

THE HIGH COURT

RECORD NUMBER 2019/258 EXT

BETWEEN

MINISTER FOR JUSTICE AND EQUALITY

APPLICANT

AND

ZSOLT MEDNYANSZKI

RESPONDENT

AND

THE HIGH COURT

RECORD NUMBER 2019/364 EXT

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APPLICANT

AND

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RESPONDENT

Judgment of Mr. Justice Paul Burns delivered on 25 May 2020.

1. By two separate applications pursuant to the European Arrest Warrant Act 2003, as amended, (hereinafter referred to as 'the Act of 2003') the Applicant seeks an order for the surrender of the Respondent to Hungary pursuant to two respective European arrest warrants: warrant dated 4 June 2019 issued by Enforcement Judge Lakatos of the Regional Court of Szeged, as issuing judicial authority and endorsed by the High Court on 2 December 2019 (record number 2019/258 EXT), herein referred to as 'Warrant A', and warrant dated 10 September 2019 issued by Enforcement Judge Lakatos of the Regional Court of Szeged, as issuing judicial authority and endorsed by the High Court on 11 November 2019 (record number 2019/364 EXT), herein referred to as 'Warrant B'.
2. It should be noted that an earlier European arrest warrant dated 2 April 2019 had been issued by Hungary seeking the surrender of the Respondent for prosecution in respect of the offences set out in Warrant B, had been endorsed by the High Court and the Respondent had been arrested on foot of same on 31 August 2019. This warrant was vacated on 11 November 2019 and Warrant B was endorsed by the High Court on that day. Effectively Warrant B was substituted for the earlier warrant. While Warrant B was endorsed by the High Court prior to Warrant A, it is easier to follow the course of correspondence in the order designated as there was pre-endorsement correspondence in respect of Warrant A.
3. As both Applications involved the same parties and as there was a considerable overlap in the issues to be determined, both matters were eventually heard together.

Warrant A

4. Warrant A is stated to be based on an enforceable "*Judgment of the District Court of Szeged no. 14.Fk.4666/2016/23 dated 25 April 2017 becoming final by the judgment of the Regional Court of Szeged no. 4.Bf.1334/2017/16 on 17 October 2018 sentenced convict Mednyanszki to non-suspended imprisonment of 1 (one) year for the misdemeanour of 6 counts of theft and another criminal offence.*" At section (d) of

Warrant A where asked to indicate if the person appeared in person at the trial resulting in the decision, the warrant states:

"1. Yes, the person appeared in person at the trial resulting in the decision".

At section (e) of the warrant it states that the warrant related in total to two offences but then goes on to set out the circumstances relating to the commission of a larger number of offences and states;

"with the above acts Szolt Mednyanzski committed six counts of the misdemeanour of theft... in one count as an abettor, and, additionally, the felony of theft...."

5. By letter dated 13 September 2019 (prior to putting the warrant before the High Court) the Minister as the Central Authority in Ireland made a request for additional information of the Hungarian Authority seeking clarity as to how many offences the warrant related to; an explanation as to whether the decision of the Regional Court was an appeal against the decision of the District Court and, if so, asking that section (d) of the warrant be completed in respect of the appeal hearing in accordance with certain ECJ decisions and an indication as to whether when committing the seven criminal acts, the intention of the Respondent was to permanently deprive the owner of the property in question. By reply dated 25 September 2019, it was stated that the warrant referred to seven offences with the last offence being a felony and the description of same was set out. It was confirmed that the hearing before the Regional Court on 17 October 2018 was an appeal hearing and the Respondent did not appear,

"even though he was aware of the date – he was cited to the trial. The Hungarian State provided a lawyer in his defence who appeared at the trial."

The said letter also confirmed that the intention of the Respondent was to permanently deprive the owner of the property in question.

6. Warrant A was put before the High Court on 11 November 2019 for endorsement and the Court directed a request for additional information, in particular that a completed section (d) of the warrant be furnished in respect of the appeal hearing. By letter dated 21 November 2019 a further request for additional information was made in respect of the decision of the Regional Court, in particular seeking a completed section (d) for the appeal hearing in accordance with the ECJ caselaw. By reply dated 26 November 2019 it was stated;

"As it was already clarified the wanted person was present at the first instance procedure and at the trial when the first instance judgement was delivered, but he failed to show up at the appeal trial, despite having been incited. (sic) So a state appointed lawyer defended him in the appeal procedure."

The reply enclosed a copy of the warrant with section (d) re-completed so as to tick the boxes as follows;

"2. No, the person did not appear in person at the trial resulting in the decision."

