

THE HIGH COURT

[2021] IEHC 837
[2021 No. 304 EXT.]

BETWEEN

MINISTER FOR JUSTICE AND EQUALITY

APPLICANT

AND

STANISLAV SMIRNOVS

RESPONDENT

JUDGMENT of Ms. Justice Caroline Biggs delivered on the 17th day of December, 2021

1. By this application, the applicant seeks an order for the surrender of the respondent to the Republic of Latvia pursuant to a European Arrest Warrant dated 1st of April 2014 ("the EAW"). The EAW was issued by Ms S. Petersone, Prosecutor of the International Cooperation Division, Department of Analysis and Management, Prosecutor General's Office of the Republic of Latvia, as the issuing judicial authority.
2. The EAW seeks the surrender of the respondent in order to enforce a sentence of five years' imprisonment imposed upon the respondent on the 2nd of July 2013 of which four years, eleven months and twenty-seven days remains to be served.
3. The respondent was arrested on the 28th of October 2021, on foot of a Schengen Information System II alert, and brought before the High Court on the 2nd of November 2021. The EAW was produced on that date.
4. I am satisfied that the person before the court, the respondent, is the person in respect of whom the EAW was issued. No issue was raised in that regard.
5. I am satisfied that none of the matters referred to in ss. 21A, 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.
6. I am satisfied that the minimum gravity requirements of the Act of 2003 have been met. The sentence in respect of which surrender is sought is in excess of four months' imprisonment.
7. The warrant seeks that Mr. Smirnovs be surrendered to Latvia to serve the remaining portion of a 5 year sentence (4 years, 11 months and 27 days) which was originally suspended on certain conditions on the 10th of January 2012 and then reactivated on the 21st of June 2013. The court has been informed via the response to a s.20 request that this reactivation occurred against the background of non-compliance with the terms of suspension of that 5 year sentence, in particular by failing to engage with the probation services as Mr. Smirnovs was required to do.
8. The EAW specifies a single indivisible sentence imposed in respect of the 17 offences. The 17 counts may be divided up into two separate sets of offences: the counterfeit

offences contrary to Section 193(4) of the Criminal Law and 'the evading of sentence' offence contrary to s.312 of the Criminal Law. Part E (1) of the warrant states :

"e) Offences:

This warrant relates to in total: 17 offence/offences

- (1) Stanislavs Smirnovs evaded serving the imposed sentence of restriction of rights, under the following circumstances.

On 29 November 2010, prosecutor of Riga Road Transport Prosecution Office determined a penal order in criminal case on charges of S.Smirnovs under Section 262(2)(for driving a vehicle under the influence of alcohol without a driver's licence) of the Criminal Law and sentenced him to 100h of community service with the deprivation of the driver's licence for a period of 2 years 6 months.

Having failed to comply with the penal order determined by the prosecutor, during the time of unserved additional sentence, on 13 July 2011 at about 15.08 o'clock. Stanislavs Smirnovs, violating the requirements of Paragraph 39.5 of the Road Traffic Regulations, at the time when the ban on the use of driver's licence had entered into legal force, drove a car "Ford-Scorpio", state registration number CN 2714, and drove in it in Riga, along *Kreslas iela* from the side of *Daugavgrivas iela* in the direction of *Slokas iela*, where he was detained.

Moreover, during the time when his criminal record was not extinguished, having failed to comply with the penal order determined by the prosecutor, on 28 August 2011 at about 19.30 o'clock, Stanislavs Smirnovs, violating the requirements of Paragraph 39.5 of the Road Traffic Regulations, drove a vehicle "Ford-Scorpio", state registration number CN 2714, in Riga, along *Tilta iela* from the side of *Sarkandaugavas iela* in the direction of *Duntes iela*.

By his actions Stanislavs Smirnovs committed the criminal offence provided for in Section 312 of the Criminal Law."

The warrant continues at para (2):

"(2) Moreover, Stanislavs Smirnovs repeatedly utilise counterfeit means of payment.

In order to utilise counterfeit means of payment, Stanislavs Smirnovs acquired, under the circumstances not established during the investigation, counterfeit "American Express" payment cards No.371732677041005, No.371732193234001 and No.372527302783016, which were made on Stanislavs Smirnovs' name. While carrying out his criminal intent, S. Smirnovs repeatedly utilised and attempted to utilise the said counterfeit payment cards at the following time, places, and amounts [...]"

The warrant further states at para. 3:

“Thus, on 18 May 2011, within the period of time from 16.33 until 20.17 o’clock, S. Smirnovs, repeatedly utilising and attempting to utilise counterfeit means of payment – counterfeit payment cards No.371732677041005, No.371732193234001 and No.372527302783016, committed six illegal transactions for a total amount of LVL 552.64 and attempted to commit ten illegal transactions for a total amount of LVL 925.40.”

