THE HIGH COURT

[2023 No. 36 EXT.]

BETWEEN

MINISTER FOR JUSTICE AND EQUALITY

APPLICANT

AND

SB

RESPONDENT

Judgment of Mr. Justice Kerida Naidoo delivered on the 6th day of November, 2023.

1. By this application, the applicant seeks an order for the surrender of the respondent to the Republic of Croatia pursuant to a European Arrest Warrant dated 16th February 2023 ("the EAW"). The EAW was issued by a Judge of the Municipal Court of Osijek, as the Issuing Judicial Authority ("the IJA").

2. The EAW seeks the surrender of the respondent in order to prosecute her in respect of an alleged offence involving moving a child from the issuing State in breach of a court order.

3. The respondent was arrested on 9th March 2023, on foot of a Schengen Information System II alert, and brought before the High Court on the same date. The EAW was produced to the High Court on 20th March 2023.

4. I am satisfied that the person before the court, the respondent, is the person in respect of whom the EAW was issued. No issue was raised in that regard.

5. I am satisfied that none of the matters referred to in section 21A, 22, 23 and 24 of the European Arrest Warrant Act, 2003, as amended ("the Act of 2003"), arise for consideration in this application and surrender of the respondent is not precluded for any of the reasons set forth in any of those sections.

6. I am satisfied that the minimum gravity requirements of the Act of 2003 have been met. The offence in respect of which surrender of the respondent is sought carries a maximum penalty in excess of twelve months' imprisonment.

7. As surrender is sought to prosecute the respondent, no issue arises under s. 45 of the Act of 2003.

Lack of Clarity and Identity of Judicial Authority

8. The respondent objects to surrender on the basis that the warrant says that the decision upon which it is based is an *"Order of detention pending trial"* which is described as an *"Order brought by the County Court of Osijek dated 12 November 2019 under the file number Kir-464/2029-2".*

9. The respondent says that cannot be a valid decision to ground the issue of the EAW because it predates the culmination of the alleged offending on 10th December 2019. She

also says that it should be clear that any decision to prosecute is a decision that covers the entirety of the period to which the allegation relates.

10. It is apparent from the description of the offending in the body of the warrant that it relates to a period between September 2016 and 10th December 2019. The allegation is that the respondent took her child outside the territory of the issuing State and was thereby in breach of a court order of the issuing State granting specified periods of access to the child's father.

11. The decision of 12th November 2019 ordered detention of the respondent pending trial. It is therefore clear that a decision has been made to prosecute the respondent for the offence to which the warrant relates. On the respondent's own account, she had come to Ireland in 2016. The pre-trial detention order was one she obviously did not comply with. That led to the decision to issue the EAW, which is for the purpose of prosecuting the respondent for the offence to which the warrant relates. There is in principle no reason why the decision that leads to the issuing of an EAW cannot be made during the commission of an offence that by its nature consists of an allegation of ongoing criminality.

12. Furthermore, by correspondence dated 16th June 2023, the IJA has confirmed that a decision has been made to prosecute the respondent for the offending set out in the warrant at section e) from September 2016 to December 2019.

13. I am therefore satisfied that a decision was made to prosecute the respondent for the offence in respect of which surrender is sought, for the period set out in the warrant.

14. The respondent also objects to surrender on the grounds that the EAW issued under the hand of Judge Šimleša on 16th February 2023, in circumstances where section (i) of the warrant indicates that Judge Poštić is the authorised representative of the Municipal Court of Osijek, Criminal Division.

15. Compliance with the Framework Decision and the Act of 2003 requires that the warrant is signed by a judicial authority, or an authority subject to judicial oversight. In the instant case, the warrant was signed by a judge. No issue therefore arises in that regard.

16. I am satisfied that no issue arises under section 11 of the Act of 2003.

Correspondence

17. The respondent objects to surrender under section 38 of the Act of 2003 by reason of absence of correspondence.

18. The applicant says that the conduct outlined in the warrant corresponds with the offence of abduction of a child by a parent contrary to section 16 of the Non-Fatal Offences Against the Person Act, 1997. Under that section a person shall be guilty of an offence: *"who takes…a child under the age of 16 years out of the State…(a) in defiance of a court order, or (b) without the consent of each person who is a parent, or guardian or person to whom custody of the child has been granted by a court unless the consent of the court*

has been obtained." The applicant says that the conduct described in the warrant is captured by the relevant language of section 16 of the Act of 1997.

