem* to order surrender in respect of offences which are stated in the warrant to be offences which meet the requirements of Article 2.2 of the Framework Decision, when the warrant itself makes it clear that this is not the case, unless it is also the case that those offences correspond under section 5 of the Act. The Act prohibits such surrender by virtue of the provisions of section 38 thereof.

30. Section 17 of the Act provides:

> *"17.— Where, in relation to an offence specified in a European arrest warrant, the High Court decides not to make an order under section 15 or 16, it shall not be necessary for the issuing judicial authority to issue another European arrest warrant in respect of such other offences as are specified in that warrant, and, where such other offences are specified in the European arrest warrant, that warrant shall be treated as having been issued in respect of those other offences*

only."

31. This Section entitles this Court to order surrender in respect of any of the offences referred to in the warrant which are Article 2.2 offences or which correspond, even though one or more of the offence do not come within these categories, without the need for the issuing judicial authority to issue a fresh warrant.

32. I propose therefore ordering the surrender of the respondent for the purpose of being prosecuted for all the offences set forth in this warrant, but excluding the "3 counts of the felony of abuse of personal data in contravention of Section 177A(1)(a) of the Criminal Code" and the "1 count of the misdemeanour of bribery in contravention of Section 318(1) and qualified by subsection (2) of the Criminal Code".

33. Under the new specialty provisions contained in the Framework Decision, given effect to by section 22 of the Act, it is open to the issuing judicial authority to seek the prior consent of the High Court if it still wishes to prosecute the respondent in respect of any offence for which surrender has not been ordered. Under s.22 (6) of the Act this Court presumes that the issuing state will not proceed to prosecute the respondent for offences for which surrender has not been ordered, without first obtaining that consent. The High Court may give that consent under the provisions of s. 22 (8) of the Act unless "*the offence concerned is an offence for which a person could not by virtue of Part III [of the Act] or the Framework Decision (including the recitals thereto) be surrendered under this Act*". One reason for such a refusal would be if there is no offence under Irish law to which any such offence corresponds under s.5 of the Act. In such a situation, the issuing judicial authority continues to have the opportunity to satisfy this Court on such an application for consent that the offences for which the respondent has not been surrendered in fact comprise acts which give rise to an offence or offences under Irish law. I am making no finding in relation to correspondence in respect of these offences at this time since the information contained in the warrant do not enable the Court to make such a determination. That question therefore remains open for submission on any application which may be made to this Court on behalf of the issuing judicial authority for its consent under s. 22 of the Act.