# THE HIGH COURT

**[2024] IEHC 516**

**[2023 No. 233 EXT]**

**BETWEEN**

**MINISTER FOR JUSTICE**

**APPLICANT**

**AND**

**AMIRIK SINGH**

**RESPONDENT**

**JUDGMENT of Mr Justice Patrick McGrath delivered on the 15th of July 2024**

## A. APPLICATION

1.1 By this application, the applicant seeks an order for the surrender of the respondent to the Republic of Italy pursuant to a European Arrest Warrant dated 17 July 2023 ("the EAW"). This EAW was issued by Maria Beatrice Parati, Judge for Preliminary Investigations of the Court of Bergamo, as the issuing judicial authority.

1.2 The EAW is a prosecution warrant and seeks the surrender of the respondent in order to prosecute him for three offences which carry a maximum penalty of 14 years' imprisonment.

1.3 The issuing State has certified that the offences to which the warrant relate are contrary to Articles 56, 110 and 575 of the Criminal Code, as well as Articles 61 no. 2, 81 paragraph

2, 110 of the Criminal Code, 10, 12 14 of Law 14 October 1974 n. 497, 23 paragraph 4 (regarding Article 11) of Law 18 April 1975 n. 110.

1.4 The respondent was arrested on 23rd October 2023 on foot of a Schengen Information System II alert and brought before the High Court on the same date. The EAW was produced to the High Court on 17th July 2023.

1.5 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.

1.6 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.

1.7 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 years imprisonment.

1.8 I am further satisfied that the EAW was issued by a judicial authority within the meaning of the Framework Decision and the 2003 Act.

1.9 The Respondent is sought, as now clarified following the issue of a s20 request and a reply thereto from the Issuing Judicial Authority on the 12th of December 2023, for prosecution in relation to three separate offences being:

(i) Causing Grievous Bodily Harm contrary to Articles 56, 110 and 175 of the Criminal Code

(ii) Breaching a prohibition on the possession of a firearm contrary to Articles 10 and 14 of Law 497/ 1974; and

(iii) Prohibition on carrying a weapon in a public place contrary to 12 and 14 of Law 497/ 1974.

1.10 The offences, which each carry a maximum sentence in excess of 3 years detention or custody, are certified by the issuing judicial authority as 'ticked box offences' of 'murder, grievous bodily harm' and 'illicit trafficking in weapons, munitions and explosives' as per Article 2.2 of the Framework Decision. As such, therefore, correspondence need not be proven. In any event no issue was raised in relation to correspondence and no manifest or apparent error in this regard is claimed by the Respondent.

1.11 The respondent made the following objections to surrender:-

(i) no decision has been made to prosecute him, and as such, his surrender is prohibited by s. 21A of the Act; and

(ii) The respondent is an international protection applicant and, whilst this does not of itself operate as a bar to surrender, he may not be surrendered until such time as a decision has been made in relation to this protection application.

**2. OBJECTION PURSUANT TO S21A OF 2003 ACT**

2.1 In support of his s21A objection, the Respondent filed an affidavit sworn by an Italian lawyer, Ms Eliza Izzotti, on the 28th of February 2024. Having set out in some detail the criminal procedures followed in Italy in a case such as the present, Ms Izzotti concluded as follows at paragraphs 13 and 14 of the affidavit:

*'13. After an examination of the documents and relying on my personal experience, I do believe that no formal indictment by the GUP has been ordered yet, because normally the order of application of a precautionary measure by the GIP is given before the preliminary hearing in front of the GUP. At this point, the decision by GIP is limited to acknowledge that: a) there are serious elements that may suggest the liability of the suspect; b) there are precautionary needs related to possible obstacles to the investigation that may be caused by the suspect / a risk of escape / a risk of perpetration of other crimes (art. 273, 274 c.p.p.) 14. In the wake of the exposed arguments and of the documentation provided, replying to the proposed question, I consider that without the notification either of the decree adopted by the GUP ordering the indictment or, at least, the decree adopted by the GIP scheduling the preliminary hearing, no decision can have possibly been made to charge and try the suspect in Italy'*

