

THE HIGH COURT

Record Number: 2007 No. 16 Ext.

BETWEEN

MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

APPLICANT

AND
J H

RESPONDENT

Judgment of Mr Justice Michael Peart delivered on the 22nd day of May 2007

The surrender of the respondent to the Czech Republic is sought on foot of a European arrest warrant dated 4th August 2006, which was endorsed for execution by order of this Court on the 23rd January 2007. He was arrested on foot of that warrant on the 8th February 2007 and, as required by s. 13 of the European Arrest Warrant Act, 2003, as amended, was brought before the High Court and remanded thereafter from time to time until the present application for an order of surrender was heard.

No issue has been raised as to the identity of the respondent, and I am satisfied from the affidavit evidence of the arresting Garda officer, Sgt. Thomas Malone that the person before the Court and whose surrender is sought is the person in respect of whom the warrant has issued.

The surrender of the respondent is sought so that he can be returned to the issuing state to serve a sentence of two years which was imposed on him by the District Court in Pardubice on the 11th December 2003 for offences of theft and fraud. He was tried and sentenced in his absence, but the issuing judicial authority has attached to the warrant an undertaking for the purpose of section 45 of the Act, and this document undertakes that the respondent will be retried for the offences or given an opportunity of such a retrial, and will be notified of the time when, and the place at which any retrial will take place, and finally that he will be permitted to be present when any such retrial takes place. I am satisfied that such an undertaking is sufficient for the purpose of section 45 of the Act.

The offences of which he has been convicted in his absence are described as 'fraud' and this offence is one among those listed in Article 2.2 of the Framework Decision as 'swindling' and as such are ones in respect of which correspondence/double criminality is not required to be verified. Minimum gravity is also satisfied in respect of the offences.

I am satisfied also that there is no reason under sections 21A, 22, 23 or 24 of the Act which requires this Court to refuse to make the order for surrender, and indeed no attempt has been made by the respondent to rebut the presumptions provided in these sections.

Subject to addressing the only Point of Objection being maintained by the respondent on this application I am satisfied also that there is nothing in Part III of the Act or the Framework decision which prohibits the surrender of the respondent.

The Point of Objection:

1. This objection is listed at paragraph 4 of the Amended Points of Objection filed on behalf of the respondent, and reads as follows:

"The respondent was not a fugitive from justice when convicted in his absence on the 11th of December 2003 and sentenced to a period of imprisonment in absentia. There was nothing surreptitious or improper about the respondent's departure from the Czech Republic."

This point has been raised in view of the provisions of s. 10 of the Act which provides:

"10.— Where a judicial authority in an issuing state duly issues a European arrest warrant in respect of a person—

- (a) against whom that state intends to bring proceedings for an offence to which the European arrest warrant relates, or
- (b) who is the subject of proceedings in that state for an offence to which the European arrest warrant relates,
- (c) who has been convicted of, but not yet sentenced in respect of, an offence to which the European arrest warrant relates, or
- (d) on whom a sentence of imprisonment or detention has been imposed in respect of an offence to which the European arrest warrant relates, and who fled from the issuing state before he or she—
 - (i) commenced serving that sentence, or
 - (ii) completed serving that sentence,

that person shall, subject to and in accordance with the provisions of this Act and the Framework Decision, be arrested and surrendered to the issuing state." (my emphasis)

Patrick McCarthy SC of the respondent has submitted that this respondent is not someone who has been shown to have fled from the Czech Republic before he commenced serving the sentence imposed upon him in absentia, and that therefore this Court is not required to order surrender. He submits that the European arrest warrant is silent as to whether it was lawful or unlawful for him to have left the Czech Republic.

In argument before me the point of objection widened to some extent in that Mr McCarthy not only submitted that the respondent had not been shown to be a fugitive from justice, but that in any event, whether a fugitive or not, he was not a person on whom a sentence has been passed and who *after passing of sentence* and before commencing serving that sentence has fled the country.

This latter submission is made as a result of an interpretation which I suggested in my judgment in *Minister for Justice, Equality and Law Reform v. Tobin*, unreported, 12th January 2007 in relation to the four categories of person referred to in s. 10 (a), (b), (c), and (d). In that case I stated in this regard:

".....but the entire of section 10 appears to follow as logical time sequence. Paragraph (a) refers to a situation where the person sought may not even have been charged but is wanted to face prosecution, and where a decision has been made to prosecute. Paragraph (b) refers to a time after indictment where a person is subject to proceedings and where a trial has not yet taken place. Paragraph (c) refers to a case where the trial has taken place, but sentence has not yet been passed. Paragraph (d) then covers a situation where both conviction and sentencing has taken place and the person has "fled" before that sentence was served."