"3.2 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".

It went on to state;

"The wanted person was present at the first instance procedure and at the trial when the first instance judgement was delivered, but he failed to show up at the appeal trial, despite having been cited. So a state-appointed lawyer defended him at the appeal procedure. The appeal trial was held on 17 October 2018 to which Szolt Mednyanszki was properly cited according to Hungarian law".

7. Warrant A was endorsed by the High Court on 2 December 2019 and on foot of same the Respondent was arrested and brought before the High Court on 4 December 2019.
8. The Respondent filed points of objection (undated) in January 2020 putting the applicant on full proof; denying any correspondence of offences, taking issue with the lack of clarity as regards the number of offences to which the warrant related, alleging that the surrender of the Respondent was prohibited by section 37 of the Act of 2003 on grounds of delay and interference with the Respondent's right to private and family life and due to the Respondent's mental health issues and the overcrowding and lack of appropriate psychological care in Hungarian prisons. The Respondent in an affidavit dated the 23 day of January 2020 pointed out that the warrant had been endorsed on 2 December 2019 notwithstanding that he had been in custody in respect of another European arrest warrant from Hungary since 31 August 2019. He claimed that the value of the items in question equated to approximately €75.00 and €1.49. He set out his family circumstances and his mental health problems. He stated that he had been imprisoned in Hungary on two previous occasions, with the most recent occasion involving a period of 7 ½ months in custody and he believed that this period may be referable to the offences in this warrant or in respect of the other European arrest warrant by way of activation of a previously suspended sentence. He exhibited a United States Department of State 2018 Human Rights Report on Hungary which referred to prison conditions and a shortage of psychological care for prisoners.
9. Warrant A came before the High Court again on 23 January 2020 and the Court directed a further request for additional information and by letter dated the 28 January 2020 that further request for additional information was made seeking clarity as to the number of offences by providing the description of the offences in a numbered format, asking whether the Respondent gave a mandate to the lawyer appointed for the purpose of the appeal hearing and seeking clarity as to whether the Respondent had served any period in custody relating to the offences in respect of which his surrender was sought in that warrant.

10. By reply dated 29 January 2020 a further amended copy of the Warrant was enclosed with the offences set out in a numbered format as requested. As regards the appeal hearing the reply stated;

"On 25th September 2019 we informed you, that at the appeal hearing the respondent did not appear, despite being cited to the trial, and that the Hungarian State appointed a lawyer in his defence and this lawyer appeared in his defence at the trial. In Hungarian law there are 2 types of defence in a criminal procedure: a state-appointed lawyer and a mandated lawyer. The first is appointed by the Hungarian state to act in defence of the accused person. The second is mandated by the accused; in this case the Hungarian state appointed the lawyer, the respondent did not give a mandate to any lawyer for the purpose of the appeal hearing, he only fled the country."

The reply stated that the information regarding whether the Respondent served any period in custody in relation to the offences would be furnished as soon as received. It is noteworthy that the further copy of the warrant did not give any further details or explanation as regards section (d) and in particular did not provide any further information about how the relevant condition 3.2 had been met. By further reply dated 17 February 2020 it was confirmed that the respondent was indeed in preliminary detention from 3 September 2016 until 25 April 2017 and that this time was to be deducted from the one-year prison sentence.

11. By way of further affidavit sworn on 12 March 2020, the Respondent exhibited his medical records.

Warrant B

12. Warrant B is stated to be based upon an enforceable judgment; *"The District Court of Szeged by virtue of its Judgement (Court Ruling) no. 15.B.2672/2018/29 dated 3 June 2019 and final as of 28 June 2019, sentenced convict Szolt Mednyanszki to imprisonment of 6 (six) months to be served in prison"*. It related to three offences of theft. At section (c) of the Warrant it was indicated that the full six months of the sentence remained to be served. At section (d)2 it was stated:

"No, the person did not appear in person at the trial resulting in the decision".

At section (d)3 the relevant box marked was as follows:

"3.2 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." At section (d)4, by way of providing information as to how the relevant condition had been met, it stated "the legal representative actually defended the involved person at the trial".

13. Warrant B was endorsed on 11 November 2019 and on foot of same the Respondent was arrested and brought before the High Court on 25 November 2019.