2.2 A s20 request was sent to the Issuing Judicial Authority and in her reply, dated the 18th of March 2024, the Issuing Judicial Authority Ms Maria Beatrice Parati replied inter alia as follows:-

*'Following your request for information, if:*

*(a) There was an intention and/or decision to charge the requested person with the offences and to put him on trial*

*(b) It was considered that sufficient evidence existed for that to occur*

*I hereby represent the following:*

*(a) Yes, we confirm that, at the time the European Arrest Warrant was issued, there was the intention to charge the requested person with the offences and to put him on trial.*

*The decision to put him on trial will be made as soon as the suspected person will be extradited to Italy. We inform you that against the other person who participated in the crime CHAHAL Marvir Singh the decision to put on trial has already been taken and the next hearing will be held on May 9th 2024*

*(b) Yes it was considered that sufficient evidence existed for the offences on which the request is based, otherwise the European Arrest Warrant would not have been issued.*

*In fact the European Arrest Warrant was issued following the adoption of a precautionary measure. This measure is issued by a Judge, upon request of the Public Prosecutor, and requires the presence of serious evidence of guilt as well as precautionary needs. In other words the existence of serious circumstantial evidence has been positively assessed'*

2.3 Ms Parati further indicated that, within 5 days of the person being detained, he must be interrogated. She also indicated, in response to questions about whether it was possible under Italian law to charge or indict a person without him or her ever being present or interviewed. She stated that that it was only possible to proceed in each such instance '*without the suspected being present'* where the suspected person *'is aware of the offences and has voluntarily withdrawn or become fugitive before the decision to proceed or indict'.*

2.4 In conclusion Ms Parati states:

*'Regarding the Paragraph 14 of Izzottis's affidavit my opinion is that, under Italian law, in the same way as under Irish law, when a European Arrest Warrant is issued and based on sufficient existing evidence, is required to verify only if there was the intention to charge and try the person and it is not required that the decision to charge and try the person has been taken yet'*

2.5 A supplemental affidavit of Ms Izzotti was filed on behalf of the Respondent. At paragraph 2 of that affidavit, she confirmed that in her opinion in this case *'no decision can have possibly been made to charge, and try the suspect in Italy yet'* and the decision to put him on trial can and will only be made after a preliminary hearing which has not yet taken place.

2.6 Section 21A of the 2003 Act provides that:-

> *'(1) Where a European arrest warrant is issued in the issuing state in respect of a person who has not been convicted of an offence specified therein, the High Court shall refuse to surrender the person if it is satisfied that a decision has not been made to charge the person with, and try him or her for, that offence in the issuing state.*
>
> *(2) Where a European arrest warrant is issued in respect of a person who has not been convicted of an offence specified therein, it shall be presumed that a decision has been made to charge the person with, and try him or her for, that offence in the issuing state, unless the contrary is proved'*

2.7 The interpretation of this provision has been the subject of a number of decisions of the Supreme Court including *MJELR v Bailey* [2012] 4 IR 1 *, MJELR v Olsson* [2011] 1 IR 384*, MJELR v Pocevicius* [2015] IESC 59 and *MJELR v Campbell* [2022] IESC 21.

2.8 In *Olsson* the Swedish authorities sought the surrender of Mr Olsson for the purposes of prosecution. Under Swedish law however the police would, following his return, have to interview the respondent prior to concluding their investigation and it was only after then that a final decision could be made to prosecute Mr Olsson. The High Court and, on appeal the Supreme Court, dismissed the objection that his surrender should be refused as there had been no decision made to 'charge' and 'try' the respondent. Having referred to the presumption in s21A of the 2003 Act O'Donnell J stated:

> *'26. The issue here, however, is not merely one of the evidence before the court. As is apparent, s 21A(2) of the Act of 2003, as inserted by s.25 of the Act of 2005, contains*

