Neutral Citation Number: [2008] IEHC 156

THE HIGH COURT

Record Number: 2007 No. 133 Ext.

BETWEEN

MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

Applicant

AND
VERA DUNKOVA

RESPONDENT

Judgment of Mr Justice Michael Peart delivered on the 30th day of May 2008

1. The surrender of the respondent is sought by a judicial authority in the Czech Republic so that she can serve the balance of a sentence of imprisonment imposed upon her there on the 26th February 1996. An appeal against that sentence was disposed of on the 31st May 1996, and according to the warrant became effective and enforceable thereafter. I will address an issue arising from the postponement of the commencement of that sentence to 9th December 1998 at the respondent's request, when addressing the points of objection raised by the respondent on the present application for an order for surrender.

2. I am satisfied from the evidence adduced on this application 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 trial and sentence of the respondent did not take place in absentia, and no undertaking under s. 45 of the Act arises.

4. I am satisfied that there is no reason under sections 21A, 22, 23 or 24 of the Act to refuse to make the order sought, and I am satisfied also, subject to addressing the points of objection raised herein, that her surrender is not prohibited by any provision in Part III of the Act or the Framework Decision.

Points of Objection

1. Respondent not informed of right to consent to surrender under s. 15 of the Act

5. The respondent has referred to the affidavit sworn by Sgt. Kirwan following his arrest of the respondent, and in which he states, *inter alia*, that following the arrest of the respondent on the 28th September 2007 he informed her that "*under section 13 of the European Arrest Warrant Act she could consent to her early surrender to the requesting state….*". It is argued on her behalf that he has thereby failed to comply with the provisions of s. 13 of the Act because the right to consent is a right under s. 15 of the Act and not under s. 13 of the Act. Factually it is correct to say that the right to consent to surrender is a right under s. 15 of the Act, but it is perfectly obvious that the affidavit simply contains an error as to the number of the section. What is clear is that she was told that she had the right to consent should we wish to do so. In addition, s. 13 of the Act requires the Court, when remanding the respondent to the hearing date, to again inform the respondent of her right to consent as well as of her right to the services of an interpreter, and to her right to be provided with legal advice and representation. The error in relation to the number of the section concerned has not deprived the respondent of any substantive right to which she is entitled on this application, and I am completely satisfied that the error in the affidavit is not such as to render her arrest unlawful or otherwise to require a refusal of the order sought for her surrender.

2. Respondent is not a person to whom s. 10 of the Act applies

3. There is no conviction, sentence or detention order immediately enforceable against the respondent

6. These two points of objection can be taken together:

7. Section 10 of the Act 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)*

8. It is paragraph (d) which is relevant, since the respondent is a person who was sentenced to a term of imprisonment before she left the Czech Republic, and the question arising is whether given the circumstances in which she left that country, she is a person who "fled".

9. It is necessary to set out those circumstances as evidenced from her own affidavit and the other documentation accompanying this application.

10. The offence for which she was convicted was committed on the 13th February 1995. Her trial took place on the 23rd May 1995 when she was found guilty. On the 26th February 1996 she was sentenced to a term of two years and six months' imprisonment, and having appealed that conviction and sentence, they were confirmed by order of the appeal court on the 31st May 1996. It would appear from her affidavit that she spent time in custody from a date in February 1995 until a date in June 1995 having applied for

temporary release on the basis that she was pregnant and suffering from heart disease. It is presumably that period of time in custody which has resulted in the warrant indicating that of the sentence of two years and six months imposed on her there remains a period of two years, two months and twenty two days remaining to be served by her upon surrender.

11. She was never brought back to prison following her temporary release in June 1995. However, a letter dated 7th January 2008 from the District Court in Prague has stated that on the application of the respondent a "resolution" was made by the court on the 27th January 1998 whereby "*it was decided to suspend the execution of imprisonment….. for a period until December 9, 1998, the resolution becoming legally valid on the March 3, 1998.*"

12. An important matter arising on this application is that under the law of the Czech Republic there is a limitation period of five years in relation to this sentence. A question arising for consideration in due course, but relevant also to this particular ground of objection is whether that limitation period expired on the 2nd March 2003 (being five years from the 3rd March 1998 when the resolution became valid) or on the 8th December 2003 (being five years from the end of the postponement period). The respondent submits that when she left the Czech Republic on the 17th July 2003, the sentence was unenforceable, as five years had passed since the 3rd March 1998, and accordingly she was free to leave and did not therefore "flee".

