

THE HIGH COURT

[2013 No. 148 EXT]

BETWEEN

THE MINISTER FOR JUSTICE AND EQUALITY

APPLICANT

AND

JERZY KIERNOWICZ

RESPONDENT

JUDGMENT of Ms. Justice Deirdre Murphy delivered on 27th May, 2014.**Introduction**

1. The Respondent is a Polish national who is sought by the Republic of Poland for prosecution in respect of three offences. The Respondent does not consent to his surrender to the Republic of Poland and accordingly the court is now being asked by the Applicant to make an order pursuant to s. 16 of the European Arrest Warrant Act 2003 ("hereinafter 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 have been satisfied and whether or not there is any bar to the surrender of the Respondent.

Relevant Matters

2 The Respondent is the subject of a European arrest warrant ("hereinafter the warrant") issued by Thomas Borowczak Regional Court Judge of the Regional Court in Poznan, Poland on 29th October, 2012. The Republic of Poland seeks the rendition of the Respondent on foot of this warrant for the purposes of prosecuting him for the three offences particularised therein. The warrant was endorsed by the High Court for execution in this jurisdiction on 18th June, 2013. It was duly executed on 30th September, 2013. The Respondent was arrested by Garda Sean Burns of Store Street Garda Station on that date and he was brought before the High Court later on the same day pursuant to s. 13 of 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 in custody to the date fixed. Thereafter the matter was adjourned from time to time, ultimately coming before the court for the purposes of a surrender hearing on 29th April, 2014.

Offences

3. The warrant relates to three offences. The circumstances in which the offences were perpetrated are stated in the warrant to be as follows:-

Offence 1 (Warrant paragraph E.2.1)

Between 15th August, 2004 and 19th August, 2004, in the City of Poznan acting together and in agreement with Marek Rudzki and Grzegorz Piotrowski, Jerzy Kiernowicz financially profited from prostitution carried out by another person through financially profiting from sexual intercourse and other sexual activities carried out by minor Joanna Stepinska.

Offence 2 (Warrant paragraph E.2.II)

Between the end of April, 2004 and the end of May, 2004 in the City of Poznan acting together and in agreement with Marek Rudzki and Grzegorz Piotrowski, Jerzy Kiernowicz financially profited from prostitution carried out by another person through financially profiting from sexual intercourse and other sexual activities carried out by Alicja Bedyniak.

Offence 3 (Warrant paragraph E.2.III)

Between 25th April, 2004 and the end of May, 2004 in the City of Poznan acting together and in agreement with Marek Rudzki and Grzegorz Piotrowski, Jerzy Kiernowicz financially profited from prostitution carried out by another person through financially profiting from sexual intercourse and other sexual activities carried out by Agnieszka Szczeral.

At s. E.3 each of the three offences is described as being a continuing offence.

4. The issuing authority seeks an exemption from the requirement to prove correspondence by invoking Article 2.2 of the Framework Decision in respect of the first offence which involved a minor. The offence which is ticked in the warrant is specified as being a crime against sexual freedom or decency to the prejudice of a minor.

5. A further apparent anomaly in the warrant is that s. D has been completed notwithstanding the fact that the warrant is a prosecution warrant. The foregoing is the context in which the points of objection raised by the Respondent fall to be considered.

Points of Objection

6. Points of Objection were filed on the 22nd January, 2014. Eight headings of objection were originally pleaded and four were maintained at the s. 16 hearing. These are set out below in the order in which the court proposes to deal with them:

(1) Insofar as the Respondent's surrender is sought in respect of continuing offences, the Respondent's surrender is prohibited by Article. 2.2 of the European Arrest Warrant Act as amended.

(2) The warrant fails to provide sufficient information for the purpose of s. 11 of the European Arrest Warrant Act 2003, as amended by s. 72 of the Criminal Justice (Terrorist Offences) Act 2005, and s. 7 of the Criminal Justice (Miscellaneous Provisions) Act 2009, in that, *inter alia*, it is indicated at para. D of the warrant that the Respondent has been tried and sentenced on two matters which are nowhere specified in the warrant.

(3) Insofar as the offence described in para. E.2.I of the warrant has been certified as an offence to which Article 2.2 of the Framework Decision applies, said certification is a manifest error and/or does not come within the scope of Article 2.2.

(4) The surrender of the Respondent on the face of the documents furnished by the issuing state is prohibited by virtue of s. 38(1) of the European Arrest Warrant Act 2003. In this regard correspondence has not been established with the offences set out at paras E.2.1, II or III of the warrant.

