

THE HIGH COURT

[2024] IEHC 724

[2024 No. 126 EXT]

**IN THE MATTER OF AN APPLICATION UNDER S. 16 OF THE EUROPEAN
ARREST WARRANT ACT 2003, AS AMENDED.**

BETWEEN

MINISTER FOR JUSTICE

APPLICANT

AND

KORNELIJA KUSEC DURBEK

RESPONDENT

JUDGMENT of Mr Justice Patrick McGrath delivered on the 11 December 2024

1. By this application, the applicant seeks an order for the surrender of the respondent to the Republic of Croatia pursuant to a European Arrest Warrant dated 17 October 2022 (“the EAW”).
2. The EAW is a prosecution warrant and seeks the surrender of the respondent in order to prosecute her for two offences being ones of Threat, prescribed in Article 139, paragraphs 2 and 3 of the Criminal Code.
3. The respondent was arrested on the 4 June 2024 on foot of a Schengen Information System and brought before the High Court on the same date. The EAW was subsequently produced on the 7 June 2024 and the Respondent was thereafter granted bail on the 20 June 2024.
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 section 22, 23 and 24 of the European Arrest Warrant Act, 2003, as amended (“the 2003 Act”), 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 maximum sentence in respect of each of the offences for which surrender is sought is in excess of one year’s imprisonment.
7. I am further satisfied that the EAW was issued by a judicial authority within the meaning of the Framework Decision and the European Arrest Warrant Act, 2003 (as amended) [‘the 2003 Act’]
8. In her Notice of Objection, the Respondent submitted that
 - a. Correspondence is not made out;
 - b. The time limit for the prosecution of these offences may have expired and surrender is therefore prohibited under s39 of the 2003 Act; and
 - c. Were she to be surrendered and detained in a prison in Croatia, she would be subject to conditions that would breach her rights under Article 40.3.1 of the Constitution and / or Article 3 of the European Convention on Human Rights such that surrender is prohibited under s37 of the 2003 Act.

LIMITATION PERIOD

9. A s.20 request sought clarification as to whether ‘*there is a statute of limitations on the prosecution of this offence[and] if there is a statute of limitations when does this statute run out?*’. In the reply dated the 26 June 2024, the IJA stated that there is a statute of limitation period of 15 years in respect of both offences for which surrender is sought.
10. There is therefore no issue with regard to a limitation period and the evidence is that there is an enforceable prosecution extant in Croatia. Furthermore, there is nothing to

suggest that this Respondent has been granted any amnesty or pardon. This ground of objection is not therefore made out.

CORRESPONDENCE

11. This is not a case where the ‘tick box’ procedure under Article 2.2 of the Framework Decision was relied upon and it is therefore a case where it is necessary to show correspondence in accordance with s.38 of the 2003 Act.

12. Section 5 of the 2003 Act provides:-

‘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. The relevant principles for showing correspondence are well established. In assessing correspondence, the question is whether the acts or omissions that constitute the offence in the requesting state would, if carried out in this jurisdiction, amount to a criminal offence – *Minister for Justice v Dolny* [2009] IESC 48.

14. The facts which underlie the alleged offences are set out at paragraph (e) of the EAW as follows:-

‘On September 29, 2021, at 2.57pm in Bjelovar, due to strained family relations with her sisters Maja Kusec Cik and Mirela Kusec, with the intention of frightening them, she sent Maja Kusec Cik a voice message via the social network Whatsapp to her mobile number 095/864-2364, with the content ‘Maja, if you go after Matej with knives, I will kill everything you care about, you scum’. Then on October 22, 2021, she sent Maja Kusec Cik a message stating that she would send someone to harm her children, as well as the child of her sister Mirela Kusec, Pavel, a message that Maja Kusec Cik conveyed to Marjela Kusec, which caused fear in both Maja Kusec Cik and Mirela Kusec for their own lives and the lives of their loved ones’

15. The Respondent had initially raised an objection on the basis of Extraterritoriality, namely that surrender was prohibited pursuant to s.44 of the 2003 Act as the respondent was at the time of the alleged offences, in Ireland. In reply to a s.20 request which raised this issue and how Croatia asserts jurisdiction over these alleged offences the issuing judicial authority replied as follows:

‘The jurisdiction of the Republic of Croatia in this case is based on the fact that the accused is a citizen of the Republic of Croatia, and both criminal acts she is charged with were committed within the territory of the Republic of Croatia. This is because the victim, at the time the threats were made against her, was located in Bjelovar, Republic of Croatia’

16. Having considered this response the Respondent no longer, rightly, pursues this objection. I am therefore satisfied that the alleged offences alleged correspond with the offence of Threats to Kill or Cause Serious Harm contrary to Section 5 of the Non-Fatal Offences Against the Person Act, 1997 [‘the 1997 Act’].

PRISON CONDITIONS IN CROATIA

17. There have been a number of decisions of the ECtHR which have criticised conditions generally in the Croatian prison estate. Furthermore, there are a number of decisions of this Court where objections to surrender to Croatia on Article 3 grounds have been considered – see *Minister for Justice v Dragan Rakanovic* Greally J, [2024] IEHC 391 and *Minister for Justice v Dario Celik* Keane J, [2023] IEHC 102.

18. The Respondent refers in her submissions to the Report of the European Committee for the Prevention of Torture and Inhuman and Degrading Treatment (CPT) following their visit to Croatia between the 19 and 22 September 2022. At page 5 of that report, the CPT expressed concern about the accommodation of female prisoners in Croatia as follows:-

‘The CPT is particularly concerned about the austere, impersonal and cramped nature of the dormitories accommodating female prisoners, particularly in the closed regime building, and the insufficiency of sanitary facilities. The renovation of Pozega Prison should address the serious deficiencies raised by

the Committee. Further, the restrictions on womens daily life, such as the prohibition of keeping personal belongings, needs to be reviewed. The serious overcrowding of Department No. 10 of Zagreb Prison, which accommodates both pre-trial and convicted female prisoners, accompanied by an extremely impoverished regime needs to be addressed urgently'

19. In particular, Ms Dubrek refers to the following:-

- a. Whilst the majority of those in custody in Prozega (the one prison which at that time appeared to house long term female prisoners) described being treated correctly by staff there were allegations of physical ill treatment, which included slaps and occasional punches, inflicted by staff particularly in the context of disruptive behaviour and inter prisoner violence. There were also some instances of inter prisoner violence and the use of derogatory and abusive language by staff and fellow inmates.
- b. There was at best a mixed description of the conditions in the physical condition of that prison. In this regard the closed and semi closed regime units were austere and impersonal, and the sanitary facilities were in a poor state of repair and inadequate for the number of inmates.
- c. There was a lack of proper personal space in Department 10 of Zagreb Prison where the space per inmate fell below 3m².
- d. Whilst the amount of extracurricular activities available to sentenced female prisoners in Prozega was adequate, there were several factors identified which impacted the quality of life and prospects for rehabilitation including:-
 - i. The austere dormitory environment and the ban on personal belongings in certain units in Prozegba .
 - ii. The absence of a common room in the closed regime units in that prison.
 - iii. The absence of any cover on the exercise area used by female prisoners in the closed regime Prozegba.
 - iv. Many of the same concerns arose in relation to the semi open units in that facility.
 - v. There was some criticism of the extra curricular activities available in Prison 10 Zagreb.

- vi. There were general criticisms of the levels and training of staff .
- vii. There was some criticism of the use of strip searches and restraints during transportation .

20. It should also be noted that the Croatian authorities submitted a reply to the CPT Report stating inter alia:

- a. A new female prison is being constructed in Gospic to house prisoners from Southern Croatia.
- b. An extensive programme and renewal is underway in Prozega Penitentiary and this will pay particular attention to improving conditions of detention and is consistent with the Ministry of Justice long term strategy for treatment of female offenders.
- c. Referring to works (which appear to be at an early stage) in Zagreb No 10.
- d. There are various endeavours to improve extracurricular activities in the female prison(s).
- e. Handcuffing and strip search are based on individual risk assessment.

