Neutral Citation Number: [2010] IEHC 200

THE HIGH COURT

2009 89 Ext

Between:

Minister for Justice, Equality and Law Reform

Applicant

And

Jaroslaw Ostrowski

Respondent

Judgment of Mr Justice Michael Peart delivered on the 19th day of March 2010:

The surrender of the respondent is sought on foot of a European arrest warrant which issued in Poland on the 7th January 2009. That warrant was endorsed for execution here by order of the High Court on the 22nd April 2009. The respondent was arrested on foot of same on the 19th October 2009, and brought before the High Court on the following day, the 20th October 2009. Thereafter he was remanded from time to time pending the hearing of the present application for his surrender.

There is no issue raised as to the identity of the respondent, and in any event I am satisfied from the affidavit evidence of the arresting Garda officer that the person who he arrested and brought before the Court is the person in respect of whom this European arrest warrant has been issued.

Surrender is sought so that the respondent can be prosecuted for a single offence described in the following way in the warrant:

> *"On 11 May 2006 in Wroclaw, acting in violation of the law, he was in possession of psychotropic agents in the form of marihuana - 0. 72 grams of the net weight. "*

The warrant indicates that this offence is one coming within Article 62, paragraph 1 of the Polish Criminal Code, and that the maximum punishment for such an offence under that Code is a sentence of three years' imprisonment. In this way, it is submitted by the Applicant that minimum gravity is satisfied, since the maximum punishment exceeds twelve months imprisonment.

There are two objections being raised to surrender in this case.

1. Errors in endorsed warrant:
Following the respondent's arrest here on the 19th October 2009, the respondent's solicitors corresponded with a lawyer in Poland who informed them by letter dated 10th December 2009 that the European arrest warrant which was endorsed here and on foot of which the respondent was arrested contained errors. It was explained by him that the domestic warrant dated 17th May 2007 on foot of which this European arrest warrant has been issued relates to somebody else entirely, as the file reference given for that warrant, namely 11 K 687/07, does not relate to the respondent. This error was drawn to the attention of the Central Authority here who in turn brought it to the attention of the issuing judicial authority by letter dated 21St October 2009.

The issuing judicial authority replied to the Central Authority by letter dated 26th January 2010. That letter states as follows:

> *"With reference to the letter of 21.10.2009, I would like to advise you of the occurrence of errors, in the form of obvious misprints, in the European arrest warrant against [the respondent], issued on 07.01.2009, which was sent to you. Therefore I am sending you the enclosed Ruling together with the corrected version of the European arrest warrant (in Polish together with its translation into English). I would also like to ask you to send me information as to how advanced the extradition proceedings are against the mentioned above person. "*

It is clear from the "corrected version" of the warrant that a different file reference has been inserted in paragraph (b) and that the date of the domestic warrant is different. As indicated by this letter, a Court ruling was obtained which sought to correct these two errors. That Ruling is dated 26th January 2010. In all other respects the "corrected version" is the same as that on foot of which the respondent was arrested on the 19th October 2009.

On the 13th January 2010, the respondent had filed Amended Points of Objection in view of the information which had come to light in relation to these errors since the filing of his original Points of Objection. The amended points plead that by reason of these errors the warrant on foot of which the respondent was arrested has not been duly issued, is bad on its face and invalid, since the basis on which it was issued - namely the domestic warrant recited therein, related to an entirely different person. In addition it is pleaded that the requirements of s.11(1 A)(e) of the European Arrest Warrant Act, 2003, as amended have not been complied with as there is no evidence that the decision of the District Court in Jelenia Gora specified in the warrant is immediately enforceable against the respondent.

Ms. Noctor for the applicant accepts that the European arrest warrant on foot of which the respondent was arrested contained the errors which have been identified, but relies on the fact that the issuing judicial authority has corrected these having obtained a court ruling in that regard on the 26th January 2010. She submits also that the issuing judicial authority need not have sent over a corrected version of the warrant, and that it would have sufficed that they explain and correct the errors by way of additional information.