The respondent therefore faces charges contrary to Section 312 of the Criminal Law, Evading of Serving a Sentence adjudged by a Court and 193(4) of the Criminal Law Illegal Activities with Financial Instruments and Means of Payment

9. The respondent submits that correspondence has not been established with offences in this jurisdiction. The relevant statutory requirement for correspondence is set out in Section 5 of the European Arrest Warrant Act 2003, which provides as follows:

“ 5. — For the purposes of this Act, an offence specified in a relevant arrest warrant corresponds to an offence under the law of the State, where the act or omission that constitutes the offence so specified would, if committed in the State on the date on which the relevant arrest warrant is issued, constitute an offence under the law of the State. ”

10. The appropriate test to be applied in deciding correspondence is well established. In *Minister for Justice, Equality and Law Reform v Altaravicius (No.2)* [2007] 2 IR 265, MacMenamin J stated that;-

"This issue was fully examined by the Supreme Court in Attorney General v. Dyer [2004] IESC 1, [2004] 1 I.R. 40. In the course of his decision, Fennelly J identified a number of principles set out in previous cases. These are:-

1. In considering whether correspondence has been established, the court looks to the facts alleged against the subject of their request, as opposed to the name of the offence for which he or she is sought in the requesting state, and considers whether these facts or this conduct would amount in this State to a crime of the necessary minimum gravity;

2. In considering correspondence therefore the court is concerned not with the name of the offence in the requesting country but the criminal conduct alleged in the request or warrant, and;

3. In the absence of anything suggesting that the words used in a warrant had a different meaning in the law of the requesting state, the question of correspondence was to be examined by attributing to such words the meaning they would have in Irish law."

11. In *Minister for Justice, Equality and Law Reform v Dolny* [2009] IESC 48 Ms Justice Denham stated; -

"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."

12. The respondent has not raised any specific arguments on the correspondence of the fraud offences but puts the applicant to proof of correspondence. The fraud offences are described as follows:

"Moreover, Stanislavs Smirnovs repeatedly utilise counterfeit means of payment. In order to utilise counterfeit means of payment, Stanislavs Smirnovs acquired, under the circumstances not established during the investigation, counterfeit "American Express" payment cards No.371732677041005, No.371732193234001 and No.372527302783016, which were made on Stanislavs Smirnovs' name. While carrying out his criminal intent, S.Smirnovs repeatedly utilised and attempted to utilise the said counterfeit payment cards at the following time, places, and amounts."

13. The warrant then sets out 16 acts where the respondent utilised said counterfeit payment cards with dates, times, places and locations and whether each offence was completed or attempted. It is submitted by the applicant that correspondence is made out on the following offences:

- Making gain or causing loss by deception (or an attempt of same) contrary to Section 6 of the Criminal Law (Theft and Fraud Offences) Act, 2001, as amended, which provides as follows:

"6.—(1) A person who dishonestly, with the intention of making a gain for himself or herself or another, or of causing loss to another, by any deception induces another to do or refrain from doing an act is guilty of an offence."

- Alternatively the offence of using or attempting to use a false instrument under Section 26 of the same act:

"26.—(1) A person who uses an instrument which is, and which he or she knows or believes to be, a false instrument, with the intention of inducing another person to accept it as genuine and, by reason of so accepting it, to do some

act, or to make some omission, or to provide some service, to the prejudice of that person or any other person is guilty of an offence.”

- Alternatively the offence of custody of a false instrument under Section 29 of the same act:

“29.—(1) A person who has in his or her custody or under his or her control an instrument which is, and which he or she knows or believes to be, a false instrument with the intention that it shall be used to induce another person to accept it as genuine and, by reason of so accepting it, to do some act, or to make some omission, or to provide some service, to the prejudice of that person or any other person is guilty of an offence.”

14. The plain meaning of the words set out in the warrant makes clear that the respondent acquired counterfeit American Express cards *"[i]n order to utilise counterfeit means of payment... which were made on Stanislavs Smirnovs' name. While carrying out his criminal intent, S. Smirnovs repeatedly utilised and attempted to utilise the said counterfeit payment cards at the following time, places, and amounts"*. The various offences in relation to time, place, date and amount are then set out.
15. In my view, correspondence is clearly made out under Sections 6, 26 and 29 of the Criminal Justice (Theft and Fraud Offences) Act, 2001, as amended.
16. Driving Offences:

The offence itself is described as an evasion of *"serving the imposed sentence of restriction of rights, under the following circumstances"*. The warrant then explains that the respondent was subject to a sentence of community service, which included the *"deprivation of the driver's licence for a period of 2 years, 6 months"*. The warrant then sets out that on a named date and place the respondent violated the traffic code *"at the time when the ban on the use of driver's licence had entered into legal force"*. Two instances are given of him then driving on different dates, times and locations. The applicant submits that there can be no doubt that the offence corresponds to the offence of driving without a licence.

17. Section 38(1) of the Road Traffic Act, 1961, as amended, provides as follows:

“38.— (1) A person shall not drive a mechanically propelled vehicle in a public place unless he holds a driving licence for the time being having effect and licensing him to drive the vehicle.”

