

THE HIGH COURT

[2021] IEHC 305
[2020 No. 343 EXT.]

BETWEEN

MINISTER FOR JUSTICE AND EQUALITY

APPLICANT

AND

IONUȚ-TONI TULBURE

RESPONDENT

JUDGMENT of Mr. Justice Paul Burns delivered on the 4th day of May, 2021

1. By this application, the applicant seeks an order for the surrender of the respondent to Romania pursuant to a European arrest warrant dated 7th January, 2016 ("the EAW"). The EAW was issued by Cristian Birjovanu, Judge of the Roman Court, as the issuing judicial authority. The EAW seeks the surrender of the respondent in order to enforce a sentence of 2 years' imprisonment imposed upon the respondent on 4th December, 2015, all of which remains to be served.
2. The EAW was endorsed by the High Court on 16th November, 2020, and the respondent was arrested and brought before the High Court on 4th February, 2021, on foot of same.
3. I am satisfied that the person before the Court is the person in respect of whom the EAW was issued. No issue was raised in that regard.
4. 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 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 have been met. The sentence in respect of which surrender is sought is in excess of four months' imprisonment. Minimum gravity was not contested.
6. Part E of the EAW indicates that the warrant refers to a total of three offences. A description of the circumstances in which the offences were committed is set out therein. From the particulars furnished, it would appear that on 14th December, 2014, police attended at a bar to enforce a warrant issued against the respondent's brother. In the course of executing the warrant, the police officers restrained the respondent's brother at which point the respondent took a metal chair and raised it above his head, threatening three police officers that he would kill them if they did not release his brother. It is noted that the respondent at pre-trial submitted a memo containing a defence on the merits to the charges. The three offences are referred to as "outrage" offences with three separate injured parties being named.
7. I am satisfied that in accordance with ss. 5 and 38(1)(a) and of the Act of 2003, correspondence can be established between the offences referred to at the first section of part E of the EAW and offences under Irish law, namely making a threat to kill contrary to s. 5 of the Non-Fatal Offences Against the Person Act, 1997 and/or obstructing a police

officer acting in the execution of his duty contrary to s. 19(3) of the Criminal Justice (Public Order) Act, 1994.

8. At part E.II. of the EAW, reference is made to offending other than that set out at the first section of part E. In particular, at part E.II. of the EAW, it is indicated that a suspended sentence of 9 months' imprisonment had been imposed upon the respondent on 31st January, 2013, that such suspension had been revoked and the sentence added to the penalty imposed in respect of the offences referred to in the first section of part E in order to arrive at a total penalty of 2 years' imprisonment.
9. At hearing, the respondent pursued three grounds of objection as follows:-
 - (i) surrender is precluded as the EAW failed to contain sufficient particulars to meet the requirements of s. 11(1A) of the Act of 2003 and, in particular, it was not clear how the calculation of 2 years' imprisonment was arrived at;
 - (ii) surrender is precluded by s. 45 of the Act of 2003 as the requirements of that section had not been met; and
 - (iii) surrender is precluded by s. 37 of the Act of 2003 due to prison conditions in Romania.

Section 11(1A) of the Act of 2003

10. Section 11(1A)(g)(iii) of the Act of 2003 provides that a European arrest warrant shall specify, *inter alia*:-

"(iii) where that person has been convicted of the offence specified in the European arrest warrant and a sentence has been imposed in respect thereof, the penalties of which that sentence consists."

Counsel on behalf of the respondent submitted that, at part C of the EAW, it was indicated that the maximum sentence which could be imposed for the offence referred to in the EAW was said to be 1 year and 6 months' imprisonment, but then went on to state that the length of sentence actually imposed was 2 years' imprisonment and that, even taking into account the reference to the suspended sentence at part E.II. of the EAW, it was not clear how the 2 year sentence had been arrived at.

11. By additional information dated 25th February, 2021, the issuing judicial authority confirms that the sentence to be served is 2 years' imprisonment and explains how that sentence has been arrived at. For each of the three offences of "outrage" (threats to kill), the maximum penalty which could be applied is 1 year and 6 months' imprisonment. The respondent had been sentenced to a penalty of 1 year and 3 months' imprisonment in respect of those three outrage offences. He had previously been sentenced to a penalty of 9 months' imprisonment, conditionally suspended for 2 years and 9 months. During that probation period he had committed the three "outrage" offences referred to in the EAW, so the Court had proceeded to reverse the conditional suspension and impose the sentence of 9 months' imprisonment, adding same to the penalty of 1 year and 3 months'

imprisonment. This resulted in a penalty of 2 years' imprisonment. By further additional information dated 23rd March, 2021, the issuing judicial authority again confirms that the length of imprisonment to be served is 2 years. It further explains that, as regards the three outrage offences, a sentence of 9 months' imprisonment had been imposed in respect of one of those offences to which had been added one-third of the sum of the other two sentences (i.e. 6 months, representing one third of 18 months). This resulted in a sentence of 15 months' imprisonment after which the penalty of 9 months' imprisonment previously suspended was added, resulting in a total of 24 months imprisonment.