She submits that the errors in question are not so fundamental as to invalidate the warrant. She has referred to the judgment of the Supreme Court in Minister for Justice, Equality and Law, Reform v. Rodnov, (Unreported) Supreme Court, lst June 2006, and submits that the errors in the present case are of no greater significance that the error contained in the warrant in the Rodnov case and which was found not to undermine the validity of the document as a European arrest warrant. But she refers also to the amendment of the Act by the Oireachtas by the insertion in s. 45 of s. 45 C, which provides as follows:

> *"45C. - (1) Subject to subsection (2), an application for surrender under section 16 shall not be refused on the grounds of-*
>
> *(a) a defect in substance or in form or an omission of non-substantial detail in the European arrest warrant or any accompanying document grounding the application.*
>
> *(b) any variance between any such document and the evidence adduced on the part of the applicant at the hearing of the application, or*
>
> *(c) failure to comply with any provision of the Act where the Court is satisfied that such failure is of a technical nature and does not impinge on the merits of the application.*
>
> *(2) Subsection (1) shall not apply where the Court is satisfied that an injustice would thereby be caused to the respondent.*

Ms. Noctor submits that even if the errors were considered by the Court not to be covered by the decision in Rodnov, they certainly are such as to be captured by the provisions of s. 45C above, and accordingly, where clearly no injustice would be caused to the respondent given the explanation for and correction of the errors in question, surrender should not be refused on this ground of objection.

Ms. McGillycuddy on behalf of the respondent submits that the warrant which was endorsed by this Court for execution and on foot of which the respondent was arrested was a defective warrant. She submits that when the issuing judicial authority corrected the warrant and sent over a correct warrant, the appropriate procedure would have been for the first warrant to be withdrawn, and for the corrected warrant to be the subject of an endorsement application, and if endorsed by the High Court, for the respondent to be re-arrested on foot of same and again brought before the court. She submits that for the warrant to be a valid warrant it must contain certain information as set forth in s. 11 (1 A) of the Act, one of which is set forth in paragraph (e) thereof, namely *"(e) that a conviction, sentence or detention order is immediately enforceable against the person..... ".* She submits that this must mean that the correct information is contained in that regard. In the present case the details inserted related to an entirely different person and a different date, and that the domestic warrant so identified was clearly not *"immediately enforceable against the [respondent]".*

Ms. McGillycuddy submits that the errors in the warrant were significant and fundamental and fall within the degree of carelessness and lack of attention to detail in the preparation of warrants which was so roundly criticised by McCarthy J. in his judgment in the Supreme Court in *McMahon v. Leahy* [1984] IR. 525 at p.547, and which merited in that learned judge's view a release under Article 40 of the Constitution.

She has referred also to the judgment of Murray CJ in *Minister for Justice, Equality and Law Reform v. Kavanagh,* (Unreported) Supreme Court, 23rd October 2009. In that case, the document which was endorsed for execution by the High Court was neither the original European arrest warrant, a facsimile of the original warrant or a true copy of the original warrant, but rather a translation into English of the original warrant, and it was on foot of such a document that the respondent had been arrested and brought before the Court. I note from my own judgment in the High Court in that case that subsequently the Dutch issuing judicial authority later sent over a copy of the original warrant which contained his signature and which had been issued and therefore in existence at the time the endorsement application had been made. Nevertheless, on appeal, the Chief Justice was not satisfied that the document which was endorsed was capable of being considered a true copy of the European arrest warrant since it had not been certified to be such by the issuing judicial authority, and surrender was refused. Ms. McGillycuddy submits that the judgment of the Chief Justice is indicative of a view that significant defects cannot be overlooked on the basis of mutual trust and confidence between Member States. She refers to the fact that in *Kavanagh* the problem was simply that the copy warrant endorsed for execution was not a true copy as defined by s. 12(7) of the Act, even though it was clear that a European arrest warrant had been in existence at that time. In the present case she refers to the fact that the form of warrant does not comply with s. 11(1 A) of the Act in the way I have already set forth, and in her submission this is a defect of the same order as in *Kavanagh,* even though the issuing judicial authority has sought to correct matters by obtaining subsequently a court ruling amending the warrant.

