

**THE HIGH COURT**

[2020] IEHC 598

**RECORD NUMBER 2020/126 EXT**

**BETWEEN**

**MINISTER FOR JUSTICE AND EQUALITY**

**APPLICANT**

**AND**

**JAMES CONNORS**

**RESPONDENT**

**JUDGMENT of Mr. Justice Paul Burns delivered on the 20th day of November, 2020**

1. By this application the applicant seeks an order for the surrender of the respondent to the United Kingdom of Great Britain and Northern Ireland ("the UK") pursuant to a European arrest warrant dated 15th May, 2020 ("the EAW") issued by Sheriff Thomas Welsh, of the Sheriff Court of Lothian Borders at Edinburgh as the issuing judicial authority. The EAW seeks the surrender of the respondent to face prosecution in respect of three offences of housebreaking and one offence of dangerous driving.
2. The EAW was endorsed on 15th June, 2020 and the respondent was arrested and brought before this Court on 15th October, 2020.
3. I am satisfied that the person before the Court is the person in respect of whom the EAW was issued. This was not put in issue by the respondent.
4. I am satisfied that the minimum gravity requirements of the European Arrest Warrant Act, 2003, as amended ("the Act of 2003"), are met. The offences in respect of which surrender is sought each carry a maximum penalty in excess of 12 months' imprisonment.
5. I am satisfied that none of the matters referred to in ss. 21A, 22, 23 and 24 of the Act of 2003 arise and that the surrender of the respondent is not prohibited for the reasons set forth therein.
6. At part C of the EAW, the offences in respect of which surrender is sought are set out as three offences of theft by housebreaking and one offence of dangerous driving. The particulars of the acts stated to constitute the alleged offences are set out at part E of the EAW. In essence, it is alleged that the respondent and others broke into three separate properties and stole property therefrom, and that in attempting to evade arrest, the respondent drove a car dangerously, for which the respective dates and locations have been provided.
7. Points of objection were filed on behalf of the respondent dated 29th October, 2020, which can be summarised as follows:-
  - (a) surrender is precluded under s. 38 of the Act of 2003 by reason of the tick-box procedure having been wrongly relied upon by the issuing state; and
  - (b) surrender is precluded by reason of the UK Government having announced its intention to break a treaty entered into between the UK and the European Union

("the EU") regarding the UK's withdrawal from the EU, and in particular the introduction into the UK Parliament of proposed legislation known as the Internal Market Bill 2020.

**Section 38 of the Act of 2003**

8. Section 38 of the Act of 2003 provides as follows: -

- "(1) Subject to subsection (2), a person shall not be surrendered to an issuing state under this Act in respect of an offence unless—*
- (a) the offence corresponds to an offence under the law of the State, and—*
    - (i) under the law of the issuing state the offence is punishable by imprisonment or detention for a maximum period of not less than 12 months, or*
    - (ii) a term of imprisonment or detention of not less than 4 months has been imposed on the person in respect of the offence in the issuing state, and the person is required under the law of the issuing state to serve all or part of that term of imprisonment,*
  - or*
  - (b) the offence is an offence to which paragraph 2 of Article 2 of the Framework Decision applies, and under the law of the issuing state the offence is punishable by imprisonment for a maximum period of not less than 3 years.*
- (2) The surrender of a person to an issuing state under this Act shall not be refused on the ground that, in relation to a revenue offence—*
- (a) no tax or duty of the kind to which the offence relates is imposed in the State, or*
  - (b) the rules relating to taxes, duties, customs or exchange control that apply in the issuing state differ in nature from the rules that apply in the State to taxes, duties, customs or exchange control.*
- (3) In this section 'revenue offence' means, in relation to an issuing state, an offence in connection with taxes, duties, customs or exchange control."*

In effect, s. 38(1)(a) of the Act of 2003 precludes surrender in respect of an offence unless the acts stated to constitute that offence would also constitute an offence in this State and carries a maximum penalty in the issuing state of at least 12 months' imprisonment or a sentence of at least 4 months' imprisonment has been imposed by the issuing state in respect of the offence. However, s. 38(1)(b) provides an alternative procedure whereby it is not necessary for the applicant to establish the requirements of s. 38(1)(a) where the offence is an offence to which article 2(2) of the Council Framework Decision dated 13th June, 2002 on the European Arrest Warrant and the Surrender Procedures Between Member States, as amended ("the Framework Decision") applies and

which carries a maximum penalty of at least 3 years' imprisonment under the law of the issuing state.

