[2019] IEHC 674

THE HIGH COURT

[Record No. 2018/29 EXT]

[Record No. 2018/150 EXT]

IN THE MATTER OF THE EUROPEAN ARREST WARRANT ACT 2003 (AS AMENDED)

BETWEEN:

THE MINISTER FOR JUSTICE AND EQUALITY

APPLICANT

AND

TN

RESPONDENT

Judgment of Mr. Justice Alexander Owens delivered on 14th October 2019

1. I have decided to decline to order surrender of the respondent on the European arrest warrants relating to the sentences imposed on him in Poland in 2004 and 2006. He has established that the effect of the interference with his family life and the family lives of his dependants which would follow from surrender to serve these sentences would be disproportionate and is not justified by countervailing public interest considerations arising under the Framework Decision.

2. Various objections to surrender were advanced on behalf of the respondent. In the light of my finding on disproportionality it is not necessary to rule on all of these objections. It is appropriate for me to comment on issues where there is enough material before me to enable me to come to a conclusion.

3. I would have needed further information from the Polish authorities in order to deal with some of the points raised. I might have enquired whether the duration of the sentences is calculated by reference to calendar or lunar months. The requesting authority states that the time limit in Poland for the execution of the first sentence of four months imprisonment expired on 11th October 2019. I would have sought further information on this. The respondent states in his affidavit that he did not initiate an appeal against the second conviction. This contradicts information supplied by the requesting authority and I would have afforded that authority an opportunity to respond.

4. I refer to the first conviction and sentence. The respondent asserts in his supplemental affidavit that he was abroad on a particular date, implying that he could not on that date have collected the notice of the sentence hearing relating to the first offence, as claimed by the requesting authority. This is unsatisfactory. His affidavit does not engage with how he came to agree the penalty for the offence with the prosecutors around the same time. This agreement was formalised by a subsequent court order at the hearing which he did not attend.

5. The European arrest warrant relating to this proceeding and the supplemental information provided establish on their face compliance with a requirement in the Table to s. 45 of the European Arrest Warrant Act 2003, as amended. I accept this information at face value. A bare assertion of the sort relied on by the respondent is not sufficient to warrant further enquiry of a requesting authority. Further enquiry is only necessary where there is ambiguety or inconsisteny in the documentation presented by the requesting authority or

where credible evidence is presented which casts doubt on the reliability of the statements in that documentation.

6. The European arrest warrants were issued in November 2010 and June 2014. They seek the surrender of the respondent to Poland to serve sentences of imprisonment for violations of a court ban on driving motor vehicles "*in land traffic*" which is the equivalent of an Irish offence of driving a mechanically propelled vehicle in a public place while disqualified, contrary to s. 38 (1) and s. 38 (5) of the Road Traffic Act 1961 as inserted by s. 12 of the Road Traffic Act 2006 and earlier legislation.

7. The first offence took place in a street in Szczecin in July 2004. The respondent asserted that the applicant has not established that this offence corresponds with an Irish offence. It was argued that the offending might have occurred when the respondent was driving in a street at a time when it was not a "*public place*" as defined in Irish legislation. In my view, there is no substance to this objection. The documents make clear that the offence was of driving "*in land traffic*" on a street. This information and description are sufficient for me to conclude that the offence was committed while he was driving in a public place. He has not offered any evidence to demonstrate that he was not driving a car in a public place at the time.

8. The second offence was committed in Szczecin on 24th April 2006. It resulted in a criminal charge which the respondent did not answer to. He was convicted in his absence. This conviction was the subject of an appeal which he denies that he initiated or participated in. His evidence is that his wife attended at the appeal hearing as he was abroad and that the appeal court refused to entertain her.

9. As a result of the first conviction the respondent was sentenced to a term of four months imprisonment. As a result of the second conviction he was sentenced to a term of six months imprisonment. I am told that the first sentence was a suspended sentence which was activated at some point.