12. On the basis of the additional information provided, I am satisfied that the requirements of s. 11(1A)(g)(iii) have been met and that the sentence which the respondent is required to serve, and the penalties of which that sentence consists, have been adequately set out.
13. I dismiss the respondent's objections to surrender based upon s. 11(1A) of the Act of 2003.

Section 45 of the Act of 2003

14. At part D of the EAW, the issuing judicial authority has indicated that the respondent was not present at the trial which led to the decision. In such circumstances, surrender is precluded by virtue of s. 45 of the Act of 2003 unless the EAW indicates the matters required by points 2, 3 and 4 of the table set out therein. Section 45 of the Act of 2003 transposes article 4a 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"), into Irish law. In the present case, the issuing judicial authority ticked boxes 3.1a. and 3.4. of the relevant table. However, as regards box 3.1a., the issuing judicial authority states that the person concerned had been summoned in person but failed to set out the date on which he had been summoned in person. At point 3.4., the issuing judicial authority indicates that the respondent had not been served with the decision but that he would be served without delay after surrender and that he would be entitled to retrial or appeal *de novo* in which he was entitled to be present and which would allow the situation of the case, including new evidence, to be re-examined and which could result in the cancellation of the original decision and that he would be informed on the time limit to request retrial of the case or appeal *de novo*, which is 30 days.
15. Counsel on behalf of the respondent stated that, by ticking both box 3.1a and box 3.4, the issuing judicial authority had introduced an unacceptable level of ambiguity into the EAW. He further submitted that, as part of the sentence consisted of the imposition of a previously suspended sentence, it was necessary for the issuing judicial authority to satisfy the Court that the requirements of s. 45 of the Act of 2003 had been met in respect of the previously suspended sentence and/or the revocation thereof.
16. By additional information dated 25th February, 2021, the issuing judicial authority confirmed that the respondent was not present at the hearing although he had been summoned at the known address and warrants for his arrest had been issued. He had left

the address and his location could not be determined. He had filed a memorandum for the case. I am satisfied that such circumstances do not establish that the respondent was personally summoned, and this explains why no date for such summons was set out at point 3.1a. of table D in the EAW.

17. I am satisfied that the ticking of box 3.1a. in the EAW is of no effect, as it does not set out the date upon which the respondent was notified of the hearing date. It can, therefore, be discounted by this Court. On the other hand, the ticking of box 3.4. by the issuing judicial authority has been correctly completed and, in the absence of any evidence to the contrary, the Court is obliged to accept and give effect to same. I am therefore satisfied that the requirements of s. 45 of the Act of 2003 have been met as regards the sentence imposed in respect of the three offences of outrage as referred to in the EAW.
18. As regards the suspended sentence imposed, by way of additional information dated 23rd March, 2021, the issuing judicial authority has indicated that the respondent appeared before the Court in person and was assisted by a lawyer. A table as required by s. 45 of the Act of 2003 to that effect has been completed by the issuing judicial authority ticking the relevant box: "*1: Yes, the person appeared in person at the trial resulting in the decision*". I am therefore satisfied that, as regards the imposition of the suspended sentence of 9 months' imprisonment, the requirements of s. 45 of the Act of 2003 were satisfied.
19. In the additional information dated 25th February, 2021, the issuing judicial authority explains that during the probation time in respect of which the 9 months' sentence of imprisonment was suspended, the respondent committed the three outrage offences referred to in the EAW and, thus, the Court reversed the suspension of the penalty of 9 months' imprisonment and proceeded to add same to the sentence imposed in respect of the three outrage offences.
20. In *The Minister for Justice and Equality v. Lipinski* [2018] IESC 8, the Supreme Court had to consider whether the absence of the respondent at a hearing which led to the revocation of suspension of a sentence of imprisonment engaged the *in absentia* requirements of the Framework Decision. While the Supreme Court initially made a reference to the Court of Justice of the European Union ("the CJEU") on the point, it transpired that such reference was unnecessary by virtue of a previous decision of the CJEU in *Samet Ardic* (Case C-571/17 PPU). The ruling of the CJEU in *Ardic* was in the following terms:-

"Where a party has appeared in person in criminal proceedings that result in a judicial decision which definitively finds him guilty of an offence and, as a consequence, imposes a custodial sentence the execution of which is subsequently suspended in part, subject to certain conditions, the concept of 'trial resulting in the decision', as referred to in Article 4a(1) of Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant on the surrender procedures between Member States, as amended by Council Framework Decision 2009/299/JHA of 26

February 2009, must be interpreted as not including such proceedings in which that suspension is revoked on grounds of infringement of those conditions during the probationary period, provided that the revocation decision adopted at the end of those proceedings does not change the nature or the level of the sentence initially imposed.”