It appears from documentation exhibited by the respondent's solicitor, that the respondent left the Czech Republic with his partner in about July 2002, going first to Switzerland where he unsuccessfully claimed asylum. Thereafter he went to Belgium where he again unsuccessfully sought asylum. Thereafter in about June 2003 he came to Ireland.

It seems to be accepted that the respondent left the Czech Republic in about July 2002. The offence for which his surrender is sought was committed in the month of May 2001. His conviction and sentence in absentia was the 11th December 2003. The European arrest warrant itself describes the respondent as "a fugitive"(see page 7 of the decision of the District Court of Pardubice), and it is also indicated in that decision that the whereabouts of the respondent were unknown. A missing piece of information is the date on which the case against the respondent arising out of the offence referred to in the warrant commenced. The Court does not know for example whether it commenced before July 2002 when the respondent seems to have left the country in order to try and claim asylum elsewhere. No evidence has been adduced by the respondent as to his state of knowledge of the proceedings being brought against him prior to his departure from the Czech Republic.

Catherine Noctor BL for the applicant complains first of all that the second argument now being put forward by Mr McCarthy is not one which is suggested in paragraph 4 of the Points of Objection. That point does not make reference to the respondent not being someone against whom a sentence has been passed and who fled before commencing to serve the sentence. She draws attention to the description of the respondent in the warrant as "a fugitive" and to the fact that the respondent has not sworn any affidavit to contradict this description of him. But in any event she submits that this Court must interpret the Act and the Framework Decision in a conforming way and a way which best achieves the objective of the Framework Decision, unless to do so would be '*contra legem*', and that since Article 1.1 provides:

"1. The European arrest warrant is a judicial decision issued by a Member State with a view to the arrest and surrender by another Member State of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order"

it is clear that the Oireachtas intended to enact a provision in s. 10(d) of the Act which gives effect to this article. She refers also to the provisions of s. 45 of the Act which require certain undertakings to be given where someone such as the respondent is sentenced in his absence. In this regard she submits that even if this Court's reasoning in *Tobin* as to the meaning to be given to s. 10 is correct, it is nevertheless obiter in the sense that in *Tobin* the applicant had conceded that the respondent was someone who fell within s. 10(d) of the Act.

Ms. Noctor also submitted that the respondent could in any event be someone in the category of person referred to in paragraph (b) of s. 10 as being someone "who is the subject of proceedings in that state for an offence to which the European arrest warrant relates". She urges that the Court should give a wide meaning to the phrase "subject of proceedings", since the sentence passed is part of the proceedings as a whole and since this has yet to be served, the respondent is still subject to the proceedings. I do not have to decide that question really, but it seems to me that if so wide a meaning was to be given it would render paragraphs (c) and (d) otiose.

However, I am satisfied that the point or points raised by Mr McCarthy can be decided against the respondent on the basis of a failure by the respondent to discharge the evidential burden which is upon him. The fact is that the respondent has chosen not to swear any affidavit in support of his objections. His solicitor has sworn an affidavit on his instructions. Everything in that affidavit is therefore hearsay and incapable of being tested by any cross-examination. Even if the affidavit has been allowed to be opened in support of the objections, the weight to be given to the contents must be affected. But even if that were not to be the case, the most his solicitor is able to say is that given that the respondent's asylum application was refused in January 2004 it is likely that there would have been communication between the Irish authorities and the Czech authorities about the respondent and that "it is likely that the whereabouts of the applicant at or around the time of his conviction in December 2003 could have been ascertained." I am certain that this averment was made in relation to a delay objection which at the end of the day was not proceeded with. There is not a single averment to deal with the respondent's state of knowledge of any prosecution being brought against him in respect of these offences. There is simply the averment that he left his country and unsuccessful sought asylum in Switzerland, Belgium and Ireland. This is in stark contrast to the very detailed facts and circumstances averred to by the respondent in the *Tobin* case. This case cannot be regarded as coming into that category of case where it was accepted even by the authorities in Hungary who were seeking surrender that when that respondent left Hungary he did so lawfully. If the present respondent wishes to submit that he is not a fugitive from justice, the onus is upon him to substantiate that assertion by evidence. Otherwise, this Court is entitled and indeed obliged to work on the basis of the high degree of mutual trust and confidence between member states of the European Union and a presumption that where it describes the respondent as a fugitive that means what it says and that the respondent is someone who left the issuing state in order to avoid prosecution, and sentence if convicted. This respondent has not attempted to upset that presumption. The onus is a heavy one given the contents of Article 1.1 of the Framework Decision to which Ms. Noctor has quite correctly drawn attention. I am satisfied that the Court must interpret s. 10(d) of the Act in the conforming way submitted by her, and as including the respondent, particularly given his failure to adduce any evidence which leads the contrary conclusion.

I am satisfied that the Court is obliged to make the order sought and so order.