14. An undated Notice of Points of Objection was delivered in respect of warrant B containing the same objections as the Points of Objection in respect of Warrant A but also containing an objection that, contrary to what was stated in the warrant, the Respondent did not instruct any lawyer to represent him and he was unaware of the trial until the execution of the Warrant. He referred to an earlier European arrest warrant issued by Hungary in which his surrender had been sought for the purpose of prosecuting him for the offences set out in warrant B. As pointed out hereinbefore, that earlier warrant had issued on 2 April 2019, had been endorsed by the High Court and he had been arrested on foot of same on 31 August 2019. That earlier warrant had been vacated on 11 November 2019. He maintained that the application seeking his surrender on foot of Warrant B amounted to an abuse of process.
15. The matter came before the High Court again on 23 January 2020 and the Court directed a request for additional information. By letter dated 28 January 2020 the request for additional information was made seeking confirmation

"that it is the case that the Respondent had given a mandate to the legal counsellor concerned who appeared for him at the trial. The court is concerned that this is not likely as the Respondent was not in attendance at the trial and he has stated on affidavit that he was not aware of the scheduled trial did not give a mandate to a legal counsellor to defend him at the trial".

Clarification was also sought as to whether the Respondent had served any period in custody in respect of the offences in respect of which his surrender was sought pursuant to that warrant.

16. By reply dated 3 March 2020 reference was made to both Warrant A and Warrant B but there was some mix up in the reference numbers as between the two warrants. Although the incorrect reference number is given, it would appear that the reply stated that as regards Warrant A;

"in this case the Hungarian State appointed the lawyer, the Respondent did not give a mandate to any lawyer for the purpose of the appeal hearing ,he only fled the country."

In respect of Warrant B and the reference to the legal representative actually defending the Respondent at trial it was stated;

"It means the same as at the other EAW: the Hungarian State appointed a lawyer in his defence, the respondent did not give a mandate to any lawyer because at the time he was at large for the crimes committed that are contained in the EAW Szv.460/2018 [warrant A]". The reply went on to state "So as question nr. 1 from your letter dated 28th January is concerned: the respondent of course did not give a mandate to any lawyer, because after being condemned to prison he fled the country to elude any additional procedure and to elude, of course the prison sentence. In Hungary, if someone is interrogated by the police or by the court, he

is warned, that if he moves to another address, he has to notify about it the conducting authority dealing with the case (the police, the prosecutor's office, or the court). Zsolt Mednyanszki did not fulfil this obligation, though he knew about it, as he was present at the beginning of the proceedings (as he was in preliminary custody). The time spent in preliminary custody is to be deducted from the one-year sentence of the EAW nr. Szv.460/2018 – sorry about it, this had to be an administrative mistake from the issuing court, having forgotten to deduct this at the c/2 bracket.” [In fact if the period of preliminary detention was to be deducted from the 1 year sentence in Warrant A then presumably the preliminary detention could not relate to the offences in Warrant B.]

The reply effectively ended as follows:

"As far as we are concerned, you are in possession of the necessary information so we hope you will be able to decide on the surrender of the wanted person. If you have any additional questions you are kindly requested to communicate it in a way, that we can understand, what is it that you would like to know, or what is it, that you do not understand from the European arrest warrants or our previous letters."

17. The Respondent swore an affidavit dated 12 March 2020 in respect of the Warrant B proceedings exhibiting the earlier prosecution warrant. He set out a timetable of events and stated that although he had been arrested by the police in Hungary that when he was released he believed the matters were at an end and he did not believe criminal charges would follow. He averred that he was not aware of the scheduled trial and that he did not give a mandate to a legal counsellor to defend him at the trial and that any lawyer who did defend him did so without his knowledge and without instructions from him. He pointed out that the earlier prosecution warrant had given no indication that a trial date had been fixed in respect of the offences referred to therein or that a prosecution would proceed in his absence. He pointed out that there was nothing in the warrant to indicate how the requesting state contended that it had notified him of the scheduled trial date. He estimated the value of the items in the offences at €90.00, €117.00 and €105.00. Again he referred to having spent 7 ½ months in custody in Hungary in respect of either the offences set out in Warrant A or Warrant B. The Respondent swore a second affidavit also dated 12 March 2020 exhibiting his medical records.

Submissions

18. At hearing, Counsel for the Minister pointed out that there was a lack of clarity in the warrants and that the correspondence had not adequately explained matters. She accepted that it was incumbent on the requesting state to accurately complete the requisite details in the European arrest warrant or to furnish sufficient information and clarity as would satisfy the court in the executing state as to the matters referred to in section (d) of a warrant. It was suggested that despite the protracted correspondence and inadequacy of the information furnished that the Court should request further additional information in relation to how the Respondent was personally aware of the relevant hearing dates. Counsel for the Respondent opposed such a course given that there had

already been considerable correspondence. He also made submissions in respect of his substantive objections.