9. At part E(I) of the EAW, the issuing state has invoked the procedure provided for at s. 38(1)(b) by certifying that the offences carry a maximum penalty of at least 3 years' imprisonment and has ticked the relevant box for "participation in a criminal organisation", as the relevant offence to which article 2(2) of the Framework Decision applies.
10. It was submitted on behalf of the respondent that the certification by the issuing state at part E(I) of the EAW was in error and introduced an unacceptable level of confusion or ambiguity into the EAW. It was submitted that on its face, the certification at part E(I) appeared to include the offence of dangerous driving, which was stated as carrying a maximum penalty of 2 years' imprisonment at part C of the EAW. It was further submitted that there was an insufficient factual basis set out in the EAW to justify the certification of the offences as "participation in a criminal organisation".
11. At part E(II) of the EAW under the heading "*Full description of offence(s) not covered by section I above*", it is stated:-

*"The Theft by Housebreaking offences and dangerous driving described are covered by section I above insofar as they are aggravated by a connection with serious organised crime."*

12. At Part F of the EAW, it is stated:-

*"Money and belongings stolen in these three housebreakings amounts to in excess of £100,000.*

*This case forms part of a wider investigation into an organised crime group linked to a large number of housebreakings across the UK.*

*Co-accused Michael Connors and Lawrence Larry Connors are themselves also sought by way of separate European Arrest Warrants."*

13. It is clear that the inclusion of the offence of dangerous driving at part E(I) of the EAW is in error if the maximum penalty for same in the UK is 2 years' imprisonment as set out at part C of the EAW. However, I am not satisfied that such an error is fatal as regards the execution of the EAW. If the certification at part E(I) is in error or ambiguous, then the effect of same is that the issuing state cannot rely upon the certification under s. 38(1)(b) of the Act of 2003 and thus, correspondence must be established by the applicant in accordance with s. 38(1)(a) of the Act of 2003.
14. In *Minister for Justice v. Dolny* [2009] IESC 48, the Supreme Court emphasised that when considering correspondence, the question should be asked in general terms as to whether the conduct set out in the warrant is contrary to the criminal law of the State. Denham J., as she then was, outlined at para. 38:-

*"[38] In addressing the issue of correspondence it is necessary to consider the particulars on the warrant, the acts, to decide if they would constitute an offence in the State. In considering the issue it is appropriate to read the warrant as a whole. In so reading the particulars it is a question of determining whether there is a corresponding offence. It is a question of determining if the acts alleged were such that if committed in this jurisdiction they would constitute an offence. It is not a helpful analogy to consider whether the words would equate with the terms of an indictment in this jurisdiction. Rather it is a matter of considering the acts described and deciding whether they would constitute an offence if committed in this jurisdiction."*

Applying the test as set out in *Dolny*, I am satisfied that the acts set out in the EAW as constituting the offence of dangerous driving in the UK would, if committed in this jurisdiction, constitute the offence of dangerous driving contrary to s. 53 of the Road Traffic Act, 1961, as amended. I am satisfied that the offence of dangerous driving meets the minimum gravity requirement as set out in s. 38(1)(a) of the Act of 2003 as the offence is said to carry a maximum penalty of 2 years' imprisonment.

15. As regards the certification of the housebreaking offences in part E(I) of the EAW as "participation in a criminal organisation", I am satisfied that there are sufficient facts set out in the EAW to support such certification. It is alleged that the offences were connected with serious organised crime, there were at least three persons engaged in same and the proceeds of the offences were in excess of £100,000. The case is said to be part of a wider investigation into an organised crime group linked to a large number of housebreakings across the UK. I note that in this jurisdiction, an organised criminal group is defined in s. 70 of the Criminal Justice Act, 2006, as amended, as:-

*"(1) In this Part—*

*... 'criminal organisation' means a structured group, however organised, that has as its main purpose or activity the commission or facilitation of a serious offence;*

*... 'structured group' means a group of 3 or more persons, which is not randomly formed for the immediate commission of a single offence, and the involvement in which by 2 or more of those persons is with a view to their acting in concert; for the avoidance of doubt, a structured group may exist notwithstanding the absence of all or any of the following:*

- (a) formal rules or formal membership, or any formal roles for those involved in the group;*
- (b) any hierarchical or leadership structure;*
- (c) continuity of involvement by persons in the group. "*

I am satisfied that the certification of the housebreaking offences as "participation in a criminal organisation" is not in error and nor does it give rise to any ambiguity so that this Court should look beyond such certification.

16. Furthermore, even if this Court was not to accept the certification of the housebreaking offences at part E(I) of the EAW, this would not automatically result in a refusal to execute the EAW, but rather would necessitate the applicant satisfying the Court that correspondence exists between such offences and offences under the law of this State, as provided for at s. 38(1)(a) of the Act of 2003. Applying the test as set out in *Dolny*, I am satisfied that the acts said to constitute the offences of housebreaking in the EAW would, if committed in this jurisdiction, constitute the offence of burglary contrary to s. 12 of the Criminal Justice (Theft and Fraud Offences) Act, 2001. I am satisfied the offences of housebreaking meet the minimum gravity requirement as set out in s. 38(1)(a) of the Act of 2003 as the offences are said to carry a maximum penalty of life imprisonment.
17. I dismiss the respondent's objections to surrender concerning or arising out of part E of the EAW.