19. From the particulars of the alleged offending in the warrant it is apparent there was a court order providing for the father to have, *inter alia*, supervised access to the child at his residence.

20. The respondent says that she is the guardian of the child, not the father. She says, therefore, that section 16 of the Act of 1997 is not a corresponding offence because section 16(1)(b) of the Act makes it an offence to take a child from the State without the consent of each person who is a parent, or guardian or person to whom custody of the child has been granted by the court unless the consent of a court was obtained.

21. She also says that the child's father has not been deprived of custody or guardianship but has, at most, been hindered in his ability to have supervised visitation with the child. She submits that is not an offence that corresponds with *"abduction"* within the meaning of section 16 of the Act of 1997.

22. The test for correspondence is whether the conduct in the issuing State attributed to the respondent would be an offence under the law of the State if done here. The allegation in the warrant is not that the respondent took the child out of the issuing State without the consent of one of the child's parents, guardians or person to whom custody had been granted by the court. What is alleged is that there was a court order in place granting access to the child's father and removing the child from the State resulted in that order being breached. The applicant is therefore arguing correspondence on the basis of section 16 (1)(a) of the Act of 1997, not section 16 (1)(b). Section 16 1(a) of the Act of 1997 makes it an offence to remove a child from the State *"in defiance of a court order".*

23. I accept the applicant's submission that it is not necessary for the court to be satisfied that the allegation is that the respondent took the child out of the jurisdiction of the issuing State without the consent of the child's father, whether or not he is the child's guardian.

24. The respondent also submits there is no correspondence with 16(1)(a) of the Act of 1997 because the access order did not explicitly say that she was not to take the child out of the State.

25. The relevant order in this instance provided for the father to have supervised access to the child at his home. The effect of the court order granting access to the father requires that the child be in the state. The question is whether taking the child from, and keeping him out of, the issuing state would amount to *"defiance of a court order"* if done in the same circumstances in the State. Giving the word its ordinary natural meaning "defiance" means opposition, non-compliance, subversion or disobedience. The effect of taking the child out of the issuing State was to subvert the access order because it was not possible for the supervised access provision to be complied with.

26. The respondent also argues that correspondence cannot be established because section 16(3) of the 1997 Act provides for a defence to a charge of child abduction and it is not clear that if surrendered the respondent will be entitled to avail of such a defence to the offence in the issuing State.

27. Section 16(3) provides as follows:

"It shall be a defence to a charge under this section that the defendant—

(a) has been unable to communicate with the persons referred to in subsection (1)(b) but believes they would consent if they were aware of the relevant circumstances; or

(b) did not intend to deprive others having rights of guardianship or custody in relation to the child of those rights."

28. The applicant relies on section 5 of the Act of 2003, which provides that an offence specified in the relevant warrant corresponds to an offence under the law of the State *"where the act or omission"* that constitutes the offence so specified would, if committed in the State on the date on which the relevant arrest warrant is issued, constitute an offence under the law of the State. She therefore says that what the court is required to have regard to is the particulars of the alleged offending set out in the warrant and the fact that a particular defence may be available under the corresponding Irish legislation is not a matter that governs correspondence under the Act of 2003.

29. In that regard the applicant relies on the decision of Peart J. in *Minister for Justice, Equality and Law Reform v. Adam Walas* [2009] IEHC 129. That case concerned an allegation that the respondent had removed the chassis number from one car and applied it to another car. The contended for corresponding offence was contrary to a particular regulation governing the requirement to have chassis numbers exhibited on a vehicle. The regulation provided that certain classes of people would not be required to comply with the relevant regulation.

30. Peart J. ruled as follows:

"In my view correspondence is established with the offence put forward for correspondence in this State, and that the exception provided for in Article 21 is not relevant to that issue. I am satisfied that if the respondent did in this State what he is alleged to have done in the warrant he would commit the offence referred to. The fact that there may be a defence open to him in this State if he was to establish that he is a person not required to comply with that requirement in Article 12, he could of course mount that defence. But that does not mean that there is no corresponding offence in the State in respect of the offence alleged against him in the warrant."

