

THE HIGH COURT

[2021] IEHC 414
[2020 No. 413 EXT.]

BETWEEN

MINISTER FOR JUSTICE

APPLICANT

AND

SORIN COSMIN DRĂGHIA

RESPONDENT

JUDGMENT of Mr. Justice Paul Burns delivered on the 16th day of June, 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 29th September, 2020 ("the EAW"). The EAW was issued by Judge Cernuș Dubravca, of the Timiș County Court, as the issuing judicial authority.
2. The EAW seeks the surrender of the respondent in order to enforce a sentence of five years' imprisonment from which the period 16th May to 23rd May, 2018 will be deducted.
3. The EAW was endorsed by the High Court on 21st December, 2020 and the respondent was arrested and brought before the High Court on 1st March, 2021.
4. 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.
5. 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 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 sentence in respect of which surrender is sought is in excess of four months' imprisonment.
7. Section 38(1)(b) of the Act of 2003 provides that it is not necessary for the applicant to establish correspondence between the offences to which the EAW relates and offences under the law of the State, where the offences referred to in the EAW are offences to which article 2.2 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"), applies and carry a maximum penalty in the issuing state of at least three years' imprisonment. In this instance, the issuing judicial authority has certified that the offence referred to in the EAW is an offence to which article 2.2 of the Framework Decision applies, that same is punishable by a maximum penalty of at least three years' imprisonment and has indicated the appropriate box for "*illicit trafficking in narcotic drugs and psychotropic substances*". There is no manifest error or ambiguity in respect of the aforesaid certification such as would justify this Court in looking beyond same. In any event, I am satisfied that if necessary to do so, correspondence could be established between the offence to which the EAW relates and

an offence under the law of the State, namely possession of drugs for the purpose of supply contrary to s. 15 of the Misuse of Drugs Act, 1977, as amended, and/or possession of drugs contrary to s. 3 of that Act.

8. At part D of the EAW, it is indicated that the respondent was personally present at the trial following which the court decision was delivered.

9. The issuing judicial authority has also indicated at part D of the EAW that it is relying upon the following:-

"3.2. being aware of the scheduled trial, the person had given a mandate to a legal counsellor, who was either appointed by the person concerned or by the State, to defend him or her at the trial, and was indeed defended by that counsellor at the trial."

10. Part D.3.4. of the EAW has also been completed by the issuing judicial authority, purportedly indicating that it is relying upon the fact that the respondent will have a right of appeal. At part B of the EAW, it is indicated that the enforceable court order is a criminal sentence number 58/24, dated 24th February, 2020 of Timiș County Court delivered in case file number 2561/30/2019 and it is further stated:-

"Final by the criminal decision no. 755/A/03 September 2020 delivered by Timișoara Court of Appeal in the case file no. 2561/30/2019, by which the defendant's appeal was rejected."

11. Due to the ambiguity in respect of part D of the EAW, a request for additional information was sought. By reply dated 29th December, 2020, it is indicated that the respondent appeared personally at certain points of the proceedings before Timiș County Court and was represented by his chosen lawyer throughout the proceedings. As regards the appeal, the respondent did not appear personally but was represented by a different chosen lawyer from that at first instance.

12. At hearing the respondent objected to surrender on the following grounds:-

(i) surrender is precluded by reason of s. 37 of the Act of 2003 as the minimum sentence provided for under Romanian law in respect of the offence in question is one of five years' imprisonment which is disproportionate and contrary to the Constitution;

(ii) surrender is precluded by reason of s. 45 of the Act of 2003, as the hearing had taken place in the absence of the respondent and the requirements of that section had not been met;

(iii) surrender is precluded by reason of an unacceptable lack of clarity in the EAW insofar as it is stated to relate to one offence and yet the details of that offence appear to refer to a number of different types of wrongdoing; and

(iv) surrender is precluded by reason of the respondent having lodged an application before the European Court of Human Rights ("the ECtHR") in respect of his conviction and sentence.

13. The respondent swore an affidavit dated 11th May, 2021 in which he avers that he has lodged an application with the ECtHR in respect of his conviction, which he believes was in breach of article 6 of the European Convention on Human Rights ("the ECHR"). He avers that he has instructed a Romanian lawyer in respect of that application and exhibits a copy of the original application and translation to confirm that his application for admissibility to the court is under active consideration. The application form exhibited with the affidavit completed on behalf of the respondent indicates that he was convicted and received a sentence of five years' imprisonment before Timiș County Court. It is stated:-

"I appealed the sentence, within the legal time to appeal, before Timisoara Court of Appeal."

The form then sets out his complaints regarding the trial at first instance and the evidence given at the initial trial. It goes on to criticise the Timișoara Court of Appeal for refusing the appeal. It states:-

"Also, on the court date of 02/07/2020 I was not present but, through my lawyer Adrian Badi, I requested the Timisoara Court of Appeal court a court date for the purpose of hearing from me, because I haven't been heard by the court of first instance..."

