

**THE HIGH COURT**

[2022] IEHC 638

**[2022 No. 64 EXT.]**

**BETWEEN**

**MINISTER FOR JUSTICE**

**APPLICANT**

**AND**

**IACOB-LEONTIN CAPRA**

**RESPONDENT**

**JUDGMENT of Ms. Justice Caroline Biggs delivered on the 16<sup>th</sup> day of June 2022**

1. By this application, the applicant seeks an order for the surrender of the respondent to Romania pursuant to a European Arrest Warrant dated 26<sup>th</sup> January 2022 (“the EAW”). The EAW was issued by Judge Golban Livia, as the issuing judicial authority.
2. The EAW seeks the surrender of the respondent in order to enforce a sentence of two years and four months’ imprisonment imposed upon the respondent on the 12<sup>th</sup> March 2019, with the sentence originally suspended and activated on the 22<sup>nd</sup> December 2021.
3. The respondent was arrested on the 18<sup>th</sup> March 2022, on foot of a Schengen Information System II alert, and brought before the High Court on 18<sup>th</sup> March 2022. The EAW was produced to the High Court on 25<sup>th</sup> March 2022.
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 ss. 21A, and s. 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. I am satisfied that Correspondence can be established between the offences referred to in the EAW and offences under the laws of this State, being Driving without a Licence contrary to Section 38 of the Road Traffic Act, 1961.

8. The respondent objected to surrender on the following grounds:

- The respondent was not aware of any activation of the suspended sentence against him. He was not served with any documents or information in respect of this activation; the European arrest warrant does not disclose the basis for any activation of this sentence and does not disclose any offence on foot of which the sentence was activated.
- The European arrest warrant cites an offence of driving a moped without a licence as the operative offence, for which the respondent received a sentence of two years and four months' imprisonment. This sentence was seemingly suspended and later activated. The European arrest warrant does not set out the grounds for this activation.
- It is not clear from the facts set out on the face of the European arrest warrant that any breach of the suspended sentence occurred during the currency of the suspended person. It appears that this period of suspension has expired.
- The European arrest warrant mentions on its face, an offence for which the respondent was sentenced to two years' imprisonment - SP No. 161 of 6 September 2017. The European arrest warrant states that the sentence for which the return of the respondent is sought is to run "concurrently" with this sentence. The failure to nominate the offence for which this sentence was imposed, raises the question as to whether this compound

sentence is in respect of an offence that comes within the scheme of the Act and complies with the requirements for European arrest warrants.

- The exact makeup of the sentence for which the respondent is sought is unclear, and this lack of clarity renders the European arrest warrant deficient. The respondent raises the question as to whether the sentence for which he is sought exceeds the maximum available penalty for an offence of driving without a licence in Romania and has engaged a lawyer domestically to review this issue. The surrender of the respondent to serve a sentence that exceeded the statutory maximum would not be in accordance with the Charter of Fundamental Freedoms.

**9.** The respondent received a suspended sentence for the commission of an offence involving driving without a driving licence, committed on the 16<sup>th</sup> January 2016. This sentence, record No. 161/2017, was suspended on certain conditions. It appears that the respondent breached the terms of the suspended sentence by the commission of another offence of driving without a licence on 8<sup>th</sup> April 2017. A sentence of one year was imposed in respect of this sentence, and as consequence of domestic law, this was converted to a sentence of 4 months' which was to be served consecutively upon the activated sentence of two years. It further appears that this period of imprisonment, of two years and four months, was again suspended on certain conditions, including that the respondent was to engage with a probation programme. The respondent failed to comply with this programme established by the Probation Services, in particular by failing to attend a reintegration programme and by failing to carry out a community service condition.

**10.** In this context, the District Court revoked the suspended sentence that had been imposed and did so in the absence of the respondent. The SIS Alert and subsequent European arrest warrant issued on foot of this revocation, seeks the return of the applicant to serve the sentence of two years and four months imprisonment.

**11.** In light of the additional information provided in answer to the Section 20 requests sent by this Court, the respondent now only seeks to raise two issues in relation to his potential surrender to Romania.

**A. The Section 45 Objection**

The respondent asserts that this Court should refuse to surrender him on the basis that the revocation of the suspended sentence occurred *in absentia*. It is submitted that an undertaking to re-hear this revocation should be sought.

