

**THE HIGH COURT**

**RECORD NUMBER 2020/19 EXT**

**BETWEEN**

**MINISTER FOR JUSTICE AND EQUALITY**

**APPLICANT**

**AND**

**CRISTIAN NICOLA**

**RESPONDENT**

**JUDGMENT of Mr. Justice Paul Burns delivered on the 25th day of June, 2020.**

1. By this application the applicant seeks an order for the surrender of the respondent to the Federal Republic of Germany ("Germany") pursuant to a European arrest warrant dated 14th June, 2019 ("the EAW"). The EAW was issued by Judge Sybille Peters of the County Court Zwickau, as issuing judicial authority. The EAW seeks the surrender of the Respondent to face prosecution in respect of 61 offences.
2. The EAW was endorsed by the High Court on 24th February, 2020, was executed by An Garda Síochána and the respondent was brought before the High Court on 17th May, 2020. The Respondent has been in custody since that date.
3. I am satisfied that the person before the Court is the person in respect of whom the EAW was issued. No issue was raised in this respect.
4. I am satisfied that the minimum gravity requirements of the European Arrest Warrant Act 2003, as amended ("the Act of 2003"), have been met. The offences in respect of which the surrender of the respondent is sought carry a maximum penalty of 10 years imprisonment.
5. The respondent delivered points of objection dated 29th May, 2019 which can be summarised as follows:-
  - (a) that the EAW did not contain sufficient or sufficiently clear details as required by s. 11(1A)(f) of the Act of 2003;
  - (b) that it was not clear which offences the ticking of the box at section (e) I of the EAW in respect of "organised or armed robbery" was intended to relate to;
  - (c) that the warrant confirmed that the surrender of the respondent was sought for the purpose of investigative custody and not for prosecution, and accordingly surrender should be refused in accordance with s. 21A of the Act of 2003;
  - (d) that the respondent had previously been arrested and detained in Northern Ireland on foot of a European arrest warrant issued in respect of the same alleged offences and that his surrender should be refused unless the issuing authority provided an undertaking that time served in detention in Northern Ireland would be deducted from any sentence of imprisonment which might be imposed on the respondent if convicted of the alleged offences.

6. Subsequent to delivery of the points of objection, additional information was received from the issuing authority in relation to the number of offences, details as to each of those offences and clarifying the issue in relation to article 2 (2). At hearing, Counsel on behalf of the respondent accepted that the additional information received appeared to deal with the issues raised as regards s. 11 of the Act of 2003 and the issue of correspondence of offences and article 2 (2) of the Council Framework Decision on the European Arrest Warrant and Surrender Procedures between Member States of 13th June, 2002, as amended ("the Framework Decision"). While he did not formally concede those points of objection, he indicated that same were not being pursued vigorously. I am satisfied that taking into account the totality of the contents of the EAW together with the additional information provided by the issuing authority, the requirements of s. 11 of the Act of 2003 have been met. I am further satisfied that on foot of the information provided as to the circumstances of the alleged offences set out in the EAW that these correspond to offences under the law of the state, viz. theft, burglary, criminal damage and attempt to commit such offences. Correspondence was not seriously disputed at hearing.
7. At s. (b) of the EAW, under the heading "*decision on which the warrant is based and in particular in the relevant portion of same setting out the type of domestic arrest warrant or judicial decision having the same effect*", the following is stated; "*warrant for investigative custody*". It was argued on behalf of the respondent that this clearly indicated that no decision had been made to charge the respondent with and try him for the alleged offences and that the surrender of the respondent was being sought merely for investigative purposes. If that is so, then this Court is obliged by virtue of s. 21A of the Act of 2003 to refuse surrender.
8. Section 21A of the Act of 2003 provides as follows:-
  - (1) *Where a European arrest warrant is issued in the issuing state in respect of a person who has not been convicted of an offence specified therein, the High Court shall refuse to surrender the person if it is satisfied that a decision has not been made to charge the person with, and try him or her for, that offence in the issuing state.*
  - (2) *Where a European arrest warrant is issued in respect of a person who has not been convicted of an offence specified therein, it shall be presumed that a decision has been made to charge the person with, and try him or her for, that offence in the issuing state, unless the contrary is proved."*
9. By virtue of s. 21(A)(2) there is thus a presumption that the German authorities have decided to charge and try the respondent for the offences set out in the EAW. However, that presumption is capable of being rebutted.
10. By way of additional information dated 14th February, 2020, the Senior Public Prosecutor for the Free State of Saxony stated:-