*a presumption that a decision has been made to charge the person and try him for the offence. Furthermore, the opening lines of the European arrest warrant itself, request that the person mentioned below 'be arrested and surrendered for the purposes of conducting a criminal prosecution..' That statement, and the further statements made in Ms. Maderud's affidavit in relation to the practice of the Kingdom of Sweden, must also be read in the light of recital 10 of the Framework Decision which describes '[t]he mechanism of the European arrest warrant [as being] based on a hight level of confidence between member states'.*

2.9 At paragraph 33, O'Donnell J continued:

*'[33] When s.21A speaks of a 'decision' it does not such decisions as final or irrevocable, nor can it be so interpreted in light of the Framework Decision. The fact that a further decision might be made eventually not to proceed, would not therefore mean that the statute had not been complied with, once the relevant intention to do so existed at the time the warrant was issued. The Act of 2003 does not require any particular formality as to the decision; in fact, s.21 focuses on (and requires proof of) the absence of one. The issuing state does not have to demonstrate a decision. A court is only to refuse surrender a requested person when it is satisfied that no decision has been made to charge or try that person. This would be so where there is no intention to try the requested person on the charges at the time the warrant is issued. In such circumstances, the warrant could not be for the purposes of conducting a criminal prosecution'.*

And continuing at paragraph 36, he stated:

*'[36]…in short the intention of the Swedish prosecution authority to bring the respondent before the Swedish court for the purpose of being charged is but a step in the prosecution process. For the reasons set out above the High Court was correct to conclude that the respondent was not being sought only to be questioned as part of the investigation and that there was a decision to charge the respondent within the meaning of the Act of 2003. Certainly, even without the presumption contained in s.21(A), the section requires clear proof. Once a court finds the European arrest warrant to be in order (and therefore on its face a request made for the purpose of prosecution or trial), then before the court can refuse to surrender a person requested under such a warrant, it must be satisfied by cogent evidence to the contrary that a decision has not been made to charge the particular person with, and try him or her for, the offence'*

2.10 In *Campbell* the Court, per Baker J, specifically referred to *Olsson* in rejecting the contention of Counsel in that case that while an intention is required for a 'decision', an intention is not a decision. At paragraph 91 and 92 of the Judgment, she stated:-

*'91. Counsel argues that while an intention is required for a decision to be made, an intention is not a decision. I disagree. In the context of surrender, an intention to do something is a present expression and not merely of a proposal. In other words, a decision has been taken that something will be done, Intentionality, therefore, is not a state of mind that leads to a particular outcome, but is itself a fact.*

*92. A decision to try a person is a decision that he or she be sent forth for trial, and not a statement that the trial process has commenced, It cannot yet commence in Lithuania, as it could not in Olsson have commenced in Sweden, because of a procedural formality and*

*mandatory step which remained to be taken. Thus a decision to try a person is not coterminous with the fact that the trial has commenced, but is rather a state of facts or state of affairs which means that sufficient evidence exists or is thought to exist to put a person on trial'*

2.11 A number of principles have therefore emerged from the cases cited above:-

a. Effect must be given to the presumption in Section 21A(2) and such presumption will only be rebutted and the Court put on inquiry as to whether decisions to charge and try a Respondent were made at the time of issue of the warrant on the basis of evidence adduced which is *'sufficiently cogent in its terms, and concerning in its substance';*

b. Statements made in an EAW that a person is sought for the purposes of a criminal prosecution must be read in light of recital 10 of the Framework Decision which describes the mechanism of the European Arrest Warrant as being based on a high level of confidence between Member States of the European Union;

c. The decision to charge and try need not be irrevocable and what is important is that, at the time it was issued, there then existed on the part of the requesting state an **intention** to prosecute the requested person for an offence. As Murray J stated in *Bailey (No 1) ,* the question of whether a decision had been made expressly or impliedly to put the appellant on trial is a fairly net issue of act. The question to be asked is whether this decision was made at the time prior to the issue of the EAW in the individual case.

