

# THE HIGH COURT

[2024] IEHC 645

[2023 No. 212 EXT]

**BETWEEN**

**MINISTER FOR JUSTICE**

**APPLICANT**

**AND**

**FRANCLIM JOSE SOARES VITOR**

**RESPONDENT**

**JUDGMENT of Mr Justice Patrick McGrath delivered on the 7 of November 2024**

## **APPLICATION**

1. By this application, the applicant seeks an order for the surrender of the respondent to Portugal pursuant to a European Arrest Warrant dated 13<sup>th</sup> February 2023 (“the EAW”). This EAW was issued by Judge Dr. Antonieta Nascimento of the Judicial Court of Faro, Portimao, Portugal.
2. The Respondent is sought for arrest and surrender to Portugal for the purposes of executing a custodial sentence imposed on him on 6 October 2011.
3. The Respondent was arrested on the 13 of November 2023 on foot of an SIS II Alert and brought before this Court on the following day. The Respondent was subsequently admitted to bail pending the determination of these proceedings.
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 21A, 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 further satisfied that the EAW was issued by a judicial authority within the meaning of the Framework Decision and the 2003 Act.
7. I am satisfied that the details and particulars as set out in the Warrant are sufficient to satisfy the requirements of s.11 of the 2003 Act.
8. The Respondent is sought to serve the said sentence for two offences of:
  - a. Theft in a Public Place contrary to Article 210.1 of the Criminal Code of Portugal and
  - b. Aggravated Theft ( or attempted aggravated theft ) contrary to Article 201. 22 and 23 of the said Code.
9. The particulars of the conduct comprising the said offences are set out at paragraph (e) of the Warrant. The offences are not ‘ticked box’ offences as set out in Article 2.2 of the Framework Decision, and I am therefore required to consider whether there is correspondence for such offences. 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’.*
10. 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.

11. I am satisfied that the offences set out in the Warrant do correspond with offences under Irish Law being:
- a. Theft contrary to Section 4 of the Criminal Justice (Theft and Fraud Offences) Act, 2001; and
  - b. Robbery contrary to Section 14 of the said Act
12. I am further satisfied that, given that the Respondent is sought to serve a sentence of more than 4 months, the requirements of minimum gravity laid down in s.38 of the EAW are met in this case.

### **GROUND OF OBJECTION**

13. A single point of objection pursued at the various hearings of this application relates to s.45 of the 2003 Act. The Respondent submits that, not having been present at the *'trial resulting in the decision'* in the requesting state, surrender is prohibited under s.45 of the Act.
14. At paragraph 2.d of the EAW, it is stated that the Respondent was not present at the trial resulting in the decision. The requesting state rely upon Paragraph 3.1b, namely that though he was not personally notified, he was by other means effectively provided with official information of the anticipated date and place for the trial that led to the decision, in a manner that left it unequivocally established that he was informed that a decision could be rendered even if he was not present at the trial.
15. The Respondent acknowledges that he did leave the issuing state after receiving a formal notification which included a requirement to inform the authorities of any such changes and therefore may be taken to have at least been constructively aware of the fact that a criminal process was likely to occur in his absence. But he submitted that such notification as he received (the *'Term of Identity and Residence'*) which was included in responses received to s.20 requests sent to the issuing judicial authority, did not unambiguously or unequivocally inform him that a final decision could be taken in his absence.

16. The Respondent further refers to a further stage in the process subsequent to the trial itself, namely an appeal to the Supreme Court of Justice on 6 October 2011. This appeal was brought by his co-accused and resulted in a change in the sentence imposed not only in relation to his co-accused but also in relation to this appellant. The Respondent says that this constituted a 'trial resulting in the decision' which he did not attend and in relation to which he states he received no notification.

17. A number of s.20 requests have issued to the IJA seeking further information and clarification. On the 9 of April 2024, a detailed request was sent to the IJA raising a series of questions in relation to:

- a. The appeal of his co-accused, Artiom Turcanu, to the Supreme Court which led to the reduction of not only Mr Turcianu's sentence but also this Respondent's sentence. Questions were asked in relation to what (if any) notification of that appeal had been given to the Respondent or any lawyer acting on his behalf, any involvement of the Respondent or his lawyer in such appeal and whether or not the reduction of the Respondents sentence was automatic following the reduction of that of Mr Turcana or whether some discretion subsisted in that regard;

18. The Respondent indicated on affidavit that, after he had received notification of the Judgment of the Portuguese Court in February 2021, he had instructed a lawyer in Portugal to make any available applications and was subsequently informed that whatever applications were made were unsuccessful and the original judgement remained in place. Information was sought from the IJA as to their record(s) of any such applications.