*"... I would like to inform you that it is intended to bring full charges against the prosecuted person because of the criminal acts that the European Arrest Warrant issued by the County Court Zwickau on 14th June 2019. However, bringing charges is currently impeded by the fact that it has not yet been possible to hear the prosecuted person about the charges."*

The Court is satisfied on foot of that additional information that a decision has been made to charge and try the respondent for the offences set out in the EAW.

11. A very similar issue was considered by the Supreme Court in *Minister for Justice, Equality and Law Reform v. Olssen* [2011] IESC 1. In that case, the surrender of Mr. Olssen was sought by Sweden in respect of four offences in circumstances where the Swedish police were required to interview him in order to formally conclude their criminal investigation after which a final decision on whether or not prosecute him would be taken. In correspondence, the Swedish authorities stated that while there was an intention to prosecute on the basis of the available evidence, the requested person had at all material times been abroad and had not been available to be interviewed and the procedure could not be finalised in his absence. The Supreme Court dismissed the objection to surrender. The Court emphasised that what is impermissible is surrender in circumstances where a decision to prosecute is dependent upon some further evidence being obtained. However, if an intention to prosecute has been made then surrender should take place even in circumstances where that decision is revocable upon further information or evidence coming to light which might indicate the requested person's innocence. O'Donnell J. stated at para. 33:-

*"When s. 21A speaks of "a decision" it does not describe such decision as final or irrevocable, nor can it be so interpreted in the light of the Framework Decision. The fact that a further decision might be made eventually not to proceed, would not therefore mean that the statute had not been complied with, once the relevant intention to do so existed at the time the warrant was issued. The Act of 2003 does not require any particular formality as to the decision; in fact, s. 21 focuses on (and requires proof of) the absence of one. The issuing state does not have to demonstrate a decision. A court is only to refuse to surrender a requested person when it is satisfied that no decision has been made to charge or try that person. This would be so where there is no intention to try the requested person on the charges at the time the warrant was issued. In such circumstances, the warrant could not be for the purposes of conducting a criminal prosecution."*

12. In the present case, the EAW expressly states at the outset that it has been issued for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order. The correspondence from the issuing state makes clear that it is the intention of the German authorities to prosecute the respondent for the offences set out in the EAW. By way of a procedural safeguard, such prosecution cannot be commenced by the German authorities until the respondent is interviewed but that does not in any way take away from the current intention to prosecute the respondent. In such circumstances,

the presumption contained in s. 21A(2) has not been rebutted and indeed the information before the Court confirms that it is the intention of the German authorities to prosecute the respondent.

13. Arising out of the points of objection, a request for additional information was made by the Court dated 22nd May, 2020, in which the German authority was asked, *inter alia*:-

*"Has this warrant been previously executed in another jurisdiction; specifically, was it previously executed in Northern Ireland?"*

By reply dated 28th May, 2020, the German authority replied, *inter alia*:-

*"The prosecuted person was already arrested on 31st October 2018 in Belfast, but initially served a prison sentence imposed by the British Authorities. The request by the Public Prosecution Office Zwickau at that time related to the European Arrest Warrant issued by the Public Prosecution Office Zwickau on 15th March 2018, issued anew on 10th May 2019. However, the prosecuted person was released by the British Authorities and was henceforth a fugitive. The European Arrest Warrant dated 14th June 2019 which is now the object of the proceedings, has not been object of any other extradition proceedings. The Romanian Authorities, upon their request, also received a copy of the European Arrest Warrant. There has, however, been no information of an arrest in the Romanian Republic."*