31. The respondent says that the decision in *Walas* can be distinguished from the instant case because the court in that case was not explicitly dealing with a defence, rather the issue

was whether the respondent could have been in a class of exempted persons. In my view the ruling of the court in *Walas* is a principle of general application and supports the submission made by the applicant. The issue of correspondence turns on whether the acts set out in the warrant would, if done in the State, be an offence under the law of the State. The fact that the corresponding offence contended for has associated with it a defence is not part of the test when determining the issue of correspondence.

32. The respondent also argues that section 16(3) of the 1997 Act should not be construed as giving rise to a defence. I understand the argument to be that the fact that a person did not intend to deprive others having rights of guardianship or custody in relation to the child of those rights, is a feature the offence itself. I am satisfied that giving the words *"It shall be a defence to a charge under this section"* their ordinary meaning section 16(3) does provide for a defence and the reasoning in *Walas* applies to it.

33. There was further argument about whether or not section 16(3)(b) was intended as a defence to an offence under section 16(1)(a), as opposed to being a defence only to an offence under section 16(1)(b). Because I do not accept the respondent's main argument about the defence in section 16(3) that point does not have to be determined by me.

34. I am therefore satisfied that correspondence can be established between the offences referred to in the EAW and offences under the law of this State, namely an offence of abduction of a child contrary to section 16 of the Non-Fatal Offences Against the Person Act, 1997.

Extraterritoriality

35. The respondent objects to surrender under sections 10 and 44 of the Act of 2003. She says the place of commission of the alleged offence was not within the territory of the issuing State. The extraterritoriality argument is premised on the submission that surrender of the respondent is sought so that she can be prosecuted in the issuing State for events that occurred in this State and it is therefore a matter for the Irish authorities to prosecute.

36. Section 44 of the Act of 2003 provides that: *"A person shall not be surrendered under this Act if the offence specified in the European arrest warrant issued in respect of him or her was committed or is alleged to have been committed in a place other than the issuing state and the act or omission of which the offence consists does not, by virtue of having been committed in a place other than the State, constitute an offence under the law of the State."*

37. The respondent relies on *Attorney General v. Lee* [2017] IESC 68 in which the Supreme Court confirmed that the criminal law of most states is concerned with offences that have been committed within the territory of the state concerned and that the default position is that offences should be prosecuted where they are committed. That is an uncontroversial proposition. The respondent also relies on the *Minister for Justice v Bailey* [2012] 4 IR 1 in which France sought the extradition of a person for a murder that was committed in Ireland.

38. In the instant case the gravamen of the offending alleged is removing a child from the issuing State in breach of a court order and keeping the child outside the issuing State during the period to which the warrant relates. The act of removing the child was done within the territory of the issuing State and it is the on-going absence of the child from the issuing State that constitutes the breach of the court order. The requesting State has issued a warrant exercising jurisdiction over the offence and there is nothing about the nature of the offending that causes me to have any concern but that they are entitled to do so under their law.

39. Furthermore, the corresponding offence is one in which Ireland would be entitled to seek extradition of a suspect in precisely the same circumstances as those in which the requesting State seeks the surrender of the respondent. In my view, no extraterritoriality issue would arise in the State under section 16 of the 1997 Act and no such issue therefore arises in respect of the warrant before me.

40. I am therefore satisfied that no extraterritoriality issue arises that would be preclude surrender under the Act of 2003.

Section 37 – Right to liberty, her personal and family rights and the rights of her child

41. The respondent objects to surrender under section 37 of the Act of 2003 on the grounds of the breach of her Constitutional or her Convention rights, including her right to liberty and to her personal and family rights, including the rights of her child, as respectively enshrined in Article 40 of the Constitution and Article 8 of the Convention. The respondent also submits that her surrender would be contrary to the Charter of Fundamental Rights of the European Union.

42. This objection is grounded on the respondent's own affidavit, received on 20th April 2023, and that of her solicitor dated 2nd May 2023.

43. The contents of the respondent's affidavit are set out in her written submissions. In summary she says she is the person to whom the EAW relates and that she has been living in Ireland since 9th September 2016. She says she was in a relationship with her former husband ("DB") since 2007. She says she and her child were physically and emotionally assaulted, abused and deprived of basic needs by the child's father, who she says has a criminal record and criminal associates. The respondent avers that she is the child's sole guardian.

44. She says that on 4th September 2016, when the child was returned to her from DB, the child was exhausted and traumatised, that she took him to hospital, where he was reviewed, and a psychiatric report was prepared.

