

THE HIGH COURT

[2021] IEHC 89
[2020 No. 197 EXT.]

BETWEEN

MINISTER FOR JUSTICE AND EQUALITY

APPLICANT

AND

SALMAN SHAHZAD

RESPONDENT

JUDGMENT of Mr. Justice Paul Burns delivered on the 8th day of February, 2021

1. By this application the applicant seeks an order for the surrender of the respondent to the United Kingdom of Great Britain and Northern Ireland ("the UK") pursuant to a European arrest warrant, dated 20th March, 2020 ("the EAW"), issued by District Judge John Zani, Westminster Magistrates' Court, as the issuing judicial authority. The surrender of the respondent is sought in order to execute a sentence of 8 years' imprisonment imposed upon him in respect of an offence of conspiracy to defraud, all of which remains to be served.
2. The EAW was endorsed by the High Court on 18th August, 2020 and the respondent was arrested and brought before the High Court on 9th September, 2020.
3. I am satisfied that the person before the Court is the person in respect of whom the EAW was issued. This was not put in issue by the respondent.
4. I am satisfied that none of the matters referred to in ss. 21A, 22, 23 and 24 of the European Arrest Warrant Act, 2003, as amended ("the Act of 2003"), arise and that the surrender of the respondent is not prohibited for the reasons set forth therein.
5. I am satisfied that the minimum gravity requirements of the Act of 2003 are met. The term of imprisonment in respect of which the respondent's surrender is sought is 8 years.
6. Part E of the EAW indicates that the sentence in question was imposed in respect of a single offence and the circumstances of the offence, including the extent of the respondent's participation in same, is set out. As regards correspondence, by virtue of s. 38(1)(b) of the Act of 2003, it is not necessary for the applicant to show correspondence between an offence in the EAW and an offence under Irish law where the offence in the warrant is an offence to which article 2(2) of the Council Framework Decision dated 13th June, 2002 on the European Arrest Warrant and the Surrender Procedures Between Member States ("the Framework Decision") applies and, under the law of the issuing state, the offence is punishable with a maximum term of not less than 3 years imprisonment. In this instance, the issuing judicial authority has certified that the offence is an offence to which article 2(2) of the Framework Decision applies, the offence is punishable by imprisonment for a maximum period of not less than 3 years and has indicated the relevant box at part E of the EAW for "*fraud including that affecting the financial interests of the European Communities within the meaning of the Convention of 26 July 1995 on the protection of the European Communities' financial interests*". There is nothing in the EAW that gives rise to any ambiguity or perceived manifest error, such as

would justify this Court in looking behind the certification in the EAW. No issue was taken in respect of correspondence.

7. The respondent objected to his surrender on the following grounds:-
 - (i) surrender is precluded by reason of the sentence having been imposed *in absentia* where the requirements of s. 45 of the Act of 2003 were not met; and
 - (ii) surrender is precluded by reason of the fact that the enforceable judgment as set out at part B of the EAW contains a recommendation for deportation and the respondent will not have the protection of the Court of Justice of the European Union ("the CJEU") in respect of such a process.

Section 45 of the Act of 2003

8. At part D of the EAW, the issuing judicial authority has indicated that the respondent did not appear in person at the trial resulting in the decision and its reliance upon the equivalent of paragraph 3.1a of the table set out at s. 45 of the Act of 2003 that "*the person was summoned in person on 11/04/2013... and thereby informed of the scheduled date and place of the trial which resulted in the decision and was informed that a decision may be handed down if he or she does not appear for the trial*".
9. The respondent submitted that part D of the EAW had been incorrectly completed by the issuing judicial authority. Mr. Tony Hughes, solicitor for the respondent, swore an affidavit dated 22nd October, 2020, in which he averred that the respondent had instructed him that he had not received any notification as set out in the EAW. The affidavit was accepted into evidence by the Court due to pandemic-related difficulties as regards the respondent swearing an affidavit in custody.
10. By way of additional information dated 26th November, 2020, the UK indicates that as regards the offence referred to in the EAW, there had been two aborted trials, the first taking place between 15th April, 2013 and 31st May, 2013, and the second taking place between 30th September, 2013 and 3rd October, 2013. The case was then listed for mention on 18th October, 2013 and a new trial was set for 31st March, 2014. Confirmation that the respondent was present was awaited. A record of hearing dates is included that indicated the respondent was represented at all hearings. It is stated that the reference at part D of the EAW to the date 11th April, 2013 was an error and referred to his appearance in respect of a separate matter. It clarifies that as regards the offence referred to in the EAW, the respondent's first appearance in the Magistrates' Court was on 6th December, 2013, when he was sent forward to Harrow Crown Court for a hearing on 19th December, 2013. The additional information goes on to state that the trial took place on 31st March, 2014 and concluded on 17th June, 2014. The respondent had failed to appear at Harrow Crown Court on 28th February, 2014 for a pre-trial review and he must have been required to attend as a warrant for his arrest was issued. The respondent had breached the electronic tag condition of his bail on 4th February, 2014 and he had not been seen at his address after that. The purpose of the pre-trial hearing was to ensure all parties were in attendance and ready for trial.