2.12 The Respondent refers however to two previous cases where surrender to Italy was refused on the grounds of non-compliance with s21A of the 2003 Act, *Minister for*

*Justice v Patrick Meegan* [2016] IEHC 129 and *Minister for Justice v Alan Gray* [2016] IEHC 128. He submits that it is clear that no decision to charge and try has been made in this case in Italy. He says that the '*bald assertion*' of such an intention is made by the IJA this is contradicted by thereafter saying that a decision will not be made until after surrender takes place. He also says that his expert, Ms Izzotti, has sworn two affidavits and o replying affidavits were filed and nor was her evidence challenged under cross examination and indeed the reply to the s20 requests failed to comment thereon. He submits that, for the same reason as in *Meegan* and *Gray,* this court should refuse surrender.

2.13 The Minister submits that *Gray* and *Meegan* are readily distinguishable from this case. In those cases the IJA confirmed that no intention to charge and try the respondents had been made at the time of the issue of the EAWs (see paragraph 34 of Judgment) and it was impermissible to surrender a person for the purposes of assisting in an investigation or where no present intention to charge and try exists.

2.14 I agree with the Minister's submission that the facts in this case are readily distinguishable from the facts in *Gray* and *Meegan.*. On the basis of the answers received from the issuing authority in those cases and the expert evidence of an Italian lawyer engaged on their behalf, it was clear that at the time of the issue of the EAWs no intention had been formed to charge and try the Respondents. At paragraph 36 of her judgment, having referred to the s20 correspondence in the case, Donnelly J stated:-

*'In the view of the Court this submission {*of the Minister that there was evidence of the requisite intention to charge and try] *does not take into account what is agreed to be the*

*legal and factual position here i.e. that it is only at the end of the 'preliminary investigation stage', that the public prosecutor can ask for the person to stand trial* ***and*** *it was only after the issue of the EAW, that such a request was made in this case. Furthermore, when asked the specific question whether an intention to charge and try had been made prior to the issue of the EAW, the issuing judicial authority simply confirmed that the request for committal for trial was made after the issue of the EAW but on the basis of documentation that was available earlier. By that answer the issuing judicial authority goes no further than equating the request for the committal for trial with the intention to try. On the basis of what the Italian judicial authority state, no decision to try had been made at the date of the EAW as there was no intention on the part of the prosecutor to try him until at the earliest the request for the committal for trial'*

2.15 Here on the other hand the issuing judicial authority has specifically confirmed that it had the intention to charge and try the Respondent at the time of the issue of the EAW. In the absence of good reason, a high level of confidence and trust must be given to the responses received from the issuing judicial authority in reply to the 20 requests issued in this case. Indeed, there is in fact no disagreement on the central issue, namely whether the issuing judicial authority had an **intention to charge and try** the Respondent, between that authority and the Italian lawyer engaged by the Respondent. Ms Izzotti maintains in both affidavits that, owing to the operation of the Italian criminal procedures, a 'decision' to charge and try cannot be made until after a preliminary procedure (as described by her) takes place. That may well be the position under Italian law but the fact remains that, although the final decision to charge and try cannot take place until after that point, the

issuing authority have expressly stated it is their intention to charge and try the Respondent if surrendered and Ms Izzotti cannot and does not dispute that intention.

2.16 Applying the reasoning of the Judgments set out above to the present facts:-

(i) There is a presumption that this TCAW was issued for the purpose of charging and trying Mr Singh with the offences set out therein;

(ii) It is stated on its face to be for the purpose of conducting a criminal prosecution and this has to be read in the light of the high level of confidence between this State and the Republic of Italy which underlies the mechanism of the Framework Decision;

(iii) There is nothing before the Court which would suggest that the EAW has been issued to allow further investigatory steps to be taken prior to a decision being made to charge and try this respondent. There is nothing to suggest that he is sought for the impermissible purpose of 'investigation';

(iv) There is nothing to rebut the presumption that there is a current present intention to charge and try the Respondent, if surrendered, for the offences for which he is sought. The fact that a decision has not, and indeed cannot as matters stand, been made to charge and try the Respondent is not at all conclusive.

