

THE HIGH COURT

[2021] IEHC 292
[2019 No. 041 EXT.]

BETWEEN

MINISTER FOR JUSTICE AND EQUALITY

APPLICANT

AND

RAFAŁ KLUBIKOWSKI

RESPONDENT

JUDGMENT of Mr. Justice Paul Burns delivered on the 27th day of April, 2021

1. By this application the applicant seeks an order for the surrender of the respondent to the Republic of Poland ("Poland") pursuant to a European arrest warrant dated 5th September, 2018 ("the EAW"). The EAW was issued by District Judge Joachim Wieliczuk, delegated to the Regional Court in Gorzow Wielkopolski, as the issuing judicial authority. The EAW seeks the surrender of the respondent in order to enforce a sentence of 4 years' imprisonment imposed on 12th September, 2011 of which 3 years, 1 month and 2 days remains to be served.
2. The EAW was endorsed by the High Court on 4th March, 2019 and the respondent was arrested and brought before the High Court on 1st July, 2019.
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 surrender of the respondent is not precluded for any of the reasons set forth in ss. 21A, 22, 23 and 24 of the European Arrest Warrant Act, 2003, as amended ("the Act of 2003") and I deal briefly with the objection to surrender based on s. 22 of the Act of 2003 at the end of this judgment.
5. 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 4 months' imprisonment.
6. The sentence of 4 years' imprisonment imposed on the respondent is an aggregate sentence in respect of nine drugs-related offences. It is agreed between the parties that, in line with the reasoning of the Supreme Court in *Minister for Justice, Equality and Law Reform v. Ferenca* [2008] IESC 52, as the aggregate sentence cannot be broken down into specific sentences for each offence, then, unless correspondence can be established for all of the offences, surrender must be refused. Of particular interest in this regard is offence VII in the EAW, which is particularised as follows in the English translation: -

"VII. On January 21, 2011, in Gorzów Wilkp., Lubuskie Province, in the apartment at Maczka 17/5, contrary to the provisions of the Act, the requested grew cannabis, other than fibrous hem; additionally, the requested committed this act within 5 years after having served more than 6 months of a penalty of deprivation of freedom for an intentional offence similar to that for which he was sentenced by the District Court in Stargard Szczeciński, case file No. II K 666/05, for one year and 6

months of imprisonment, which he served from 11 March 2005 to 25 April 2005 and from 10 August 2008 to 27 December 2009."

In the original Polish version of the EAW, the offence is set out as follows:-

"VII. w dniu 21 stycznia 2011 r. w Gorzowie Wlkp. woj. lubuskiego w mieszkaniu przy ul. Maczka 17/5 wbrew przepisom ustawy uprawiał konopie inne niż włókniste, przy czym czynu tego dokonał w ciągu 5 lat od odbycia kary pozbawienia wolności w wymiarze powyżej 6 miesięcy, będąc skazanym za umyślne przestępstwo podobne wyrokiem Sądu Rejonowego w Stargardzie Szczecińskim sygn. akt II K 666/05 na karę roku i 6 miesięcy, którą odbywał w okresach od 11 marca 2005 r. do 25 kwietnia 2005 r. i od 10 sierpnia 2008 r. do 27 grudnia 2009 r."

7. Counsel on behalf of the respondent submitted that this particular offence had been the subject of a previous European arrest warrant and the High Court had determined there was no correspondence between that offence and an offence under the law of the State. He submitted that such finding was binding as between the parties and therefore surrender could not be ordered in respect of same.
8. It is agreed between the parties that by a previous European arrest warrant issued on 27th August, 2014 ("the 2014 warrant"), the surrender of the respondent was sought and refused in respect of an offence particularised in the English translation as follows:-

"III. On January 21, 2011, in Gorzów Wlkp., Lubuskie Voivodeship in the apartment at ul. Maczka 17/5, the sought man grew hemp other than other textile crops, whereas he committed the offence within 5 years from serving custodial sentence of over 6 months, being sentenced for similar intentional offence with the decision of District Court in Stargard Szczeciński, case no. II K.666/05 for the penalty of one year and six months, which he served from March 11, 2005 to April 25, 2005 and from August 10, 2008 to December 27, 2009,

i.e. the offence under Art. 63 sec.1 of the Act on prevention of drug abuse in conjunction with Art. 64 § 1 of the Penal Code."

