

THE HIGH COURT

[2021] IEHC 758
[2021 No.218 EXT.]

BETWEEN

MINISTER FOR JUSTICE AND EQUALITY

APPLICANT

AND

ANDREW CONNORS

RESPONDENT

JUDGMENT of Ms. Justice Caroline Biggs delivered on the 16th day of November, 2021

1. By this application, the applicant seeks an order for the surrender of the respondent to the Kingdom of Belgium pursuant to a European Arrest Warrant dated 16th of November 2018 ("the EAW"). The EAW was issued by I. Delissen First Assistant Public Prosecutor, Antwerp Public Prosecutors Office, as the issuing judicial authority.
2. The EAW seeks the surrender of the respondent to enforce a sentence of imprisonment of two years imposed upon the respondent on the 18th day of April 2018, of which one year remains to be served.
3. The respondent was arrested on the 22nd of July 2021, on foot of a Schengen Information System II alert, and brought before the High Court on the 23rd of July 2021. The EAW was produced to the High Court on the 29th of July 2021.
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 more than four months' imprisonment.
7. Part (d) of the EAW indicates that the respondent did not appear in person at the hearing which resulted in the decision which is sought to be enforced and the issuing judicial authority. However, I am satisfied that s.45 of the Act of 2003 is complied with insofar as the warrant indicates:

"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 (i.e. 15 days) or appeal (i.e. 30 days).”

8. The respondent objects to surrender on the ground that surrender is precluded by reason of s. 38 of the Act of 2003.
9. Points of objection were filed on behalf of the respondent. The respondent raised a number of grounds but confirmed to the Court on the 9th of November 2021 that he was pursuing the s. 38 ground only and formally abandoned all others.

Section 38 of the 2003 Act states:

“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,
- (b) in the case of a European arrest warrant, 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 three years, or
- (c) in the case of a Trade and Cooperation Agreement arrest warrant, the offence is an offence to which paragraph 5 of Article 79 of the Trade and Cooperation Agreement applies and under the law of the issuing state the offence is punishable by imprisonment for a maximum period of not less than three years.

(2) The surrender of a person to an issuing state under this Act shall not be refused on the ground that, in relation to a revenue offence—

- (a) no tax or duty of the kind to which the offence relates is imposed in the State, or
- (b) the rules relating to taxes, duties, customs or exchange control that apply in the issuing state differ in nature from the rules that apply in the State to taxes, duties, customs or exchange control.

(3) In this section “revenue offence” means, in relation to an issuing state, an offence in connection with taxes, duties, customs or exchange control.”

10. Section 38(1)(b) of the Act of 2003 provides that 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 Framework Decision dated the 13th of 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 the issuing state has indicated the appropriate box for "organised or armed robbery". The respondent submits that the offences described in the warrant do not amount to offences of "organised or armed robbery", and as such the Court cannot rely upon the tick box process.
11. In this regard the respondent refers to Part (e) of the warrant which sets out the nature and the circumstances surrounding the offences:

"e) Offences

This warrant relates to in total 2 offences.

A/ participation in attempted burglary as co-perpetrator

B/ Conspiracy

Description of the circumstances in which the offence(s) was (were) committed, including the time, place and degree of participation in the offence(s) by the requested person

On 18 January 2018, at around 12.55 o'clock, a witness noticed three males stepping out of a black Citroen C3 vehicle with Irish licence plate 07D7262 and accessing the residence at address Grote Nieuwedijkstraat 68 in Mechelen – occupied by Zoulikha Bahloul – through the front door. After 2 minutes, they came outside again and, as passengers, they entered the waiting vehicle that then left right away. There appeared to be signs of forced entry at the front door. The witness notified the police, and the vehicle details were then ran through the ANPR system. The witness took photographs of the vehicle, which revealed that the licence plate was white and had black letters on it.

On the same day, at around 13.30 o'clock, Luc Diels arrived back home after having walked his dog, when he noticed a male ringing at the door of his residence at address Eikestraat 27 in Mechelen. In front of his house, there was a black vehicle with foreign licence plates and the steering wheel on the other side. Inside the vehicle, there were three individuals. The male who rang at the door without any success, stepped inside the vehicle again, and a minute after, he got out of it again and ring at the door again. Meanwhile, Luc Diels had almost reached his

house and addressed the male individual. The latter seemed to be taken aback and asked him in English whether he was allowed to park the car over there. When Luc Diels said that that was not allowed, the male did not respond and stepped inside the vehicle again, which then drove off.

At 13.40 o'clock, the vehicle was spotted on the ANPR camera at the R6 ring road, at the entrance to E19 motorway. The police travelled to the location in question, as a result of which the vehicle made attempts to escape and crashed on the E19. All individuals who had been sitting inside the vehicle ran away. Martin Cawley and Martin Paul Cawley were apprehended. The two other individuals who had been sitting inside the car, got a lift from an unsuspecting local resident and managed to get away. The analysis of images from the CCTV system of the city and analysis of telecommunication data revealed that these individuals were Andrew Crawley and Andrew Connors.