13. Another relevant fact is that in the month of June 1998, the respondent sought a pardon in respect of the offence. It appears that this application was forwarded to the Ministry of Justice on the 24th June 1998 for a decision, but no decision was made on that application before she left the country, or thereafter, even to the present day.

14. Yet another relevant fact, according to the said information dated 7th January 2008 is that on the 7th March 2003, the authorities sent "*an invitation to start executing the imprisonment, but she did not arrive for the execution of the punishment*". It goes on to state that on the 3rd September 2003 "*a search for the convicted was announced*", and that it was discovered that she was by then in this country. The respondent on the other hand emphasises the fact that the postponement resolution is stated by the District Court in Prague to have "come into effect on the 3rd March 1998", and that the latter must be seen as the date from which the five year limitation period commenced.

15. According to her affidavit she remained in the Czech Republic until the 17th July 2003 when she left and came to this country with her husband and family. She claims that she did so to get away from abuse, intimidation and violence against her and her family, who are all members of the Roma community, and unsuccessfully applied for asylum. That application was refused, but she and her family have remained here since that time. She says that she has at all times lived openly in this country. She also states that in the years following her release in June 1995 and before she left that country the authorities never made any attempt to bring her back to prison.

16. The letter from the District Court in Prague dated 7th January 2008 states that the sentence is not "time-barred". A second translation of the same letter uses the phrase "not forfeited" because of the fact that the respondent had applied for a postponement of the sentence until 9th December 1998.

17. In support of her contention that the sentence had expired or become barred on the 2nd March 2003, the respondent has provided an affidavit from her lawyer in the Czech Republic, Vera Ptakova. She states that she had acted for the respondent, and that she had been contacted by the respondent for the purpose of seeking the pardon referred to, on the basis of her poor health and her family circumstances, particularly her children. She believes that no decision was ever made on that application. She also states that "in about 2003" the respondent contacted her again in relation to the request received that she commenced serving her sentence. That refers to the invitation dated 7th March 2003 to which I have already referred. This lawyer states that she replied to this latter on behalf of the respondent to the effect that pursuant to section 68 of the Czech Criminal Code, "the punishment was subject to limitation". I take this averment to mean that she informed the authorities that the limitation period of five years had expired and that therefore the sentence was unenforceable. She states that she never received any response to that letter.

18. Ms. Ptakova states in her affidavit that under section 68 of the Code "*the statute of limitations commences with the entry into force of the judgment that punishment should be executed*", and that any period during which the punishment could not be executed because the convicted person was abroad or was executing another punishment of imprisonment does not count towards the statute of limitations. She states that the sentence in this case of two years and six months "*came into force on the 26th February 1996*" (i.e. the date on which it was originally imposed), and she exhibits a copy of the relevant section of the Code. She refers also to the fact that the respondent was convicted of another offence on the 13th March 1998 but that only a fine was imposed, and that such a penalty does not interfere with the statute of limitations. She states accordingly that the limitation period was due to expire "in 2001" before the respondent left the Czech Republic before any step was taken to execute the punishment, and before the European arrest warrant issued in this case.

19. Ms. Ptakova also refers to the letter dated 7th January 2008 from the District Court in Prague, and to the reference therein to the fact that the sentence was postponed until 9th December 1998. She states that this resolution came into force on the 3rd March 1998, and that "*the period of limitation therefore starts on the 4th March 1998*" and that the forwarding of the application for a pardon "*cannot lead to the interruption of the period of limitation*", and that any steps taken after that date are of no legal effect and do not operate so as to discontinue the limitation period.