Following the filing of Points of Objection, the Applicant sought clarification from the issuing authority in respect of the Point of Objection set out at (2) above by letter dated 3rd March, 2014, asking the issuing authority to confirm that the Respondent had not been convicted of any of the offences in the warrant and is sought for prosecution only.

In a further letter of 5th March, 2014, the Applicant requested the issuing authority to elaborate on the alleged role or acts of the Respondent in committing the offences described in the warrant at paras. E.2.11 and III for the purpose of establishing correspondence in relation to the second and third offences set out above. By letter dated 11th March, 2014, the requesting authority confirmed firstly that the Respondent had not been convicted of any of the offences listed in the warrant and that his surrender is sought in order to prosecute him for the offences. Secondly, in response to the request for elaboration on the alleged role or acts of the Respondent in committing the offences described in the warrant at paras. E.2.11 and III, the issuing authority attached an excerpt from the indictment filed against Jerzy Kiernowicz. It states that he is the owner of a business in the form of an escort agency and that together with Marek Rudzki and Grzegorz Piotrowski is accused of the offences set out in the warrant. The excerpt from the indictment goes on to give further information under the heading "Statement of Reasons". These are set out in greater detail in paragraph 16 of this judgment.

7. Finally, on 24th April, 2014, five days before the s. 16 hearing, the Applicant requested clarification on the matter raised in the Point of Objection set out at (3) above, namely that the offence set out in the warrant at E.2.1 does not come within the scope of Article 2.2. The Applicant wrote to the issuing authority with regard to the offence described at para. E.2.1 of the warrant "alleged to have been committed between 15th August, 2004, and 19th August, 2004" and requested confirmation as to whether the offence is intended to be covered by the offence of sexual exploitation of children and child pornography which is the fourth offence in the list of 32 offences at Article 2.2 of the Framework Decision. By letter dated 25th April, 2014, the requesting authority replied:

"We can confirm that the offence described in s. E.1 of the European Arrest Warrant is covered by the offence of sexual exploitation of children and child pornography within the meaning of Article 2.2 of the Framework Decision of the Council of 13th June, 2002, on the European Arrest Warrant and surrender procedures between member states."

That letter is signed by the Regional Court Judge in Poznan, Tomasz Borowczak.

Compliance with Requirements of the Act of 2003

8. Before dealing with the matters in controversy the court proposes to deal with the balance of the formalities in respect of which the court is required to be satisfied prior to any surrender. The court has received and scrutinised a true copy of the warrant in this case. Further, the court has inspected the original warrant which is on the court's file and which bears this Court's endorsement dated 18th June, 2013. The court has received an affidavit of Garda Sean Burns sworn on 25th February, 2014, at Parkgate Street in the County of Dublin testifying as to his arrest of the Respondent and as to the questions he asked of the Respondent to establish the Respondent's identity. When these are compared with the information in Part A of the warrant, they can be seen to correspond. Further, while the Respondent has put the state on full proof in a Points of Objection filed, no real issue arises either as to the arrest or as to identity.

9. The court is satisfied that:

- (a) The 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 warrant was issued;
- (d) The warrant is in the correct form;
- (e) The warrant is a prosecution type warrant and the Respondent is wanted in the Republic of Poland for the purposes of prosecuting him for the three offences particularised in Part E of the warrant;
- (f) The underlying domestic decision on which the warrant is based IS a domestic arrest warrant issued pursuant to a ruling of 28th September, 2009, of the District Court in Poznan;
- (g) The nature and classification of the offences alleged under the law of the issuing state are one instance of financially profiting from prostitution carried out by a minor- continuing offence contrary to Article 204(3) in conjunction with Article 12 of the Polish Criminal Code and two instances of financially profiting from prostitution carried out by another person contrary to Article 204(2) of the Polish Criminal Code and this also described as a continuing offence;
- (h) The issuing judicial authority has invoked Article 2.2 of the " Council Framework decision of 13th June, 2002, on the European Arrest Warrant and the Surrender Procedures between Member States", (2002/584/JHA) OJL 190/1 18.7.2002 (hereinafter referred to as the Framework Decision) in respect of the first offence by ticking a box in Part E.2.1 of the warrant, namely that relating to crime against sexual freedom or decency to the prejudice of a minor. Accordingly, subject to the court being satisfied that the invocation of Article 2.2 is valid (*i.e.* that the minimum gravity threshold is met) and that there is no basis for believing that there has been gross or manifest error, it need not concern itself with correspondence in respect of that offence;
- (i) The minimum gravity threshold in a case in which Article 2.2 of the Framework Decision is relied upon is that which is transposed into Irish domestic law within s. 38(1)(b) of the Act of 2003 as amended, namely that under the law of the issuing state the offence is punishable by imprisonment for a maximum period of not less than three years. It appears from part C of the warrant that the offence involving profiting from the prostitution of a minor carries up to ten years imprisonment. Accordingly, the minimum gravity threshold is comfortably met in respect of that alleged offence;
- (j) The court is invited to find correspondence with an offence in Irish law of Organisation of Prostitution contrary to s. 9

