

THE HIGH COURT

[2018 No. 95 EXT]

BETWEEN

MINISTER FOR JUSTICE & EQUALITY

APPLICANT

AND

NOEL MCPHILLIPS

RESPONDENT

THE HIGH COURT

[2018 No. 96 EXT]

BETWEEN

MINISTER FOR JUSTICE & EQUALITY

APPLICANT

AND

CARON HATHERLEY

RESPONDENT

JUDGMENT of Mr. Justice Binchy delivered on the 8th day of April, 2020

1. This judgment relates to two separate applications brought pursuant to two separate European arrest warrants, each dated 5th March, 2018 (the "EAWs") and by which the surrender of each of the respondents is sought by the Kingdom of Belgium for the purpose of conducting a criminal prosecution against each of the respondents. Since the EAWs are in identical terms, and since identical points of objection have been filed in each case, this judgment deals with both applications, without distinction.
2. The EAWs were endorsed by the High Court on 14th March, 2018. The respondents were arrested and brought before this Court on 15th October, 2019, and this application proceeded on 13th February, 2020.
3. At the opening of this application, I was satisfied that the persons before the Court are the persons in respect of whom the EAWs were issued, and counsel for the respondents confirmed that the identity of the respondents was not in dispute.
4. At para. B of the EAWs, it is stated that the decision on which each EAW is based is an arrest warrant rendered in *absentia* and issued on 5th March, 2018 by an investigating judge at the Court of First Instance, West Flanders, district of Veurne, the issuing judicial authority ("IJA").
5. At para. C of each of the EAWs, it is stated that the maximum length of the custodial sentence or detention order which may be imposed for the offences to which the EAWs relate is ten years, and, accordingly, the requirement for minimum gravity is satisfied.
6. At para. E of the EAWs, it is stated that they relate to two types of criminal offence. Firstly, in each case, there are seven counts of aggravated theft and, secondly, there is a charge in each case of membership of a criminal organisation. Detailed particulars of all counts of aggravated theft are provided, as well as the alleged involvement of each of the respondents in the offences. Relevant provisions of the Belgian Penal Code relating to each of the offences are also provided. At para. E (I) of each of the EAWs, two boxes

have been ticked, the first being participation in a criminal organisation, and the second being organised or armed robbery. Para. E (II) of each of the EAWs has been indicated as being “*not applicable*”, which means that there are no offences in respect of which the ticked box offences are inapplicable, i.e. all of the offences to which the EAWs relate are ticked box offences.

Further Information

7. Pursuant to s. 20 of the European Arrest Warrant Act 2003 (the “Act of 2003”), a request for additional information was sent to the IJA by letter dated 16th January, 2020. Six questions were asked, in each case, and the replies provided in each case were identical. The questions and answers are as follows:-

“(i) Will [the respondent] be subject to further interrogation if he/she is surrendered?”

Answer: He/she will be subject to further interrogation once surrendered.

“(ii) Will these interrogations be carried out by police?”

Answer: The interrogation will be both carried out by myself as an investigating judge and the Belgian Federal Police.

“(iii) Will further questioning of [the respondents] be carried out by an investigating judge?”

Answer: Once in Belgium, he/she will be questioned by Belgian Police in detail. Afterwards, he/she will be brought before the investigating judge to be questioned again about the facts but also about the possibility to be detained. Questioning will take place with the support of a lawyer if one is requested.

“(iv) Will the preliminary decision as to whether the respondents are to be arrested by a Court of First instance be taken prior to [the respondents’] interrogation, or subsequent to their interrogation?”

Answer: An [sic] Belgian Arrest Warrant can only be issued by the investigating judge after the interrogation of a suspect (subsequent).

For the moment, the [suspects are] subjected to an Belgian arrest warrant by absentia which forms the basis of his/her European Arrest Warrant [sic].

Once a suspect is surrendered/extradited the investigation has the freedom of taking the suspect into custody or to set bail or to set him/her free under strict conditions. The suspect has to be questioned first.

In case the suspect is placed under arrest by the investigating judge, the Belgian arrest warrant will be controlled within 5 days by another magistrate judge with monthly controls.

The investigating judge has the possibility to release a suspect when his detention is no longer required.

- (v) *Will the decision to charge and try be taken at a still subsequent stage before a pre-trial chamber judge, at which stage criminal proceedings can be initiated?*

Answer: The decision to charge and try will be taken in a later stage (when the investigation is closed by the investigating judge) by the public prosecutor (Procureur des Konings).

