

**THE HIGH COURT**

[2021] IEHC 375  
[2021 No. 059 EXT.]

**BETWEEN**

**MINISTER FOR JUSTICE AND EQUALITY**

**APPLICANT**

**AND**

**VASILE-ALIN JELECUTEAN**

**RESPONDENT**

**JUDGMENT of Mr. Justice Paul Burns delivered on the 19th day of May, 2021**

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 13th May, 2020 ("the EAW"). The EAW was issued by Judge Michale Baptist of the Local Court in Augsburg as the issuing judicial authority.
2. The EAW seeks the surrender of the respondent for the purposes of conducting a criminal prosecution against him in respect of alleged trafficking in stolen vehicles.
3. The respondent was arrested on 22nd March, 2021 on foot of a Schengen Information System II alert and brought before the High Court on the same day. The EAW was produced to the High Court on 25th March, 2021.
4. 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 regard.
5. I am 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 for consideration in this application and surrender of the respondent is not precluded for any of the reasons set forth in any of those sections. As regards s. 21A of the Act of 2003, this is dealt with later on in this judgment.
6. I am satisfied that the minimum gravity requirements of the Act of 2003 have been met. Each of the offences in respect of which surrender of the respondent is sought carries a maximum penalty in excess of 12 months' imprisonment. No issue was taken in respect of minimum gravity.
7. By virtue of s. 38(1)(b) of the Act of 2003, it is not necessary for the applicant to establish correspondence between the offences to which the EAW relates and offences under the law of the State where the offences referred to in the EAW are offences to which article 2.2 of the European 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 carry a maximum penalty in the issuing state of at least three years' imprisonment. In this instance, the issuing judicial authority has certified that the offences referred to in the EAW are offences to which article 2.2 of the Framework Decision applies, that same are punishable by a maximum penalty of at least three years' imprisonment and has indicated the appropriate box for "*trafficking in stolen vehicles*". There is no apparent mistake or ambiguity in such

certification as would justify this Court looking beyond same. No issue was raised in respect of correspondence.

8. At hearing, counsel for the respondent indicated that he was pursuing three grounds of objection to surrender as follows:-

- (i) surrender is precluded by reason of s. 21A of the Act of 2003;
- (ii) surrender is precluded by reason of s. 44 of the Act of 2003; and
- (iii) surrender is precluded as the EAW does not contain sufficient detail as required by s. 11 of the Act of 2003.

**Section 21A of the Act of 2003**

9. Section 21A of the Act of 2003 provides:-

*"21A.(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."*

10. Counsel on behalf of the respondent referred the Court to a report from a German lawyer, Mr. Wolfgang Bendler, dated 11th April, 2021. Counsel submitted that it was clear from the said report that the proceedings in Germany are still at the investigative stage and that no decision had been made to charge and try the respondent with the offences referred to in the EAW. That the proceedings in Germany are still at a pre-trial stage is confirmed by additional information received from the issuing judicial authority, dated 6th April, 2021, which states, *inter alia*, "the EAW is for pre-trial stage, i.e. a trial did not take place until now".

11. The report from Mr. Bendler states:-

*"In both the national and the European Arrest Warrant, the investigating judge assumed that our client was strongly suspected of the alleged offences. This is based on the requests of the public prosecutor's office. It must be assumed that the public prosecutor's office will continue to hold this view. Therefore, in case Mr. Jelecutean will be transferred, the prosecution will subsequently file indictment. The competent Court will then decide again on the suspicion of the crime and the grounds for detention in the context of the examination of the opening of the main proceedings. In the case of our client, the indictment is likely to be brought before the Grand Criminal Chamber of the Regional Court of Augsburg."*

12. This actually appears to support the view that a decision has been made to charge and try the respondent. Mr. Bendler further points out:-

*"Regarding your question as to whether further judicial decisions have already been brought about in the absence of the accused:*

*This is not possible under our procedural law. Since there are no 'in absentia' proceedings, the public prosecutor's office must wait with the indictment until the accused is available to the German prosecution authorities. Incidentally, the accused also has the right to a so-called final hearing before indictment."*

13. The foregoing appears to indicate that, under German procedural rules, it is not possible to proceed with the indictment stage of the proceedings without the respondent being present. Thus, the fact that the proceedings have not yet reached indictment stage in the issuing state is not indicative of a lack of a decision to charge and try the respondent. Section 21A of the Act of 2003 does not require that an irrevocable decision has been made to charge and try the respondent. That would be absurd. What is required is that there is currently a decision to charge and try the respondent subject to whatever procedural formalities may have to be completed, and of course subject to any subsequent decision not to carry on with the prosecution.

