

**THE HIGH COURT**

[2020] IEHC 569

**RECORD NUMBER 2020/5 EXT**

**BETWEEN**

**MINISTER FOR JUSTICE AND EQUALITY**

**APPLICANT**

**AND**

**JEVGENIJS JURČENOKS**

**RESPONDENT**

**Judgment of Mr. Justice Paul Burns delivered on the 30th day of October, 2020**

1. By this application the applicant seeks an order for the surrender of the respondent to the Republic of Latvia ("Latvia") pursuant to a European Arrest Warrant dated 9th September, 2018 ("the EAW") issued by Ms. S. Pētersonē, Prosecutor General's Office, Riga, as the issuing authority. The EAW indicates that the surrender of the respondent is sought to enforce a sentence of 1 year and 10 months' imprisonment, all of which remains to be served.
2. The EAW was endorsed by the High Court on 13th January, 2020 and the respondent was arrested and brought before the High Court on 6th February, 2020.
3. I am satisfied that the person before the Court is the person in respect of whom the EAW was issued. This was not put in issue by the respondent.
4. I am further 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 are met. The sentence in respect of which surrender is sought is in excess of 4 months' imprisonment.
6. A notice of objection to surrender, dated 24th February, 2020, was delivered and may be summarised as follows:-
  - (a) surrender is precluded by reason of s. 38 of the Act of 2003 as there is no correspondence between the offences referred to in the EAW and offences under Irish law;
  - (b) surrender is precluded by reason of a lack of sufficient details as required by s. 11 of the Act of 2003;
  - (c) surrender is precluded by reason of s. 45 of the Act of 2003 as the respondent was tried and sentenced *in absentia* and the requirements of s. 45 have not been met;
  - (d) surrender is precluded by reason of s. 37 of the Act of 2003 as the respondent's fair trial rights would be breached; and
  - (e) surrender is precluded as it amounts to an abuse of process.

7. An affidavit dated 9th March, 2020 was sworn by Mr. Edmund Burke, solicitor for the respondent, indicating that the respondent had come to Ireland on 7th May, 2016, started work on 9th May, 2016 and thus was not present for the court decisions of 16th May, 2016 or 1st November, 2016. It was stated the respondent had never been in court in Latvia but it was accepted that he had attended a police station in Latvia in relation to the road traffic incident in question and had made a statement. It was denied that the respondent had been summonsed or advised to attend court.
8. In a further affidavit dated 28th May, 2020, Mr. Burke indicated that he had been instructed that the respondent had not received any legal advice when he made his statement and was suffering from concussion at the time. He also stated that he had been instructed that the respondent was not advised of the court date of 16th May, 2016 or the court date for the revocation of the suspended sentence, and was of the opinion that he was free to leave Latvia.
9. The sentence in respect of which surrender is sought is described under part B of the EAW as follows:-
  - " 1. *Ogre District Court judgment of 16 May 2016, by which J.Jurčenoks was admitted to be guilty for commission of the criminal offence provided for by Paragraph 2 of section 260 of the Criminal Law and sentenced with the liberty deprivation for a period of 1 (one) year 10 (ten) months, imposing the suspended sentence with probationary period for 2 (two) years;*
  2. *Daugavpils Court decision of 01 November 2016 to lift the suspended sentence and to enforce the liberty deprivation sentence for a period of 1 (one) year 10 (ten) months imposed to J.Jurčenoks by Ogre District Court judgment of 16 May 2016.*

*The decision entered into legal force on 22 November 2016 "*
10. At part E of the EAW, it is indicated that the sentence was imposed in respect of one offence, that the respondent on 6th June, 2015, while driving a vehicle, violated road traffic regulations and as a result thereof inflicted moderate bodily injuries upon one person and serious bodily injuries upon another. It also indicated details as to the date, time, place and circumstances of the offence, the identity of the persons injured and the injuries sustained. In brief, the respondent's vehicle crossed on to the incorrect side of the road and struck another vehicle. I am satisfied that the offence set out in the EAW corresponds to an offence in this State, namely an offence of careless driving or dangerous driving.
11. I am satisfied that the requirements of s. 11 of the Act of 2003 have been met as regards the details to be specified in the EAW. In particular, I am satisfied that there is no ambiguity regarding the decision upon which the EAW is based, or the sentence imposed and the remainder of same to be served.

12. At part D of the EAW, it is indicated that the respondent appeared in person at the trial resulting in the judgment. In light of the issues raised by the respondent, the Court sought additional information from the issuing authority and by reply dated 1st April, 2020, it was clarified that the respondent had not been present at the hearing but had entered into an agreement with the prosecutor that the matter be dealt with by way of a written procedure indicating a plea of guilty, and proposing an agreed penalty of the suspended sentence. The written proposal was dealt with by the Court on 16th May, 2016 when the agreed penalty was imposed.
13. By letter dated 3rd June, 2016, the Court sought further additional information, including a request that a fresh part D table be completed and whether an appeal was open to the respondent as regards either court decision. The issuing authority replied by letter dated 5th June, 2020 indicating that the respondent had entered into an agreement dated 22nd April, 2016 admitting guilt and agreeing to a punishment of 1 year and 10 months' deprivation of liberty suspended for a probationary period of 2 years. It also indicated that the case was examined in a written procedure and the respondent had been notified of his right to object to such procedure and the date when a decision would be handed down. The respondent had not objected and had not appealed. It was stated that point 3.1.b of part D of the EAW had been complied with. The suspension had been lifted by a court decision of 1st November, 2016, without modifying the severity of the sentence. The Daugavpils court had no information about the conditions of entering into the agreement and that it was obvious from the files of the case that after judgment, the State Probation Service informed and warned the respondent about the enforcement of a custodial sentence in the event of a failure to fulfil the terms of suspension. It was indicated that the respondent could request the renewal of the procedural term for submitting a complaint [appeal] regarding a court ruling.
14. By letter dated 26th June, 2020, the issuing authority furnished a copy of the agreement of 22nd April, 2016. It is clear from this document that the agreement was entered into approximately 10 months after the occurrence of the road traffic incident. The respondent declined the services of defence counsel, admitted his guilt and was aware that the matter was to be submitted to the Court with the request that the agreed penalty be imposed. The respondent acknowledged receipt of a copy of the agreement.
15. By letter dated 13th July, 2020, the Court sought details from the issuing authority as to how the respondent was notified of the date when a decision may be handed down or was otherwise aware of same. By reply dated 15th July, 2020, the issuing authority replied that the respondent was informed by ordinary post to the place of residence indicated by him. The attached documents showed that the relevant letter had been posted but there was no indication that same had been received.
16. At hearing, the factual position was established to be as follows:-
  - (i) the respondent had signed an agreement dated 22nd April, 2016 to have the matter dealt with in a written procedure proposing an agreed penalty, although the