His office nominated me as an investigating judge to do the necessary investigations as an independent and impartial judge.

- (vi) *Has a decision been taken to put [the respondents] on trial for specific charges; if so, please indicate the specific offences relevant to [each respondent].*

Answer: The offences relevant to [each respondent] are mentioned in the European Arrest Warrant under section e). He/she is a suspect of:

- (a) *Aggravated thefts (7) A.1 until A.7.*
(b) *Membership of a criminal organisation."*

Points of Objection

8. Notices of objection were delivered on behalf of each of the respondents on 12th February, 2020. These are in identical terms in respect of each respondent. There are four objections raised in each case as follows:-

- (1) The first objection is a general objection whereby each of the respondents puts the applicant on proof of all matters necessary to obtain an order under s. 16 of the Act of 2003.
- (2) The second, and most substantive objection, and the only objection actually pursued at the hearing of these applications, is that the surrender of each of the respondents is sought, not for the purpose of charging and placing each of the respondents on trial for the offences referred to in the EAWs, but for the purposes of pre-trial investigative detention. It is pleaded that no decision to charge and try the respondents has been made, and will not be made until the conclusion of the investigative stage, and that this is clear from reply (v) of the IJA to the questions asked by the central authority here, in its letter of 16th January, 2020 (see para. 7 (v) above). Accordingly, the surrender of the respondents is prohibited by s. 21A of the Act of 2003.
- (3) It is pleaded that the surrender of the respondents is not in compliance with s. 11(1A) (e) of the Act of 2003 since there is a lack of precision as to the nature of

the first instance warrants which issued against each of the respondents. It is further pleaded that there is a lack of precision as to which of the possible charges referred to in the EAWs are referable to that first instance domestic arrest warrant.

- (4) Finally, it is pleaded that the EAWs do not comply with s. 11(f) of the Act of 2003, because there is a lack of clarity in each of the warrants as to i.) the precise alleged acts attributable to each of the respondents and, ii.) the degree of involvement alleged on the part of each of the respondents in the commission of the alleged offences.

Previous Request in the United Kingdom

9. An identical application for the surrender of the respondents was previously moved on behalf of the IJA before the Westminster Magistrates' Court. The applications were in each case rejected by that court by a decision handed down on 25th October, 2018. In each case, the judge hearing the applications concluded that a decision to charge and try the respondents had not been made in Belgium, and that the absence of the respondents from that jurisdiction was not the sole reason for the failure to take a decision to charge and try the respondents. On this basis, in the case of both respondents, the application was refused. Ms. Hatherley also succeeded in resisting the application on another ground, i.e. that her surrender would give rise to a violation of her rights under Article 8 of the European Convention on Human Rights and Fundamental Freedoms, because of the impact that it would have on her mental health.

Discussion and Decision

10. The interpretation and application of s. 21A of the Act of 2003 was considered by the Supreme Court in the case of *Minister for Justice, Equality and Law Reform v. Thomas Olsson* [2011] IESC 1; [2011] IR 384. In that case, the respondent sought to resist his surrender to the Kingdom of Sweden on the grounds that no decision to charge and try the respondent had yet been made in Sweden, and, that being the case, his surrender was prohibited pursuant to s. 21A of the Act of 2003.
11. In his judgment in the matter, O'Donnell J. noted that it was clear from the evidence in that case that Mr. Olsson would not be prosecuted with the offences concerned until Swedish prosecutors had interviewed him. This was a statutory requirement, designed to protect the rights of an accused person. In an affidavit sworn on behalf of the prosecutor, it was stated:-

"While there is an intention to prosecute on the basis of the available evidence the requested person has at all material times been abroad and has not been available to be interviewed and the procedure cannot be finalised in his absence. The [respondent's] surrender is therefore sought for the purposes of conducting a criminal prosecution in respect of the above serious offences, although by Swedish law any final decision to prosecute can only be taken if the above procedure is followed and the [respondent's] right protected. I understand that the system which operates in Sweden is analogous to that which operates in many other

countries, for example, Finland, Denmark, Germany, the Netherlands, Spain, Estonia and Austria. Furthermore, Swedish law does not permit trial in absentia."

12. At para. 28 of his judgment, O'Donnell J. observed that:-

"If the Act intended that only warrants emanating from a criminal justice procedure which was identical to that of Ireland would be executed here, then the Act would manifestly fail to achieve its object, and indeed that of the Framework Decision."

