[2020] IEHC 130

THE HIGH COURT

[2019 No. 265 EXT]

BETWEEN

MINISTER FOR JUSTICE AND EQUALITY

APPLICANT

AND

RAZVAN TACHE

RESPONDENT

JUDGMENT of Mr. Justice Binchy delivered on the 5th day of March, 2020

1. By this application the applicant seeks an order for the surrender of the respondent to Germany pursuant to a European Arrest Warrant dated 24th June, 2019 ("the EAW"). The EAW was issued by the Krefeld local court as issuing judicial authority.

2. The EAW was endorsed by the High Court on 26th July, 2019. The respondent was arrested and brought before the Court on 25th September, 2019. The hearing of this application took place on 5th February, 2020.

3. At the opening of the application, I was satisfied that the person before the Court is the person in respect of whom the EAW was issued.

4. I was further satisfied that none of the matters referred to in ss. 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 any of the reasons set forth in any of those sections.

5. At para. B of the EAW, it is stated that it is based upon an arrest warrant dated 4th April, 2017, which was also issued by the Krefeld local court. It is described as being a "*custodial arrest warrant".*

6. At para. C of the EAW, it is stated that the maximum length of the custodial sentence or detention order which may be imposed for the offences to which the EAW refers is ten years. Accordingly, minimum gravity in respect of the offences with which the EAW is concerned is established.

7. It is apparent from the EAW that it has been issued for the purpose of prosecuting the respondent, and not for the purpose of requiring him to serve a sentence. At para. E of the EAW it is stated in the opening line that it relates to a total of 13 offences. A few lines further on in para. E it is stated that the accused is charged with a total of 28 offences. This is then broken down as follows:

   (1) Thirteen counts of fraudulently acquiring cigarettes, food stuffs and gift cards from named companies, "*for own use or profitable resale, at filling stations in Krefeld, Wetter, Mönchengladbach, Dormagen and Rüsselsheim jointly with a separately prosecuted person using a previously stolen or found EC card with PIN code to the bank account no. 202187977 with the bank Sparkasse Hagen held by the injured*

party Seifert, knowing that he was not authorised to use the EC card. In doing so, the accused caused damage in the amount of approximately 1,350.00 euros."

(2) Secondly, ten counts of fraudulently acquiring clothing and other items with a total value of approximately €900, "*for own use or profitable resale at Maxhütte, Borgwedel, Oldenburg, Osteinbek, Plochingen, Wuppertal and Hagen using his EC card to the bank account number 0127521300 with the bank Commerzbank, which did not have sufficient cover to honour the direct debits authorised by the accused*", and

(3) thirdly, the respondent is charged with five counts of using public transport at Hagen, Düsseldorf, Ennepetal, Duisburg and Dortmund, without being in possession of tickets.

8. It is apparent from the above that the offences were described in more general terms than is required. However, the central authority had previously requested details of each separate offence, and also requested clarification as to the apparently contradictory information within the EAW as to the number of offences. This information had been requested in the context of an earlier European arrest warrant ("the earlier EAW") which had issued in respect of the same respondent and in respect of the same offences. The earlier EAW, which had to be withdrawn because it was issued by a public prosecutor, and, following upon the decision of the Court of Justice of the European Union in the cases of *OG* and *PI* on 27th May, 2019, the authorities in Germany restructured the arrangements for the issue of European arrest warrants with the result that the EAW in respect of which these proceedings are concerned was issued in replacement of the earlier EAW, by a court rather than by a prosecutor, but is otherwise identical. So, therefore, it is apparent that the additional information that was provided in connection with the earlier EAW is of equal application to the EAW.

9. That additional information confirmed that the respondent is being charged with 28 offences. There was also a different error in the earlier EAW which referred to nine offences (rather than thirteen), but this is of no consequence – what is of consequence is that clarification is given as to the number of offences with which it is intended to charge the respondent. Somewhat unusually, but very helpfully, the additional information in relation to each offence is provided in the form of a copy of the underlying arrest warrant of the Krefeld local court of 4th April, 2017. This provides a brief statement of each offence, including the date and time of day at which each offence was committed. The arrest warrant also provides detailed particulars of the statutory provisions creating the offences of which the respondent is accused.

10. Points of objection were filed on behalf of the respondent on 1st November, 2019. The points of objection as pursued at the hearing of this application are as follows:

(1) The EAW is not in the form required by s.11(1) of the European Arrest Warrant Act, 2003, as amended (the "Act of 2003") and/or the Framework Decision in that it is does not adequately or correctly specify the number of offences that the

respondent has allegedly committed and does not provide sufficient clarity and particulars as regards the time, place and degree of participation of the respondent in those offences.

