Neutral Citation [2015] IEHC 664

THE HIGH COURT

[2015 No. 52 EXT]

BETWEEN

THE MINISTER FOR JUSTICE AND EQUALITY

APPLICANT

AND

RAFAL DAMIAN FISZER

RESPONDENT

JUDGMENT of Ms. Justice Donnelly delivered the 27th day of October, 2015.

1. The respondent is sought by Poland to serve a sentence of three years imprisonment imposed upon him on 25th August, 2008 in respect of ten offences. The only contentious issue in the case is whether his surrender is prohibited under s. 45 of the European Arrest Warrant Act, 2003, as amended ("the Act of 2003").

Section 45 of the Act of 2003

2. The European arrest warrant ("EAW") in this case was dated 28th September, 2010. Point (d) of the EAW was drafted in accordance with the style of warrant annexed to the Framework Decision of 13th June, 2002 (2002/584/JHA) on the European arrest warrant and the surrender procedures between Member States ("the 2002 Framework Decision"). At point (d) of the EAW, the issuing judicial authority had crossed out the two available options. I am satisfied that this is usually intended to indicate, and did indicate in this case, the view of the issuing judicial authority that the respondent had appeared in person at his trial.

3. The Framework Decision of 26th February, 2009 (2009/299/JHA) on the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial ("the 2009 Framework Decision") amended the form of the EAW to provide for the completion of a new point (d). The central authority, on receipt of the EAW, sent a request that point (d) be completed in the new format. In reply, the issuing judicial authority forwarded a completed point (d) in the new format required by the 2009 Framework Decision. The completed point (d) utilised a slightly different paragraph numbering system from that contained in s. 45 of the Act of 2003 as amended. This makes no substantive difference to these proceedings, but for ease of comprehension, I will use the numbering system set out in section 45.

4. Point (d) as forwarded by the issuing judicial authority indicates "[n]o, the person did not appear in person at the trial resulting in the decision." Under point (d) 3, in answer to the question "[i]f you have ticked the answer 'No', please confirm the existence of one of the following:", the issuing judicial authority indicates as follows:

> "c. being aware of the scheduled trial, the person had given a mandate to a legal counsellor, who was either appointed by the person concerned or by the State, to defend him or her at the trial, and was indeed defended by that counsellor at the trial;"

5. Somewhat confusingly, under part 3.3 of point (d), the issuing judicial authority crossed out virtually everything except one of the alternative explanations, namely that the person did not request a retrial or appeal within the applicable time frame. In other words, the condition precedent, namely that the person was served with the decision, which triggers the alternatives was not ticked.

6. The condition precedent within 3.3 having been crossed out, the remainder of that part has no standalone meaning. Without the condition precedent being ticked, I am satisfied that the issuing judicial authority did not intend to rely on point 3.3 to establish that the conditions under point (d) have been met as regards trial *in absentia*. I am satisfied that the reference to the lack of a request for a retrial or appeal is simply a statement of fact by the issuing judicial authority, *i.e.* it is making the point that the respondent did not request a retrial or an appeal.

7. At part 4 of point (d), the issuing judicial authority provided the following information:

> "The convicted person was advised during the proceedings on the duty to inform about any change of whereabouts. During the proceedings he was represented by a court-appointed counsel and knew who was his defence counsel. Damian Fiszer appeared for the trial on 20 March 2007 and gave his correspondence address. He also appeared for the trial on 14 April 2008 and was summoned in person on 16 June 2008, when he did not appear. When summoned for the next trial on 18 August 2008, the convicted person did not collect the summons, yet due to it being sent properly with an advice note, it was deemed properly served. He did not appear for that trial, yet his defence counsel did. The date of issuing the decision was adjourned then, of which he knew due to having been properly summoned for the trial and having a defence counsel. On 25 August 2008 the verdict was pronounced, against which neither the convicted person nor his defence counsel appealed."

8. The central authority engaged in further correspondence apparently with a view to gaining an understanding as to which dates were being indicated as trial dates. By the completion of the correspondence, the issuing judicial authority had confirmed that the court proceedings were commenced at a trial on 20th March, 2007 at which the indictment was read and the respondent was present. The next trial was held on 12th April, 2007 at which the respondent was present and provided a brief explanation in respect of certain matters. This included an admission to one of the offences but a denial of other acts, together with a refusal to provide any explanation. The issuing judicial authority confirmed that subsequent trials were held on 13th June, 2007, 22nd August, 2007, 5th September, 2007, 9th November, 2007, 14th January, 2008, 11th February, 2008, and 14th April, 2008, on each occasion at which the respondent was present. The issuing judicial authority then stated that the trials of 16th June, 2008 and 18th August, 2008 were held in the absence of the respondent who had, according to Polish law, been properly notified. The verdict was given on 25th August, 2008, and neither the respondent nor his counsel was present on that date as presence is not compulsory and notification of the trial date had been sufficient. There is an express statement that the respondent's defence counsel was present at all trials

between 20th March, 2007 up to and including 18th August, 2008.