The vehicle has also been used during a previous attempt to commit burglary.

The individual concerned was also convicted on account of participation in a conspiracy to commit burglary."

12. The warrant continues in describing the nature and legal classification of the offences and applicable statutory provisions:

"A.

In Mechelen, on 18 January 2018

Having attempted to deceitfully take away an object that did not belong to him, under the circumstance that the theft was committed through burglary, the intent to commit a crime having revealed itself through overt actions that constitute an outset of the commission of that crime and were interrupted or failed their effect only due to circumstances independent of the will of the perpetrator:

to the detriment of Bahloul Zoulikha, unspecified objects

B.

In Mechelen, between 15 January 2018 and 19 January 2018

Having participated in a conspiracy that had been set up with the intent of committing crimes against individuals and property, other than those that carry imprisonment for life or imprisonment of ten years to fifteen years or a longer term.

Punishable in accordance with Sections 51, 52, 80, 81, 322-326, 461, 467, 484, 485, 486 and 487 of the Criminal Code."

13. It would appear that there is a potential internal inconsistency within the warrant in the context of the offences described, the offences described in Part (e) are described as

attempted burglary and conspiracy to commit burglary and the offences ticked under Part (e)(i) are organised or armed robbery. Further under the law in this jurisdiction there are of course clear differences between burglary or conspiracy to commit burglary and organised or armed robbery. However, in my view such differences do not give rise to a reason to refuse surrender.

The use of the tick box procedure is considered by Mr Justice Peart in the case of *Minister for Justice, Equality and Law Reform.v. Eamonn Devlin* [2008] IEHC 12, [2010] 1 IR 97. In that case the respondent's surrender was sought so that he could face prosecution for one offence described in the warrant as "cheating the public revenue". The issuing judicial authority had at paragraph (e) of the warrant certified, *inter alia*, that the conduct constituting this offence specified in the warrant fell within what was described in that paragraph as "the European framework list". That was a reference to the list of offences set forth in Article 2.2 of the Framework Decision, and in this regard, the issuing judicial authority had ticked the relevant box in paragraph (e) to indicate that the offence came within that category of offence, namely "*fraud, including that of affecting the financial interests of the European communities within the meaning of the Convention of 26 July 1995 on the protection of European Community's financial interests*".

Points of objection had been delivered on behalf of the respondent in Devlin and one of the points related to the question of correspondence of the offence set forth in the warrant with an offence in this jurisdiction. The respondent had sought to go behind the ticking of the box in paragraph (e) of the warrant and submitted that the mere fact that this box had been ticked to indicate that the offence contained in the warrant was one within the list contained in Article 2.2 of the Framework Decision was not itself determinative in relation to the question of correspondence or double criminality. At paragraphs 10 and 11 of the judgment, Mr Justice Peart stated as follows:

"10. *I have considered these submissions in relation to correspondence, but I cannot accept that this Court is obliged in this case to look behind the fact that the issuing judicial authority has ticked the box in question in paragraph (e) of the warrant. Indeed, I would go so far as to state that the insertion of the certificate referred to is something which is not essential, given that the same judicial authority has already ticked the box to indicate that the alleged acts on the part of the respondent constitute acts giving rise to an offence of a nature contained in the categories of offences set forth in Article 2.2 of the Framework Decision. It would require something in the nature of a genuine and manifest error on the face of the warrant before this Court could disregard the fact that the offence has been ticked, and conclude that the matter of double criminality has not been satisfied by the ticking of the box.*

11. *One could perhaps foresee a possible situation arising where a respondent's surrender was being sought for an offence of, say, murder and where the box was ticked in error in respect of fraud. That would be so blatant a mistake given the facts of the offence disclosed in the warrant, that the Court would be required to*

seek a clarification as to that mistake before any order could be made, but that is not the situation in the present case. Absent such an obvious mistake, I cannot think of any circumstances in which this Court is required not to accept the fact that the box is ticked and that double criminality therefore is not required to be verified. The presence of the words in Article 2.2 as highlighted by Mr O'Higgins, namely "as they are defined in the law of the issuing state" merely indicates that it is unnecessary that the acts alleged should be viewed at all by reference to the law of the executing state. These are not words, in my view, which are intended to mean that any law of the issuing state must be proven by an affidavit of law or other evidence. In my view, as I have stated, the certificate referred to in paragraph (e) is in fact surplus to requirement, and certainly does not give rise to any frailty in the warrant. To find otherwise would run completely contrary to the mutual trust and confidence and mutual recognition which underpin the adoption of the Framework Decision, and would reinstate the sort of difficulty and complexity in extradition matters, which the Framework Decision by its own terms sets out to remove by putting in place a simpler and more expeditious arrangement between member States of the European Union for the surrender of persons between them."