(2) The EAW is contradictory, in stating that the respondent is accused of 13 offences in one place, and 28 offences in another. It is not open to the issuing judicial authority to clarify this by way of additional information, and a new European arrest warrant should have been issued in order to address such a fundamental change in the warrant.

(3) The EAW does not adequately identify the decision on which it is based, and is therefore invalid .

(4) The EAW does not disclose that a decision has been made by the relevant authority in Germany to try the respondent for any of the alleged offences and his surrender is therefore prohibited pursuant to s.21A of the Act of 2003.

(5) The surrender of the respondent is prohibited by s.37 of the Act of 2003 because it is clear from the EAW that, if surrendered, the respondent will be remanded in custody with no right to bail.

(6) The EAW is ambiguous in that Article 2(2) of the Framework Decision has been invoked insofar as the box relating to "*swindling*" has been ticked in Part E I of the EAW, and yet Part E II of the EAW is completed in relation to all categories of offences.

11. The respondent supported his objections through an affidavit of a German lawyer, a Dr. Holger Matt, to which I refer below.

12. In response to these points of objection, the applicant argues as follows. While there was an error on the face of the EAW as regards the number of offences, it is clear from both the EAW itself and the additional information that the number of offences is 28. There is no doubt or ambiguity about this, and particulars of all 28 offences have been provided.

13. In this regard, in considering whether or not there has been compliance with s.11(1) of the Act of 2003, the Court is entitled to consider all of the information placed before it, and moreover the Court is also entitled, pursuant to s.45C of the Act of 2003, to order surrender notwithstanding any defect in the EAW. There is no question of changing a fundamental element in the nature or purpose of the warrant – it is clear from the information provided that the respondent is wanted in connection with the prosecution of 28 offences, and not 13 offences.

14. The EAW is in the form required by the Framework Decision and does identify the decision on which it is based i.e. the national arrest warrant, a copy of which has been provided.

15. The EAW clearly states on the front page that the surrender of the respondent is required for the purpose of conducting a criminal prosecution or executing a custodial sentence or

detention order. It is apparent that it is for the former purposes that the surrender of the respondent is required. The respondent has not produced cogent evidence or any adequate evidence to displace the statutory presumption contained in s.21A (2) of the Act of 2003, that a decision has been made to charge and try the respondent for the offences described in the EAW, which presumption operates under the terms of that section "*unless the contrary is proved".* No cogent evidence to the contrary has been provided. The affidavit of Dr. Holger Matt provided on behalf of the respondent in opposition to this application goes no further than saying that the information does not disclose the state of the investigation or when a bill of indictment can be expected. This is not sufficient to displace the statutory presumption contained in s.21A (2) of the Act of 2003.

16. The respondent is clearly entitled to apply for bail, when surrendered. This is apparent both from the additional information and the affidavit of Dr. Holger Matt.

17. The ambiguity at para. E of the EAW may be addressed by proving correspondence with offences in this jurisdiction.

Objections 1 and 2 – Ambiguity in EAW / Insufficiency of Information

18. In relation to his objection that the EAW is unclear or ambiguous, the respondent relies upon the decision of the Supreme Court in the case of *MJE v. Arnost Herman* [2015] IESC. In that case the surrender of the respondent was sought pursuant to three European arrest warrants. It was the respondent's case that there was a lack of clarity in the warrants and in the additional information as to the purposes for which surrender was sought. The applicant in that case contended that any lack of clarity was addressed by the additional information, which could be treated as a variance (of the European arrest warrants, by the additional information) for the purposes of s.45C of the Act of 2003 such that surrender should not be refused on the grounds of that variance. However, the Supreme Court determined that what the applicant contended was a variance for the purposes of s.45C was a fundamental change from the purpose for which surrender was sought in the original European arrest warrant. The change was indeed significant: In para. 30 of her decision Denham C.J. describes it thus:

> *"The position now is that instead of being sought for sentencing under Warrant No. 3 the appellant is now sought to be arrested and prosecuted. Further, the effect on Warrant No. 1 is that he may have to serve a different sentence on Warrant No. 1 to that set out in the warrant itself."*

At para. 33, Denham C.J. held:

> *"Where the national judicial authority which issued a European arrest warrant seeks to change a fundamental element in the nature or purpose of the warrant, as opposed to providing further information or corrections of a minor nature, a new warrant should be issued in the form required by the Act, namely, in the form in the Annex to the Framework Decision, so that it may be endorsed for execution in the State by the High Court."*

19. In these proceedings, it is contended on behalf of the respondent that the further information purports to change the EAW in a fundamental manner by changing the number of offences for which surrender is sought from 13 to 28, and also by providing particulars of those offences. On the basis of Herman, it is argued that these are fundamental changes which cannot be effected merely by the provision of additional information.