10. The respondent has been living and working in Ireland since 2007. He got married in Poland in 2005. The abandoned element of the first European arrest warrant suggests that he has two children in Poland from a previous relationship. He lives with his wife and their three children in a village in west County Cavan and has worked at various jobs while living here. It is clear that he emigrated to Ireland with his family for economic reasons and that he decided not to engage with the Polish penal authorities. I suspect that his situation is not unique and that many Polish nationals may be working and settled in Ireland who are in a similar position.

11. The offences which led to these European arrest warrants are minor offences. The sentences are at or close to the minimum period set out in Article 2 (1) of the Framework Decision.

12. A long period elapsed before the European arrest warrants were issued and these warrants have been executed very recently. There is no explanation as to why

enforcement is taking place now. This case cannot have been the most pressing matter in the priorities of the authorities in the requesting Member State.

13. In this type of case what is categorised by a respondent as "*delay*" is often nothing more than time which has passed as a result of inefficiency of prosecution or enforcement authorities and his good fortune that these authorities have not yet caught up with him.

14. There is evidence that the respondent was in contact with Polish authorities in 2013 with a view to returning to deal with the outstanding sentences and that he was refused a passport renewal because of an objection by the prosecution authorities in Szczecin. He gave his address and telephone number to the Polish Embassy in Dublin. In 2013 the Embassy corresponded with him, using this address. One letter dated 22nd July 2013 conveyed a decision about a passport to a different address in Cavan town and was copied to the authorities in Szczecin. He does not know how this address got on the document and states that it was in fact sent to him at his west Cavan address which the Embassy used in earlier correspondence. He states that he was not told about the 2010 European arrest warrant during this interaction. He has not held a passport since. He was aware in 2013 that the Polish authorities had not decided to abandon enforcement of the sentences and had no reason to think that they had altered their position since.

15. While I have taken into account this evidence, which the respondent categorises as delay and obstruction of his return by the Polish authorities, these are minor factors in assessing whether surrender of the respondent to Poland would result in disproportionate interference with family rights.

16. A number of authorities were referred to during legal argument. These include the judgments delivered by members of the Supreme Court in *The Minister for Justice and Equality v. J.A.T. (No. 2)* [2016]2 I.L.R.M. 262; [2016] IESC 17. I have also been referred to the judgment of Edwards J. in *The Minister for Justice and Equality v. T.E*. [2013] IEHC 323. In *J.A.T. (No. 2)* the issue of a European arrest warrant was found to be an abuse of process. The Court also decided that the return of the respondent to the United Kingdom to face charges of taxation offences would be incompatible with Article 8. While the judgments do not give general guidance, I agree with observations made by O'Donnell J. at paragraphs 2, 4 and 11 of his concurring judgment. Many of these observations are relevant to the circumstances of this case.

17. I am told that the recent decision of Hunt J. in *The Minister for Justice and Equality v. Vestartas* [2019] IEHC 481 is being appealed to the Supreme Court which will give further guidance in due course.

18. Rights under Article 8 only take precedence over the public interest in implementing surrender under the Framework Decision in exceptional circumstances. Where an objection to surrender is advanced which relies on Article 8 grounds it is necessary to apply a test based on the principle of proportionality.

19. The United Kingdom Supreme Court has stated that the question at issue in applying the test is whether the gravity of the interference with family life is justified by the gravity of the public interest pursued: see *Norris v. Government of The United States of America* [2010] 2 A.C. 487 and *H(H) v. Deputy Prosecutor Genoa; H(P) v. Same*; *F-K v. Polish Judicial Authority* [2013] 1 A.C. 338. Judgments in these cases state that exceptionality is not the test but the predicted outcome of the application of that test.

20. Disruption to family life as a result of surrender will usually be very significant in cases where a respondent satisfies the test. In my view, the test is not confined to carrying out a balancing exercise. When courts speak of disproportionality, they mean significant disproportion. In order to justify a decision to refuse surrender it is necessary to identify the factors which give rise to clear disproportionality in the sense of a significant disproportion between the adverse effects on family life and the public interest in trial or punishment of the respondent in due course of law.