45. Thereafter the respondent resigned her job and, acting on what she says was professional advice, moved to Ireland in the interests of herself and her child. She says that DB did not leave them alone and instituted child abduction proceedings before the High Court, which were withdrawn in 2017. Psychiatric reports from Croatia and the report of a chartered psychologist in this jurisdiction are said to attest to *"the atrocious acts of*

abuse" perpetrated by DB. It is the opinion of the psychiatrist that DB not be permitted to be in close proximity to the child and that it is in the child's interest for the respondent to have sole custody. The respondent says she believes that DB was advised to abandon the child abduction proceedings in Ireland and, by letter dated 26th September 2017, the Legal Aid Board advised her that the proceedings were withdrawn. She says that proceedings appear then to have been instituted in Croatia.

46. The respondent avers that having now lived in Ireland for a number of years her son is very happy and is doing well in school. She says she is working and has secured a mortgage. She says that in the circumstances she believes her surrender to Croatia would place the child's life and her life at risk and would expose them to relive the violence that she says she was subjected to by DB.

47. She says she is the lawful guardian of the child, that they have been resident in the State since 2016 and surrender to the requesting State would put them both in peril and contravene their rights.

48. In his affidavit the respondent's solicitor exhibits a number of documents:

    (a) A copy of the judgment pertaining to the divorce. The order says the child is to be placed in the care and custody of the respondent.

    (b) A judgment convicting DB under domestic violence legislation wherein he was fined and made the subject of a restraining order.

    (c) A copy of a charge against DB for criminal offences against marriage, family and children and a violation of child rights. The charge does not set out the particulars of the alleged offending.

    (d) Copies of reports and updates to the authorities and courts in Croatia that resulted from the ongoing assessment of the child.

    (e) A court decision of 27th November 2015 restraining DB from approaching the respondent, who would be entrusted with parental care and upbringing of the child, recognising the father's entitlement to supervised access under the supervision of the Centre for social welfare.

    (f) A letter of confirmation that on 9th September 2016 the child was enrolled in national school.

    (g) A decision dated 15th November 2016 overturning an earlier decision of 13 September 2016 that had entrusted the child to the temporary care of his father. That decision includes a record of a hearing at which the child give evidence that his father does not take care of him, and that the child was present when his father beat his mother.

(h) A report prepared by a chartered psychologist in Ireland. The report is based on an assessment carried out on the child on 15th June 2017. The assessment refers to a school report in which the child is said to be an excellent student who has made good progress academically. No behavioural problems are reported. The conclusion, based on the information provided and the author's own observations and assessment, is that the child has made excellent progress emotionally during the period when he had no contact with his father. The author says that *"It is vital that this is not permitted to unravel again to a situation where [the child] experiences anxiety, poor self-worth and insecurity."* The author makes an assessment of the child's father and concludes that he does not meet the requirements that would be regarded as essential to parent effectively. The author concludes that the respondent should not be restricted in providing the child's best interest and should not have to refer to DB for parental permission and signatures that are frequently required in a child's life.

49. Based on the affidavits, the respondent submits that her personal circumstances comfortably surpass the requisite threshold to justify the refusal of surrender on section 37 grounds. She also submits that there has been a significant delay and that it seems two years elapsed after the withdrawal of the Hague Convention proceedings before the domestic warrant issued and a further three years past thereafter before the EAW issued.

50. She also says that, in addition to being wrong, the decisions were, to some degree, not impartial. That is a matter for the issuing State and is not something that this court can determine on the evidence.

51. The respondent says that the court should have regard to the application made by the child's father under the Hague Convention and the fact that it was abandoned in 2017 as being relevant to the section 37 objection. The Hague Convention application was directed towards having the child returned to the issuing State. The respondent does not make an abuse of process argument that in some way the withdrawal of the Convention application in 2017 and the issuing of the EAW are related. She does not suggest that the relevant authorities in the issuing State deferred issuing the EAW until the conclusion of the Convention application. It is equally not suggested that the issuing of the EAW was an indirect means of having the child returned to the issuing State. I am not persuaded that the Hague Convention application has any bearing on the respondent's contention that surrender would result in a breach of section 37 rights.