### **The Internal Market Bill 2020**

18. Counsel on behalf of the respondent submitted that the system of surrender provided for under the Act of 2003 and the Framework Decision was based upon the principle of mutual trust and confidence as between the member states, both as regards the information which is set out in a particular EAW and, more importantly, as regards compliance with the Framework Decision, including respect for fundamental human rights. He submitted that recent statements by members of the UK Government, as widely reported, and the introduction of the Internal Market Bill 2020 into the UK Parliament demonstrated a clear willingness and intention by the UK not to honour or give effect to international agreements or arrangements which it had entered into. He referred to the fact that the European Commission had served a preliminary letter upon the UK concerning an anticipated breach by the UK of the European Union Withdrawal Agreement entered into between the UK and the EU. In such circumstances, it was submitted that this Court was precluded from ordering the surrender of the respondent as it could have no confidence that the UK authorities would abide by the terms of the Framework Decision or respect the fundamental rights of the respondent once surrendered.
19. Whilst the behaviour of the UK Government as regards the introduction of the Internal Market Bill 2020 has been a matter of considerable controversy, I am not satisfied that a refusal to surrender the respondent as a result of same is justified under the Act of 2003 or the Framework Decision.
20. Counsel for the applicant referred to the decision of the Court of Justice of the European Union ("the CJEU") in *RO* (Case C-327/18 PPU), which involved a reference from the High Court seeking a preliminary ruling following the UK serving notice of its intention to withdraw from the EU. The issue before the CJEU was whether the uncertainty as to the extent to which a national of a member state would in practice be able to enjoy rights under the EU treaties, the European Charter of Fundamental Rights ("the Charter") or relevant legislation, if surrendered to the UK on foot of a European arrest warrant, required a member state to refuse surrender to the UK. The CJEU determined that mere notification by a member state of its intention to withdraw from the EU in accordance with article 50 of the Treaty on the Functioning of the European Union ("the TFEU") cannot be

regarded, as such, as constituting an exceptional circumstance, within the meaning of the case law capable of justifying a refusal to execute a European arrest warrant issued by that member state. The CJEU went on to state at para. 49:-

*"[49] However, it remains the task of the executing judicial authority to examine, after carrying out a specific and precise assessment of the particular case, whether there are substantial grounds for believing that, after withdrawal from the European Union of the issuing Member State, the person who is the subject of that arrest warrant is at risk of being deprived of his fundamental rights and the rights derived, in essence, from Articles 26-28 of the Framework Decision..."*

21. At para. 61 of its decision, the CJEU noted that the UK is a party to the European Convention on Human Rights ("the ECHR"). It noted the UK had incorporated the provisions of ECHR into its national law, and that after the withdrawal of a member state, a presumption can still be made that the former member state would apply the substantive content of the rights derived from the Framework Decision if the national law of the former state incorporated the substantive content of those rights, and, in particular, if the former member state continued to participate in international conventions such as the European Convention on Extradition and the ECHR after withdrawal from the EU. Only if there is concrete evidence to the contrary could the judicial authorities of a member state refuse to execute the European arrest warrant.
22. At the time of giving judgment in this matter, the transitional arrangements between the UK and the EU remain in place and will continue to remain in place until 31st December, 2020. It is accepted by both the applicant and the respondent that under those arrangements, including the withdrawal agreement between the UK and the EU and the national legislation put in place in this jurisdiction to give effect to same, the provisions of the Act of 2003 continue to be in force and that this Court is obliged to give effect to same. The essential question before the Court is whether the Court is satisfied that the respondent has demonstrated the existence of a real risk that his surrender to the UK will result in a breach of his fundamental rights under the Charter, the ECHR or the Constitution.
23. As matters stand, there has been no breach of any treaty or international law by the UK as envisaged by the respondent. There has been no decision by the European Council pursuant to article 7 of the Treaty on the European Union ("the TEU") that the UK is in serious and persistent breach of the principles in article 6(1) TEU so as to suspend surrender arrangements with the UK. There has been no express or implied suggestion from the UK authorities that it is the intention of the UK to no longer respect or give effect to fundamental rights as protected under the Charter or the ECHR. By virtue of s. 4A of the Act of 2003, it shall be presumed that an issuing state will comply with the requirements of the Framework Decision, unless the contrary is shown. I am satisfied that such presumption has not been rebutted by the respondent. The respondent's objections to surrender are speculative, vague, unsupported by evidence and are subject to innumerable variables so that this Court could not refuse surrender on foot of same. On

the case before me, the respondent has failed to adduce any cogent evidence to even suggest that there are substantial or reasonable grounds for believing that this particular respondent, if surrendered to the UK, will be exposed to a real risk of being subjected to treatment contrary to his fundamental rights. I therefore dismiss the respondent's objections to his surrender based on the Internal Market Bill 2020 in the UK.

24. I am satisfied that the surrender of the respondent is not precluded by s. 37 of the Act of 2003.

**Conclusion**

25. I am satisfied that the surrender of the respondent is not precluded by ss. 37 or 38 of the Act of 2003 or by any other provision of part 3 of the Act of 2003.
26. Having dismissed the respondent's objections, it follows that this Court will make an order pursuant to s. 16(1) of the Act of 2003 for the surrender of the respondent to the UK.