- (i) How was it clear from the document entitled 'Term of Identity and Residence', dated the 14 October 2009, that the Respondent had been informed that a trial may take place in his absence.

19. In relation to the appeal of his co-accused, Artiom Turcanu, the reply received from the IJA indicated:

- b. Neither the Respondent nor his lawyer participated in the processing of this appeal to the Supreme Court which was finalised on the 6 of October 2011;
- c. There was no hearing before the Supreme Court as this was not requested and it was decided on the papers;
- d. The decision of the Court in Portimao in relation to this Respondent was not, under Portuguese law, final until he could be notified of the same and neither he nor his lawyer could procedurally be informed of his co-accused's appeal;
- e. Because of the basis for the appeal and the fact that they had both committed the criminal offences in question together, as a matter of law the alteration of the co-accused's sentence had an automatic knock-on effect on this Respondents sentence. No discretion (or arbitrariness) existed in how the Respondents sentence was reduced;
- f. No new evidence was adduced at this appeal.

20. In relation to applications brought by this Respondent following his being notified of this conviction, the Portuguese IJA stated:

- g. The appeal was, as required under Portuguese law, lodged first with the Court of First Conviction and this was done through his lawyer, who was chosen by Mr Vitor
- h. On the 21 October 2021 the Supreme Court ordered the Appeals Court of Evora to decide the appeal as the facts needed to be re-examined
- i. The Appeals Court in Evora dismissed this appeal on the 6 November 2021 with the adjustment of the penalty following on from the Supreme Courts adjustment of the co-accused's penalty.

21. It was further indicated by the IJA that in the 'Declaration of Identity and Residence' given to the Defendant, he was told of the possibility of trial in his absence. He was so informed by a police office at the time of signing this document and the validity of this communication was assessed by the Appeal Court in Evora.

22. Two further requests were sent to the IJA in relation to this 'Declaration of Identity and Residence' on the 20 June and 9 August 2024 respectively.

23. In the reply to the request of the 20 of June 2024, having dealt with the obligation to notify change of residence and the fact that court documents will be deemed received at his residence, the notification given to the Respondent by the police stated:-

*‘- that the failure to comply with the provision of the previous paragraphs, legitimises representation by counsel at all procedural acts in which he has the right or duty to be present, as well as the holding of the hearing, in accordance with Article 333 of the Code of Criminal Procedure’*

24. A copy of the translation of the said Article 333 was subsequently provided and this sets out the circumstances in which the case can proceed in the absence of the Defendant.

### **SUBMISSIONS OF THE PARTIES**

25. The Applicant submits that, taking into account all of the documents in the case including the various replies to the section 20 requests, there is simply no basis for this Court to refuse surrender pursuant to s45 of the 2003 Act. The Respondent refers inter alia to the fact that, as acknowledged by the Respondent himself on affidavit, he left Portugal at a time when he knew that a ‘*criminal investigation*’ was ongoing and prior to the initial trial and sentence.

26. In addition, he signed a document – the ‘Declaration of Residence and Identity’ – in which he acknowledged that documents in relation to the matter would be served on the address he had given, he undertook to inform the authorities of any change of address and furthermore he was made aware that a hearing might proceed in his absence.

27. The Respondent maintains his objections under s.45 submitting that the defence rights were not honoured in the process. He further refers to a portion of the transcript of the Evora Appeal Court decision which he says suggests that the follow-on effect or benefit for him as a result of his co-accused’s appeal, was not necessary automatic and therefore that hearing was a ‘*trial resulting in the decision*’ and one where there was a failure to honour defence rights. From my reading of the section quoted by the

Respondent (p 167 of the Transcript) it is my view that this refers to the analysis being conducted by that Court in the course of this Respondents subsequent appeal. In other words, during the appeal to the Evora Court of Appeal at which he was represented having instructed a lawyer to act for him. I do not therefore consider that this could be said to be a *'trial resulting in the decision'*.