9. On affidavit, the respondent stated that he left the Republic of Poland in May 2008 and initially spent a number of months in Belfast. He did not indicate when he headed south of the border, but it appears he has been living in this jurisdiction for some time. Of particular note is that at para. 4 of his affidavit, he stated: "I say that a lawyer was appointed by the Court to represent me in the proceedings the subject matter of the European Arrest Warrant. I say that once I left Poland I did not keep in touch with this lawyer who did not have any instructions to act after this date."

Submissions
10. Counsel for the minister relied upon the interpretation of s. 45 set out by this court in *Minister for Justice and Equality v. A.P.L.* [2015] IEHC 458. She submitted that under s. 45, a person has appeared in person at the proceedings resulting in the sentence or detention order in respect of which the EAW was issued, where he or she was present at the trial at which his or her guilt or innocence has been determined.

11. Counsel for the minister submitted that in line with the decision in *Minister for Justice and Equality v. Surma* [2013] IEHC 618, as applied in *A.P.L.*, the court was entitled to go behind the indication given by the issuing judicial authority that the respondent had not appeared at the trial. She referred in particular to para. 36 of Surma and the approval of that passage by the Court of Appeal in *Minister for Justice and Equality v. Palonka* [2015] IECA 69.

12. Counsel submitted there was cogent evidence to show that the issuing judicial authority was in error in saying that the respondent did not appear at the trial. Section 45 required presence at the proceedings at which guilt or innocence was to be determined. It was submitted that the entirety of the information showed that the trial had commenced at an early stage and that he had been present at those proceedings, except on the two dates specified. His presence on the dates indicated amounted to presence at his trial.

13. Counsel on behalf of the respondent submitted that, if counsel for the minister was correct and that there were manifest errors in the EAW, then the court could not rely upon the EAW at all. He submitted that in those circumstances it was the equivalent to no point (d) having been filled in. He submitted that *Minister for Justice and Equality v. Palonka* established that there had to be a completed point (d) in the EAW.

14. Counsel further pointed to the query sent by the central authority to the issuing judicial authority. He submitted that despite requests, the issuing judicial authority had not confirmed on which days the issue of guilt or innocence was determined. He submitted that there were a number of trial dates but that of significance was the fact that his client left on 18th May, 2008 and that there were at least two trial dates after that date. He submitted that it had to be accepted that his client was not present at the trial. Further, he submitted that there was no notification of his client of the further trial dates. He submitted that after his client had left Poland, the lawyer had no instructions to act. Counsel relied upon the case of *Minister for Justice Equality and Law Reform v. Sliczynski* [2008] IESC 73 and to the *dicta* of Murray C.J. at para. 17 of that judgment to the effect that under the former s. 45, actual notification was required.

The Court's analysis and determination on the Section 45 issue
15. In accordance with the decision in *Palonka*, the Court has jurisdiction, and indeed an obligation, to review the assessment of the issuing judicial authority of the scenarios set out under 3.1b, 3.2 or 3.3 of point (d). In light of the particular facts of that case, the ratio of that decision does not purport to extend to review of the designation by the issuing judicial authority that the requested person did not appear in person at the trial resulting in the decision.

16. The High Court has held, in *Minister for Justice and Equality v. E.P.,* (6th October, 2015), that the designation by the issuing judicial authority of trial in the absence of the requested person does not engage s. 45 or s. 16 (in so far as it relates to s. 45), where the EAW was issued for the prosecution of offences and what was being referred to was pre-trial detention. The argument of the minister is entirely different here. Unlike the situation in *E.P.,* there has been a trial in this case, but the minister has submitted that the designation of trial *in absentia* is wrong based upon this jurisdiction's legislative provisions regarding what constitutes a trial.

17. Not every case where an accused is absent from a trial requires surrender to be prohibited. At the very least, if the actual designation by the issuing judicial authority at point (d), together with any necessary explanation contained in the EAW, is sufficient to comply with the requirements of s. 45, then it is appropriate that this Court, as executing judicial authority, would act upon that designation. I propose, therefore, to consider at the outset, whether, on the basis of the Polish designation in relation to trial *in absentia*, the provisions of s. 45 have been complied with in these proceedings.