20. It is well established that a person whose surrender is sought pursuant to the Act of 2003 is entitled to know the number and nature of the offences for which his/her surrender is sought (see para. 30 of the decision of Hardiman J. in *Minister for Justice v. Connolly* [2014] IESC 34). In the earlier EAW, the number of offences for which the respondent was sought was stated to be nine. The opening line of para. E of the EAW states that the warrant relates in total to thirteen offences. It is clear that both of these statements are in error. Six lines down from the first line of para. E of the EAW it is stated that the accused is charged with a total of 28 offences. It then proceeds to describe the 28 offences, starting with *"13 counts of fraudulously acquiring cigarettes", and then later describing ten counts of "fraudulously acquiring clothing and other items", and concludes "with 5 counts of using public transport… without being in possession of the necessary ticket"*. It is, in my view, clear from the EAW itself, without reference to the further information, that the reference to thirteen offences is an error, because a breakdown is provided for the 28 offences which are referred to at just six lines later.

21. Because there was an error in the earlier EAW, the central authority here had sought clarification as regards the statement that it referred to nine offences, and then proceeded to refer (by reference to the same breakdown) to 28 offences. This clarification was provided by a letter dated 19th March, 2019 which unambiguously stated that the reference to nine offences was an error, and that the respondent is being charged with 28 offences. The national arrest warrant was provided setting out full particulars of the 28 charges.

22. Firstly, it must be stated that there is no lack of clarity or ambiguity about the number or nature of charges that are to be proffered against the respondent upon his surrender. It is immediately apparent that the facts in *Herman* were very different. It is true that there is an error on the face of the EAW, but even without reference to the letter of 19th March, 2019 or the national arrest warrant, it is apparent that the surrender of the respondent is required in connection with 28 charges. While there is no obligation on an issuing judicial authority to provide a copy of the arrest warrant, it was helpful that they did so in this case in order to provide particulars of the date and time of each individual offence. In my opinion, this could not be considered to be a fundamental change in the purpose for which the EAW was issued, or in the nature of the information set out in the EAW. It amounts to no more than an expansion of the information provided in the EAW, so that the respondent has detailed particulars of the date and time of each alleged offence. The Court is entitled to read all of the information provided in the EAW and the additional information as a whole in considering whether or not there has been compliance by the issuing judicial authority as regards the information required to be provided by the

Framework Decision. I am satisfied that the information provided meets the requirements of both the Framework Decision and the Act of 2003 in this regard and that the additional information does not constitute a fundamental change of the EAW such as to require this Court to refuse this application. I therefore reject this objection.

Objection 3 - EAW does not identify decision on which it was based

23. This objection was not pursued at hearing. It is not difficult to understand why, as the EAW clearly states, at para. B that the EAW is based upon an arrest warrant issued by the Krefeld local court.

Objection 4 - S. 21A Objection

24. As regards the objection that surrender is prohibited by s.21A of the Act of 2003, the respondent is relying upon the opinion of Dr. Holger Matt and the decision of this Court (Donnelly J.) in *Minister for Justice and Equality v. Alan Gray* [2016] IEHC 128. In order to succeed with this argument, the respondent must produce cogent evidence that no decision to charge and try the person whose surrender is sought has been made at the time of issue of the EAW. The evidence put forward on behalf of the respondent in this case is to be found at the end of the opinion of Dr. Holger Matt where he states:

> *"The given information does not disclose the state of investigation or when a bill of indictment can be expected. A lawful national court decision has been made through the (national) arrest warrant issued at 04 April 2017. In this regard the criminal investigation was commenced before that time and is ongoing obviously until today. The EAW of June 2019 is based on the national arrest warrant of April 2017 and both are issued by a court. Wether [sic] or when the investigation merges to a trial based on a bill of indictment is not clear (not mentioned in the documents), however, pre-trial-detention in Germany (without trial) is restricted to 6 months…."*