(v) The indisputable evidence, in the form of responses received from Ms Parati, is that there exists a present intention on the part of the issuing state to charge and try Mr Singh if surrendered. In his case it seems that this cannot be done until after he is surrendered and after he is interrogated and a preliminary hearing takes place

2.17 In my view, applying the reasoning of the decisions of O'Donnell J in *Olsson and* Baker J in *Campbell* that 'present intention' is sufficient for the purposes of s21A of the 2003 Act. I am therefore satisfied that this ground of objection is not made out.

**3. APPLICANTS STATUS WHILST SEEKING INTERNATIONAL PROTECTION**

3.1 The applicant is an international protection applicant. As such, it is submitted by the respondent that he may not be surrender until such time as a decision is made in relation to his international protection application.

3.2 Section 16(1) of the *International Protection Act, 2015* provides:-

*'An applicant shall be given, by or on behalf of the Minister, a permission that operates to allow the applicant to enter and remain or, as the case may be, to remain in the State for the sole purpose of the examination of his or her application, including any appeal to the Tribunal in relation to the application.'*

3.3 Article 7 of the Council Directive 2005/85/EC (1 December 2005) on minimum standards on procedures in Member States for granting and withdrawing refugee status '*Asylum Procedures Directive'* provides:-

'*1. Applicants shall be allowed to remain in the Member State, for the sole purpose of the procedure, until the determining authority has made a decision in accordance with the procedures at first instance set out in Chapter III. The right to remain shall not constitute an entitlement to a residence permit.*

*2. Member states can make an exception only where, in accordance with Articles 32 and 34, a subsequent application will not be further examined or where they will surrender or*

*extradite, as appropriate, a person either to another member state pursuant to obligations in accordance with a European arrest warrant or otherwise, or to a third country, or to international criminal courts or tribunals''*

3.4 It is submitted that s. 16(1) of the 2015 transposes Article 7(1), but there is no domestic legislation transposing Article 7(2) and, given the failure to provide in Irish law for the exemption provided for in Article 7(2) above, the respondent is entitled to remain in Ireland pending determination of his international protection application.

3.5 This issue was considered by Burns J. in *Minister for Justice and Equality v M.E.H* [2022] IEHC 71. In his judgment held that s.16 did not create a barrier to surrender, provided relevant safeguards are in place to protect against non-refoulment and to ensure access to an affair asylum procedure. At paragraph 27 Burns J stated as follows:

*'It is clear from Article 7(2) of the Asylum Procedures Directive and paras 35 to 37 of the UN Guidance Note, that there is no principle in international law which prohibits the surrender or extradition of a person seeking international protection/ asylum, provided the relevant safeguards are in place to protect against non-refoulement and to ensure access to a fair asylum procedure. Indeed, it would appear to be the case that international law expressly recognises that a system or surrender / extradition can operate in such circumstances'.*

3.6 At paragraph 31 he continued:-

*'The Respondent is of course entitled to protection of his fundamental rights in the course of any surrender procedure and surrender should not take place where same would amount to a breach, or constitute a real risk of a breach, of those fundamental rights, including his right to be protected from refoulement pending an application for international protection.*

*I see no reason why section 16(1) of the Act should be interpreted in the manner contended for by the respondent'*

3.7 As later referred to by Burns J at paragraph 33, there are here ( as in *MEH* ) a number of safeguards available to the Respondent to ensure that his international protection application is determined (either in Ireland following the determination of the proceedings or Italy whilst proceedings are ongoing) without risk of refoulement, including the seeking of assurances from the Minister and / or Italy.

3.8 For the same reasons as those of Burns J in *MEH* , I do not accept the argument that the Respondent, as an applicant for international protection, has a right to remain in the state that operates as a bar to surrender on foot of this EAW.

3.9 This ground of objection is therefore not made out.

**4. CONCLUSION**

4.1 For the reasons set out above I have rejected the objections made by the Respondent.

4.2 I am satisfied that this is a case where a s16 order should be made for the surrender of the Respondent on foot of the EAW from Italy and propose therefore to make such an order.