18. The Table at s. 45 is derived from, and required by, the 2009 Framework Decision. Section 45 provides that a person shall not be surrendered under the Act if he or she did not appear in person at the proceedings resulting in the sentence or detention order in respect of which the EAW was issued, unless the EAW indicates the matters required by points 2, 3 and 4 of point (d) of the form of the warrant in the Annex to the 2009 Framework Decision. In *Minister for Justice and Equality v. A.P.L.,* the court held that there was no literal interpretation that would bring total clarity to the words 'proceedings' and 'trial' contained within section 45. In accordance with the established jurisprudence, it is quite proper, therefore, for this Court to interpret these aspects of s. 45 as far as possible in the light of the wording and purpose of the Framework Decisions in order to attain the result which they pursue.

19. During the course of the s. 16 hearing, I raised with both parties the difference in wording in the Table at s. 45, between on the one hand points 3.1a and 3.1b, which refer to scheduled date and place of the trial, and the wording in point 3.2 which refers to scheduled trial. The recitals to the 2009 Framework Decision also reflect that difference in wording. It is appropriate and proper that the Recitals to the 2009 Framework Decision be considered in the interpretation of the Table set out at point (d) to section 45.

20. The first recital of the 2009 Framework Decision narrates that the rights of an accused person to appear in person at the trial is included in the right to a fair trial provided by Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR") as interpreted by the European Court of Human Rights ("ECtHR"). The recital recounts that the ECtHR has also declared that the right of the accused person to appear in person at the trial is not absolute and that under certain conditions the accused person may, of his or her own free will, expressly or tacitly but unequivocally waive that right.

21. The seventh recital asserts that the recognition and execution of a decision rendered following a trial at which the person concerned did not appear in person should not be refused if, either he or she was summonsed in person and thereby informed of the scheduled date and place of the trial which resulted in the decision, or if he or she actually received by other means official information of the scheduled date and place of that trial in such a manner that it was unequivocally established that he or she was aware of the scheduled trial. That language is reflected in point (d) 3.1a and point (d) 3.1b of section 45.

22. The eighth recital refers to the right of a person to appear in person at the trial and recounts that in order to exercise this right, the person concerned needs to be aware of the scheduled trial. It goes on to recite that under the 2009 Framework Decision, the person's awareness of the trial should be ensured by each Member State in accordance with its national law, it being understood that this must comply with the requirements of the ECHR. Thereafter, it is recited that, in accordance with the case law of the ECtHR, when considering whether the way in which the information is provided is sufficient to ensure the person's awareness of the trial, particular attention could, where appropriate, also be paid to the diligence exercised by the person concerned in order to receive information addressed to him or her. It is to be noted that the reference in the eighth recital is to awareness of the "scheduled trial".

23. Recital nine declares the scheduled date of a trial may for practical reasons initially be expressed as several possible dates within a short period of time. That is reference to a scheduled date of trial but even then the scheduled date can be a number of dates within a short period of time.

24. Recital ten is the recital to which the requirements of point (d) 3.2 most directly relate. This recital provides that the recognition and execution of a decision rendered following a trial at which the person concerned did not appear in person should not be refused where the person concerned, being aware of the scheduled trial, was defended at the trial by a legal counsellor to whom he or she had given a mandate to do so, ensuring that legal assistance is practical and effective. In this context, it should not matter whether the legal counsellor was chosen, appointed and paid by the person concerned or whether this legal counsellor was appointed and paid by the State, it being understood that the person concerned should deliberately have chosen to be represented by a legal counsellor instead of appearing in person at the trial. The appointment of the legal counsellor and related issues are a matter of national law.

25. In the view of the Court, the 2009 Framework Decision makes a deliberate distinction between knowledge of the date and place of the scheduled trial on the one hand and "scheduled trial" on the other. Indeed, point (d) 3.2 would be otiose if the requirement is that a person must be made aware of the actual date and place of the trial by means of some official communication, be it by summons or otherwise. Provision for that requirement is already contained in 3.1a and 3.1b of point (d) of section 45.

26. Point (d) 3.2 makes provision for the situation where a person knows of their scheduled, or in other words, their planned trial and opts to give a mandate to a lawyer to represent him or her at that trial. In those circumstances, the person has waived his or her right to attend at the trial.

27. The importance of the distinction between "scheduled date and place of the trial" and "scheduled trial", is one that is perhaps more immediately apparent from the French version of the 2009 Framework Decision. In the French version under point (d) 3.1a and point (d) 3.1b, the requirement is that the person be informed "…de la date et du lieu fixés pour le procès…". In contrast, also in the French version, point (d) 3.2 commences "ayant eu connaissance du procès prévu…". Under point 3.1a and point 3.1b, the reference is to a fixed or set day thereby conveying a sense of permanence with respect to the date of the trial. Under point 3.2, the reference is to an anticipated or intended trial. In short, the emphasis in point 3.1a and point 3.1b is on the actual date for the trial, whereas under point 3.2 it is on the anticipation of the trial.

