[2019] IEHC 742

THE HIGH COURT

[2018 No. 369 EXT]

BETWEEN

THE MINISTER FOR JUSTICE AND EQUALITY

APPLICANT

AND

DANIEL SOSNOWSKI

RESPONDENT

JUDGMENT of Mr. Justice Binchy delivered on the 1st day of November, 2019

1. By this application, the Minister seeks an order for the surrender of the respondent to Poland pursuant to a European Arrest Warrant ("EAW") dated the 26th July, 2018 which was endorsed by this Court on the 4th February, 2019. The Polish authorities require the surrender of the respondent for the purpose of serving a sentence of imprisonment imposed upon him by the district court of Szczecin on the 29th January, 2016. The EAW states that the respondent appeared in person at the trial resulting in the decision. In an affidavit sworn on his behalf by his solicitor, Mr Stiofan Fitzpatrick, and dated 21st October, 2019, it is averred on behalf of the respondent that while he did receive a suspended sentence and fine on that date, they were unrelated and unconnected to the offences to which this warrant relates, and moreover it is claimed that the respondent was serving a different sentence on 29th January, 2016 and was not therefore present in court when the sentence to which this warrant relates was handed down.

Identity

2. No issue was raised as to the identity of the respondent and accordingly I am satisfied that the person before the Court is the person referred to in the warrant.

Offences/ Correspondence

3. The warrant is stated to relate to four offences, and correspondence has been challenged in relation to two of those offences.

4. The first offence relates to what is clearly an assault. It is stated that the respondent hit a named person with his fists, picking her up and making her fall over, causing bodily injuries which are described in detail. This would clearly amount to an assault in this jurisdiction contrary to section 2 of the Non-Fatal Offences Against the Person Act 1997.

5. In the description of the second offence it is stated that the respondent possessed a psychotropic substance in the form of a white-yellow powder weighing in total 1.61g, which was amphetamine sulphate. The respondent contends that there is no proof that possession of the substance constitutes an offence in this jurisdiction. For his part, the Minister argues that possession of this substance is prohibited pursuant to section 3 of the Misuse of Drugs Act 1977 by reason of it being a controlled drug specified as such pursuant to section 2 of the same Act. Counsel for the Minister refers to the schedule of controlled drugs set forth in schedule one of the Act of 1977 in which "amphetamine" is listed. Counsel further draws my attention to paragraph 4 of the schedule which provides that: "any salt of a substance or product specified in paragraph 1" is also a controlled drug. He further draws my attention to paragraph 5 of the schedule which states that

"any preparation or product containing any proportion of a substance or product specified in", inter-alia, paragraph 1 is a controlled drug.

6. I am satisfied that a sulphate is a salt of a substance for the purposes of paragraph 4 of the schedule to the Act of 1977. I do not believe that it was necessary for the Minister to produce expert evidence to prove this. But even if I am wrong about this, I think it is clearly the case that amphetamine sulphate must be a preparation or product containing a proportion of amphetamine and that it is therefore a controlled drug when paragraphs 1 and 5 of the schedule to the Act of 1977 are read together. In my view therefore correspondence in relation to this offence is established.

7. The third offence is described in the following terms: "the requested person, on 14th February, 2011, in Szczecin , threatened Marzanna Sochacz with committing an offence against her health, which threat caused in the threatened person a justified fear to be fulfilled". The respondent contends that the acts described do not correspond to any offence in Irish law. By letter dated 26th October, 2018, the Minister asked for clarification in relation to this offence and specifically enquired whether the threat made by the respondent was to cause physical injury to the victim. The issuing judicial authority replied by letter dated 8th November, 2018 stating that "the threat of the sentenced person had to consist in a physical injury of the body of the wronged person".

8. Counsel for the Minister argues that the acts as described correspond to an assault contrary to section 2 of the Non-Fatal Offences Against the Person Act 1997, and in particular section 2 (1)(b) thereof. This section provides as follows: -

"2.— (1) A person shall be guilty of the offence of assault who, without lawful excuse, intentionally or recklessly—

(a) directly or indirectly applies force to or causes an impact on the body of another, or

(b) causes another to believe on reasonable grounds that he or she is likely immediately to be subjected to any such force or impact,

without the consent of the other.

(2) In subsection (1)(a), "force" includes—

(a) application of heat, light, electric current, noise or any other form of energy, and

(b) application of matter in solid liquid or gaseous form."

9. Counsel for the Minister submits that section 2 when read as a whole embraces just about every possible form of harm to a person's health and therefore the actions as described in paragraph 2 (C) of the EAW must correspond to an offence under section 2 of the Act of 1997. However, I consider that there are insufficient particulars of this offence given. In order to know whether or not the threat made falls within the definition of an assault for the purpose of section 2 of the Act of 1997 it is necessary to know exactly what was said.

I am therefore directing the Minister to enquire of the issuing judicial authority precisely what the respondent is alleged to have said by way of threat to Marzanna Sochacz on the 14th February, 2011, before I can rule on this issue.

10. The particulars of the fourth offence describe how the respondent forced his way into a flat and thereafter threatened the occupant "with committing an offence against his life and health" and then goes on to state that the respondent "used violence against the victim by hitting them with fists, kicking, hitting with a hot frying pan, a broomstick, a carpet beater, by which the requested person caused in the victim numerous bruises". No argument was raised as to correspondence in relation to the actions described in this part of the EAW which clearly describe a burglary and an assault each of which would constitute offences in this jurisdiction.

Sentence/ Minimum Gravity

11. The EAW states that the four offences described above carry maximum sentences of 10 years, three years, two years and five years of imprisonment respectively, and accordingly Minimum Gravity is established.