## **DECISION**

28. A summary of the principles to be applied by the Court in considering s.45 of the 2003 Act were set out by Baker J at paragraph 90 of *Minister for Justice v Zaranescu* [2020] IESC 59 as follows:-

- '(a) The return of a person tried in absentia is permitted;*
- (c) A person tried in absentia will not be returned if that persons rights of defence are breached;*
- (d) Section 45 of the Act expressly identifies circumstances in which a person tried in absentia may be returned, primarily where there is evidence of service or where the person was legally represented or where it is shown that the right of retrial is available as of right;*
- (e) the examples outlined in section 45 as forming the basis of the analysis are not exhaustive, and the requested authority may look to the circumstances giving rise to the non attendance of the requested person at the hearing;*
- (f) the requested state has a margin of discretion in how it approaches the facts, and the right to be present, but should still consider whether the rights of defence were adequately protected or breached'*

29. From the EAW and correspondence in this case, the following is established:-

- j. The Respondent left Portugal at a time when, as averred to in his own affidavit, he knew there was a criminal investigation ongoing against him;
- k. It is clear from the Identity and Residence document that he left Portugal at time when he had been informed of the obligation to inform the authorities of

any change of address and was aware of a possible criminal prosecution against him;

- l. It is now clear from all the evidence in the case, and specifically the document, that he was aware of the possible consequences of his actions i.e. that a summons could be served on him and that a process could proceed and conclude in his absence;
- m. The respondent was legally represented by a Court appointed defence counsel, Mr Rui Malta, at the date of the hearing and judgment, being the 4<sup>th</sup> and 11<sup>th</sup> of May 2011 respectively;
- n. The Respondent was the beneficiary of the appeal brought by his co-accused, who had apparently attended all hearings, to the Portuguese Supreme Court in October 2011. At this point in time the Respondent, on his own evidence, was in Ireland and the issuing state were clearly unaware of his location as he had failed to inform them of his change of address – despite his obligation to do so. His co-accused succeeded in his appeal to the extent that his sentence was reduced from. As a consequence of the success of this appeal by his co-accused, owing to the operation of Portuguese Law, Mr Vitor's sentence was automatically reduced from 4 years and 6 months to 3 years;
- o. Under Portuguese Law, this Respondent could not lodge or prosecute an appeal until he was served with the decision of the Court of First Instance in Portimao. By letters Rogatory, dated 12 October 2020, An Garda Siochana were asked to serve the decision upon Mr Vitor and advise him that he had 30 days to appeal against that Judgment after the date of service upon him. From his own affidavit, it is clear that Sgt Hoban served this on the Respondent on the 26 February 2020. In the Letters Rogatory the Respondent was informed of the conviction and sentence in the First Instance Court in Portimao, of the partially successful appeal lodged by his co-accused Artiom Turcanu which led to a reduction in sentence by the Supreme Court on his co-accused and of the fact that, as a matter of Portuguese law, he automatically benefitted from this reduction and had his own sentence similarly reduced.
- p. Furthermore, he was advised of his right to now lodge his own appeal and Mr Vitor thereafter exercised that right via the same Mr Rui Malta, who had acted for him at first instance. He was served with that decision in Ireland on the 26 February 2021.



q. His lawyer lodged an appeal, and this court has been provided with a transcript of its rulings. There were three grounds of appeal advanced on his behalf which were rejected by that Court, the Court of Appeal in Evora:-

- The hearing was a nullity due to his failure to attend at the proceedings. This was rejected as it was held by that court that he had been properly notified of the proceedings and chose not to attend and no defences guarantees were disregarded;
- Taking into account his own circumstances and criminal history, there were no grounds for changing the sentence imposed on him and
- Given his history and the facts of the case, there were no grounds for suspending execution of sentence.

30. Taking all of these facts into account, it is clear that the defence rights of this Respondent were protected in relation to this matter. Whether or not the facts of this case fall within the strict terms of the box ticked by the IJA for the purposes of s.45 of the Act, it is beyond doubt that his defence rights were fully protected in circumstances where it is now established:

- a. He was under a duty, in the course of a criminal investigation, to inform the authorities of any change of address and he failed so to do.
- b. He was made aware of the consequences that might flow from such failure – including the possibility that the matter could proceed in his absence.
- c. He was represented by a Court appointed lawyer who acted for him in his absence at the hearings.
- d. He benefitted from the appeal brought by his co-accused, owing to the operation of Portuguese Law.
- e. He was served with the decision of the first instance court after his co-accused's partly successful appeal and was informed that he now also had his own right of appeal.
- f. He exercised that right of appeal with the assistance of a lawyer to the Appeal Court in Evora.

31. In those circumstances I reject the submission made under s.45 of the Act and will make an order for his surrender pursuant to s.16(2) of the 2003 Act.