20. According to the text of section 68 (2) of the Code "*the statute of limitations shall start to run as of the day when the sentence becomes final and, in the case of a suspended sentence or of release on parole, on the day when the verdict ordering enforcement of the punishment takes legal effect……*"

21. In response to that affidavit the District Court in Prague has furnished a further letter dated 29th April 2008 in which it is stated, *inter alia*:

> *"The term of postponement of the execution of the punishment of imprisonment elapsed for the sentenced person on 9th December 1998 and consequently, she was obliged to enter for execution of the punishment of imprisonment after that date.*
>
> *New 5-year's term of statutory limitation began to run from 10th December 1998 – that is why its end comes to 10th December 2003".*

22. Seán Guerin BL for the respondent submits that on these facts the respondent is not someone who can be regarded as having "fled" from the issuing state following sentence and before she commenced serving that sentence or completed serving that sentence, since as a matter of Czech law the sentence has expired according to the clear text of s.68 of the Czech Criminal Code,

and since, before she left and after receipt of the "invitation" dated 7th March 2003 she actually consulted her lawyer who wrote to the authorities pointing out that the limitation period had expired, and failed to get any reply to that letter. In such circumstances, it is submitted that she was entitled to assume that what she contended in relation to the expiry of the sentence was correct, and that she was accordingly free to leave the country, as she did some months later, in July 2003. He submits that there is no evidence that she left in haste following receipt of the invitation dated 7th March 2003, that she took the responsible decision to consult her lawyer in relation to it, and that in no sense can this be regarded as "fleeing" in the sense of evading any legal obligation upon her to remain and serve her sentence. He points also to the uncontroverted evidence that the sending of this letter in March 2003 was the only step taken by the authorities to make contact with the respondent following the postponement of the sentence, and that by that date it was some seven years after the sentence had originally been imposed in February 1996. He submits that there was ample opportunity for the Czech authorities to have engaged with the respondent or her lawyer before she left in relation to the issue between them as to whether the limitation period had expired or not, and that they obviously chose not to. He submits that in these circumstances the respondent did all she could to ensure that she was free to leave the country by July 2003. He points to the reasons which she has given in her affidavit for leaving the country, namely to escape from the intimidation, violence and abuse which she says was endured by her and her family as members of the Roma community.

23. Siobhán Ní Chúalacháin BL for the applicant submits that the question whether or not the limitation period in relation to this sentence has expired is a matter of Czech law, and that where the issuing judicial authority has informed this Court in its letters dated 7th January 2008 and again on 29th April 2008 that the limitation period has not expired, this Court ought to accept that view on the basis of the mutual trust and confidence which exists between judicial authorities under the Framework Decision, and in deference to the recognition to be accorded to judicial decisions in the issuing state. She submits that if there is a legal issue to be resolved in relation to this period of limitation, it is the Czech court which should be allowed to resolve it.

24. In relation to whether or not the respondent is to be regarded as having "fled", she submits that the present case is very different on the facts to the case of *Minister for Justice, Equality and Law Reform v. Tobin*, unreported, Supreme Court, 25th February 2008, where it was accepted by the Hungarian Court that there was no legal impediment to the respondent leaving Hungary and returning to this country when he did, and that there was no issue remaining to be decided in that regard. In the present case, she submits, there is an outstanding issue to be determined since the court in Prague does not agree that the sentence had lapsed under s. 68 of the Czech Criminal Code. She points to the fact that although the respondent's letter to the court in response to the "invitation" to come in and serve the sentence had not been responded to, the respondent nevertheless left the country without making further enquiries about the sentence.

Conclusion
25. In the *Tobin* case, as stated by Fennelly J. in his judgment in that case at p.8 thereof, "*the regularity of the procedure whereby the respondent left Hungary is confirmed in several documents …… For present purposes, however, the pursuit of this procedure mainly demonstrates that the respondent left Hungary with the full authority and approval of the Hungarian prosecutor and of the court.*"