In the original Polish version of the 2014 warrant, the offence is set out as follows:-

"III. w dniu 21 stycznia 2011r. w Gorzowie Wlkp. woj. lubuskiego w mieszkaniu przy ul. Maczka 17/5 wbrew przepisom ustawy uprawiał konopie inne niż włókniste, przy czym czynu tego dokonał w ciągu 5 lat od odbycia kary pozbawienia wolności w wymiarze powyżej 6 miesięcy, będąc skazanym za umyślne przestępstwo podobne wrokiem Sądu Rejonowego w Stargardzie Szczecińskim sygn. akt II K.666/05 na karę roku i 6 miesięcy, którą odbywał w okresach od 11 marca 2005 r. do 25 kwietnia 2005 r. i od 10 sierpnia 2008 r. do 27 grudnia 2009 r.,

tj. o czyn z art. 63 ust 1 Ustawy o przeciwdziałaniu narkomanii w zw. z art. 64 § 1 kk."

9. If there was any doubt on foot of the English versions as to whether offence III in the 2014 warrant and offence VII in the current EAW relate to precisely the same offence, then such doubt is dispelled by the Polish version which is identical in both documents. In fairness to counsel for the applicant, she did not dispute that offence III in the 2014 warrant and offence VII in the current EAW were, in substance, the same offence. She also accepted that, despite surrender being refused by the High Court in 2015 in respect of that offence, following surrender, the respondent was prosecuted and sentenced in respect of that offence. However, she submitted that there had been no breach of the rule of specialty as set out in article 27 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 incorporated into Irish law by s. 22 of the Act of 2003, as the respondent had not yet been deprived of his liberty in respect of same and the current EAW could be treated as a request for permission to do so in accordance with s. 22 of the Act of 2003.
10. Prior to dealing with issues concerning the rule of specialty, a fundamental issue arises as to what is the legal effect of the High Court judgment in 2015, in which Donnelly J. held there was no correspondence between that offence and an offence under the law of the State. It is agreed by the parties that the basis of the decision of Donnelly J. was the reference in offence III in the 2014 warrant to 'hemp' as opposed to 'cannabis' and that it was not an offence under Irish law to cultivate hemp. Counsel for the respondent submits that an issue estoppel arises in respect of that issue and this Court is bound by same. Counsel for the applicant submits that no issue estoppel arises, that there has been a change of facts and this Court is free to consider the issue of correspondence afresh. She submits that as the Polish wording in the description of the offence in both warrants is identical, there must have been a mistranslation in the 2014 warrant and that knowledge of such mistranslation constitutes a new fact which allows this Court to reconsider the issue.
11. The requirement of correspondence between offences in the EAW and offences under the law of the State, or double criminality as it is sometimes referred to, is set out at s. 38(1) of the Act of 2003:-

"38.-(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.*"

12. The concept of correspondence is set out at s. 5 of the Act of 2003:-

"5 .-For the purposes of this Act, an offence specified in a European 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 European arrest warrant is issued, constitute an offence under the law of the State."

13. In *Minister for Justice v. Dolny* [2009] IESC 48, Denham J., as she then was, explained how the Court should approach the issue of correspondence at para. 38 as follows:-

"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.*"

14. I am satisfied that the facts as set out in the current EAW would be capable of establishing correspondence with the offence at Irish law of cultivation of cannabis plant contrary to s. 17 of the Misuse of Drugs Act, 1977. However, the question arises as to what is the significance, if any, of the earlier decision of Donnelly J. on the matter.