11. It is noteworthy that no reference to the earlier aborted trials was made in the affidavit sworn by Mr. Hughes on the respondent's instructions. In the course of submissions, counsel for the respondent informed the Court that the respondent did not recall cancelling the retainer given to his lawyers.
12. By way of additional information dated 11th January, 2021, the issuing state clarifies that the reference at part D of the EAW to the respondent being summoned in person on 11th April, 2013 was incorrect. It indicates that the respondent was sent for trial on 6th December, 2012, and his first appearance in Harrow Crown Court on the charge to which the EAW relates was on 19th December, 2012. It confirms that the respondent was present at the two aborted trials between 15th April to 31st May, 2013, and 30th September to 3rd October, 2013. On 18th October, 2013, a new trial date was fixed for 31st March, 2014. The respondent was not present on 18th October, 2013, for fixing the trial date but he was legally represented at same and it was the responsibility of his lawyers to inform him of any decisions of the court. When the respondent failed to attend the pre-trial hearing on 28th February, 2014, a bench warrant was issued. He was legally represented at all times. The respondent had appointed his own solicitors and counsel.
13. The solicitor for the respondent, Mr. Tony Hughes, swore a supplemental affidavit in which he points out that in the records provided by the issuing state, some of the names of the legal representatives of the prosecution and defence appeared to be the same or interchanged. He avers that the respondent had not been present for the setting of the date for the third trial, had not been notified personally by the crown prosecution service of the date for trial and had not appeared at the trial. He further avers that the respondent instructed him that he had no contact with his lawyers in the aftermath of the second aborted trial and did not specifically mandate them to appear on his behalf at the third trial.
14. In *Minister for Justice and Equality v. Fiszler* [2015] IEHC 664, Donnelly J. stated at paras. 26-29:-

"[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 the trial. In those circumstances, the person has waived his or her right to attend at 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 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."

15. In *Minister for Justice and Equality v. Lipatovs* [2019] IEHC 126, Donnelly J. held at para. 52:-

"[52] ... A person who is notified of their rights in respect of being present at a trial and who mandates a person to appear for them at that trial is clearly given notice of both the trial and the fact that the mandate will include any sentencing matter."

Donnelly J. rejected the respondent's contention in that case that, even if he had waived his right to be present at his trial, he had not waived his right to be present at the sentencing, stating at para. 48:-

"[48] ... [T]he concept of trial encompasses the sentence hearing. Therefore, if there has been a waiver of the right to be present at the trial, it can be said that there is a waiver of the right to be present at the sentence."

16. I am satisfied that the respondent was at all material times fully aware of the fact that he was involved in an ongoing trial process in respect of which he had given a mandate to his legal representatives to act on his behalf. There had been two earlier aborted trials. I am satisfied that the respondent's lawyers were in attendance at the hearing to fix a date for the third trial, so that the respondent can be taken to have been informed of the trial date for the third trial. I am satisfied that the respondent had mandated his lawyers to act on his behalf as regards that trial, up to and including sentence. There is no evidence before the Court to indicate that the mandate given by the respondent to his lawyers was ever withdrawn, and in particular, the respondent has not asserted through his solicitor's affidavits that he withdrew such mandate.
17. I am satisfied that the requirements as set out at point 3.2 of table D of s. 45 of the Act of 2003 have been complied with as regards the trial, including the sentence, the subject matter of these proceedings. Furthermore, I am satisfied that in so far as the respondent absented himself from the proceedings of which he was aware, this was an informed decision on his part not to take any further personal part in the proceedings and to effectively waive his right to be in attendance. He continued to be legally represented throughout the proceedings. There is no suggestion that he withdrew the mandate of his legal team to represent him. Bearing in mind the decision of the Supreme Court in *Minister for Justice v. Zarnescu* [2020] IESC 59, I am satisfied that the defence rights of

the respondent were adequately protected and were not breached. I dismiss the respondent's objection to surrender based on s. 45 of the Act of 2003.