14. In *Minister for Justice, Equality and Law Reform v. Olssen* [2011] IESC 1, [2011] 1 I.R. 384, O'Donnell J. stated at para. 33:-

*"[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 purpose of conducting a criminal prosecution."*

15. O'Donnell J. further stated in *Olssen* at para. 36:-

*"[36] .... Certainly even without the presumption contained in s. 21A(2), the section requires clear proof. Once a court finds the European arrest warrant to be in order (and therefore on its face a request made for the purpose of prosecution or trial), then before a court can refuse to surrender a person requested under such a warrant, it must be satisfied by cogent evidence to the contrary that a decision has not been made to charge the particular person with, and try him or her for, the offence."*

16. In addition to the presumption contained at s. 21A(2) of the Act of 2003, in the present case a letter dated 22nd March, 2021 from the issuing judicial authority, which accompanied the transmission of the EAW, expressly states that the extradition of the respondent is "*for the purpose of criminal prosecution*".
17. I am satisfied that the presumption provided for at s. 21A(2) of the Act of 2003 has not been rebutted and, furthermore, on the documentation before the Court, I am satisfied that a decision has in fact been made to charge and try the respondent with the offences to which the EAW relates. I dismiss the respondent's objection grounded upon s. 21A of the Act of 2003.

**Section 44 of the Act of 2003**

18. Section 44 of the Act of 2003 provides as follows:-

*"44. — A person shall not be surrendered under this Act if the offence specified in the European arrest warrant issued in respect of him or her was committed or is alleged to have been committed in a place other than the issuing state and the act or omission of which the offence consists does not, by virtue of having been committed in a place other than the State, constitute an offence under the law of the State."*

19. It is, by now, well-established jurisprudence that s. 44 of the Act of 2003 sets out a two-part test for determining whether surrender is prohibited by virtue of that section. Firstly, it must be established that the offence specified in the EAW was committed or is alleged to have been committed in a place other than the issuing state. Secondly, it must be established that the act or omission of which the offence consists does not, by virtue of having been committed in a place other than the State, constitute an offence under the law of the State. In *Minister for Justice and Equality v. Egharevba* [2015] IESC 55, at para. 15 of her judgment, Denham C.J. stated:-

*"15. The requirements set out in s. 44 of the Act of 2003, as amended, are conjunctive. Thus, both conditions are required to be met for the appellant to succeed."*

It is noteworthy that the wording of s. 44 of the Act of 2003 refers to "*was committed or is alleged to have been committed*". This envisages two separate concepts, namely that of "*was committed*" and that of "*is alleged to have been committed*". The reference to "*was committed*" reflects the fact that a European arrest warrant may be issued in respect of a person who has already been convicted for the offence in question and, therefore, the relevant facts relating to the commission of the offence have been judicially determined, including the location thereof. The reference to "*is alleged to have been committed*" reflects the fact that surrender may be sought in order for the person to be tried in respect of an alleged offence where it has not yet been judicially determined whether the offence was actually committed including the location thereof and, thus, the relevant criteria is where the offence *is* "*alleged to have been committed*". In this instance, the surrender of the respondent is sought in order to stand trial in respect of the offences referred to in the EAW and, therefore, the Court must consider where the offences are

alleged to have been committed and, in particular, whether it is alleged that the offences were committed in a place other than the issuing state.

