

THE HIGH COURT

[2021] IEHC 50
[2020 No. 226 EXT.]

BETWEEN

MINISTER FOR JUSTICE AND EQUALITY

APPLICANT

AND

M.B.

RESPONDENT

JUDGMENT of Mr. Justice Paul Burns delivered on the 21st day of January, 2021

1. By this application the applicant seeks an order for the surrender of the respondent to the Republic of Croatia ("Croatia") pursuant to a European arrest warrant dated 30th July, 2020 ("the EAW") issued by Judge Petar Šakić, of the County Court in Zagreb, as the issuing judicial authority. The EAW seeks the surrender of the respondent to execute a sentence of 3 years and 8 months' imprisonment, of which 3 years, 1 month and 18 days remain to be served.
2. The EAW was endorsed by the High Court on 29th September, 2020 and the respondent was arrested and brought before the High Court on 28th October, 2020.
3. I am satisfied that the person before the Court is the person in respect of whom the EAW was issued. This was not put in issue by the respondent.
4. I am satisfied that the minimum gravity requirements of the European Arrest Warrant Act, 2003, as amended ("the Act of 2003"), are met. The sentence in respect of which surrender is sought is in excess of 4 months' imprisonment.
5. I am satisfied that none of the matters referred to in ss. 21A, 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.
6. At part E of the EAW, it is indicated that the sentence imposed relates to four offences as follows:-
 - (1) an offence against marriage, family and children;
 - (2) an offence against personal freedom;
 - (3) an offence against sexual freedom;
 - (4) an offence against personal freedom.

The circumstances of each offence, including the extent of the respondent's involvement in same and the relevant statutory provisions, are set out in part E of the EAW. It is certified that the offences each carry a maximum penalty of at least 3 years' imprisonment and fall 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"), with the relevant boxes are ticked for "kidnapping, illegal restraint and hostage-taking" and "rape".

7. 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.
8. In summary, the offences in question consisted of assault, rape and false imprisonment. No issue was raised in respect of the invocation of the tick-box procedure or correspondence. I am satisfied that correspondence exists between the offences in the EAW and offences under the law of this State, including:
 - (1) assault causing harm contrary to s. 3 of the Non-Fatal Offences Against the Person Act, 1997 ("the Act of 1997") and child cruelty contrary to s. 246 of the Children's Act, 2001;
 - (2) false imprisonment contrary to s. 15 of the Act of 1997;
 - (3) rape contrary to s. 4 of the Criminal Law (Rape) (Amendment) Act, 1990; and
 - (4) false imprisonment contrary to s. 15 of the Act of 1997.

At hearing, no issue was taken on behalf of the respondent as regards correspondence between the offences referred to in the EAW and offences under Irish law.

9. Points of objection were delivered dated 6th November, 2020, which can be summarised as follows:-
 - (i) surrender is precluded by s. 45 of the Act of 2003; and
 - (ii) surrender is precluded because the relevant court order imposing sentence had not been served on the respondent as required under Croatian law.

Section 45 of the Act of 2003

10. The sentence in question was imposed at first instance on 19th October, 2016 by the Municipal Criminal Court in Zagreb and upheld on appeal by the County Court in Zagreb on 18th June, 2019. The relevant hearing for the purposes of the EAW was the appeal hearing. At part D of the EAW, it is indicated that the respondent appeared in person at the trial resulting in the decision. The respondent's solicitor, Ms. Elizabeth Ferris, swore an affidavit dated 9th November, 2020, averring that the respondent had instructed her that he had not been present at the trial at first instance and he had retained a lawyer, Ms. Šijan, to prosecute an appeal on his behalf. He further instructed that neither he nor Ms. Šijan had been served with notice of the decision on appeal.
11. The respondent placed before the Court a letter from his lawyer in Croatia, Ms. Šijan, dated 6th November, 2020, in which Ms. Šijan set out that the respondent was represented at first instance by a different lawyer and that both she and the other lawyer

had filed appeals. The other lawyer was relieved from the case by court order dated 26th January, 2017. The appeal court rejected the appeal on 18th June, 2019 and confirmed the sentence. Notice of the appeal court decision was served on the other lawyer instead of Ms. Šajic and attempts to serve it on the respondent personally were unsuccessful as he had left the jurisdiction. She indicated that it was a requirement of Croatian law that the final judgment shall be executed after it is duly served and she had initiated a procedure for having the wanted notice and arrest warrant withdrawn.

12. Section 45 of the Act of 2003 is intended to incorporate the provisions of article 4a of the Framework Decision into Irish law and provides:-

"A person shall not be surrendered under this Act if he or she did not appear in person at the proceedings resulting in the sentence or detention order in respect of which the European arrest warrant was issued, unless the European arrest warrant indicates the matters required by points 2, 3 and 4 of point (d) of the form of warrant in the Annex to the Framework Decision as amended by Council Framework Decision 2009/299/JHA, as set out in the table to this section.