18. Section 38(5) then provides higher penalties if the offence occurred while the driver was disqualified.
19. The applicant submits that it is clear from the plain and ordinary meaning of the words used in the warrant that the respondent was deprived of his driving licence for 2 years and 6 months, during the currency of which he was caught driving on two occasions.

20. Both parties refer to two authorities on the question of correspondence with the offence of driving without a licence, being *MJELR -v- Jan Odstrcilik* [2010] IEHC 315 (hereinafter "Odstrcilik") and *Minister for Justice Equality & Law Reform -v- Anderson* [2006] IEHC 95 (hereinafter "Anderson").

21. Anderson was run on the basis that there was a difference between driving while disqualified and driving without a licence. Peart J. found:

"20. I believe this to be a meaningless distinction. In looking at the facts as disclosed and carrying out the necessary inquiry as to whether those facts if committed in this State would give rise to an offence under our law, the Court not lose sight of commonsense. The facts are not unusual facts. The offence alleged to have been committed is a common enough offence. It is quite clear that in this country if a person has been disqualified from holding a driving licence and he drives thereafter he can be convicted of the offence created by s. 38(1) of the Road Traffic Act, 1961. The fact that the facts speak of the respondent of having been disqualified, as opposed to him not having a licence, makes no difference as far as I can see, and I therefore hold that correspondence is made out in respect of these particular offences."

22. *Odstrcilik* was run on the basis that the offence in the warrant of driving in breach of a court order was different to the Irish offence of driving while disqualified and that there was no evidence of the driving being in a public place. Peart J. found that *"it is clear that even if the offence under Polish law is somewhat different, though not greatly, the respondent would commit an offence under s. 38 of the Act of 1961 if while he had been disqualified from driving he drove in a public place during the period of disqualification."* In relation to the "public place" argument, it was found by Peart J. to be *"contrived [...] to the point of absurdity"*.

23. The respondent confirmed that he was cognisant of the above cases but suggests that they are distinguishable ultimately on the basis that neither case deals with the specific arguments that he seeks to rely upon. His challenge on the issue of correspondence can be summarised as follows:

- a. That there are two separate offensive conducts comprised within the warrant, occurring on two separate occasions.
- b. That the offensive conduct may involve the disregard of the terms of a previous order and/or violating Paragraph 39.5 of the Road Traffic Regulations.
- c. The court has not been informed as to precisely which of the terms of the penal order which was imposed were breached and it could have been the requirement to complete community service and/or to not to commit further offences (such as driving without a valid licence) or it could have been not to drive *simpliciter*.

- d. The court has not been informed about what is prohibited by Paragraph 39.5 of the Road Traffic Regulations. It may therefore be that this infraction was separate to and unrelated to the non-possession of a licence (e.g. speeding or not being insured), in which case the licence issue could merely have been a circumstance of that offence, including possibly an aggravating feature.
- e. While the test for correspondence in the context of EAW's may be reduced to a succinct test as to "whether the offence for which surrender is sought would constitute an offence in Ireland", this is subject to the important assumption that one has correctly in the first place identified the offence for which surrender is sought.
- f. It seems clear why this must be so – unless correspondence is properly moored to the legal terms in which the foreign offence describes itself (in Mr. Smirnov's case *'evading of serving a sentence etc.'*), there is always the risk that the part of the offending which is chosen may not actually be an offence in the country seeking surrender (or, if it was, might not be an offence which achieves minimum gravity).

In light of the aforementioned arguments, the court determined that the issues could be resolved by issuing a Section 20 request asking the issuing judicial authority a simple question. In a letter dated the 8th Of December 2021, the issuing judicial authority was asked:

"In relation to the information referred to in part e) of the warrant please confirm what offence or conduct is covered by Paragraph 39.5 of the Road Traffic Regulations".

The issuing judicial authority answered by letter dated the 9th of December 2021:

" The Road traffic Regulations

(39) it is prohibited for a driver of a vehicle

(39) (5) to drive a vehicle if the prohibition to use a driver's licence has entered into force."

- 24. The respondent concedes that this information effectively puts an end to his case. I am therefore satisfied, having considered the EAW in its entirety and this additional information, that correspondence can be clearly established between the offences referred to in the EAW and offences under the law of this State, i.e. Section 38 (1) of the Road Traffic Act, 1961, as amended, and I dismiss the respondent's objections based on Section 38 of the Act of 2003.
- 25. At Part D of the EAW, it is indicated that the respondent appeared at the hearing which resulted in the decision which is sought to be enforced, no issue is raised pursuant to Section 45 of the Act of 2003 in this regard.

26. I am satisfied that surrender of the respondent is not precluded by reason of Part 3 of the Act of 2003 or another provision of that Act.
27. It therefore follows that this court will make an order pursuant to Section 16 of the Act of 2003 for the surrender of the respondent to the Republic of Latvia.