26. That is far from the situation in the present case where it is quite clear from the information provided by the issuing judicial authority that they do not regard the respondent as having been entitled to leave without serving the sentence imposed upon her. An issue has been raised by the respondent that the sentence in question has expired by virtue of s. 68 of the Criminal Code. That issue is unresolved as a matter of Czech law. I accept the respondent's evidence and that of her lawyer that a letter which sought to clarify that situation received no response. But the respondent asks this court to have regard to that feature of the case so as to deem that failure to respond as an acceptance that the limitation period had expired, or at least to have entitled the respondent to conclude that she was no longer being required to serve it. To do so, in my view, would be to ignore the statements to the contrary received here as recently as the letters dated 7th January 2008 and 29th April 2008 respectively to which I have referred. Whether or not that sentence has expired by operation of Czech law is a question which can be determined only by reference to Czech law, and as such, is a matter within the exclusive competence of the courts in the Czech Republic. What this Court has is a judicial decision of a Czech Court which has imposed a sentence of imprisonment on the respondent which it now seeks to execute. The principle of mutual recognition of judicial decisions is a cornerstone of the Framework Decision by which the arrangements for surrender under a European arrest warrant were put in place between Member States of the European Union. It follows that this Court must give due recognition to the existence of such an order, and furthermore, it must, on the basis of the high degree of trust and confidence in the legal systems of such member states, evidenced by the fact that the Czech Republic has been designated by the Minister for Foreign Affairs pursuant to s. 3 of the Act, have confidence that if upon surrender the Czech judicial authority is persuaded that the sentence is unenforceable, the respondent will not be required to serve the sentence. But the fact that a European arrest warrant has been issued at all is sufficient for this Court to presume that it is prima facie enforceable, and under the arrangements in place, it is not open to this Court to refuse to order surrender on the basis that the respondent did not "flee" and is not somebody to which s. 10(d) of the Act does not apply. It cannot be presumed that the lack of a response from the Czech Court to the letter from the respondent's Czech lawyer is an end of the matter. It would of course have been possible for that letter to have been followed up seeking a reply which may have put the matter beyond doubt. There is no evidence that this occurred. There is no evidence at all that, as happened in Tobin, the Czech court gave any indication that the respondent was free to leave without serving that sentence. In such circumstances, this Court must take the view that she left the country while there existed an outstanding obligation under Czech law. That clearly distinguishes the case from the Tobin case where there was no doubt whatsoever that in leaving Hungary that respondent breached no such obligation, albeit that the present respondent may have believed herself free to leave without serving her sentence. The fact that she did not leave in haste, as submitted by Mr Guerin, does not alter the fact that she left before the issue had been resolved.

27. It follows also in relation to objection 3 that this Court must conclude that there is an order in respect of the respondent which is enforceable against her for the reasons already stated in relation to the s. 10 issue.

4. The offence does not correspond to an offence in this jurisdiction
28. Mr Guerin submits that the facts as set out in the warrant in paragraph (e) of the warrant and which give rise to the conviction in the Czech Republic would not, if done in this jurisdiction as alleged in the warrant, give rise to an offence of robbery under s. 4 of the Criminal Justice (Theft and Fraud Offences) Act, 2001 since there is no allegation that, in taking the property in the circumstances set forth in that paragraph, she did so without the consent of the owner thereof. He submits that the facts may give rise to a bailment dispute, but fall short of what is required to found the offence of robbery under s. 4 of that Act.

29. He refers to the relevant provision of Czech Criminal Code, namely s. 247 thereof as set forth in the warrant which states:

> *"Section 247 – Theft*
>
> *(1) A person who appropriates other person's thing by seizing it, and*

(a) causes a not inconsiderable damage in such a way

(b) commits the crime by breaking into,

(c) attempts immediately after the crime to retain the thing by using violence or a threat of an immediate violence,

(d) commits the crime on a thing that somebody else is wearing or having on, or

(e) has been sentenced or convicted of such a crime for the past three years,

shall be sentenced to a term of imprisonment of six months up to three years or to a statutory penalty or to a forfeiture of such a thing.

(2) The offender shall be sentenced to a term of imprisonment of six month up to three years or to a statutory penalty, if he/she causes a not small damage through the act stated in the subsection 1."

30. Mr Guerin then refers to the facts alleged in the warrant against the respondent as described in paragraph (e) thereof as follows:

"On February 1995, circa 22.30 o'clock at the flat of the aggrieved Jiri Rimovsky, born on 23rd August 1923 at {address] (after the aggrieved fell asleep) she took away from his flat the financial mount of 2,590 – CZK (cash) [and other property as set forth] whereby she brought about to the aggrieved Jiri Rimovsky damage amounting to 12,799,-CZK."