13. O'Donnell J. held, at para. 32, that the concept of the "decision" in s. 21A should be understood in the light of the "intention" referred to in s. 10 of the Act of 2003 and the "purpose" referred to in Article 1 of the Framework Decision. Following on from this, at para. 33, he stated that:-

"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."

14. At para. 34, he stated:-

"The requirement of the relevant decision, intention or purpose can best be understood by identifying what is intended to be insufficient for the issuance and execution of a European arrest warrant. A warrant issued for the purposes of investigation of an offence alone, in circumstances where that investigation might or might not result in a prosecution, would be insufficient. Here it is clear that the requested person is required for the purposes of conducting a criminal prosecution (in the words of the Framework Decision) and that the Kingdom of Sweden intends to bring proceedings against him, (in the words of s. 10 of the Act of 2003). Consequently it follows that the existence of any such intention is virtually coterminous with a decision to bring proceedings sufficient for the purposes of section 21A."

15. At para. 35, he stated:-

"What is impermissible is that a decision to prosecute should be dependent on such further investigation producing sufficient evidence to put a person on trial. In such a situation there is in truth no present "decision" to prosecute, and no present "intention" to bring proceedings. Such a decision and intention would only crystallise if the investigation reached a certain point in the future. In such a case any warrant could not be said to be for the purposes of conducting a criminal prosecution: instead it could only properly be described as a warrant for the purposes of conducting a criminal investigation. In such circumstances, a court

would be satisfied under s. 21A of the Act of 2003, as amended, that no decision had been made to charge or try the requested person.”

16. It is clear from the decision of the Supreme Court in *Olsson* that the Court should interpret and apply s. 21A of the Act of 2003 in an expansive way, i.e. that words such as “charge” and “prosecution” should be interpreted in such a manner as to take account of the differences in criminal justice procedures across the European Union, to the intent of giving effect to the purpose of the Framework Decision. Indeed, this is consistent with the general obligation on Member States to interpret domestic legislation in such a manner as to give effect to European Union law, but not so as to be contrary to domestic law (see the decision of the CJEU in *Pupino*). In *Olsson*, as in this case, there was a clear statement in the European arrest warrant that the surrender of the person requested in the warrant was required for the purpose of conducting a criminal prosecution. However, in *Olsson*, there was an additional statement, contained in the affidavit as sworn by the prosecutor in that case, that there was an intention to prosecute the respondent in that case on the basis of the available evidence, and the only thing preventing that from occurring was that it was necessary to interview the respondent in the first instance. In the concluding paragraph of his judgment (para. 36) in *Olsson*, O’Donnell J. stated that:-

“It would be a surprising result if either the Framework Decision or the Act of 2003 were to be interpreted so as to prevent the execution of the European arrest warrant in respect of such countries and where (as here) the requesting authority had in the terms of the warrant, and in sworn evidence in the case, stated that the warrant was issued for the purposes of conducting a criminal prosecution.”

17. In this case, there is no equivalent sworn evidence such as there was in *Olsson*, but there is further information provided by the investigating judge. It is clear from the information provided, that the investigation into the offences with which the EAWs are concerned is on-going. While that in itself is not inconsistent with an intention to prosecute, or a decision to charge and try a requested person, it is apparent from the reply to question (v) that no decision to charge and try the respondents in this case has yet been taken, and that such a decision will only be taken (if it is taken at all) at a later stage by the public prosecutor. Furthermore, it is stated that the public prosecutor nominated the investigating judge “to do the necessary investigations as an independent and impartial judge”. It is apparent from the reply to question (v) that it is not merely a question of going through a procedure, following upon which the respondents may be charged and tried. The matter remains at the investigation stage in a meaningful way, not just because there is a procedural step to be taken before the investigation is deemed concluded. This is also apparent from reply (iii) to the request for further information, wherein it is stated that, once surrendered, the respondents will be questioned by Belgian Police in detail, following upon which they will be brought before the investigating judge to be questioned again.
18. The information provided by the IJA in response to the request for further information constitutes cogent evidence that no decision has been made to charge and try the

respondent with the offences referred to in the EAWs. In all of these circumstances, and making due allowances for the differences in procedures as between jurisdictions, and indeed, the differences in terminology in those legal processes, it is, in my opinion, impossible to come to any conclusion other than that the presumption in s. 21A (2) of the Act of 2003 is rebutted, and that no decision to charge and try the respondents has yet been made. Accordingly, the surrender of the respondents is prohibited by s. 21A of the Act of 2003, and this application must be refused.