of the Criminal Law (Sexual Offences) Act 1993, and/or Living on Earnings of Prostitution contrary to s. 10 of the Criminal Law (Sexual Offences) Act 1993 and/or Brothel Keeping contrary to s. 11 of the Criminal Law (Sexual Offences) Act 1993;

(k) Subject to the court being satisfied that correspondence is established, the relevant threshold of minimum gravity as provided for by s. 38(1)(a)(i) of the Act of 2003, namely that there is a potential penalty of at least twelve months imprisonment or deprivation of liberty in respect of all offences contained in the warrant, it is apparent from part C of the warrant that the offence of financially profiting from prostitution contrary to Article 204(2) in conjunction with Article 12 of the Polish Criminal Code carries a maximum penalty of up to three years imprisonment and accordingly, the minimum gravity threshold is comfortably met;

(l) As the Respondent is wanted for prosecution no issue as to trial *in absentia* arises in the circumstances of the case notwithstanding the fact that he issuing authority filled in s. D of the warrant;

(m) There are no circumstances in this case that would cause the court to refuse to surrender the Respondent under ss. 21(a), 23 or 24 of the Act of 2003 as amended.

10. In addition to the factors outlined in 9., the court is satisfied to note the existence of the European Arrest Warrant Act 2003, designated member states Order 2004, Statutory Instrument No. 4 of 2004 (hereinafter the 2004 Designation Order) and duly notes that by a combination of s. 3(1) of the Act of 2003 and Article 2 and the Schedule to the 2004 Designation Order, the Republic of Poland 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 Objection to Surrender

11. The Respondent has raised two significant issues. Firstly, whether Article 2.2 of the Framework Decision has been properly invoked in this case so as to exempt the Applicant from establishing correspondence in relation to the first offence specified at para. E.2.1 of the warrant, that between 15th August, 2004 and 19th August, 2004 in the City of Poznan acting together and in agreement with Marek Rudzki and Grzegorz Piotrowski, Jerzy Kiemowicz financially profited from prostitution carried out by another person through financially profiting from sexual intercourse and other sexual activities carried out by a minor Joanna Stepinska. The second significant issue raised is whether there is a correspondence between the offences delineated in the warrant and additional information supplied and the offences of Organisation of Prostitution contrary to s. 9 of the Criminal Law (Sexual Offences) Act 1993, and/or Living on Earnings of Prostitution contrary to s. 10 of the Criminal Law (Sexual Offences) Act 1993, and/or Brothel Keeping contrary to s. 11 of the Criminal Law (Sexual Offences) Act 1993. The two other points of objection raised, namely that the Respondent's surrender was sought in respect of continuing offences and the objection that the warrant failed to provide sufficient information because it was indicated at para. D of the warrant that the Respondent has been tried and sentenced on two matters which are nowhere specified in the warrant were resolved during the course of the s. 16 hearing. At the request of the court, it was clarified by the Applicant that the phrase "continuing offences" referred to at E.2.I, II, III of the warrant under the category and legal classification of the offences in fact refers to repeated instances of profiting from prostitution during the periods specified in the warrant such that in respect of the first offence (E.2.I), there were repeated instances involving the prostitution of a minor between the dates of 15th August, 2004 and 19th August, 2004. Similarly, there were repeated instances of profiting from prostitution in the period April, 2004 and May, 2004 in respect of a named female referred to in offence No.2 (E.2.11). Similarly, there were repeated instances of financially profiting from sexual intercourse in relation to the woman named offence No.3 (E.2.III) between 25th April, 2004 and the end of May, 2004. In fairness to the Respondent the explanation proffered for the term "continuing offence" was accepted. In relation to the point of objection listed at (2) in the Respondent's Points of Objection set out above that the warrant failed to provide sufficient information for the purpose of s. 11 of the European Arrest Warrant Act in that, *inter alia*, it is indicated at para. D of the warrant that the Respondent has been tried and sentenced on two matters which are nowhere specified in the warrant. Again, counsel for the Respondent in effect accepted the explanation that para. D of the warrant was completed in error in that the warrant was confirmed by the requesting authority to be a prosecution warrant and the trial of the Respondent had not yet taken place. This was confirmed in additional information sought from the requesting state dated 11th March, 2014. Accordingly, the two issues that the court is required to address is whether or not Article 2.2 of the Framework Decision has been properly invoked in this case so as to obviate the need for the establishment of correspondence between the offence in the requesting state and an offence in this jurisdiction. The second issue raised by the Respondent is whether there is correspondence between offences E.2.II and E.2.III and in the event that if Article 2.2. was improperly invoked, offence E.I, and any offence in this jurisdiction.