respondent complained that the agreement procedure had taken only six minutes and he had no legal advice;

- (ii) the matter was subsequently listed to be dealt with by a court on 16th May, 2016 and the respondent had a right to object to same;
- (iii) the relevant hearing for the purposes of s. 45 of the Act of 2003 was the procedure on 16th May, 2016;
- (iv) the respondent was entitled to be told of the said hearing date and his right to object to same;
- (v) notice of the hearing date and the respondent's rights in respect thereof was posted by ordinary post to the respondent's given address on 28th April, 2016;
- (vi) the respondent was still at that address up to 5th May, 2016;
- (vii) the respondent avers that he did not receive the notice; and
- (viii) the issuing state can put the matter no further than it was posted out to that address.

17. In *Minister for Justice and Equality v. Zarnescu* [2020] IESC 59, the Supreme Court considered the requirements of s. 45 of the Act of 2003. Baker J. held, *inter alia*, at para. 90:-

"[90] *From this analysis the following emerges:-*

- (a) *The return of a person tried in absentia is permitted;*
- (b) *Article 4(6) of the 2002 Framework Decision permits the refusal to return where the requested state has a legitimate reason to refuse the EAW;*
- (c) *A person tried in absentia will not be returned if that person's rights of defence were 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 a right of retrial in the requesting state 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 accused person at the hearing;*
- (f) *The requested state has a margin of discretion in how it approaches the facts, and whether to refuse return;*

- (g) *In so doing the requested authority must be satisfied that it has been established unequivocally that the accused person was aware of the date and place of trial and of the consequences of not attending;*
- (h) *Actual proof of service is not always required, and an assessment may be made from extrinsic evidence that the requested person was aware but nonetheless chose not to attend;*
- (i) *Proof of service on a family member is not sufficient extrinsic evidence of that knowledge;*
- (j) *The assessment is made on the individual facts but there must be actual knowledge by the requested person;*
- (k) *Whether actual knowledge existed is a matter of fact and can be shown from extrinsic evidence;*
- (l) *The purpose of the exercise is to ascertain whether the requested person who did not attend at trial has waived his or her right of defence;*
- (m) *A waiver may be express or implicit from the circumstances, but an implication that a requested person has waived his or her rights to be present at trial is not to be lightly made and will not be made if it has not been unequivocally established that the person was aware of the date and place of trial;*
- (n) *The degree of diligence exercised by a requested person in receiving notification of the date and place of trial may be a factor in the assessment of his or her knowledge of the date of trial:*
- (o) *In a suitable case a manifest absence of diligence may lead a requested authority to the view that the accused person made an informed decision not to be present at trial, or where it can be shown that there was an informed choice made by the person to avoid service;*
- (p) *The mere absence of enquiry as to the date or place of hearing in itself may not be sufficient, as it must be unequivocally shown that the requested person made an informed decision and, so informed, either expressly or by conduct waived a right to be present:*
- (q) *It may in a suitable case be appropriate to weigh the degree of responsibility of the requesting state to notify an accused person of the date of trial against the accused's responsibility for the receipt of his or her mail:*
- (r) *The enquiry has as its aim the assessment of whether rights of defence have been breached. It is not therefore a wide ranging or free-standing enquiry*

*into the behaviour or lack of diligence of the requested person, and the purpose is to ascertain if rights of defence were adequately protected.”*

18. In the particular circumstances of this case, I am not satisfied that it has been established unequivocally that the respondent was aware of the relevant court date. I am not satisfied to draw an inference that he must have received the letter posted out to him. Further, I am not satisfied that there was a sufficient lack of diligence on the part of the respondent such as would show unequivocally that he had expressly or by conduct waived his right to be informed of the hearing date. He submits that he believed the process was effectively over after he signed the agreement which indicated the sentence would be suspended, but that the agreement did not refer to the imposition of terms and conditions or any restriction on his right to travel and it was in such circumstances that he left Latvia. He says, in effect, that he did not know he had to do anything further as regards the process.
19. In circumstances where it has been agreed that there is to be no trial or hearing as such, but rather a written procedure is to be adopted based on a proposed agreed penalty, it may be open to debate as to the extent to which the requirements of s. 45 of the Act of 2003 can apply or the extent to which the analysis of Baker J. can or should apply. However, in this particular case I am not satisfied that the defence rights of the respondent have been adequately protected or waived.
20. In circumstances where the applicant cannot establish compliance with the requirements of s. 45 of the Act of 2003 or a waiver of his rights by the respondent or a sufficient lack of diligence on his part, I find that surrender is precluded by s. 45 of the Act of 2003.
21. It follows that this Court will make an order refusing surrender and discharging the respondent.