21. Some exceptional features will usually be present in a case where surrender is refused on this ground. What grave interference with family life will the respondent and his family suffer? It is inherent in the surrender process and in any criminal process that the removal of a person elsewhere and incarceration pending trial or for punishment will result in disruption in family relationships and may cause very significant hardship. This is not an exceptional feature which results in disproportionality. It is an inevitable consequence of many surrenders.

22. In many cases surrender of a person to serve a short term of imprisonment will not involve much family hardship.

23. While many factors may be relevant, the starting point is that special weight must be given to the objective of ensuring that persons within the European Union who may have committed crime are duly prosecuted in the appropriate Member State and that they serve sentences imposed by the courts of the Member States. It is for a respondent to demonstrate in a clear way the existence of some factor under Article 8 which should take precedence.

24. The conduct of a respondent is relevant. How has the family situation which the respondent is now seeking to rely on arisen? Is it appropriate that a respondent should use family circumstances to avoid facing trial or punishment where he should have been aware that he might have to face trial or punishment in the requesting Member State at some stage?

25. While the seriousness of offending and the length of sentence imposed are potentially relevant in considering the gravity of the interest being pursued by the requesting authority, it is also necessary to bear in mind that Article 2 (1) of the Framework Decision sets out the offence and sentencing thresholds. The interest in ensuring that a person serves a short term of imprisonment may be less important than that of securing return for the purposes of prosecution or punishment for a more serious offence. These are

subsidiary considerations as the focus of enquiry should be on the effect of the surrender on the family circumstances of the respondent and his dependants.

26. If authorities in a requesting Member State appear to take little interest in pursuing enforcement of a minor punishment over a number of years, it may be more difficult to assert that there is an important public interest in enforcing that sentence. However, any failings of administrators and judicial authorities in a requesting Member State should not be equated with an absence of a public interest in prosecution and enforcement in that State or an absence of a European Union interest in the effective operation of criminal law and the Framework Decision throughout the European Union. It is the communal interest of the Member States that those who may be guilty of crimes in any Member State are duly prosecuted and that sentences imposed by the courts of a Member State are enforced. Lack of administrative or judicial resources and outdated systems will always have an adverse impact on the efficiency of prosecution and enforcement. We do not live in a world of perfect and uniform judicial, prosecutorial, investigative or administrative efficiency.

27. A respondent can have no legitimate expectation that he can avoid surrender under the European arrest warrant arrangements because of passage of time arising from lack of resources or from the inefficiency of those who should be pursuing the matter. He cannot order or alter his family affairs in the meantime or make family commitments on the basis of an assumption that the law will not eventually catch up with him. Members of his family can have no such expectations either.

28. Applications for surrender under the Framework Decision must be decided speedily and there is no room for the development of an elaborate jurisprudence on "*delay*" and "*systemic delay*". Delay is not a stand-alone ground on which surrender should be refused.

29. Personal circumstances may change with the passage of time in a way which increases potential of disruption to family life as a result of a surrender. In this case the respondent's family is now facing more difficulty as their eldest son with multiple learning disabilities and autism grows older and becomes more difficult to manage. The problems which the family will face if the respondent is surrendered now would not have been so acute if his return had been sought when his son was younger.

30. This case comes within the category of exceptional cases where the interest in enforcement does not outweigh the gravity of the interference with the respondent's family life and the disruption to the lives of his family members which will result from the surrender to Poland. The weighting to be given to the public interest is minor when set against the likely adverse effects on the respondent's family and the surrender would result in disproportionate disruption to family life.

31. The respondent is the family breadwinner. He and his wife are heavily involved in looking after their teenage son who suffers from autism and many other disabilities. He attends a special day school which is located some 45 km from the family home. The respondent's

wife is also involved in looking after their other children and it is clear that she will not be able to cope on her own. Their son has profound behavioural and other problems which are very difficult to manage and require the constant presence of his father. I have no doubt that surrender of the respondent will cause very severe disruption to the members of this family unit. I refer to the content of paragraphs 16-19 of the respondent's affidavit sworn on 7th October 2019 and to the report from the special day school dated 4th September 2019 which I accept.