Invocation of Article 2.2 of the Framework Decision

12. There is no doubt that the issuing authority has sought to invoke Article 2.2 of the Framework Decision in respect of the first offence set out at para. E.2.I of the warrant, namely financially profiting from prostitution carried out by a minor. It is immediately apparent upon a consideration of the list of offences set out E.I of the warrant that they are different to the offences set out in the English language version of the Framework Decision. For example, the first offence specified under E.I in the warrant is trafficking in human beings. In the Framework Decision that offence is the third listed offence. The first item listed in The Framework Decision is participation in a criminal organisation. Closer scrutiny of the list at E.I in the warrant shows a number of offences which do not appear in the English language version of the Framework Decision. For example, item 5 in the list in the warrant is bribery or paid influence peddling. This may well equate with item 7 in the English language version of the Article 2.2 list, i.e., corruption. Other offences in the list contained in the warrant might be said to equate with offences in the list in the Framework Decision, but they are described differently. For example, item 15 in the English language version of the Article 2.2 list in the Framework Decision is "fraud". This may equate with item 20 in the Article 2.2 list which is "swindling". However, it is clear that neither the order of the offences set out in the warrant nor the description of them corresponds with the offences set out in the Framework Decision. In fact the list of offences in the warrant comes to 33, whereas the list in the Framework Decision comes to 32. Closer examination of the list suggests that the additional offence in the warrant is set out at 9 in the list which is stated to be "illegal trading in weapons, munitions or explosives". That item is also included at item 7 in the list in the warrant where it is described as "illicit trafficking in weapons, munitions and explosives". The court inquired of counsel as to whether or not the original Polish version of the warrant of which this is a translation was in conformity with Article 2.2. Counsel were unable to assist other than to state that the list in Polish only lists 32 types of offence as opposed to the 33 set out in the English translation.

13. Bearing in mind that the process upon which the court is engaged is in the nature of an inquisitorial process rather than an adversarial one, the court has checked the Polish Framework Decision on the European e-justice portal (<https://e-justice.europa.eu>), a copy of which is appended to this judgment and of which the court is entitled to take judicial notice. It is not necessary to understand Polish to appreciate that the list of offences set out in the Polish Framework Decision does not correspond to the list of offences set out in the Polish language version of the warrant. This being a process which affects the liberty of the individual, strict compliance with the terms of Article 2.2 is necessary in order to properly invoke its provisions so as to obviate the need to prove dual criminality in respect of alleged offence.

14. The Applicant has sought to remedy this defect by requesting the issuing authority to confirm that the offence ticked in the warrant in purported compliance with Article 2.2, being "crime against sexual freedom or decency to the prejudice of a minor", is intended to be covered by the offence of "sexual exploitation of children and child pornography" which is the fourth offence in the list of 32 offences at Article 2.2 of the Framework Decision. By letter dated 25th April, 2014, the issuing authority, being the Regional Court in Poznan, confirmed that the offence described in s. E.I of the warrant is covered by the offence of sexual exploitation of children and child pornography within the meaning of Article 2.2 of the Framework Decision. In the court's view this is not sufficient. There is a clear error on the face of the warrant. Accordingly, the court holds that there is a manifest error such that the Applicant is not entitled to rely on the exemption provided by Article 2.2 from the need to prove dual criminality or correspondence in respect of the first offence alleged in the warrant.

Correspondence

15. It follows from this finding that the Applicant has to establish correspondence or dual criminality in respect of all three offences alleged in the warrant. The Applicant seeks to establish correspondence with three offences in this State, namely Organisation of Prostitution contrary to s. 9 of the Criminal Law (Sexual Offences) Act 1993, Living on Earnings of Prostitution contrary to s. 10 of the Criminal Law (Sexual Offences) Act 1993, and thirdly, Brothel Keeping contrary to s. 11 of the Criminal Law (Sexual Offences) Act 1993. Particular reliance was placed on s. 10 of the Criminal Law (Sexual Offences) Act 1993, that is Living on the Earnings of Prostitution. That Act provides at s. 10(1) that:

"A person who knowingly lives in whole or in part on the earnings of the prostitution of another person and aids and abets that prostitution is guilty of a summary offence."