52. During the course of oral submissions the respondent alluded to the potential of the order granting access impinging on her EU freedom of movement rights. No concrete submission is made in that regard, and I am not satisfied that surrender could be refused because granting access to the child's father meant the respondent was not free to leave the issuing State.

53. The applicant relies on the judgments of the Supreme Court in *Minister for Justice and Equality v. JAT (No. 2)* [2016] IESC 17 and *Minister for Justice and Equality v. Vestartas* [2020] IESC 12. It is for the respondent to persuade the court that surrender should be

refused on the basis of her personal and family circumstances. The EAW regime contemplates that surrender will almost inevitably have an adverse impact on the requested person and their family. It is well established that only where a case involves exceptional circumstances that surrender should be refused on grounds of the impact of surrender on the respondent's personal circumstances, although exceptionality is not the test.

54. Delay is not a ground for refusal of surrender, although it has been a factor taken into account to refuse surrender in cases where the delay was accompanied by other factual circumstances falling so far outside the norm as to amount to an abuse of process. The respondent, of course, argues that the facts of her case are truly exceptional, and the delay is, in the circumstances, egregious.

55. It is not for this court to engage in any review of the decisions made by the relevant authorities and courts in the issuing State, or to decide whether the respondent was justified in leaving the issuing State. The respondent does not make the case that she should not be surrendered because of systemic failings in the administration of justice in the issuing State and I have no reason to believe that she would not receive a fair trial if surrendered.

56. The threshold for surrender under section 37 of the Act of 2003 was expressed as follows in *Vestartas* (at para. 94):

> *"For an Article 8 defence to succeed, it can only be on clear facts based and cogent evidence. The evidence must be sufficient to rebut the presumption contained in s.4A of the Act (see, para. 41 above). The circumstances must be shown to be well outside the norm; that is, truly exceptional. In the words of s. 37(1), they must be such as would render an order for surrender "incompatible" with the State's obligations under Article 8 of the ECHR. This would necessitate that the incursion into the private and family rights referred to in Article 8(1) was such as to supervene the limitations and the right contained in Article 8(2), and over the significant public interest thresholds set by the 2003 Act itself."*

57. The substantive basis upon which the respondent relies is that her surrender would result in a breach of her personal family rights. That argument is premised on the fact that she and her son have been living in Ireland since 2016. Her son's date of birth is 27th November 2008. At the time they came to Ireland time her son was approximately 8 years old and is now almost 15 years old. The domestic order on which the warrant is based is an order of detention pending trial dated 12th November 2019. The EAW is dated 16th February 2023. Throughout the time that the respondent was in Ireland she knew that she was in breach of the court order giving the child's father access.

58. Much of the respondent's affidavit is concerned with establishing that she and her son were subjected to threats and violence at the hands of the child's father. The presumption in section 4A of the Act is that the respondent's rights, including her safety, will be protected by the issuing State. In my view, there is nothing in the evidence advanced by

the respondent that is sufficiently cogent to suggest that if surrendered she will be subjected to treatment that would amount to a breach of her ECHR rights. This is also not a case in which there is evidence before the court of the kind in *JAT (No. 2).* That was a case where the respondent was responsible for his sons care, who suffered from a significant and deteriorating mental illness.

59. The question is whether the respondent's surrender would have such a significant impact on her son that it would amount to a breach of their family rights such as would reach the very high threshold identified in *Vestartas*. The respondent points to what she contends is the delay seeking her surrender. The lapse of time between when the respondent left the issuing State, the order of detention pending trial in 2019 and the issuing of the warrant in 2023 is not exceptional. The respondent says that while a period of time may not be very long in the context of other delay cases, it represents a very long time for the respondent's son. The fact of the matter is that the respondent and her son are in a situation common to that of many respondents who are parents. As observed by MacMenamin J. in *Vestartas, "It is natural that there will be human sympathy in a situation like this. But this must take second place to the duties which devolve upon the courts under the Framework Decision and the terms of the Act itself."*

60. Having considered the respondent's submissions and the contents of her affidavit, I am satisfied that the grounds relied on by her, either in isolation or when taken together, are not so truly exceptional or egregious as to provide a basis for refusal of surrender.

61. I am satisfied that surrender of the respondent is not precluded by reason of Part 3 of the Act of 2003 or another provision of that Act.

62. It, therefore, follows that this court will make an order pursuant to section 16 of the Act of 2003 for the surrender of the respondent to the Republic of Croatia.