14. At the initial hearing of this matter, Counsel on behalf of the respondent submitted that the EAW before the Court or a similar European arrest warrant had been adjudicated upon by the courts of Northern Ireland. In an affidavit sworn by Mr. Edward King, solicitor for the respondent, dated 29th May, 2020, an order of the Recorder of Belfast dated 3rd May, 2019 was exhibited. This order is described as an "*Order for discharge of an extradition matter*". The respondent herein is named as the "*defendant requested person*". The body of the order contains the following, *inter alia*:-

*"WHEREAS the defendant being a person in respect of whom a Part 1 Warrant has been issued by a judicial authority of a Category 1 Territory, and having today appeared or been brought before the appropriate judge. The appropriate judge hereby orders that the Extradition matter be discharged on the grounds that: Other reason - court ruled that the warrant be discharged after hearing from both counsel."*

15. Counsel on behalf of the respondent requested the Court to raise a further request for additional information from the German authorities seeking information; (a) as to why the warrant had been discharged and (b) seeking confirmation from the German authorities that the respondent, if surrendered, would be credited with any time spent in custody in Northern Ireland as well as in this jurisdiction, should he be convicted and receive a custodial sentence in Germany.

16. The Court was reluctant to make such a request of the German authorities in circumstances where information as to what had happened in the proceedings in Northern Ireland could be easily obtained by the respondent from his former legal representatives in that jurisdiction. Furthermore, the Court had reservations as to whether it was appropriate to engage with the German authorities as regards the respondent's custody in Northern Ireland in circumstances where such credit as the respondent was entitled to in respect of time in custody was governed by article 26 of the Framework Decision and there was no reason to believe that the German authorities would not implement the requirements of that article. The matter was adjourned to enable the respondent to seek information from his previous legal representatives in Northern Ireland.
17. When the matter came back before the Court, the respondent submitted an affidavit of Mr. Ruairi Gillen, former solicitor for the respondent in Northern Ireland, dated 12th June, 2020, which clarified matters significantly. Prior to the issue of the EAW which is before this Court, the respondent had been arrested in Northern Ireland on 3rd August, 2018 in respect of an offence of burglary in that jurisdiction. He was refused bail and was remanded in custody. While on remand in custody in respect of the burglary charge he was arrested on foot of a European arrest warrant issued by Germany. He did not apply for bail in respect of the European arrest warrant matter which could not be dealt with until the domestic criminal matter had concluded. On 25th January, 2019, the burglary charge was withdrawn. Seemingly as a result of an error, he was released from detention notwithstanding the fact that he remained remanded in custody in respect of the EAW. A further warrant was issued but was subsequently discharged. Mr. Gillen in his affidavit states that the respondent had been remanded in custody on foot of the EAW on 31st October, 2018, and released on 25th January, 2019, and expresses the opinion that as the domestic criminal charges were withdrawn, the entirety of this time is attributed to the sentence to be served in respect of the EAW.
18. Counsel on behalf of the respondent accepted that the discharge of the earlier warrant by the Recorder of Belfast was not based on any consideration of the merits of the extradition request and he further accepted that the warrant or warrants before the Northern Ireland courts were not the same warrant as was before this Court. He submitted that nevertheless, the respondent had been detained in Northern Ireland as part of an extradition request by the German authorities in respect of the same offences which made up the subject matter of the EAW before this Court. He submitted that in such circumstances the respondent was entitled to be credited by the German authorities for such time spent in custody in Northern Ireland and that if the German authorities were not prepared to give such credit then this Court should refuse surrender. He submitted that this Court should make a further request for additional information from the German authorities specifically calling for confirmation that the respondent would be given credit for any time spent in custody in Northern Ireland.
19. I am satisfied that it is not necessary for this Court to make a further request for additional information as requested on behalf of the respondent. Article 26 of the Framework Decision provides as follows:-