15. In essence, this Court must decide whether the applicant, having been refused surrender in respect of the offence in question in the particular circumstances, can re-apply on foot of a fresh warrant and re-argue the same substantive issue upon which surrender was refused. I deliberately use the phrase 'substantive issue' as it is clear that where relief is refused on foot of a European arrest warrant, and that refusal is based on a technical defect in the warrant itself or the supporting documentation, there can be no bar to another European arrest warrant being issued and put before the Court. In such circumstances, the Court has not determined a substantive issue as between the parties but has merely declined to give effect to a warrant which is inherently defective.

16. It is, by now, well established law in this jurisdiction that the principle of *res judicata* does not apply to proceedings seeking surrender or extradition. The refusal of a court to surrender on foot of a warrant is not of itself a bar to a subsequent request for surrender

on a fresh warrant and this is particularly so where the earlier refusal was based on some technical defect or inadequacy in the warrant before the court. It is equally well established that this does not mean that an issue estoppel may not arise in the context of such proceedings. In *Minister for Justice v. Tobin* [2012] IESC 37, [2012] 4 I.R. 147, Murray J. explained at para. 145:-

"[145] On the question of res judicata I would observe that no issue concerning the application of that doctrine arises in this case, the parties having acknowledged the established principle that the doctrine does not apply to extradition cases (the general application of the doctrine of res judicata should not be confused with the subsidiary principle of issue estoppel, which would apply, or with other issues)."

17. In *Minister for Justice and Equality v. Leopold* [2020] IEHC 84, Donnelly J. considered an issue similar to that facing this Court. In that case, Edwards J. had held in an earlier application for surrender between the same parties that no correspondence existed between offences. She stated at para. 30:-

"30. In respect of the question of whether an issue estoppel arises in the present case, it's important to note that the earlier decision of Edwards J. was a reasoned decision of the High Court in respect of the issue of correspondence of offences. His judgment, although ex tempore, had been given the following day after it appears, significant legal argument which spanned over two days. The judge made the decision within jurisdiction and while he may or may not have been correct or incorrect in that decision, it was one which affected the parties. The Minister never appealed that decision. It should also be noted that the decision was one made between the same parties i.e. the Minister and the respondent, and both parties had the opportunity to deal with this matter in terms of the facts and the law. I should also note that it has not been opened to me that the law on correspondence of offences has changed in the intervening time, although even if it had that would have invoked a different argument based upon the reasoning of two of the five Supreme Court judges in Tobin. I should also say that the issue of whether offences correspond to offences in this jurisdiction are matters which require deep consideration of the ingredients of criminal offences in this jurisdiction when compared with the facts that are set out in the warrant requesting surrender. A decision on correspondence goes to the heart of the issue of whether surrender/extradition is permitted. It is not a technical issue of the type which had resulted in the District Court refusing the extradition in Bolger, by way of example. It is also important in that respect, that EAW 7 (the present EAW) does not 'correct' any defect in the original warrant. There is no new information provided to this Court. It is the same request being repeated in exactly the same manner. This Court is being asked to decide exactly the same issue on the same facts, i.e. is there correspondence of offences? The Minister seeks to argue that at least another offence should be considered for the purpose of making a decision on whether there is actually correspondence of an offence. In so far as we are considering whether there is an issue estoppel, the situation is therefore, that all factors and all parties

are the same, save that the Minister wants to put forward a new offence for consideration by the High Court, that is, a new legal argument for consideration. The Minister also makes the request, but the Minister also makes a request to this Court to carry out its own assessment of correspondence with regard to the full panoply of offences which could be covered, including those considered by Edwards J. but rejected by him."

18. Ultimately, Donnelly J. concluded that she was bound by the previous decision by way of issue estoppel at para. 33:-

"33. In those circumstances, I am of the view that I am bound by the decision of Edwards J. in so far as there was an issue estoppel involved as regards the correspondence of offences."