The Respondent contends that the offences as set out in the warrant merely allege that the Respondent profited financially from prostitution but is silent on the issue of aiding and abetting and that accordingly, there is no correspondence between the offence alleged and any offence in this jurisdiction. The requirement in this jurisdiction of the element of aiding and abetting is necessary in order to avoid the criminalisation of any person who conducts regular business with a prostitute.

16. The Applicant, being aware of the need to prove correspondence in relation to offences 2 and 3 in the warrant and sought further information of the facts and wrote to the issuing authority on 5th March, 2014, asking it to elaborate on the alleged role or acts of the Respondent in committing the offences described at s. E.2.II and III, for example, was the Respondent actively engaged in controlling, directing, organising or facilitating the prostitution of the women in question. The request went on to say that the information is required in order to assist in establishing a corresponding offence under Irish law. In reply, the issuing authority forwarded a section of the indictment proffered against the Respondent which is dated 29th July, 2005, in Poznan. The additional information states that the Respondent is the owner of a business in the form of an escort agency, and that together with two named individuals the Respondent had profited financially from another person's prostitution activities in the form of sexual intercourse and other sexual activities performed by three named women, one of them a minor. The indictment goes on to give a statement of reasons. It says the District Prosecutor's office for the District of Poznan-Stare Miasto supervised preliminary criminal proceeding against Maria Ordak Naskret and other persons suspected of committing offences under Article 204(2) of the Polish Criminal Code and other. In the course of preliminary proceedings based on gathered evidence in the form of witness statements, searches of various premises and partially the statement given by the Respondents, the following factual circumstances were established. In the course of their official and undercover operations, officers from the Municipal Police Station in Poznan, in particular through interviewing persons engaged in prostitution and by conducting searches of the premises of various escort agencies located in the City of Poznan and its environs, established the following: between 15th August, 2004 and 19th August, 2004, the Respondent and two other named men profited financially from prostitution services rendered by Joanna Stepinska, a minor, and furthermore between the end of April, 2004 and May, 2004 they profited financially from prostitution services rendered by Alicja Bedyniak and Agnieszka Szczerbal. It further states that when questioned as a suspect the Respondent did not admit to the offences he had been charged with and stated that he believed them to be false accusations. He stated that the women employed in his club did not render any sexual services.

Decision

17. As set out by the Supreme Court in *Attorney General v. Dyer*, the inquiry as to whether or not correspondence is established is a fact based inquiry. The principles as set out by Fennelly J. are:-

"1. In considering whether correspondence has been established the court looks to the facts alleged against the subject of their quest as opposed to the name of the offence for which he or she is sought in the requesting state and considers whether these facts or this conduct would amount in this State to a crime of the necessary minimum gravity;

2. In considering correspondence therefore the court is concerned not with the name of the offence in the requesting country but the criminal conduct alleged in the request or warrant; and

3. In the absence of anything suggesting that the words used in the warrant had a different meaning in the law of the requesting state, the question of correspondence was to be examined by attributing to such words the meaning they would have in Irish law."

18. The facts alleged in this case as established by the warrant and the additional information contained in the "indictment" are that the Respondent was the owner of an escort agency, that the police authorities in Poznan had conducted an investigation of escort agencies in Poznan through interviewing persons engaged in prostitution and by conducting searches of the premises of various escort agencies located in the City of Poznan and as a consequence of those interviews and searches, concluded that the Respondent together with two other named men were profiting financially from prostitution. The additional information that the Respondent was allegedly the owner of an escort agency and that investigations of that escort agency indicated that escorts were engaged in prostitution is sufficient to establish the additional element of aiding and abetting prostitution which is required for correspondence with an offence in this State. When interviewed as a suspect, the Respondent allegedly did not deny that he was the owner of an escort agency but is alleged to have stated that the women employed in his club did not render any sexual services.

19. For the foregoing reason based on the offences set out in the warrant and the additional information supplied by the issuing authority on 11th March, 2014, the court is satisfied that correspondence is established in relation to all three offences set out in the warrant. Accordingly, the court proposes to make an order directing that the Respondent be surrendered to such person as is duly authorised by the Republic of Poland to receive him.