Deportation issue

18. Counsel on behalf of the respondent submitted that surrender is precluded by reason of the fact that the enforceable judgment as set out at part B of the EAW contains a recommendation for deportation and the respondent will not have the protection of the CJEU in respect of such process as the UK has withdrawn from the European Union ("the EU"). I note that the reference in Part B of the warrant is to "*recommended for deportation*" and the Court was not addressed as to the effect of such recommendation. Counsel did not refer the Court to any particular provision in the Act of 2003 or to any domestic or European authorities in respect of this submission. As the Court commenced delivering judgment, the respondent sought to personally hand in a decision of the CJEU. The Court received the report of the decision and put the judgment back to consider same. The reported decision is that of the Grand Chamber in *Chenchoolia v. Minister for Justice and Equality* (Case C-94/18). Having considered the decision, I find it not to be relevant to the issues to be decided in this application, but rather concerns the rights of an EU citizen's family in the context of immigration proceedings when an EU citizen is no longer resident in the State.

18. The Court is obliged to deal with this matter in accordance with the Act of 2003. Following the UK serving notice of its intention to leave the EU, an agreement was entered into between those parties, known as the EU - UK Withdrawal Agreement 2019, agreed on 17th October, 2019 ("the Withdrawal Agreement"). Article 62.1(b) of the Withdrawal Agreement provides that:-

"(b) *Council Framework Decision 2002/584/JHA shall apply in respect of European arrest warrants where the requested person was arrested before the end of the transition period for the purposes of the execution of a European arrest warrant, irrespective of the decision of the executing judicial authority as to whether the requested person is to remain in detention or be provisionally released.*"

The "*transition period*" referred to ended at 11:00 p.m. on 31st December, 2020.

19. A statutory instrument has been signed which is designed to give domestic effect to such agreement, viz. European Arrest Warrant Act, 2003 (Designated Member States) (Amendment) Order, 2020 (S.I. No. 719 of 2020). In simple terms, this designates the UK as a Member State for the purposes of the Act of 2003, provided the European arrest warrant was issued by a judicial authority in the UK and the requested person was arrested prior to 11:00 pm on 31st December, 2020 for the purpose of execution of the European arrest warrant. It is not disputed that by virtue of S.I. No. 719 of 2020, the Framework Decision and the Act of 2003 continue to apply to this matter.

20. In *Minister for Justice and Equality v. O'Connor* [2018] IESC 47, the Supreme Court considered the decision of the CJEU in RO (Case C-327/18 PPU) (2018) and at para. 4.10, Clarke C.J. pointed out the effect of that decision to be as follows:-

"4.10. Therefore, a mere theoretical possibility of impairment of rights is not sufficient to override the obligation to surrender."

Clarke C.J. went on to state at para. 4.13:-

"4.13. The key question advanced to the CJEU was as to whether, in all the relevant circumstances, the effect of Brexit was to prevent surrender either in all cases, no cases or in certain circumstances only. In essence, the answer of the CJEU was to say that it was possible that Brexit might prevent surrender but only where there were substantial grounds to believe that the person concerned was at risk of being deprived of rights recognised by the Charter and the Framework Decision."

21. The essential question is whether this Court is satisfied that the respondent has established substantial grounds for believing that, if surrendered, there is a real risk that his fundamental rights under the Charter of Fundamental Rights of the European Union, the European Convention on Human Rights or the Constitution will be breached or that the Framework Decision will not be given effect to. The speculative assertions made by the respondent fall far short of the cogent evidence required to establish that there are such substantial grounds.
22. There is no reasonable basis on which the Court could conclude that there is a real risk that, if surrendered, the respondent's fundamental rights will not be respected. No evidence was put before the Court to support such a submission.
23. Furthermore, I note that s. 4A of the Act of 2003 provides for a rebuttable presumption that an issuing state will comply with the requirements of the Framework Decision, which in turn incorporates respect for fundamental human rights. The respondent has not adduced any evidence to rebut the said presumption.
24. I dismiss the respondent's objection based upon the reference in the enforceable judgment to a recommendation that he be deported.

Conclusion

25. I am satisfied that surrender of the respondent is not precluded by of part 3 of the Act of 2003 or any of the provisions of the said Act.
26. Having dismissed the respondent's objections, it follows that this Court will make an order pursuant to s. 16(1) of the Act of 2003 for the surrender of the respondent to the UK.