Conclusion:
In my view, the errors in the warrant which was endorsed for execution are not so technical and unimportant as to come within the *Rodnov* decision. In that case the opening paragraph of the pro-forma European arrest warrant contained in the Framework Decision was omitted. That paragraph contains a request for surrender either for the purposes of a prosecution of the offence(s) referred to in the warrant or for the execution of a sentence of imprisonment. When a person is arrested on foot of a European arrest warrant it is not to be presumed that he knows anything about the matters set forth in the warrant. In a prosecution case, in particular, a respondent clearly enjoys a presumption of innocence, and may very well be completely unaware of the basis for his surrender or the offence to which it relates. It is a requirement that he be furnished with a copy of the warrant and be shown the original endorsed warrant. It may be only from reading the warrant that he learns for the first time what the matter consists of. One of the matters which he will learn from reading the warrant is that on a certain date and in relation to a certain file reference, an order was made for his arrest in the issuing state. He will be entitled to make his own enquiries about that. It is important that the information given to him in the document is correct in relation to such important information. In the present case the warrant contained wrong information.

I am of the view, having read the remarks of the Chief Justice in *Kavanagh*, that the errors in the present warrant, as endorsed, are significant, and not simply technical. I consider them to be sufficiently significant to undermine the validity of the warrant. It is as if para.(b) of the warrant contained no information at all. Wrong information in that paragraph equates to no information, because the respondent is not informed of a decision which is enforceable against him.

The questions arising then are (a) whether the later correction of the errors by court order and the furnishing of a corrected warrant to the respondent is sufficient to cure or overlook the defective nature of the earlier document, and (b) whether the defect in the earlier document is one which may be overlooked under the new provision of s. 45C of the Act.

As to (a), I do not believe that the later correction of the errors by court order is of itself sufficient. The respondent was arrested only on the authority of a document endorsed for execution by the High Court. That document has been shown to be significantly

defective. What the issuing judicial authority has done is to transmit another warrant which does not contain the defects identified in the first warrant. But the respondent has not been arrested on foot of the corrected warrant and neither has that document been endorsed for execution. If the errors had been explained only by the provision of additional information, without a corrected version of the warrant being sent, I would not be satisfied that the additional information was sufficient to deal with the matter. It follows that simply sending over a corrected warrant does not deal with the matter either. Subject to considering the significance of s, 45C of the Act, my view is that the first warrant should have been withdrawn, the respondent released on foot of same, the corrected warrant endorsed for execution and the respondent arrested again on foot of the corrected warrant.

Section 45C:
This is a new provision, clearly designed, inter alia, to reflect decisions such as *Rodnov,* and ensure that defects of a minor and technical nature are not allowed to interfere with the objective and purpose of the Framework Decision to speed up and simplify the procedures for surrender of wanted persons between Member States. But where I am of the view, as I am, that the insertion of wrong information in paragraph (b) is tantamount to inserting no information therein, and where, if no information was contained in para. (b) of the warrant, it could not be regarded as a valid European arrest warrant given the provisions of s. 11 (1A) of the Act and of the Framework Decision, I cannot be satisfied that the error is one which is merely "a defect in substance or inform or an omission of non-substantial detail" such that no " injustice would thereby be caused to the respondent". While I am not of the view that a European arrest warrant must be viewed by this Court on an application for surrender in the same way as a domestic warrant here must be scrutinised in accordance with the principles derived from our domestic jurisprudence with regard to warrants, nevertheless it is of great importance, given the basis of mutual trust and confidence which underpins the European arrest warrant, that errors in relation to important information be not overlooked, and I do not consider that it was intended by the Oireachtas when it enacted s. 45C of the Act that this Court should overlook an error such as an incorrect date of the domestic warrant and incorrect file reference. European arrest warrants must be carefully prepared so that a person arrested on foot of same is appraised correctly of all relevant information. Minor errors in substance or in form of the warrant and which cause no injustice can be overlooked, but not every error will be of such little moment.

In my view the warrant which was endorsed and on foot of which the respondent was arrested is invalid, and cannot be the basis for an order for his surrender.

2. Minimum gravity/Proportionality:
The other point of objection raised by the respondent is that given the very small quantity of drugs behind this charge of possession, some de minimis exception should be considered to be available to the respondent, and that it would be unjust and disproportionate to order his surrender him to Poland, given the fact that while an offence under Article 62.1 of the Polish Penal Code has the possibility of a sentence of three years imprisonment, there is no reality in the idea that possession of such a small quantity as 0.72 grammes of marijuana could lead to a sentence of even twelve months imprisonment, if indeed any sentence would be imposed at all.

The question whether such proportionality type of argument should avail this respondent is something which it is unnecessary to decide on the present application. In the event that the Polish judicial authority considers it necessary to have another warrant endorsed which does not contain the errors referred to in this application, then this question can be addressed on any further application for the respondent's surrender.