19. The decision of Donnelly J. in *Leopold* was upheld on appeal by the Court of Appeal in *Minister for Justice and Equality v. Leopold* [2021] IECA 37. Delivering the judgment of the Court of Appeal, Binchy J. emphasised that the concept of issue estoppel was applicable to surrender proceedings under the Act of 2003, that Donnelly J. was bound by the earlier determination and was not entitled to enquire again into the issue of correspondence.
20. The case of *Tobin*, while not on all fours with the present case, does cast some light as to how the Court should approach the issue. In *Tobin*, the respondent had been the subject of earlier proceedings seeking his surrender to Hungary, which was refused on the ground that he had not 'fled' as was then required under the Act of 2003. The Act of 2003 was subsequently amended so as to remove the 'fled' requirement and his surrender was then sought a second time on foot of a new warrant. By virtue of the Interpretation Act, 2005, there was a rebuttable presumption that such a repeal or amendment was not intended to divest a person of a right accrued under the previous law. O'Donnell J. rejected a plea of abuse of process but held that the respondent had accrued a right which the Oireachtas had not intended to deprive him of, at paras. 443-444:-

"[443] These considerations lead me to the conclusion that it is not only desirable, but also perhaps particularly appropriate, to consider the narrow argument advanced in relation to s. 27 of the Act of 2005. The fundamental issue here is whether the outcome of Minister for Justice v. Tobin [2007] IEHC 15 & [2008] IESC 3, [2008] 4 I.R. 42 is a 'right' and more importantly a 'vested right' so that it is proper to presume that the Oireachtas did not intend to interfere with that right unless the contrary intention clearly appears either from the text of amending legislation, or its context, or both. On this argument, it is not necessary to go so far as to hold that the decision in Minister for Justice v. Tobin [2007] IEHC 15 & [2008] IESC 3 could not lawfully have been interfered with by subsequent legislation, or indeed that there had been conduct which amounted to an abuse of the process: it is sufficient that the appellant should be in a particular class of person who was entitled to have his case the subject of specific consideration by any amending legislation. As the quotation from Craies indicates, the question is whether

something had happened which means that the appellant's entitlement was something more than to take advantage of the repealed legislation. In this regard, his case can usefully be contrasted with the decisions in *Sloan v. Culligan* [1992] 1 I.R. 223 and in the recent case of *Minister for Justice v. Bailey* [2012] IESC 16, [2012] 4 I.R. 1. In each of those cases, it was determined in effect, that nothing had happened during the currency of the repealed legislation to give the individuals concerned any vested right which required to be specifically addressed to any subsequent repealing legislation. Here however something has happened. There was an application for a surrender hearing and a determination both by the High Court and this court on appeal. The question therefore is whether that can be said to be 'something' for the purpose of the law so as to trigger the provisions of s. 27 of the Act of 2005.

[444] It is here that the discussion on abuse of the process and separation of powers becomes helpful. I have no doubt that a full hearing and determination of a request for surrender is certainly something. I think it can also be properly said that the outcome of *Minister for Justice v. Tobin* [2007] IEHC 15 & [2008] IESC 3, [2008] 4 I.R. 42 was to confer or create a right. In the aftermath of *Minister for Justice v. Tobin* the appellant could not have been extradited or surrendered to Hungary in respect of this sentence, so long as Irish law retained the fleeing requirement. That was a right, and not a privilege.... His entitlement not to be surrendered having been conclusively determined by the existing law, then I think it could be said he would have a right to be released, and certainly a right to resist surrender, which once established a court would be bound to uphold. **Indeed, as the discussion in *A v. Governor of Arbour Hill Prison* [2006] IESC 45, [2006] 4 I.R. 88 shows, such a final determination would be proof against even a change in the common law in the shape perhaps of the subsequent Supreme Court determination which overturned the holding in *Minister for Justice v. Tobin* [2007] IEHC 15 & [2008] IESC 3 and determined that a person leaving in similar circumstances would be held to have fled. Such a determination might overturn the law established in *Minister for Justice v. Tobin* but would not affect the outcome of the appellant's own case. The final determination of his case, even if subsequently considered erroneous in law, would still be a bar to further proceedings.** Indeed, it seems that even if the fleeing requirement was held to be repugnant to the Constitution of Ireland 1937 and therefore was *prima facie* never a part of the legislation, the final determination of the appellant's case would, as I apprehended it, still act to prevent surrender just as surely as the conviction in the case of Mr. A in *A. v. Governor of Arbour Hill Prison* [2006] IESC 45 prevented his release from imprisonment notwithstanding the finding that the Criminal Law (Amendment) Act 1935 creating the offence of which he was convicted was, at least in one respect, inconsistent with the Constitution and deemed not to have survived the coming into force of the Constitution." (emphasis added)