21. A s.20 request was sent to the IJA on the 26 August 2024 seeking the following additional information:-

‘1. Please state the detention institution(s) or prison(s) in which it is actually intended that the requested person, if surrendered, be detained, including on a temporary or transitional basis. If it is not possible to state the actual detention institution or prison at this stage, then please state those in which it is most likely the requested person will be detained;

2. Please outline whether the issues as outlined the CPT report (attached) in relation to overcrowding has been resolved? Please confirm whether issues in relation to overcrowding and personal space at Zagreb No 10 have been resolved?

3. Please confirm that, wherever she is detained, the requested person will have a minimum individual space (including his bed and related furniture, but excluding the designated bathroom area) of 3 s. m for the entirety of her detention.

4. If the minimum of 3 sq. m cannot be guaranteed for the entirety of her detention, please indicate any further mitigating factors of detention which

would render her detention in such a regime compliant with Article 3 of the European Convention on Human Rights?’

22. In their response, the IJA stated that if surrendered her investigative detention would be carried out in Bjelovar. attached to that response was a letter from the Warden of that prison dealing with conditions of detention therein. In that letter of the 26 September 2024, details were provided of the accommodation for inmates at Bjelovar prison which showed that:

- a. the space provided for each inmate exceeded the minimum required under the various decisions of the ECtHR;
- b. the prison rooms / cells are well lit and aired;
- c. the rooms / cells contain furniture and separate sanitary facilities
- d. inmates are provided with personal hygiene supplies
- e. the rooms are regularly cleaned and are well heated
- f. there is access on a regular basis to exercise facilities
- g. there is a TV in each room / cell and a library in the facility

23. Following further submissions, a follow up s.20 request was sent seeking additional information as follows:-

‘1. Please confirm if the Respondent will be imprisoned in Bjelovar Prison if convicted and sentenced to a term of imprisonment. If this is not the case please state the prison she will be imprisoned in if imprisonment. If it is not possible to state the actual prison at this stage please state those prisons in which it is most likely the requested person will be imprisoned if convicted of the offence

2. If she will not serve any sentence imposed in Bjelovar Prison, please confirm that wherever she is detained, the requested person will have a minimum individual space (including her bed and related furniture, but excluding the designated bathroom area) of 3 sq m for the entirety of her detention

3. If a minimum of 3 sq m cannot be guaranteed for the entirety of her detention, please indicate any further mitigating factors of detention which would render her detention in such a regime compatible with Article 3 of the European Convention on Human Rights’

24. In its reply of the 28 October 2024, the IJA stated as follows:-

' 1. Please note that in the indictment dated 4 December 2023, reference number KO-DO-430/20223-1, the Municipal State Attorney's Office in Bjelovar, as the authorised prosecutor, proposed to the court that if the respondent, Kornelija Kusec Durbek, is found guilty of committing criminal offences, a sentence of 6 months imprisonment should be imposed for each of the two offences, and then a combined sentence of 10 months imprisonment should be pronounced. The combined sentence of imprisonment will not be enforced if the respondent does not commit a new criminal offence within 2 years from the finality of the judgment'

25. The IJA then goes on to note that the Court is not obliged to impose the proposed sentence but, should it decided to impose a stricter sentence (which is described in the response as a *'theoretical possibility'* as the indictment does not propose an unconditional prison sentence) then it must give sufficient reasons in a judgment, as an appeal could then be made to a higher court. A Judge of the County Court of Bjelovar directs the execution of any sentence and for any sentence of up to 6 months, this would in principle be carried out in Bjelovar. For any unconditional sentence longer than 6 months, the case is sent to the 'Diagnostic Centre in Zagreb' to assess where such a sentence would be carried out and this would not exclude the possibility of such a sentence being executed in Bjeolvar.

