

THE HIGH COURT

[2020] IEHC 695
[2020 No. 066 EXT.]

BETWEEN

MINISTER FOR JUSTICE AND EQUALITY

APPLICANT

AND

GÁBOR SZÚCS

RESPONDENT

JUDGMENT of Mr. Justice Paul Burns delivered on the 21st day of December, 2020

1. By this application the applicant seeks an order for the surrender of the respondent to Hungary pursuant to a European arrest warrant dated 6th November, 2019 ("the EAW"). The EAW was issued by Dr. Katalin Sipter, Investigative Judge of the Szeged District Court Investigative Judicial Unit, as the issuing judicial authority. The EAW seeks the surrender of the respondent in respect of a single offence of swindling/fraud.
2. The EAW was endorsed by the High Court on 9th March, 2020, was executed by An Garda Síochána and the respondent was brought before the High Court on 26th June, 2020. The Respondent has been in custody since that date with consent to bail, having not taken up bail.
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 offence in respect of which the surrender of the respondent is sought carries a maximum penalty of 3 years' imprisonment.
5. At part E of the EAW, the particulars of the alleged offence are set out. It is certified at part E that the offence carries a maximum penalty of at least 3 years' imprisonment and falls within 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"), and the relevant box is ticked for "swindling/fraud". By virtue of s. 38(1)(b) of the Act of 2003, it is not necessary for the applicant to show correspondence between an offence in the EAW and an offence under Irish law, where the offence in the EAW is an offence to which article 2(2) of the Framework Decision applies and carries a maximum penalty of at least 3 years' imprisonment. There is nothing in the EAW or other documents before the Court that gives rise to any ambiguity or perceived manifest error, such as would justify this Court in looking behind the certification in the EAW. Nevertheless, for the sake of completeness I point out that I am satisfied that correspondence could be established in respect of the offence in the EAW and the offence under Irish law of deception contrary to s. 6 of the Criminal Justice (Theft and Fraud Offences) Act, 2001. At hearing, no issue was taken on behalf of the respondent as regards correspondence.

6. The respondent delivered points of objection dated July, 2020. At hearing, counsel on behalf of the respondent pursued the following objections:-
 - (i) surrender is precluded by reason of s. 37 of the Act of 2003 as it would be incompatible with the State's obligations under the European Convention on Human Rights ("the ECHR") due to prison conditions in Hungary and/or the likely treatment of the respondent in prison due to his sexual orientation;
 - (ii) surrender is precluded by reason of s. 44 of the Act of 2003, as the offence was committed outside of Hungary and the requirements of that section have not been met; and
 - (iii) surrender is precluded by reason of s. 21A of the Act of 2003, as a decision has not been made to charge and try the respondent for the offence in the EAW.

Section 37 of the Act of 2003

7. The respondent's solicitor, Mr. Liam Ryan, swore an affidavit dated 9th July, 2020 exhibiting a large number of reports critical of prison conditions in Hungary, particularly overcrowding. He also exhibited reports highlighting hostility to, and discrimination against, persons in Hungary on grounds of sexual orientation. It was averred that the respondent had instructed Mr. Ryan that he is homosexual.
8. The Court sought further information from the issuing judicial authority in relation to the conditions in which the respondent was likely to be held if detained following surrender. By reply dated 12th October, 2020, the Hungarian Ministry of Justice set out the institutions in which the respondent was likely to be detained and gave what it described as a "binding assurance" guaranteeing that the respondent, during any period of detention he might undergo in respect of the offence in the EAW, would be afforded at least 3 square metres of personal space. It was indicated that the Hungarian General Ombudsman would monitor compliance with this assurance.
9. Mr. Ryan swore a second affidavit dated 15th October, 2020 pointing out that not all of the respondent's concerns had been addressed in the reply while also raising a fresh point regarding s. 21A of the Act of 2003 by setting out hearsay information about a conversation which members of the respondent's family had with an unnamed investigating officer who told them that the case was at an investigative stage and that it should be prosecuted in Ireland.
10. Following on from the said assurance, counsel on behalf of the respondent conceded that same went a long way to meeting the respondent's concerns as regards physical prison conditions. However, he maintained that there was a real risk that the respondent's fundamental rights would be breached if surrendered due to his sexual orientation.
11. The Court requested the issuing judicial authority to address the issue of the potential risk of discrimination, violence or ill-treatment as a result of his sexual orientation. This had not been addressed in the initial reply despite a request for same. By reply dated 6th November, 2020, the Hungarian Ministry of Justice indicated that Hungary followed the

Charter of Fundamental Rights of the European Union ("the Charter") and, as a member of the European Convention on Human Rights ("the Convention"), respects the principle of non-discrimination.

12. Counsel on behalf of the respondent submitted that the assurance from the Hungarian Authorities was too broad and sweeping, and thus was an inadequate response. On behalf of the applicant, it was submitted that the response was a sufficient assurance that the issuing state would comply with its human rights obligations, specifically non-discrimination. He also submitted that the respondent had failed to establish a real risk that he would be subjected to ill-treatment or discrimination.
13. I find that while the respondent has referred the Court to a number of reports critical of Hungary's approach to dealing with issues or persons of the respondent's sexual orientation, such materials are of a general nature, and in many instances are not directly relevant to the situation the respondent will face as regards trial and/or detention. The respondent has not put forward any specific evidence in relation to his own likely circumstances to support his submission, such as previous personal experience or proof of incidents in the institutions he is likely to be detained in. I am not satisfied that the respondent has adduced sufficient cogent evidence to support a finding that there is a real risk that if surrendered, his fundamental human rights will be breached so that his surrender would be incompatible with the State's obligations under the ECHR or the Constitution. On the basis of the mutual trust and confidence which underpins the European arrest warrant system, I accept the assurance given by the issuing state that the respondent's right not to be discriminated will be respected and that both the Charter and the ECHR will be complied with. I dismiss the respondent's objection based upon a perceived discrimination or ill-treatment on grounds of his sexual orientation, if surrendered.

