

THE HIGH COURT

[2021] IEHC 831
[2021 No. 011 EXT.]

BETWEEN

MINISTER FOR JUSTICE

APPLICANT

AND

OLIVER LOWN

RESPONDENT

JUDGMENT of Mr. Justice Paul Burns delivered on the 14th day of December, 2021

1. By this application the applicant seeks an order for the surrender of the respondent to the United Kingdom of Great Britain and Northern Ireland ("the UK") pursuant to a European arrest warrant dated 15th December, 2020 ("the EAW"), issued by Judge Peters of the Crown Court as the issuing judicial authority. The surrender of the respondent is sought in order to prosecute him for 12 offences alleged to have been committed between 2013 and 2019.
2. The EAW was endorsed by the High Court on 25th January, 2021 and the respondent was arrested and brought before this Court on 9th February, 2021.
3. I am satisfied that the person before the Court, the respondent, is the person in respect of whom the EAW was issued. This was not put in issue by the respondent.
4. I am further 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 and that the surrender of the respondent is not prohibited for the reasons set forth therein.
5. I am satisfied that the minimum gravity requirements of the Act of 2003 are met. Each of the offences in respect of which the respondent's surrender is sought carry a maximum penalty in excess of 12 months' imprisonment. Minimum gravity was not contested.

Correspondence

6. The EAW relates to 12 offences, as follows:-
 - Five offences of sexual penetration per vagina/anus by a person with a living animal;
 - Three offences of making indecent photographs of children;
 - One offence of committing an act/series of acts with intent to pervert the course of public justice;
 - One offence of possessing a controlled drug of class A, heroin;
 - One offence of possessing a controlled drug of class B, cannabis; and
 - One offence of possessing extreme pornographic image/images portraying an act of intercourse/oral sex with a dead/alive animal.

The relevant statutory provisions are set out in the EAW in respect of the offences, save for the offence of perverting the course of public justice which is said to be contrary to common law.

7. As regards correspondence, 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 European Council Framework Decision dated 13th June, 2002 on the European Arrest Warrant and the Surrender Procedures Between Member States, as amended ("the Framework Decision"), applies and, under the law of the issuing state, the offence is punishable with a maximum term of not less than 3 years' imprisonment. In this instance, at part (e).I of the EAW the issuing judicial authority has certified that one or more of the offences is an offence to which Article 2(2) of the Framework Decision applies, the offence is punishable by imprisonment for a maximum period of not less than 3 years and has indicated the relevant box at part (e) of the EAW for "*sexual exploitation of children and child pornography*". At part (e).II of the EAW under the heading "*Full description of offence(s) not covered by section I above*", the offences relating to sexual penetration of an animal, perverting the course of justice and possessing extreme pornographic images are set out but the offences of possessing drugs are not listed. This might give rise to some ambiguity as to whether the invocation of the tick-box procedure relates to the drugs offences as well as the making of indecent images of children. I am satisfied that to adopt such an interpretation of the EAW would be overly pedantic and unreasonable. I read the EAW as indicating that the invocation of the tick-box procedure is only in respect of the offences of making child pornography. In any event I am satisfied that, if necessary, the requisite correspondence can be established between those offences and offences under the law of the State, *viz.* producing child pornography contrary to s. 5 of the Child Trafficking and Pornography Act, 1998, and/or sexual exploitation of a child contrary to s. 3(2) of same.
8. I am further satisfied that correspondence can be established as follows:-
 - Sexual penetration per vagina/anus with a living animal corresponds with an offence under the law of the State of bestiality contrary to s. 61 of the Offences Against The Person Act, 1861; and
 - Possession of Class A drugs and possession of Class B drugs each correspond with an offence under the law of the State of unlawful possession of drugs contrary to s. 3 of the Misuse of Drugs Act, 1977.
9. Counsel for the respondent did not contest correspondence except in relation to the offence in the EAW of perverting the course of public justice. He submits that in so far as the offence consisted of throwing the computer into the pond, the respondent was not under arrest at the time, the computer was not in the possession of the police at the time and no proceedings were in being at the time. In such circumstances, he submits that the respondent was free to throw the computer into the pond if he so chose.

10. Counsel for the applicant submits that the action taken by the respondent in throwing the computer into the pond was taken with a view to destroying or secreting evidence of the respondent's wrongdoing so as to prevent or frustrate any reliance on the contents of the computer in any prosecution of the respondent.
11. The nature and scope of the common law offence of perverting the course of justice in this jurisdiction has been considered on a number of occasions in the context of extradition by Peart J. In *Minister for Justice, Equality and Law Reform v. Ward* [2008] IEHC 53, the surrender of Mr. Ward was sought by the UK to face prosecution for an offence of perverting the course of justice and an offence of causing death by dangerous driving. As regards the offence of perverting the course of justice, it was alleged that when making his statement in the immediate aftermath of a road traffic accident, Mr. Hill had failed to inform the police that he himself was the owner of the vehicle involved and that he was able to identify the driver who had fled the scene. Peart J. was referred to the definition of the offence of perverting the course of justice as set out in Archbold, Criminal Pleadings Evidence and Practice. At para. 28-6 of Archbold, it was stated that deliberate and intentional action taken with a view to frustrating statutory procedures required of the police can amount to the offence of perverting the course of justice. It was submitted on behalf of Mr. Ward that 'action' in that paragraph meant a positive act rather than an omission such as failing to provide information. It was submitted on behalf of the Minister that at para. 28-7 of Archbold, it was stated that a person who does an act to assist another to evade lawful arrest, with knowledge that the other is wanted by the police as a suspect, is guilty of attempting to pervert the course of justice. Peart J. held as follows at para. 31:-