21. Clarke C.J., at paragraph 3.7 of the Supreme Court decision, held:-

"3.7 It is clear, therefore, that a hearing at which a suspension of sentence is revoked on grounds of infringement of conditions attaching to that suspension is not considered to be part of a 'trial resulting in the decision' for the purposes of the Framework Decision unless the revocation decision changes 'the nature or the level of the sentence initially imposed'. If the consequence of the revocation is to alter the sentence originally imposed then different considerations may apply."

22. I am satisfied that the reason for the revocation of the suspension of the sentence of 9 months' imprisonment was the commission of the three offences referred to in the EAW and that the Court, in revoking same, did not change the nature or length of the original suspended sentence. In such circumstances, the decision to revoke the suspension of the sentence of 9 months' imprisonment was not a decision within the meaning of article 4a of the Framework Decision, or one in respect of which the requirements of s. 45 of the Act of 2003 apply.

23. I dismiss the respondent's objections to surrender based upon s. 45 of the Act of 2003.

Section 37 of the Act of 2003

24. The solicitor for the respondent, Ms. Clodagh Buckley, swore an affidavit dated 12th February, 2021 referring to generalised and systemic deficiencies in the conditions of detention in Romania and exhibited a report from the European Council Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment ("the CPT"), dated 19th March, 2019, relating to a visit to Romania in February, 2018. She also exhibited a report from the United States, State Department, on human rights practices in Romania, dated 2019. By letter dated 16th February, 2021, the Court sought additional information from the issuing judicial authority concerning the institution(s) in which the respondent would be detained and the conditions of such detention and, in particular, whether the respondent would be guaranteed a minimum of 3 square metres personal space during such detention.

25. By additional information dated 2nd March, 2021, the issuing judicial authority has enclosed a letter from the National Administration of Penitentiary, Bucharest. This indicates that the respondent will be initially accommodated in Rahova Penitentiary in Bucharest for a quarantine period of 21 days, where he will have a minimum space of 3 square metres. It is not possible to state with certainty where the respondent will then be transferred to serve his sentence but it is stated that he will probably serve the sentence initially in a semi-open regime at Miercurea Ciuc Penitentiary. Conditions in relation to that institution are set out in the letter. It is also indicated that if the respondent is

assigned to serve the sentence in an open regime, he would most likely be transferred to Iasi Penitentiary and the conditions of the open regime in same are outlined in the letter. The letter indicates that if the respondent has to serve his sentence in another unit, then measures will be taken to comply with guarantees given. The letter concludes as follows:-

"Considering the perspective of implementing the measures included in the 'action plan for the period 2020-2025, elaborated in order to enforce the pilot decision Rezmives & other against Romania, as well as the decisions pronounced in the group of cases Bragadireanu against Romania', as well the current trend of the detainees accommodated by the National Administration of Penitentiaries, as a result of the criminal policies adopted by the Romanian state, the National Administration of Penitentiaries guarantees the provision of a minimum individual space of 3 sqm for the entire period of execution of the sentence, including the bed and the related furniture. This does not include the space for the toilet."

26. On the basis of the additional information furnished, I am satisfied that, if surrendered, the respondent will be detained, for the duration of the sentence to be enforced, in conditions where he is afforded a minimum of personal space of 3 square metres and that the conditions of his detention will not amount to inhuman or degrading treatment contrary to article 3 of the European Convention on Human Rights ("the ECHR") or article 4 of the Charter of Fundamental Rights of the European Union.

27. Section 4A of the Act of 2003 provides:

"It shall be presumed that an issuing state will comply with the requirements of the Framework Decision, unless the contrary is shown."

The Framework Decision incorporates respect for fundamental rights. I am satisfied that the presumption contained in s. 4A of the Act of 2003 has not been rebutted.

28. I am not satisfied that there are substantial grounds for believing that, if surrendered, the respondent would be at real risk of his fundamental rights being breached by reason of the prison conditions in which he is likely to be detained.

29. Ultimately, bearing in mind the terms of s. 37 of the Act of 2003, this Court must determine whether surrender of the respondent is incompatible with the State's obligations under the ECHR or the Constitution. I am not satisfied that surrender would be incompatible with the State's obligations in that regard.

30. I dismiss the respondent's objections to surrender based upon s. 37 of the Act of 2003.

Conclusion

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

32. Having dismissed the respondent's objections to surrender, it follows that this Court will make an order for the surrender of the respondent to Romania.