26. In his Judgment in *Minister for Justice v Angel* [2020] IEHC 699, Burns J set out an exhaustive list of principles to be applied where an argument is made that surrender ought to be refused on Article 3 grounds relating to prison conditions in the requesting state as follows:

'(a) the cornerstone of the Framework Decision is that member states, save in exceptional circumstances, are required to execute any European arrest warrant on the basis of the principles of mutual recognition and trust;
(b) a refusal to execute a European arrest warrant is intended to be an exception;

- (c) one of the exceptions arises when there is a real or substantial risk of inhuman or degrading treatment contrary to Article 3 ECHR or Article 4 of the Charter of Fundamental Rights of the European Union ('the Charter');*
- (d) the prohibition on surrender where there is a real or substantial risk of inhuman or degrading treatment is mandatory. The objectives of the Framework Decision cannot defeat an established risk of ill-treatment;*
- (e) the burden rests upon a respondent to adduce evidence capable of proving that there are substantial / reasonable grounds for believing that if he or she were returned to the requesting country, he or she will be exposed to a real risk of being subjected to treatment contrary to article 3 ECHR;*
- (f) the threshold which a respondent must meet in order to prevent extradition is not a low one. There is a default presumption that the requesting country will act in good faith and will respect the requested person's fundamental rights;*
- (g) in examining whether there is a real risk, the Court should consider all of the material before it and if necessary, material obtained of its own motion;*
- (h) the Court may attach importance to reports of independent international human rights organisations or reports from government sources;*
- (i) the relevant time to consider the conditions in the requesting state is at the time of the hearing;*
- (j) when the personal space available to a detainee falls below 3m² of floor space in multi occupancy accommodation in prisons, the lack of personal space is considered so severe that a strong presumption of a violation of Article 3 ECHR arises. The burden of proof is then on the issuing state to rebut the presumption by demonstrating that there are factors capable of adequately compensating for the scarce allocation of personal space, and this presumption will normally be capable of being rebutted only if the following factors are cumulatively met;-*
- (1) the reductions in the required minimum space of 3m² are short, occasional and minor*
 - (2) such reductions are accompanied by sufficient freedom of movement outside the cell and adequate out-of- cell activities; and*
 - (3) the detainee is confined to what is when viewed generally, an appropriate detention facility, and there are no aggravating aspects of the conditions of his detention;*

(k) a finding that there is a real risk of inhuman or degrading treatment by virtue of general conditions of confinement in the issuing member state cannot lead, in itself, to the refusal to execute a European arrest warrant. Whenever the existence of such a risk is identified, it is then necessary for the executing judicial authority to make a further assessment, specific and precise, of whether there are substantial grounds to believe that the individual concerned will be exposed to that risk;

(l) an assurance provided by the competent authorities of the issuing state that, irrespective of where he is detained, the person will not suffer inhumane degrading treatment is something which the executing state cannot disregard and the executing judicial authority, in view of the mutual trust which must exist between the members states on which the European arrest warrant is based, must rely on that assurance, at least in the absence of any specific indications that the detention conditions in a particular detention centre are in breach of article 3 ECHR or article 4 of the Charter; and

(m) It is only in exceptional circumstances, and on the basis of precise information, that the executing judicial authority can find that, notwithstanding such an assurance, there is a real risk of the person concerned being subjected to inhuman or degrading treatment because of the conditions of that person's detention in the issuing member state'

27. An article 3 ground of objection based on Croatian prison conditions was rejected by Keane J in *Minister for Justice v Celik* [2023] IEHC 102. The issues raised in that case followed on from the contents of the CPT Report of 2018. A number of requests were sent to the Croatian authorities seeking information on the specific conditions of detention which Mr Celik would likely face if surrendered. Having received responses thereto, Keane J was satisfied that firstly, prisoners staying in cells in the prison identified (Osijek Prison) as where it was likely the respondent would be held, would be provided with a minimum individual space of 4m² for the entirety of their detention subject only to a possibility that, because of the influx of new prisoners assigned to pre-trial detention, some prisoners might not be provided with such space for the entirety of their detention and second, by the mitigating factors including a guarantee that the availability of limited personal space will be of shorter duration and to the smallest extent possible during their term of imprisonment and the guarantee that they would be

afforded free movement outside the cell, participation in physical and other activities outside the cell and appropriate physical conditions in the cell.

28. In her decision in *Minister for Justice v Rakanovic* [2024] IEHC 391, Greally refused to surrender to Croatia, finding that in the circumstance of that case, there was a real risk of a breach of Article 3 of the Convention were the Respondent to be surrendered. In that case there was evidence that there was a risk that the Respondent would be detained in conditions which included having less than 3m² space. Having received responses to s.20 requests from the IJA, Greally J was not satisfied that the periods during which that respondent would be detained in a space of less than 3m² could be ascertained and that the IJA had failed to specifically address the question of whether such reductions would be occasional and minor and furthermore she was not satisfied that there was sufficient evidence of mitigating factors.