20. Counsel on behalf of the respondent submitted that part E of the EAW, which sets out a description of the circumstances in which the offences were alleged to have been committed, indicates that the vehicles had originally been obtained from third parties in Hungary, Romania or Italy by fraud, theft or misappropriation and then transported to Germany. He submitted that in such circumstances, part of the offences were committed in a place other than the issuing state and, thus, the offences specified in the EAW are alleged to have been committed in a place other than the issuing state.
21. It is clear from the description of the offences set out at part E of the EAW that what is alleged against the respondent is that he was part of a criminal gang, the purpose of which was to unlawfully traffic in stolen vehicles. As is set out in the EAW, all members of the gang knew that the vehicles in question had been obtained from third parties in Hungary, Romania or Italy by fraud, theft or misappropriation and had then been transported to Germany where, for the purpose of resale, the gang applied for vehicle registration documents by submitting fictitious contracts and forged Romanian identity cards. The vehicles were then sold to people interested in buying them in Germany from whom the illegal origin of the vehicles was concealed. The respondent and other members of the gang used forged identification cards to mislead as to their identity and used false personal data to deceive the purchasers.
22. I am satisfied that it is alleged that the respondent was part of a criminal conspiracy to unlawfully obtain vehicles outside of Germany but to then bring them into Germany where, by further unlawful means, the vehicles were then sold on. It is clear that the offences referred to in the EAW are alleged to have been committed partly in Germany and partly in other locations. In particular, the completion of the criminal activity took place in Germany with the sale of the vehicles. The offences set out in the EAW are described in terms of the final sale in Germany. I am satisfied that it is alleged in the EAW that the offences were committed in Germany. Furthermore, the sales were part of a conspiracy. Conspiracy may transcend national borders. Acts taken in furtherance of the conspiracy may occur in a number of different locations but, notwithstanding such matters, each conspirator will be taken to have carried out such act wherever it was carried out by one of the other conspirators. It is clear from the facts as alleged in part E of the EAW that it is alleged that significant acts and, in particular, the sale of the vehicles took place in Germany. In such circumstances, I am satisfied that it is alleged that the offences to which the EAW relates were committed in the issuing state. This is consistent with the reasoning of the Irish Courts in *Minister for Justice and Equality v. D.F.* [2016] IEHC 82; *Minister for Justice and Equality v. S.F.* [2016] IEHC 81 and *Minister for Justice and Equality v. Egharevba* [2015] IESC 55.
23. It follows that the respondent has failed to satisfy the first requirement of s. 44 of the Act of 2003 and, as the two requirements of the section are conjunctive, the respondent has

failed to meet the conditions set out in s. 44 of the Act of 2003. In such circumstances, I dismiss the respondent's objection to surrender grounded in s. 44 of the Act of 2003.

**Section 11 of the Act of 2003**

24. Counsel on behalf of the respondent submitted that the description of the circumstances of the offences as set out in part E of the EAW was not sufficient to comply with the requirements of s. 11(1A)(f) of the Act of 2003 which provides:-

*"11 — (1) A relevant arrest warrant shall, in so far as is practicable - (a) in the case of a European arrest warrant, be in the form set out in the Annex to the Framework Decision as amended by Council Framework Decision 2009/299/JHA, (b) in the case of a Trade and Cooperation Agreement arrest warrant, be in the form set out in Annex Law-5 to the Trade and Cooperation Agreement, and (c) in the case of an arrest warrant within the meaning of the EU-Iceland Norway Agreement, be in the form set out in the Annex to the EU-Iceland Norway Agreement.*

*(1A) Subject to subsection (2A), a relevant arrest warrant shall specify -*

*....*

*(f) the circumstances in which the offence was committed or is alleged to have been committed, including the time and place of its commission or alleged commission, and the degree of involvement or alleged degree of involvement of the person in the commission of the offence."*

25. As stated earlier herein, it is clear that what is alleged in part E of the EAW is that the respondent was part of a criminal gang or conspiracy to unlawfully obtain motor vehicles and unlawfully sell same on to third parties. Twelve specific instances of such activity make up the 12 offences set out in the EAW. In each case, the time and place of the alleged commission of the offence is set out; the vehicle in question is identified; the person to whom it was sold is identified; the price which was obtained is identified and the false personal data used is identified. It is alleged that the respondent, acting in concert with other persons, committed each of these 12 offences. I am satisfied that the description of the circumstances in which the offences were alleged to have been committed, including the degree of participation in the offence by the respondent, is sufficiently set out in part E of the EAW. I am further satisfied that the absence of any further detail does not prejudice the respondent as regards this application or, indeed, any prosecution which he may face in the issuing state. I therefore dismiss the respondent's objection to surrender grounded on s. 11 of the Act of 2003.

**Conclusion**

26. I am satisfied that surrender is not precluded by reason of part 3 of the Act of 2003 or by any other provision of that Act.

27. Having dismissed the respondent's objections to surrender, it follows that this Court will make an order pursuant to s. 16 for the surrender of the respondent to Germany.