14. As noted above while in this jurisdiction there are differences between burglary and robbery, and there are potentially inconsistent descriptions of offences within the EAW itself, however in my view that is not to say that there are grounds for believing that there is a genuine and manifest error in respect of the aforesaid certification under the tick box process that would justify this court in looking beyond same. While the offences did not involve arms they did involve organisation, and while the offences might properly be described as burglaries or conspiracy to commit burglary in this jurisdiction we do not know how or in what way robberies are differentiated from burglaries in the issuing state. To look behind the warrant in these circumstances would be contrary to the dicta in *Devlin* and completely contrary to the mutual trust and confidence and mutual recognition which underpin the adoption of the Framework Decision.
15. In any event, I am satisfied that if necessary to do so, correspondence could be established between the offence to which the EAW relates and offences under the law of the State. The respondent suggests that if the court were to take the view that the tick box process involved a genuine and manifest error, then the Court is precluded from looking for information from the warrant in relation to the offences as Part (e)(ii) is not completed, namely there is no information under the heading "full description of offences not covered by this section". The court does not agree with this submission in that it runs contrary to the views expressed by the Supreme Court in *Minister for Justice v. Dolny*, which emphasised that when considering correspondence, the question should be asked in general terms as to whether the conduct set out in the warrant is contrary to the criminal law of the State. Denham J. outlined the following at para. 38 thereof:

"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."

Section 5 of the European Arrest Warrant Act 2003 as amended provides for the process of correspondence 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."*

16. In applying the test in *Dolny* the Court considers that the offences set out in paragraph (a) of page 8 namely "participation in an attempted burglary" correspond with the offence of burglary in this jurisdiction or at the very least correspond with the offence of attempted burglary contrary to common law. The offence of burglary is set out in Section 12 (1) of the Criminal Justice (Theft and Fraud Offences) Act, 2001, it states:

"12.—(1) A person is guilty of burglary if he or she—

- (a) enters any building or part of a building as a trespasser and with intent to commit an arrestable offence, or
- (b) having entered any building or part of a building as a trespasser, commits or attempts to commit any such offence therein."

It is clear from paragraph (e) that the warrant establishes the necessary ingredients for the offence of burglary or at the very least attempted burglary. The respondent is one of four men, three entered a building, one remained in the car that would appear to have been used as the getaway car. The men had no authority to enter the property and as such were trespassers. There was evidence of forced entry. The acts could be charged, on the basis of joint enterprise, in this jurisdiction in one of two ways:

That he entered a building as a trespasser and committed an arrestable offence, namely that of criminal damage.

or

That he entered the building as a trespasser with the intent to commit the arrestable offence of theft.

Further, as noted above, he could be prosecuted on the basis of the inchoate offence of attempted burglary contrary to common law.

In relation to the charge of conspiracy to commit burglary, the Court is satisfied that such an offence corresponds with an offence contrary to s.71 of the Criminal Justice Act 2006, as amended by s.4 of the Criminal Justice (Amendment) Act 2009 which states:

“71.— (1) Subject to subsections (2) and (3) , a person who conspires, whether in the State or elsewhere, with one or more persons to do an act—

- (a) in the State that constitutes a serious offence, or
- (b) in a place outside the State that constitutes a serious offence under the law of that place and which would, if done in the State, constitute a serious offence, is guilty of an offence irrespective of whether such act actually takes place or not.”

In this regard Part (e) established that the applicant was again one of four men who had conspired to commit the act of burglary in relation to the property belonging to Luc Diels. The fact that the men were interrupted in their endeavours by Mr Diel returning to his home would not prevent a charge of conspiracy to commit burglary being preferred in the circumstances.

17. I am satisfied that the certification of the offences as “organised or armed robbery” is not in error and nor does it give rise to any ambiguity so that this court should look behind such certification. Even if this Court was not to accept the certification at Part (e)(i) of the EAW, this would not automatically result in a refusal to execute the EAW, but rather would necessitate the applicant satisfying the Court that correspondence exists between such offences and the offences under the law of this state, as provided for at s.38 (1)(a) of the Act of 2003. Applying the test as set out in *Dolny*, I am satisfied that the acts said to constitute attempted burglary constitute the offence of burglary contrary to s.12 of the Criminal Justice (Theft and Fraud Offences) Act, 2001, or at the very least attempted burglary contrary to common law. I am satisfied that the offence of conspiracy to commit burglary would, if committed in this jurisdiction, constitute an offence of conspiracy to commit an arrestable offence as set out in s.71 of the Criminal Justice Act 2006, as amended by s.4 of the Criminal Justice (Amendment) Act, 2009.
18. I dismiss the respondent’s objections to surrender concerning or arising out of Part (e) of the EAW.
19. 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.
20. It, therefore, follows that this Court will make an order pursuant to s. 16 of the Act of 2003 for the surrender of the respondent to the Kingdom of Belgium.