DECISION ON ARTICLE 3 OBJECTION

29. Having considered the documents in this case, the following facts of relevance to this issue emerge:

- a. If surrendered to Croatia the Respondent will, if detained pending trial, be held in the Bjelovar women's prison.
- b. The reply received from the IJA, enclosing a detailed letter from the Warden of that prison, suggests that there are no grounds to believe that the Respondent would be exposed to any risk of inhuman or degrading treatment whilst in that prison.
- c. Given the principles of mutual trust which apply to such assurances from Croatia, I cannot disregard the contents of this reply unless there is some evidential basis for so doing. No such basis has been suggested and I must therefore accept the assurances provided in relation to Bjelovar.
- d. If the respondent is convicted of the offences for which her surrender is sought, then it is likely that the Court will impose a suspended sentence upon her by way of punishment. Whilst this is the sentence sought by the prosecution in this case, it cannot be said with certainty that this sentence would be imposed upon conviction. On the other hand it would appear from the information provided

that generally the Court would follow the recommendation of the prosecution in such cases; and

- e. If, contrary to the above, the Court were to impose a sentence of imprisonment then she may or may not continue to be detained in Bjelovar to serve such sentence. If the custodial sentence is one of 6 months or less, then she will remain in that facility whereas if it is more than that, this is not guaranteed. In the seemingly unlikely event this were to happen, then it is unclear where she would serve a sentence.

30. Having considered all of the information available, I am not satisfied that there are substantial grounds to believe that Ms Durbek would be exposed to a real risk of inhuman or degrading treatment if surrendered to Croatia and detained in a female prison.

31. Firstly, based on all the information received from the IJA it is very likely that any time she spends in detention in Croatia, will be spent in Bjelovar prison and there is no reason to have any concerns about the conditions in that facility.

32. There is a possibility, a slight possibility at most, that she might be detained in a different female prison after conviction. This would only arise if (a) she is convicted (b) the court ignores the recommendation of the prosecutor (and reasons must be given for such a course so that the matter can be appealed) and (c) she is not thereafter detained in Bjelovar. In such circumstances, the respondent has not met the evidential threshold and shown a real risk that she will be exposed to inhuman and degrading treatment in another facility.

33. In any event, having considered the CPT Report of 2023 and specifically those parts of the report which concern conditions of detention for female prisoners generally in Croatia – together with the responses of the Croatian government to the same, I do not consider that there is a real risk that this Respondent would be exposed to inhuman and degrading treatment. Even assuming, without deciding and for the sake of testing the proposition, that she would not be detained in Bjelovar after the court ignored the recommendation of the prosecution, it does not seem to me that the observations in that report (highlighted by the Respondent in her submissions) in relation to conditions of

detention for female prisoners are such as to generally raise a risk of inhuman and degrading treatment.

34. The most concerning part of the report concerns overcrowding in Prison 10 in Zagreb. Outside of that, whilst there are other general criticisms of the conditions of detention in for example Prozegba Prison and of matters such as the absence of extra-curricular activities, some poor sanitation facilities, austere living conditions, absence of covered exercise spaces and access to personal belongings, these do not individually or collectively give rise to a concern that she would be exposed to inhuman and degrading treatment. Furthermore, the reply from Croatia shows that a considerable amount is being done to upgrade the prisons in question.
35. Whilst therefore the description of overcrowding in Prison 10 in Zagreb could, if looked at in isolation, give rise to concerns of a possible breach of Article 3, I do not consider that that alone is sufficient – taking into account all of the other matters referred to in the 2023 Report and the reply of Croatia thereto – to show systemic or generalised deficiencies in relation to the detention of female prisoners as to give rise to a concern of possible breach of Article 3 of the Convention.
36. This ground of objection is not therefore made out.
37. I therefore will make an order for the surrender of this Respondent to Croatia pursuant to Section 16 of the 2003 Act.