31. He refers to the provisions of s. 4 of the Criminal Justice (Theft and Fraud Offences) Act, 2001 ("the 2001 Act") which provides for the offence to which this offence is said to correspond on this application, as follows:

"4. – (1) Subject to section 5, a person shall be guilty of theft if he or she dishonestly appropriates property without the consent of its owner and with the intention of depriving its owner of it.

(2) For the purposes of this section a person does not appropriate property without the consent of its owner if –

(a) the person believes that he or she has the owner's consent, or would have the owner's consent if the owner knew of the appropriation of the property and the circumstances in which it was appropriated, or

(b) (except where the property came to a person as trustee or personal representative) he or she appropriates the property in the belief that the owner cannot be discovered by taking reasonable steps.

But consent obtained by deception or intimidation is not consent for those purposes."

32. S.4 (5) of that Act provides:

"(5) In this section –

"appropriates" in relation to property means usurps or adversely interferes with the proprietary rights of the owner of the property;

"depriving" means temporarily or permanently depriving."

33. Mr Guerin submits that there is nothing contained in the facts contained in paragraph (e) of the warrant which alleges either that the respondent "dishonestly appropriated" these goods without the consent of the owner, or with the intention of depriving him either temporarily or permanently, of the property. Accordingly, in his submission, the facts disclosed would not, even if proven as alleged, cause an offence to be committed in this State.

34. In support of this submission he has referred the Court to the judgment of Fennelly J. in *The Attorney General v. Dyer* [2004] 1 IR. 40. In that case the offences in question were of obtaining money by false pretences contrary to common law. It was contended that these offences corresponded to either an offence under s. 32 of the Larceny Act, 1916, as amended, or s. 10 of the Criminal Justice Act, 1951, each of which included a requirement that there be an "intent to defraud" as a constituent element of the offence. It was in that case accepted that an indictment grounding an indictment for either offence must allege "intent to defraud". This element was absent from the wording of the warrants in question, and it was sought to supplement the alleged facts by an affidavit from a crown advocate in Jersey, the requesting state who stated that it was not a requirement under Jersey law to set out the requisite *mens rea* in the indictment. Fennelly J. concluded that "*in the present case, the approach so consistently laid down in these cases runs into the difficulty that the absence of any allegation of "intent to defraud" would appear to render the warrants deficient for the purposes of extradition*."

35. He concluded at p. 51 that:

"none of the warrants use the expression "criminal fraud". Nor does Mr St. John O'Connell anywhere in his affidavit refer to the actual warrants at issue in this case. His evidence goes no further than to explain the offence of criminal fraud. There is, therefore, a missing link. None of the documents, either singly or collectively, demonstrate that the respondent is charged with an offence of which intent to defraud is an element".

36. Fennelly J. went on to state that the warrants could easily have alleged "intent to defraud", and "*that is to say that a warrant might contain an allegation of fact whose proof, though not necessary according to the law of the requesting jurisdiction, would ensure its acceptance for the purposes of extradition from this jurisdiction*."

37. Mr Guerin submits that the same lacuna exists in the present case and that correspondence cannot therefore be found to have been made out.

38. Ms. Ní Chualacháin on behalf of the applicant relies on the judgment of Geoghegan J. in *Myles v. Sreenan* [1999] 4 IR. 294, where

he stated at p. 299:

> *"… a mere imperfection in draftsmanship would not be sufficient to defeat the warrant. One must read the warrant as a whole and if on any reasonable interpretation of the particulars as given they are intended to convey a set of facts which would be an offence in Ireland there is sufficient correspondence. I do not find it necessary, therefore, to consider whether, as a matter of perfect draftsmanship, a word such as "dishonestly" ought to have been inserted in para. (2) because I am satisfied that upon reading the entire charge under the heading "alleged offence" it is perfectly obvious that dishonesty is what is alleged".*

39. She submits that in the present case it is obvious that the allegation is one of taking property without the consent of the owner and that the ingredients of the Irish offence are met.