Section 44 of the Act of 2003

14. Counsel on behalf of the respondent submitted that the EAW was not sufficiently clear as regards where the offence occurred, and thus a possible issue arose as to whether the offence was committed somewhere other than in the issuing state which might preclude surrender under s. 44 of the Act of 2003. In the second affidavit, there was reference to a hearsay statement to the effect that the investigating officer had said the offence occurred in Ireland, and should be prosecuted here. This account was wholly lacking in cogency or evidential value and in fairness to counsel for the respondent, he did not propose that any weight should be given to same. At part E of the EAW, the details of the alleged offence are set out. There is nothing in the description of the circumstances of the alleged offence as set out to indicate that it was committed anywhere other than in the issuing state. The victim's address in Hungary is given and it is stated that she was at home when offered the investment opportunities via telephone and internet by the respondent. I dismiss the respondent's objection based on s.44 of the Act of 2003.

Section 21A of the Act of 2003

15. 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."

16. It is clear that by virtue of s. 21A(2) of the Act of 2003, a presumption arises that the issuing state has made a decision to charge and try the respondent for the offence specified in the EAW, and that presumption remains in place unless the contrary is proved. Counsel for the respondent relied upon the fact that at part E of the EAW, it is stated that by virtue of the description of the circumstances of the alleged offence, the respondent "can be reasonably charged". Reliance was also placed upon the fact that a domestic arrest warrant had been issued by Makó District Prosecutor's Office ("the District Prosecutor's Office") and the EAW had been issued by an "Investigative Judge". The Court made a request for additional information asking the issuing judicial authority to confirm whether a decision had been made to charge and try the respondent for the offence specified in the EAW, and not simply for questioning him in respect of same. By reply dated 6th November, 2020, the Hungarian Ministry of Justice enclosed a letter from the District Prosecutor's Office dated 3rd November, 2020. The letter stated that the respondent had not yet been interrogated as a suspect but also stated that:-

"Furthermore, I inform you that it is expected that the District Prosecution Office of Makó will lay a charge if Gábor Szűc's criminal liability is, without any doubt whatever, proven for the felony of fraud causing larger damage as defined in the crime report."

The letter also referred to an earlier request for mutual legal assistance which the issuing state had issued to the Irish Central authority for the interrogation of the respondent as a suspect. This does not appear to have been acted upon. As a person could be questioned under such mutual assistance either in the course of an investigation or in the course of proceedings, it was accepted that the making of the request was of little evidential value in respect of the issue.

17. Counsel for the respondent submitted that on the basis of the letter from the District Prosecutor's Office, the Court could not be satisfied that a decision had been made to charge and try the respondent. Counsel for the applicant submitted that there was nothing in the letter that went in any way towards rebutting the presumption contained in s. 21A of the Act of 2003. The Court was referred to the following authorities:-

Minister for Justice v. McArdle [2005] IESC 76, [2005] 4 I.R. 260;

Minister for Justice v. Ollsen [2011] IESC 1, [2011] 1 I.R. 384;

Minister for Justice v. Bailey [2012] IESC 16, [2012] 4 I.R. 1;

Minister for Justice and Equality v. Cristian Nicola [2020] IEHC 318; and

Minister for Justice and Equality v. Campbell [2020] IEHC 344.

18. Having considered the aforementioned authorities, I am satisfied that the presumption in s. 21A of the Act of 2003 must be accepted by the Court unless there is cogent evidence to prove the contrary. As a result of the said presumption, the issuing state does not have to prove or demonstrate that a decision has been made to charge and try, but rather the Court is only to refuse to surrender, the respondent when it is satisfied that no such decision has been made. The use of the word "suspect" in the documentation does not indicate that no such decision has been made. Indeed, it might be wondered how else a person wanted for trial might be described. In the present case, I find that the evidence relied upon by the respondent falls far short of proving that no such decision has been made. It is a feature of many continental European legal systems that the suspect must be questioned or at least the charges must be formally put to him for response before the formal court process may be commenced. A formal decision to charge and try the respondent may have to await such steps. It may indeed be the case that having carried out such steps, the suspect is not charged as a result of information he may supply. However, s. 21A does not require that an irrevocable decision to charge and try the respondent must have been made by the issuing state. Such a requirement would be absurd, perverse, and have the potential to cause significant injustice. As O'Donnell J. made clear in *Ollsen*, 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 is issued. In such circumstances, the warrant could not be for the purposes of conducting a criminal prosecution."

19. 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. There is nothing in the body of the EAW to indicate that surrender is being sought to execute a custodial sentence. The contents of the EAW are entirely consistent with a request for surrender for the purposes of conducting a criminal prosecution. I find that the correspondence does not contradict the presumption contained in s. 21A of the Act of 2003. I find that the respondent has failed to adduce sufficient cogent evidence that no decision to charge and try the respondent had been made at the time the EAW was issued. In such circumstances, I dismiss the respondent's objection based on s. 21A of the Act of 2003.

Conclusion

20. I am satisfied that the surrender of the respondent is not precluded by reason of s. 21A of the Act of 2003.
21. I am satisfied that none of the matters referred to in ss. 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.
22. I am satisfied that the surrender of the respondent is not precluded by reason of ss. 37, 44 or any other provision of part 3 of the Act of 2003.
23. I am satisfied that the surrender of the respondent is not precluded for any other reason.
24. 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 Hungary.