"31. I am satisfied that the action alleged against the respondent in this regard, namely that he provided a misleading statement by withholding information which he had as to the ownership of the vehicle and the identity of the driver, in circumstances where he had been asked to provide a statement, is to be interpreted as a positive act of concealment of information, so as to come within the ambit of the common law offence of perverting the course of justice. That allegation is to be distinguished from a situation where a person might observe an accident involving a vehicle being driven by someone he knows, and who simply goes home without making contact with the police in order to make himself available as a witness. That is a failure to do something which he could have done, but lacks the necessary positive element which is present in a situation where he is interviewed by the police and in making a statement fails to give information which he has as to the owner of the vehicle and the identity of the driver. There is in my view a positive act of concealment intended to conceal his own involvement and intended also to impede the police in their task of tracing the driver. There can be no doubt in my mind that if this happened in this State an offence of perverting the course of justice would be committed, if the facts were proved."

12. In *Minister for Justice, Equality and Law Reform v. Hill* [2009] IEHC 159, the surrender of Mr. Hill was sought by the UK on foot of a European arrest warrant so that he might be

prosecuted for an offence of doing an act tending or intended to pervert the course of public justice contrary to common law. It was alleged that Mr. Hill had posted two packages from Ireland containing DVDs to the foreman of a jury and the presiding judge at the trial of persons relating to bombings carried out in London and that the DVDs in question contained material tending or intended to pervert the course of justice. Peart J. referred to the definition of the common law offence of perverting the course of justice set out in Archbold at paras. 23-24 of his judgment:-

"23.

It is a common law misdemeanour to pervert the course of justice

The offence is committed where a person or persons:

- (a) acts or embarks upon a course of conduct,*
- (b) which has a tendency to, and*
- (c) is intended to pervert,*
- (d) the course of justice...'*

24. *A positive act is required. Inaction, for example, failing to respond to a summons, is insufficient to constitute an offence."*

13. In *R v. Kenny* [2013] EWCA Crim 1, it was alleged that Mr. Kenny had removed or intended to remove from the court's control assets which, pursuant to a restraint order, should have remained restrained and available for confiscation upon the conviction of a third party. Lord Justice Gross, in the Court of Appeal for England and Wales, summarised the state of the law in the UK concerning the offence of perverting the course of justice at para. 35 of his judgment as follows:-

"35.

- i) There is no closed list of acts which may give rise to the offence;*
- ii) That said, any expansion of the offence should only take place incrementally and with caution, reflecting both principles of common law reasoning and the requirements of Art. 7, ECHR;*
- iii) So far as concerns the offence generally, neither authority nor principle supports confining the requisite acts to those giving rise to some other independent criminal wrongdoing;*
- iv) If there is no such limitation generally, then there is no basis for importing such a restriction – as a matter of law – into the elements of the offence where it arises in the context of a breach of a restraint order."*

14. It should be noted that the Court of Appeal of England and Wales in *Kenny* cited with approval *Richardson, Archbold: Criminal Pleading, Evidence and Practice*, (London, 2013) regarding the parameters of the offence of perverting the course of justice. The court noted that the list of acts which might give rise to the offence of perverting the course of justice was not closed. The court did not demur from the statement in *Archbold* that what was required was a positive act and that inaction, for example failing to respond to a summons, is insufficient to constitute the offence.
15. I am satisfied that there is no closed list of acts which may give rise to the offence of perverting the course of justice, but a positive act is required and mere inaction is insufficient. In the current case, the respondent is alleged to have carried out a positive act in throwing the computer into the pond. Such action had a tendency to, and was intended to, pervert the course of justice in that it had a tendency to, and was intended to, frustrate the police in respect of the exercise of search powers, the collection of evidence, the investigation of offences and ultimately the prosecution of offences. I am satisfied that if similar action was taken in similar circumstances in this jurisdiction, same would constitute the offence of attempting to pervert the course of justice. I dismiss the respondent's objection that correspondence cannot be established with the offence in the EAW of perverting the course of justice.
16. As regards the offence of possessing extreme pornography in the EAW, counsel for the applicant was unable to nominate any corresponding offence under the law of the State and so I am not satisfied that correspondence has been made out in respect of that offence.