14. It is clear from the statement of facts set out in the application to the ECtHR that the respondent was fully aware of the appeal before the Timișoara Court of Appeal and was represented by his lawyer at same.

Article 37 of the Act of 2003 – Proportionality/Constitutionality of Mandatory Minimum Sentence

15. Section 37 of the Act of 2003 provides that a person shall not be surrendered under the Act of 2003 if his or her surrender would be incompatible with the State's obligations under the European Convention on Human Rights ("the ECHR"), the protocols thereto, or would be in contravention of the Constitution. It is submitted on behalf of the respondent that the imposition of a mandatory minimum prison sentence in respect of the offence to which the EAW relates was in breach of the respondent's constitutional rights. Reliance was placed upon the decision of the Supreme Court in *Ellis v. Minister for Justice and Equality* [2019] IESC 30, [2019] 3 I.R. 511 in which the legislative requirement to impose a mandatory minimum sentence of five years' imprisonment upon conviction for an offence contrary to s. 27A of the Firearms Act, 1964, where the conviction was a second offence under the Act, was held to be repugnant to the Constitution.
16. The essence of the decision in *Ellis* was that the imposition of the mandatory minimum penalty did not apply to all persons convicted of the specific offence but only to a limited class of such offenders. However, the provisions of the relevant articles of the Romanian

Criminal Code as cited by the respondent appear to apply to all persons convicted of the relevant offence when it concerns high-risk drugs and not simply to a limited class of persons. Moreover, the respondent acknowledges in his written submissions that this Court is not required to conduct a general proportionality test where the offence concerned meets the minimum gravity requirements of the Act of 2003. Similarly, it is not for this Court to conduct a general proportionality test where the sentence concerned meets the minimum gravity requirements: See *Minister for Justice and Equality v. Ostrowski* [2013] ISEC 24, [2013] 4 I.R. 206.

17. It is well established that this Court cannot refuse to surrender simply because the legal system of trial in the issuing state differs from the system envisaged by the Irish Constitution (see *The Minister for Justice, Equality and Law Reform v. Altaravicius* [2006] IESC 23, [2006] 3 I.R. 148). In *Minister for Justice, Equality and Law Reform v. John Paul Brennan* [2007] IESC 21, the respondent argued that a sentencing regime which provided for the imposition of a minimum sentence for a particular offence without leaving the trial judge any discretion would be contrary to the Constitution and therefore surrender was precluded by reason of s. 37 of the Act of 2003. This was emphatically rejected by Murray C.J. in delivering the judgment of the Supreme Court at paras. 47-51:-

"47. *However the argument of the appellant goes much further. He has contended that the sentencing provisions of the issuing State, in this case the United Kingdom, did not conform to the principles of Irish law, as constitutionally guaranteed, governing the sentencing of persons to imprisonment on conviction before our Courts for a criminal offence.*

48. *The effect of such an argument is that an order for surrender under the Act of 2003, and indeed any order for extradition, ought to be refused if the manner in which a trial in the requesting State including the manner in which a penal sanction is imposed, does not conform to the exigencies of our Constitution as if such a trial or sentence were to take place in this country. That can hardly have been the intention of the Oireachtas when it adopted s. 37(1) of the Act of 1973 since it would inevitably have the effect of ensuring that most requests for surrender or extradition would have to be refused. And indeed if that were the intent of the Framework Decision, which the Act of 1973 implements, and other countries applied such a test from their own perspective, few, if any, would extradite to this country.*

49. *Indeed it may be said that generally extradition has always been subject to a proviso that an order for extradition, as with any order, should not be made if it would constitute a contravention of a provision of the Constitution. I am not aware of any authority for the principle that the extradition or surrender of a person to a foreign country would contravene the Constitution simply because their legal system and system of trial differed from ours as envisaged by the Constitution.*

50. *The manner, procedure and mechanisms according to which fundamental rights are protected in different countries will vary according to national laws and*

constitutional traditions. The checks and balances in national systems may vary even though they may have the same objective such as ensuring a fair trial. There may be few, if any, legal systems which wholly comply with the precise exigencies of our Constitution with regard to these matters. Not all for example will provide a right to trial by jury in exactly the same circumstances as our Constitution does in respect of a trial for a non-minor offence. Rules of evidence may differ. The fact that a person would be tried before a judge and jury in this country for a particular offence could not in my view, be a basis for refusing to make an order for surrender solely on the grounds that in the requesting State he or she would not be tried before a jury. The exceptions which we have to the jury requirement, as in trials before the Special Criminal Court, acknowledges that a fair trial can take place without a jury even though it is constitutionally guaranteed for most trials in this country.