40. That case of course predates the passing of the European Arrest Warrant Acct, 2003, as amended, and the question of correspondence must be looked at by reference to s. 5 of that Act. I am of the view that for the offence alleged in the warrant to correspond to the offence here under s. 4 of the 2001 Act, this Court would have to read into the facts words which are absent from the certified translation of the warrant provided. The Court cannot do that. I imagine that the Czech prosecutor intends to prove that the goods in question were stolen in the broad sense of that word and that the respondent took the goods without the consent of the owner with the intention of depriving the owner thereof. But that is not contained in the warrant, and it is an essential ingredient of the Irish offence that such be alleged. It may well be that the difficulty which is encountered in this regard with this warrant is something which has occurred through the translation of the warrant, though even that is unclear. But it cannot be appropriate for this Court to read other words into this warrant for the purpose of being satisfied as to correspondence. I am satisfied, as Fennelly J. was in the *Dyer* case, that the description of the charge in the warrant is not sufficient to demonstrate correspondence with the Irish offence with which it is said to correspond. This finding will not preclude the Czech authorities from issuing a further European arrest warrant containing additional details of exactly what is alleged to have been done by this respondent, in an effort to meet the requirements here regarding showing correspondence. But the present application must fail on this point.

5. The issuing state has been guilty of unreasonable and unconscionable delay, and the life, liberty and health of the respondent would be at risk if surrendered

41. Mr Guerin has submitted that in spite of the Supreme Court's judgment in Stapleton, the question of whether there has been a breach of Convention rights or rights under the Constitution are engaged by s. 37 of the Act, particularly since this case is distinguishable from the facts of Stapleton since in the latter case that respondent faced prosecution rather that the execution of a sentence already imposed. He submits that the unexplained delay in this case, the circumstances in which the respondent came to this country, and the changed family circumstances of the respondent since she came to this country are significant features of the case, and that she enjoys a general right to have all aspects of the proceedings against her determined within a reasonable time, and has referred to a judgment of the European Court of Human Rights in *Crowther v. The United Kingdom* [Application No. 52741/00] 1 February 2005, where that Court found a violation under Article 6 of the Convention in which a period of six years passed before the authorities enforced a Confiscation Order by obtaining a committal order for non-payment of a sum of money ordered to be paid at the time of conviction six years previously. The Court concluded that the delay in enforcing that order was "*both inexcusable and, given that somebody's liberty was involved, unconscionable*". In addition, Mr Guerin submits that to enforce the period of imprisonment now in the Czech Republic would lack proportionality, which, he submits, is a principle appearing in Recital 7 to the Framework Decision. He submits that requiring her to serve this sentence now after a passage of twelve years cannot be seen as serving any of the purposes of a sentence, i.e. rehabilitation, punishment, or deterrence. He points also to the fact that there is no dispute that the respondent's health is poor.

42. There is no doubt that a considerable passage of time has elapsed from the time the respondent was originally sentenced in 1996, and the issue of this warrant for her surrender, even allowing for the fact that the sentence was postponed at her request until December 1998. However, that is not a matter upon which this Court can adjudicate, and cannot be a ground for refusing to order her surrender. If any breach of a right under the Convention will occur if the respondent is surrendered, this is a matter which the respondent will have to address in the requesting state which is in the best position to determine it. This Court's clear obligation under the Framework Decision is to order her surrender provided that the conditions to be met on such an application are met. Even if it is the case that a Convention right has been breached by the delay which has occurred in seeking her surrender, it does not follow that *her surrender* "would be incompatible with the State's obligations under the Convention" or that it "would constitute a contravention of any provision of the Constitution" as provided by s. 37 of the Act.

43. As far as the health of the respondent is put forward in aid of these submissions, this Court is not in any position to determine the adequacy or otherwise of medical attention in the prison regime in the requesting country. In the absence of very clear medical evidence and evidence of prison conditions there, this Court simply cannot enter upon that question. This ground of objection fails.

44. In view of my conclusion on correspondence, I cannot make an order for her surrender on foot of this European arrest warrant, and I refuse the application.