28. In ticking point (d) 3.2, the issuing judicial authority is relying upon the fact of the respondent's awareness of the scheduled trial and that he gave a mandate to a legal counsellor. In all of the information provided to this Court by the issuing judicial authority, which information is not contested by the respondent, it is demonstrated that the respondent was present throughout the trial proceedings from March 2007 up to and including 14th April, 2008. The information provided by the issuing judicial authority establishes that this was an ongoing trial. It is also clearly established that the respondent was represented by legal counsel throughout that period and that he knew this counsel. In May 2008, he left the Polish Republic and came to the island of Ireland.

29. I have no doubt whatsoever on the basis of the information before me, provided by the issuing judicial authority and not contested by the respondent, that the respondent was aware that his trial was ongoing. The respondent was, therefore, aware that there was a scheduled trial – he was present at a trial that was being adjourned from time to time. He may not specifically have been specifically aware of the next date but he was aware that there was going to be a further trial date and was therefore aware of his scheduled trial.

30. The question then arises as to whether the respondent had given a mandate to a legal counsellor to defend him at the trial. From the provisions of the 2009 Framework Decision and s. 45, it is permissible for a legal counsellor to be appointed by the court. That had occurred during the respondent's trial. This legal counsellor had been appearing for the respondent for over a year during the course of the trial proceedings.

31. I am satisfied that the respondent had undoubtedly given a mandate at the outset of the trial to the lawyer who appeared for him. Nonetheless, the respondent submitted that this trial lawyer had no mandate to appear for him. He relied upon his averment that he did not keep in touch with the lawyer "…who did not have any instructions to act after this date." This averment is quite disingenuous in its careful obfuscation of the issue. It is not an indication that he withdrew his mandate to the lawyer. In fact, it is really stating the opposite, there was no positive withdrawal of the mandate, there was simply a failure on his part to keep in touch with his lawyer. The respondent's statement concerning lack of instructions is inextricably linked to his statement that he did not keep in touch with his lawyer. In those circumstances, the claim that the lawyer did not have any instructions to act after that date is an inadequate response to the statement in the EAW that the lawyer did have a mandate to act and did indeed act.

32. This Court must place, and does place, mutual trust and confidence in the statements in the EAW and accompanying documentation provided by the issuing judicial authority. These documents indicate that this respondent had given a mandate to the lawyer. Furthermore, the Court is entitled to take into account that a lawyer will, in the normal course, only act on instructions. The bare reference by the respondent to not keeping in touch with the lawyer leading to his implication that the lawyer had no longer any instructions to act, does not amount to a direct statement that the instructions were actually withdrawn.

33. The reality in this case is that the respondent was aware of the trial that was planned and that, on the information provided by the issuing judicial authority, was in being. He knew the trial was in being (he acknowledges in his own affidavit that he knew of the "proceedings") and he left Poland. In those circumstances, I find that he deliberately chose to flee from Poland during the course of his trial. He had given a mandate to the lawyer who was acting for him during the course of that trial and I am quite satisfied from the evidence before me that that mandate continued throughout the trial. In those circumstances, the provisions of s. 45 of the Act of 2003 have been complied with. There are no grounds for refusing to surrender him.

34. In the circumstances set out above, it is unnecessary to reach a conclusion on the minister's argument that, despite the designation by the issuing judicial authority, the points set out in the Table at s. 45 are not relevant as the respondent appeared in person at the proceedings resulting in the sentence or detention in respect of which the EAW was issued.

Other Section 16 issues
35. The High Court may only surrender a person if all the requirements contained in s. 16 of the Act of 2003, as amended, are satisfied. Having scrutinised the EAW and additional documentation, I am satisfied that the person before me is the person in respect of whom the EAW has issued. I am satisfied that the EAW was endorsed by the High Court in accordance with s. 13 of the Act of 2003. I am satisfied that the respondent's surrender is not prohibited by s. 38 of the Act of 2003, as each of the ten offences has been indicated as a list offence within the meaning of Article 2 para. 2 of the 2002 Framework Decision and minimum gravity requirements are satisfied. I am satisfied that his extradition is not prohibited under ss. 21A, 22, 23 or 24 of the Act of 2003. I am satisfied that his surrender is not otherwise prohibited under Part 3 of the Act of 2003.

Conclusion
36. For the reasons set out above, I am satisfied that I may make an order under s. 16 of the Act of 2003, as amended, for the respondent's surrender to such other person as is duly authorised by Poland to receive him.