25. This opinion of Dr. Holger Matt is, at best, inconclusive as to whether or not a decision to charge and try the respondent had been taken as of the date of the issue of the EAW. The fact that an investigation is on-going is not inconsistent with a decision to charge and try. Indeed, it has been established that such investigation could even lead to a reversal of the decision to charge and try the requested person (see, in this regard, *Minister for Justice v Olsson* [2011] 1 IR 384). The opinion of Dr. Holger Matt falls well short of the requirement to establish, by cogent evidence, that no decision to charge and try the respondent has been taken. The statutory presumption that such a decision has been taken, as set forth in s.21A (2) of the Act of 2003, has not, therefore, been displaced. Moreover, the opening paragraph of the EAW, which is in the standard, prescribed form, states that:

> *"This warrant has been issued by a competent judicial authority. I request that the person mentioned below be arrested and surrendered for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order".*

26. There is nothing at all in the opinion of Dr. Holger Matt to displace this statement. Furthermore, in his letter dated 19th March, 2019, providing additional information, the chief prosecutor concludes his letter in the following terms:

> *"I hope my elaborations have sufficiently answered your request for clarification and can now enable you to take a decision on the accused's extradition from Ireland to Germany, based on the German request of 19 March 2019, for prosecution in the proceedings 3 Js 416/17…brought by the Krefeld Public Prosecutor's Office."*

27. It is apparent from the national arrest warrant that the respondent is charged with 28 offences. This concluding paragraph of the letter of the Chief Public Prosecutor indicates that a decision has also been taken to try the accused, and that that decision had been taken before the issue of the EAW, which issued after this letter. While the decision of Donnelly J. in *Minister for Justice and Equality v. Alan Gray* to refuse surrender on the grounds that the evidence clearly established that no decision to try the respondent in those proceedings had been made at the time of the issue of the European arrest warrant, that decision is of no help to the respondent in this case for the simple reason that the evidence in *Gray* was so clear as to constitute cogent evidence sufficient to displace the statutory presumption in s.21A (2) of the Act of 2003. In the absence of such evidence in these proceedings, this ground of objection too, must be rejected.

Objection 5 - No right to Bail

28. It is submitted on behalf of the applicant that both the opinion of Dr. Holger Matt and the additional information provided make it clear that the respondent will, if surrendered, have a right to appeal against the arrest warrant, and in particular the custodial element thereof. This is apparent from the warrant itself, at the back of which there is a section under the heading "*information regarding legal challenges to the arrest warrant". It is stated that the respondent may file an appeal against the arrest warrant. He is* also entitled to request a review of the remand in custody. These appear to be two separate processes available to the respondent. They may be conducted without a hearing, but a hearing must be held if the respondent so requests. There is a qualification to this entitlement, which states:

> *"If a hearing has already been held, you are only entitled to a new hearing if you have been remanded in custody for more than three months, and at least two months have passed since the last hearing. Furthermore, you are not entitled to a hearing as long as the main trial has not been concluded or if a judgment imposing imprisonment or a custodial rehabilitation and a public safety measure was rendered".*

29. The statement that the respondent would not be entitled to a hearing *"as long as the main trial has not been concluded"* is a little bit confusing, and may be as a result of the translation of the document. There is no doubt at all that the respondent has an entitlement to appeal the arrest warrant, and in particular the remand in custody element thereof. This is affirmed unambiguously by his own expert, Dr. Holger Matt. In his

opinion he says *"yes, the legal possibility to be released on bail pre-trial follows ss. 116, 116A StPO (Germany Criminal Procedure Code)"*. Dr. Holger Matt describes the procedure provided for in the German Code and then says:

> *"In the case of the execution of remand custody the suspect and/or his defence lawyer have two possibilities to challenge the court's decision…"*

and he goes on to provide the details of the challenges available. Accordingly, the objection to surrender on the grounds that the respondent will have no right to bail (or equivalent relief) pending his trial, must be rejected.

Objection 6 - Ambiguity in para. E of EAW / Correspondence

30. The respondent argues that surrender should be refused because of ambiguity in para. E of the EAW. It is argued that this cannot be resolved by the Court. It is accepted by the applicant that by reason of the fact that the issuing judicial authority has both ticked the box for swindling, and provided full details of all offences at para. E.II of the EAW, that it is necessary to demonstrate correspondence in relation to each of the offences, rather than relying upon the ticked box. I am satisfied that this is the correct approach. It is well established that the Court may take this course, where there is a lack of clarity in an EAW as to those offences which an issuing judicial authority intends to rely upon para. E.1 of the EAW, the Court will consider if the offences described in the EAW correspond to offences in the law of the State. This is apparent from the decision of Peart J. in *Minister for Justice, Equality & Law Reform v. Paulauskas* [2009] IEHC 32 and the decision of Donnelly J. in the case of *Minister for Justice & Equality v. Ludwin* [2018] IEHC 220 in which case, having found that the issuing judicial authority had made a manifest error in ticking one of the offences in part E.I of the European arrest warrant, she went on to say, at para. 13:

> *"A number of decided cases have dealt with the situation where the issuing judicial authority has completed part E(1), indicating reliance on Article 2(2) of the 2002 Framework Decision, and part E(II), indicating non-reliance. Following on from the decision of Peart J. in Minister v. Paulauskas [2009] IEHC 32 the High Court has accepted that this not a bar to surrender provided that correspondence has been met".*

31. The applicant submits that the following offences in this jurisdiction correspond to the offences in the EAW:

(1) Insofar as the 13 counts of fraud described in para. 7(1) above are concerned and also insofar as the 10 counts of fraud described in para. 7(2) above are concerned, all of these offences would correspondent to offences under s.6 of the Criminal Justice (Theft and Fraud Offences) Act, 2001. Section 6(1) thereof provides:

> *"A person who dishonestly, with the intention of making a gain for himself or herself or another, or of causing loss to another, by any deception induces another to do or refrain from doing an act is guilty of an offence".*

No contrary argument was advanced ion behalf of the respondent in relation to the offences at para. 7(1).

(2) It is submitted on behalf of the applicant that this section applies with equal force to the acts of the respondent as described at para. 7(2) above, as well as the acts that the respondent described at para. 7(1) even though in the latter case the acts, as described in the EAW, describe the respondent using his own bank card. However, it was argued on behalf of the respondent that it is not an offence in this jurisdiction for a person to obtain goods using his or own bank card. That may give rise to civil proceedings, but it is not a criminal offence so therefore the acts involving the use by the respondent of his own bank card do not correspond to an offence in this jurisdiction. Moreover, it is necessary that the acts of the respondent as described allege a dishonest intention on the part of the respondent, in order for the facts to correspond to the offence created by s.6 of the Act of 2001. The respondent relies on the decision of Minister for Justice, Equality and Law Reform v Ivans Desjatnikovs [2008] IESC 53 and [2009] IR 618 in support of this argument. On the basis of this authority, it is submitted, the acts involving the use by the respondent of his own bank card do not correspond to an offence in this jurisdiction.

It is correct that *Desjatnikovs* affirms the proposition advanced by the respondent. In this regard, Denham J. (as she then was) affirmed (at p.625) the decision of the High Court (Peart J.) whereby he held that the offence with which the respondent was charged in that case did not correspond to an offence under s.4(1) of the Act of 2001, because there was no act alleged that came within the concept of dishonesty. In response to this, it was argued on behalf of the applicant that the EAW clearly states that the respondent is charged with 10 counts of *"fraudulously acquiring clothing and other items….using his EC card to the bank account number 0127521300….which did not have sufficient cover to honour the direct debits authorised by the accused"*. The use of the word "*fraudulously*" makes it clear that the respondent knew that he did not have funds sufficient to cover the purchases, and that he did not intend to put funds in his account to cover the purchases. So therefore, it is submitted, this falls squarely within the parameters of the offence created by s.6(1) of the Act of 2001. The respondent was acting with the intention of making a gain for himself, at a loss to another.

(3) As regards the offences of using public transport without having a ticket, it is submitted that these offences correspond to offences under s.8(1) of the Act of 2001 which provides that a person who, knowing that payment on the spot for any goods obtained or any service done is required or expected, dishonestly makes off without having paid, as required or expected, and with the intention of avoiding payment on the spot, is guilty of an offence. No contrary argument was advanced in relation to this offence.

32. In my opinion, each of the offences described in the EAW corresponds, in this jurisdiction, to the offences relied upon by the applicant. No real argument was advanced on behalf of the respondent as regards the first and third categories of offences. As regards the second category of offences (the 10 offences that involved purchasing goods with his own bank card), the argument of the respondent was simply to the effect that it could not be an offence to use his own bank card. No dishonesty is apparent, and he might, for example, have had an overdraft facility. It is submitted that this might give rise to a civil action, but it does not indicate an offence. However, it is clear that it is alleged that the respondent was acting fraudulently, and with the intention of causing the credit institution a loss, knowing that he had no funds to meet the withdrawal. In my view this does indeed correspond to an offence under s.6 of the Act of 2001, as claimed by the applicant. This ground of objection is also therefore rejected.

33. For all of these reasons, the objections of the respondent must be rejected. I am satisfied that it is appropriate for the Court to make an order for the surrender of the respondent pursuant to s.16 of the Act of 2003.