21. In the proceedings concerning the 2014 warrant, surrender of the respondent was sought on behalf of Poland in respect of, *inter alia*, the same offence which is the subject matter of the current EAW before this Court. In the course of those proceedings in the High Court, Donnelly J. delivered a judgment on a substantive but specific issue, namely whether correspondence existed between the offence and an offence under Irish law. Donnelly J. concluded that there was no such correspondence and refused an order for surrender. The decision was not appealed and thereby became binding upon the parties. The parties in those proceedings were the same parties as are before the Court in the current application. The issue which this Court is asked to determine is precisely the same issue. Surrender was not refused on a technical defect in the warrant, but rather on the substantive issue of correspondence.
22. Bearing in mind the reasoning of the High Court and the Court of Appeal in *Leopold* and the reasoning of O'Donnell J. in the Supreme Court in *Tobin*, the respondent is entitled to the benefit of the earlier finding as regards correspondence, either by way of an issue estoppel or by way of a right which has accrued to him to enjoy the benefit of that earlier decision. Insofar as the earlier decision of Donnelly J. might be regarded as erroneous in law or premised upon a mistake of fact in the form of a mistranslation, I do not believe that this can operate to deprive the respondent of the benefit of that issue estoppel or that earlier decision on the specific issue of correspondence. If there was a mistranslation of the 2014 warrant, it was open to the applicant to request and present to the Court what it regarded as the correct translation at that stage or to withdraw the entire warrant, or withdraw the request for surrender in respect of the particular offence (having sought the issuing state's consent to same), before the Court delivered judgment on the substantive issue of correspondence as regards that offence. If that had been done there would be no bar to issuing a fresh warrant and making a fresh application in respect of the same subject matter. However, instead the substantive issues as to the particular offence were fully argued, considered and judgment delivered in respect of same. In the judgment surrender was ordered, on foot of those arguments, in respect of all offences in that warrant, save the single offence with which we are concerned. The applicant did not appeal that judgment. It is binding as between the parties.
23. In such circumstances, I find that the respondent is entitled to the benefit of the determination in his favour in the earlier proceedings as to lack of correspondence. That being the case, I refuse the application for an order to surrender the respondent.
24. Having determined this application on the basis of correspondence as set out heretofore, I do not regard it as necessary for the Court to deal at great length with the issue as to whether surrender is also precluded by reason of an alleged breach of the rule of speciality. For the sake of completeness, I briefly state that I am not satisfied that there was any breach of article 27 of the Framework Decision on the part of the Polish authorities in bringing proceedings against the respondent in respect of offence III in the 2014 warrant (offence VII in this EAW), as the actions of the Polish authorities fell short of depriving the respondent of his liberty in respect thereof. Furthermore, I am satisfied that the EAW before this Court can be regarded as including a request for consent,

pursuant to article 27 of the Framework Decision and s. 22 of the Act of 2003, to proceed to deprive the respondent of his liberty in respect of the relevant offence. Thus, I am satisfied the surrender of the respondent is not precluded by s. 22 of the Act of 2003.