TABLE

- (d) *Indicate if the person appeared in person at the trial resulting in the decision:*

1. *Yes, the person appeared in person at the trial resulting in the decision.*
2. *No, the person did not appear in person at the trial resulting in the decision.*
3. *If you have ticked the box under point 2, please confirm the existence of one of the following:*

3.1a. the person was summoned in person on . . . (day/month/year) and thereby informed of the scheduled date and place of the trial which resulted in the decision and was informed that a decision may be handed down if he or she does not appear for the trial;

OR

3.1b. the person was not summoned in person but by other means actually received official information of the scheduled date and place of the trial which resulted in the decision, in such a manner that it was unequivocally established that he or she was aware of the scheduled trial, and was informed that a decision may be handed down if he or she does not appear for the trial;

OR

3.2. being aware of the scheduled trial, the person had given a mandate to a legal counsellor, who was either appointed by the person concerned or by the State, to defend him or her at the trial, and was indeed defended by that counsellor at the trial;

OR

3.3. *the person was served with the decision on . . . (day/month/year) and was expressly informed about the right to a retrial or appeal, in which he or she has the right to participate and which allows the merits of the case, including fresh evidence, to be re-examined, and which may lead to the original decision being reversed, and the person expressly stated that he or she does not contest this decision,*

OR

the person did not request a retrial or appeal within the applicable time frame;

OR

3.4. *the person was not personally served with the decision, but*

- *the person will be personally served with this decision without delay after the surrender, and*
- *when served with the decision, the person will be expressly informed of his or her right to a retrial or appeal, in which he or she has the right to participate and which allows the merits of the case, including fresh evidence, to be re-examined, and which may lead to the original decision being reversed, and the person will be informed of the time frame within which he or she has to request a retrial or appeal, which will be . . . days.*

4. *If you have ticked the box under points 3.1b, 3.2 or 3.3 above, please provide information about how the relevant condition has been met."*

13. On foot of the documents which the respondent has placed before the Court, it has been unequivocally established that he was legally represented at both first instance and appeal. While he did not personally attend for the appeal, he had mandated a lawyer to represent him in respect of same and she had done so. In such circumstances, it is clear that the requirements of s. 45 of the Act of 2003 have been met in substance and, in particular, the requirements of table (d)3.2 have been met. I am satisfied that the mischief which article 4a of the Framework Decision seeks to avoid does not arise in the context of this case and that the defence rights of the respondent were adequately safeguarded. I dismiss the respondent's objection based on s. 45 of the Act of 2003.

Service of the Order under Croatian Law

14. The respondent objects to surrender on the basis that the order of the appeal court was served on his former lawyer rather than Ms. Šijan, whom he had retained to represent him at the appeal. It is submitted on his behalf, that under Croatian law, as set out in the letter of Ms. Sijan, "*...the final judgment shall be executed after it is duly served and when there are no legal obstacles to its execution...*" (Article 179.1. of the Criminal Procedure Act) and that "*if doubts arise regarding the permissibility of enforcing a court's decision...*

the president of the panel at first instance shall decide on these issues by a special ruling” (Article 180.2. of the Criminal Procedure Act). Ms. Šijan indicates in her letter that she initiated the relevant procedure under Croatian law for the withdrawal of the wanted notice and arrest warrant.

15. By way of a request for mutual legal assistance, the Irish authorities were requested by the Croatian authorities to serve notice of the appeal decision upon the respondent and this was done on 12th December, 2020.
16. I am satisfied that the issue of whether the particular legal requirements under Croatian law have been met so as to render the sentence imposed enforceable in Croatia is essentially a matter for the domestic courts of Croatia. The requirements of s. 45 of the Act of 2003 have been met by the issuing state. Notice of the outcome of the appeal has now been served on the respondent and his lawyer has commenced a procedure before the courts of Croatia. The Court afforded the respondent some time to await developments in Croatia. Following such time, the EAW has not been withdrawn and remains to be executed by this Court. Issues as to the particular provisions of Croatian law are more properly to be dealt with by the Croatian courts following surrender. I dismiss the respondent’s objection to surrender based on Croatian law.

Statement of the Respondent

17. At the insistence of the respondent, a hand-written statement of the respondent was put before the Court and subsequently exhibited in an affidavit of Ms. Ferris dated 18th December, 2020. This statement did not advance matters as regards the legal issues to be determined herein.

Conclusion

18. I am satisfied that surrender is not precluded under part 3 of the Act of 2003 or by any other provision of that Act.
19. 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 Croatia.