- "1. *The issuing Member State shall deduct all periods of detention arising from the execution of a European arrest warrant from the total period of detention to be served in the issuing Member State as a result of a custodial sentence or detention order being passed.*
  2. *To that end, all information concerning the duration of the detention of the requested person on the basis of the European arrest warrant shall be transmitted by the executing judicial authority or the central authority designated under Article 7 to the issuing judicial authority at the time of the surrender."*
20. It is clear from the wording of article 26 that it is for the issuing member state to deduct the periods of detention arising from the execution of a European arrest warrant from any period of detention to be served in the issuing member state. The obligation placed upon the executing member state is to transmit all information concerning the duration of the detention of the requested person on the basis of the European arrest warrant. If there is a dispute between the respondent and the issuing member state as to whether or not a particular period of detention is to be deducted, then that dispute should be resolved in proceedings before the issuing member state in the first instance and if necessary, can be adjudicated upon by the Court of Justice of the European Union if it is alleged that the issuing member state has failed to properly implement or interpret the provisions of article 26 of the Framework Decision. It is not for this Court to determine in advance of surrender whether or not a period of detention spent by the respondent in respect of an earlier warrant in a different jurisdiction should be deducted from any sentence imposed in due course by the issuing member state. It is not for this Court to certify what periods of detention were served in another jurisdiction. Presumably, the relevant certification can be obtained by the respondent from the Northern Ireland authorities. It should of course be borne in mind that the issue of such deduction will only become relevant if the respondent is convicted and given a custodial sentence in the issuing member state. That may or may not arise.
21. The concept of mutual trust and confidence between member states underpins the Framework Decision and the European arrest warrant system. There is nothing before the Court to indicate that the German authorities will not properly give effect to the provisions of article 26 of the Framework Decision. In such circumstances, this Court proceeds on the basis that the German authorities will deduct such periods of detention as it is required to do pursuant to article 26 of the Framework Decision (in the event that the respondent is convicted of any of the offences and a custodial sentence is imposed).
22. I take some support for the approach adopted by this court from the decision of Edwards J. in *Minister for Justice and Equality v. Zigelis* [2012] IEHC 12. In that case, the surrender of the respondent was sought by the Republic of Lithuania. The respondent consented to his surrender and the Court made an order pursuant to s. 15 of the Act of 2003 but pursuant to s. 18(3) of the Act of 2003, the surrender of the respondent was postponed until such time as he had completed serving a sentence imposed upon him in this jurisdiction. He completed that domestic sentence on 17th August, 2011, and on that

date the applicant sought a surrender date of 19th August, 2011. It was submitted to the Court that the respondent had spent longer in detention on foot of the EAW than he would be required to serve in Lithuania. He was admitted to bail and the matter came before the court on a number of occasions. The Lithuanian authorities took the view that the time spent by the respondent in prison in Ireland should not be deducted from the Lithuanian sentence as it related to a domestic sentence as opposed to the EA W. Edwards J. stated at p. 6:-

*"It is clear from sub-article (1) of Article 26, in particular, that it is a matter for the issuing member state to deduct all periods of detention arising from the execution of a European arrest warrant. The role of the executing judicial authority or the central authority in the executing member state is confined, per sub-article 2 of Article 26, to transmitting relevant information to the issuing member state. It is a matter for the relevant authorities within the issuing member state to interpret and give effect to Article 26(1). Article 26(1) is certainly open to the interpretation that the Lithuanian authorities are placing on it. Arguably, it may also be open to the interpretation that the respondent puts on it. It is not for this Court to adjudicate on who is correct. The issue is one for the respondent to raise before the courts of the issuing state upon his surrender."*

23. For the reasons set out above I dismiss the respondent's objections.
24. I am satisfied that the surrender of the respondent is not prohibited for any of the reasons set forth in ss. 21A, 22, 23 and 24 of the Act of 2003.
25. I am satisfied that the surrender of the respondent is not prohibited by part 3 of the Act of 2003.
26. It follows that this Court will make an order pursuant to s. 16 of the Act of 2003 for the surrender of the respondent to Germany.
27. This Court will further direct that the information to be transmitted to the issuing judicial authority concerning the duration of the detention of the requested person on the basis of the European arrest warrant shall include not only the relevant information relating to the period of detention in this jurisdiction but also copies of the affidavit of Mr. Edward King dated 29th May, 2020 and the affidavit of Mr. Ruairi Gillen dated 12th June, 2020 together with exhibits to assist the German authorities in calculating any period of detention to be deducted from any custodial sentence which may be imposed should the need to do so arise. However, it should be made clear to the German authorities that this Court has expressed no opinion on whether or not the period of detention spent by the respondent in Northern Ireland is so deductible.