51. *That is not by any means to say that a Court, in considering an application for surrender, has no jurisdiction to consider the circumstances where it is established that surrender would lead to a denial of fundamental or human rights. There may well be egregious circumstances such as a clearly established and fundamental defect in the system of justice of a requesting State where a refusal of an application for surrender may be necessary to protect such rights. It would not be appropriate in this case to examine further possible or hypothetical situations where this might arise. The sole matter which I wish to make clear here is that the mere fact that a trial or sentence may take place in a requesting State according to procedures or principles which differ from those which apply, even if constitutionally guaranteed, in relation to a criminal trial in this country does not of itself mean that an application for surrender should be refused pursuant to s. 37(2) of the Act."*

18. I am not satisfied that the imposition of a mandatory minimum sentence by the court in Romania constitutes a breach of the respondent's fundamental rights. Bearing in mind the wording of s. 37 of the Act of 2003, this Court must determine whether surrender of the respondent to the issuing state is incompatible with the State's obligations under the ECHR, the protocols thereto and/or the Constitution. I am not satisfied that the surrender of the respondent would be incompatible with the State's obligations in that regard. I dismiss the respondent's objection to surrender based upon s. 37 of the Act of 2003.

Section 45 of the Act of 2003

19. Taking into consideration all of the documentation before the Court, I am satisfied that the respondent appeared personally before the court of first instance and was also represented thereat by his chosen lawyer. As regards the appeal, I am satisfied that the respondent had mandated a lawyer to represent him in respect of the appeal and that he was in fact represented in the appeal by that lawyer. This is clear from the additional information provided by the issuing judicial authority but also from the application which the respondent has made to the ECtHR. It is worth noting that, in his affidavit, the respondent does not deny having mandated the lawyer to appear on his behalf in the appeal court. I am satisfied that, as regards the hearing in the appeal court, the

requirements of s. 45 of the Act of 2003 have been met insofar as the respondent mandated a lawyer to appear on his behalf and was in fact represented before the court by that lawyer. Furthermore, I am satisfied that the mischief which s. 45 of the Act of 2003 seeks to avoid does not arise in the context of this application.

Lack of Clarity - Number of Offences

20. Counsel for the respondent submitted that there was an unacceptable lack of clarity around the number of offences to which the EAW relates and, while it purported to relate to a single offence, details of possession of drugs on two separate dates were set out at part E of the EAW. By additional information dated 17th April, 2021 (but which should read 17th May, 2021), it is clarified that the respondent was prosecuted and tried for two offences namely trafficking in dangerous and high-risk drugs and the establishment of an organised criminal group. He was convicted of the offence of trafficking in dangerous and high-risk drugs and acquitted of the offence of establishing an organised criminal group. The said additional information sets out in considerable detail the relevant legislative framework which applied to the trial for the offences in question which allows the actions on the two occasions to be treated as a single offence. I am satisfied that the EAW relates to a single offence and that sufficient details of same have been provided to satisfy the requirements of s. 11 of the Act of 2003. I dismiss the respondent's objection to surrender based on s. 11 of the Act of 2003.

Proceedings Before the ECtHR

21. Counsel on behalf of the respondent submits that this Court should refuse surrender as the respondent has made an application to the ECtHR for a declaration that his conviction and sentence was in breach of his fair trial rights under the ECHR. In the alternative, it is submitted that the Court should adjourn the application for surrender pending determination of the application before the ECtHR.
22. The grounds upon which surrender may be refused are exhaustively set out in the Framework Decision as transposed into Irish law by the Act of 2003. An application to the ECtHR is not listed as a ground for refusing surrender. Indeed, if that was a ground for refusal of surrender, then the purpose of the Framework Decision and the Act of 2003 would be open to frustration by respondents simply making applications to the ECtHR which might take a considerable time to be resolved. The Act of 2003 allows for refusal of surrender in circumstances where the Court is satisfied that surrender would be incompatible with the State's obligations under the ECHR, the protocols thereto and/or the Constitution. In this instance, the respondent has not put before the Court any cogent evidence to support a contention that surrender would be so incompatible. The system of surrender provided for by the Act of 2003 and the Framework Decision is based upon the principle of mutual trust and confidence between Member States. Furthermore, s. 4A of the Act of 2003 provides that 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 human rights.
23. There is no cogent evidence before the Court, in the form of a report from a legal expert in Romania or otherwise, as regards the conduct of the trial of the respondent which

might justify this Court in coming to the conclusion that the fundamental rights of the respondent were not respected and that surrender should be refused. Counsel for the respondent did not seek to argue before this Court that the trial and appeal had been conducted in breach of the respondent's fair trial rights but restricted the argument to the fact that an application had been lodged with the ECtHR.

24. I am not satisfied that surrender should be refused on the basis that the applicant has an application pending before the ECtHR or that these proceedings should be adjourned pending the outcome of such application. I therefore dismiss the respondent's objections to surrender based on such considerations.

Conclusion

25. I am satisfied that surrender is not precluded by reason of part three of the Act of 2003 or any other provision of that Act.
26. Having dismissed the respondent's objections to surrender, it follows that this Court will make an order pursuant to s. 16 of the Act of 2003 for the surrender of the respondent to Romania.