Section 44 of the Act of 2003

17. The solicitor for the respondent, Mr. Tony Hughes, swore a brief affidavit dated 25th February, 2021 in which he avers that he was instructed that the surrender of the respondent is sought in respect of matters that occurred outside the UK but that data recorded on equipment that was seized in the UK is to be brought against him in criminal proceedings on the purported basis that the conduct depicted therein occurred in the UK. This affidavit appears to have been sworn for the purpose of possibly grounding an objection to surrender based upon s. 44 of the Act of 2003. No other evidence was adduced before the Court to support the contention that the offences alleged against the respondent were committed outside of the UK. An objection based on s. 44 of the Act of 2003 was not pursued at hearing.

Alleged Defects in the EAW

18. At part (h) of the EAW, it is stated to be "*Not applicable*". However, the offence of perverting the course of justice set out at part (c) of the EAW is stated to carry a maximum penalty of up to life imprisonment and, in such circumstances, part (h) of the EAW ought to have been completed. The Court sought a completed part (h) and, after some initial confusion on the part of the Crown Prosecution Service, a reply was received dated 23rd February, 2021 confirming that the offence of perverting the course of justice did indeed carry a maximum sentence of life imprisonment and that, if such a sentence was passed by the judge, both of the options at part (h) would apply: "*namely, a review*

on request of the sentence or at least after 20 years and/or the law allows for the application of measure of clemency". It is further indicated that, in the UK, the judge will normally pass a minimum term.

19. The respondent noted that the additional information had come from the Crown Prosecution Service as opposed to the issuing judicial authority. It is not unusual for additional information to be provided by state agencies other than the issuing judicial authority. The Court frequently receives additional information concerning matters such as prison conditions from the executive branch of government of issuing states. The Court of Justice of the European Union in many judgments has accepted that information in respect of an application for surrender can be received from an entity other than the issuing judicial authority, but has indicated that information provided by the issuing state but which comes from an entity other than the issuing judicial authority is not to be afforded the same level of mutual trust and confidence as information provided by the issuing judicial authority. In this instance, the issuing judicial authority did complete part (h) of the EAW by indicating that it was "Not applicable". This was clearly incorrect. Additional information from the Crown Prosecution Service, now indicates the correct position. I am satisfied that the information coming from the Crown Prosecution Service, which appears to be the central authority in the UK for European arrest warrant matters, is reliable and comes from a state agency and person which/who is likely to have knowledge of the matters in respect of which the information has been furnished. There is no reason to doubt the knowledge, competence and *bona fides* of the person furnishing the information provided and the respondent has not sought to do so. The respondent has not challenged the accuracy of the information provided. In such circumstances, I am satisfied to accept the additional information provided and I dismiss the respondent's objection to surrender arising out of part (h) of the EAW.

20. The respondent also took issue with the fact that at part (i) of the EAW, the judicial authority which issued the warrant is named as the "*Magistrates sitting at Ipswich Magistrates Court*". However, at the end of the EAW at the space provided for the signature of the issuing judicial authority and/or its representative, it is signed by Her Honour Judge Peters of the Crown Court at Ipswich. Judge Peters has endorsed on the EAW the following:-

"I am satisfied that these are serious allegations and that the defendant failed to attend his initial hearing before the Magistrates. The papers I have seen in my view justify this warrant."

21. Counsel for the respondent submits that there is an inherent ambiguity or lack of clarity as regards the issuing judicial authority. I am satisfied that the present case can be distinguished from the case of *Minister for Justice and Equality v. Jalloh* [2016] IEHC 485 in which the European arrest warrant on its face indicated that it had been issued by a deputy prosecutor, but it was subsequently established that it was in fact issued by a different person, being a judge. In *Jalloh*, there was a clear contradiction or uncertainty as to who had issued the European arrest warrant. In the present case, I am satisfied

that there is no uncertainty as to who issued this EAW. The EAW on its face clearly indicates that it was issued by Judge Peters. I dismiss the respondent's objection to surrender based upon an alleged lack of clarity regarding the issuing judicial authority.

UK Withdrawal from the European Union

22. The respondent also objected to surrender on the basis that the extradition arrangements entered into between the European Union ("the EU") and the UK following the departure of the UK from the EU were not applicable to, or enforceable in, Ireland. Following the judgment of the Court of Justice of the European Union in SN, SD (Case C-479/21 PPU), this ground of objection was not pursued.

Conclusion

23. I am satisfied that the surrender of the respondent is not precluded by reason of Part 3 of the Act of 2003 or any other provision of that Act.

24. Having dismissed the respondent's objections, save for the objection concerning the offence of possession of extreme images, it follows that this Court will make an order for the surrender of the respondent to the UK in respect of the offences set out in the EAW save for offence 7 set out at part (c) (also referred to as offence 6 of part (e)) of the EAW, namely possession of extreme pornographic image/images contrary to ss. 63(1), (7)(d) and 67(3) of the Criminal Justice and Immigration Act, 2008.