Decision

19. It is now nine months since the Respondent was arrested on foot of the earlier warrant which was subsequently vacated and replaced with Warrant B. He has been in custody on these various warrants since then albeit he has also been serving a domestic sentence which is about to be completed. Having considered this matter and taking into account the respective warrants, all relevant correspondence, additional information and submissions, I am satisfied that these proceedings should be determined without any further delay.

20. Section 45 of the Act of 2003, as amended, deals with persons convicted in absentia and provides:

"A person shall not be surrendered under this 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 European arrest warrant was issued, unless the European arrest warrant indicates the matters required by points 2, 3 and 4 of point (d) of the form of warrant in the annex to the framework decision as amended by Council Framework Decision 2009/299/JHA, as set out in the table to this section.

TABLE

(d) *Indicate if the person appeared in person at the trial resulting in the decision:*

1. *Yes, the person appeared in person at the trial resulting in the decision.*
2. *No, the person did not appear in person at the trial resulting in the decision.*
3. *If you have ticked the box under point 2, please confirm the existence of one of the following:*

3.1a. the person was summoned in person on... (day/month/year) 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 here she does not appear for the trial;

OR

3.1b. The person was not summoned in person but by other means actually received official information of the scheduled date and place of the trial which resulted in the decision, in such a manner that it was unequivocally established that here she was aware of the scheduled trial, and was informed that a decision may be handed down if he or she does not appear for the trial;

OR

3.2 *Being aware of the scheduled trial, the person had given a mandate to a legal counsellor to defend him or her at the trial, and was indeed defended by the counsellor at the trial;*

OR

3.3 *the person was served with the decision on... (day/month/year) and was expressly informed about the right to a retrial or appeal, in which he or she has the right to participate and which allows the merits of the case, including fresh evidence, to be re-examined, and which may lead to the original decision being reversed, and the person expressly stated that he or she does not contest this decision,*

OR

the person did not request a retrial or appeal within the applicable timeframe;

OR

- 3.4. *the person was not personally served with the decision, but*
- *the person will be personally served with this decision without delay after the surrender, and*
 - *when served with the decision, the person will be expressly informed of his or her right to a retrial or appeal, in which he or she has the right to participate and which allows the merits of the case, including fresh evidence, to be re-examined, and which may lead to the original decision being reversed, and*
 - *the person will be informed of the timeframe within which he or she has to request a retrial or appeal, which will be... days.*

4. *If you have ticked the box under points 3.1b, 3.2 or 3.3 above, please provide information about how the relevant condition has been met".*

21. Section 45 of the Act of 2003, as amended, is mandatory in that it requires the Court to refuse surrender unless the warrant indicates the matters required by points 2, 3 and 4 of section (d) of the form of warrant in the annex to the framework decision, which is set out in full in section 45. The information set out in the respective warrants in each of these matters was clearly incorrect. In the case of Warrant A it indicated that the Respondent had appeared in person at the trial resulting in the decision which was being sought to be enforced, viz. the judgment of the Regional Court of Szeged on 17 October 2018. In the case of Warrant B it was incorrect insofar as it indicated that the Respondent had given a mandate to a legal counsellor to defend him at the trial. Despite the protracted correspondence seeking and furnishing additional information, the requirements of section 45 have not been met. It now appears that the Respondent was not present at the relevant hearings and had not given a mandate to a legal counsellor

and had not been served with the relevant decisions. The matters required at section (d) have not been indicated as required, for example as to how he was summoned in person or in such manner that it was unequivocally established that he was aware of the scheduled trial, etc., or if not personally served or so aware, whether he would be served with the decision and informed as to his right of appeal in respect of same.

22. In the case of Minister for Justice and Equality v Zarnescu [2020] IEHC 6, Binchy J., held:

"The court is obliged to refuse the application if the respondent did not appear in person at the proceedings resulting in the detention order, unless the matters required by paragraphs D.2, 3 and 4 of the EAW are indicated".

In the present cases it is accepted by both parties that neither the Warrants nor the additional information provided indicate the matters required by paragraphs (d) 2, 3 and 4, and in such circumstances I refuse surrender in respect of each warrant. I do so by virtue of the mandatory nature of the requirement set out in section 45 of the Act of 2003. In light of the above it is not necessary to consider the Respondent's substantive objections as set out in the Points of Objection or in his affidavits. I should say that as is apparent from the content herein, this judgment is quite fact specific and is unlikely to be a precedent for other matters.