12. At paragraph C.2 of the EAW it is stated that the respondent received the following custodial sentences in respect of the offences above: six years, three months, three months and four months respectively. It is then stated that an aggregate penalty of six years and six months of imprisonment was imposed, and it then goes on to state that the remaining sentence to be served is: "6 (six) months, 5 (five) months and 27 (twenty seven) days of imprisonment."

13. Counsel for the respondent argues that this is unclear and that even allowing for the possibility that the reference to 6 months is a typographical error, as contended for by counsel for the Minister, who argues that it is clearly intended to refer to 6 years, it is submitted that it is still unclear because in the previous page of the warrant it is stated that an aggregate penalty of six years and six months of imprisonment was imposed. It is also submitted that it is unclear as to how the court arrived at an aggregate sentence.

14. The reference to 6 months in the part of the EAW that refers to the remaining sentence to be served is clearly a typographical error. This is apparent from the previous part of the EAW which states that an aggregate penalty of six years and six months of imprisonment was imposed. Paragraph C.3 then sets out the remaining sentence to be served and refers, initially, to 6 months in what is clearly an error. This is apparent because it then goes on to refer to 5 months and 27 days. Clearly this is giving the respondent some credit for four days spent in custody. It is not necessary for the issuing judicial authority to provide details as to the calculation of the aggregate sentence. This objection must therefore be rejected.

15. The respondent also raised a number of objections on what may loosely be described as rule of law issues in Poland. These were based on his assertion that he was not present in court on the 29th January, 2016, which of course was also an objection to surrender based on s. 45 of the Act of 2003. However, I ruled that so far as that assertion is

concerned, this Court is obliged to accept what is stated in the face of the warrant i.e. that the respondent was present in court at the trial that resulted in the decision. This Court is obliged to accept that statement in accordance with the trust and confidence that underpins the framework decision providing for the system of issue and execution of European arrest warrants. I, having thus ruled, counsel did not pursue the " rule of law" objections.

S. 37 Objection – Prison Conditions in Poland

16. The respondent did however advance objections to a surrender based upon prison conditions in Poland. In his affidavit sworn on behalf of the respondent, Mr Fitzpatrick avers that he is instructed that the respondent has previously served time in Szczecin prison where the conditions of imprisonment, the respondent claims, are inhuman and degrading. He claims that there were 6 to 7 people in a cell of 14/15 m² which would comprise less than the minimum requirements for prison space. Mr Fitzpatrick avers that the toilet was in the prison cell and the respondent was only allowed one hour of exercise per day. He also says that hygiene in the cells was very poor, that there were bedbugs and that his bedclothes often had blood stains on them. He also said that the cells were very cold during winter when temperatures were often between -5 and -25. He also claims that inter-prisoner violence was widespread and that he himself was assaulted on one occasion and suffered a broken nose. He claims that prisons were completely understaffed.

17. The Court was referred to a report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) dated 25th July, 2018, but referring to the period of inspection by the CPT which was from 11th to 22nd May, 2017. During this period, the CPT visited five prisons in Poland. The report records that the delegation received no allegations of physical ill treatment by staff in any of the prisons visited, and only a small number of allegations of verbal abuse. Furthermore, the report records that inter-prisoner violence was not a frequent occurrence in the establishments visited. While the report makes a number of recommendations as regards prison conditions and the prison regime, the main criticism of the CPT related to the official minimum standard of space per prisoner which is set in Poland at 3 m². It is clear from the report that the CPT has repeatedly asked the authorities to raise this minimum to 4 m² per prisoner, but the authorities in Poland have to date refused to do so. The report records however that the prisons visited are respecting the official minimum standard of 3 m² prisoner.

18. In the case of Mursic v Croatia, a decision of the European Court of Human Rights of 24th October, 2016, (application no. 7334/13) that court held, at paras. 136 and 137 : -

" 136. In the light of the considerations set out above, the Court confirms the standard predominant in its case-law of 3 sq. m of floor surface per detainee in multi-occupancy accommodation as the relevant minimum standard under Article 3 of the Convention.

137. When the personal space available to a detainee falls below 3 sq. m of floor surface in multi-occupancy accommodation in prisons, the lack of personal space is considered so severe that a strong presumption of a violation of Article 3 arises…."

19. It is unclear whether the applicant will be detained in multi-occupancy cells or in a single occupancy cell. If the latter, the CPT recommendation to the Polish authorities is that the minimum living space should be 6 m². But in any case it is clear from the report of the CPT that, in the prisons visited, the Polish authorities are respecting the official minimum standard of 3 m² and by inference this must refer to multi-occupancy cells. The conclusion that I would draw from this therefore is that while the prisons in Poland are not adhering to the ideal standard so far as living space per prisoner is concerned, nor are they falling below the minimum standard such as to give rise to a violation of rights under Article 3 of the Convention.

20. The respondent also raised other issues, through his solicitor's affidavit, alleging violation of Article 3 rights in Polish prisons. However, these are not supported by the CPT report or by any other evidence. Accordingly, the respondent has failed to establish that he is at a real risk of inhuman or degrading treatment by virtue of general conditions of detention in Poland, if he is surrendered to serve his prison sentence, and this objection must therefore also be dismissed.

Ss. 21A, 22, 23 & 24 of Act of 2003

21. I am satisfied also that I am not required to refuse surrender of the respondent for any of the reasons set forth in sections 21A, 22, 23 or 24 of the European Arrest Warrant Act 2003, as amended.

Conclusion

22. I will adjourn the matter for a short period to allow the issuing judicial authority to address the query above in relation to the third offence, before I may finalise this decision.