**12.** The respondent concedes that there is no doubt that the respondent was aware of the imposition of the original sentences and the subsequent suspension of same, and further concedes that the decision of the Court of Justice in *Ardic* (Case C-571/17 PPU) has led to a position whereby the requirements relating to judgments rendered *in absentia* do not apply to the reimposition of a suspended sentence, provided that the decision revoking the suspension of the sentence does not change the nature or the level of the sentence initially imposed. The respondent has further agreed that the law in this area is clear, in that it is only in circumstances where the reimposition of the sentence involves some variation of that original sentence (which brings it beyond the ambit of a mere revocation), that it would fall outside the ambit of the *Ardic* decision. The respondent further accepts that what occurred at the hearing does seem to be a simple revocation of the suspended sentence that had been imposed without variation of the length of sentence that had originally been suspended.

**13.** However, the question which the respondent raises and seeks to submit, and that this Court should explore, is whether the domestic Court which heard the hearing on the revocation of the suspended sentence had the “potential” power to materially alter the original sentence. This Court finds that there appears to be nothing to suggest that the Court either had, or, indeed, in any way exercised, such “potential” power.

14. More significantly, Section 45 of the Act expressly identifies the 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.

15. Of critical importance in this respect, is that Part D. 3.4 of the European arrest warrant itself indicates that the respondent will be in a position to avail of a right to a re-hearing or appeal on his return to the issuing State. Part D 3.4 states:

*“The person was not personally handed the decision, but:*

- *The decision will be handed to him personally without delay after surrender; and*
- *When the judgment is handed to him, the person will be expressly informed of the right to a retrial or an appeal, in which he has the right to be present and which allows the factual situation of the case, including new evidence, to be re-examined and which may lead to the annulment of the original judgment; and*
- *The person will be informed of the time within which he must request a retrial or the promotion of an appeal, which is 10 days.”*

16. In the circumstances, it follows that the surrender of the respondent is not prohibited by Section 45 of the Act of 2003.

#### **B. The Issue of Specialty**

The respondent points to the fact that the additional information refers to a further offence of Aggravated Theft and indicates that the respondent is sought in respect of this offence, and the respondent requests that this Court seeks an undertaking from the issuing judicial authority that he will not be prosecuted in respect of this offence as it was not included in the European arrest warrant and the rule of specialty should apply.

17. In the final paragraph of the additional information dated 14<sup>th</sup> April 2022, the issuing

judicial authority mentions that there is an additional case pending against the respondent before the Nasăud District Court relating to Aggravated Theft, which is in the “deliberation phase”. The respondent urges upon this Court that additional information should be sought seeking an assurance that the respondent will not be prosecuted for this offence on his return and that the rule of specialty will apply. It is submitted on behalf of the applicant that the additional information does not suggest that he will be so prosecuted but if the Court were of the view that additional information would assist the Court in this regard, then this option is open to the Court.

**18.** Section 22 (1) (2) (3) and (4) of the 2003 Act states; -

*“22. (1) In this section, except where the context otherwise requires, “offence” means, in relation to a person to whom a relevant arrest warrant applies, an offence (other than an offence specified in the relevant arrest warrant in respect of which the person’s surrender is ordered under this Act) under the law of the issuing state committed before the person’s surrender, but shall not include an offence consisting, in whole, of acts or omissions of which the offence specified in the European arrest warrant consists in whole or in part.*

*(2) Subject to this section, the High Court shall refuse to surrender a person under this Act if it is satisfied that –*

*(a) The law of the issuing state does not provide that a person who is surrendered to it pursuant to a relevant arrest warrant shall not be proceeded against, sentenced or detained of the purposes of executing a sentence or detention order, or otherwise restricted in his or her personal liberty, in respect of an offence, and*

*(b) The person will be proceeded against, sentenced, or detained for the purposes of executing a sentenced or detention order, or otherwise restricted in his or her personal liberty, in respect of an offence.*

*(3) It shall be presumed that, in relation to a person to whom a relevant arrest warrant applies, the issuing state does not intend to –*

*(a) proceed against him or her,*

*(b) sentenced or detain him or her for a purpose referred to in subsection (2) (a), or*

*(c) otherwise restrict him or her in his or her personal liberty, in respect of an offence, unless the contrary is proved.*

*(4) The surrender of a person under this Act shall not be refused under subsection (2) if –*

*(a) upon conviction in respect of the offence concerned he or she is not liable to a term of imprisonment or detention, or*

*(b) the High Court is satisfied that, where upon such conviction he or she is liable to a term of imprisonment or detention and such other penalty as does not involve a restriction of his or her personal liberty, the said other penalty only will be imposed if he or she is convicted of the offence.”*

**19.** A request seeking the High Court’s consent to proceedings being brought against the respondent in the issuing state for an offence which was not covered by an original warrant is, in effect, an application by the issuing state for a waiver of specialty in circumstances where Ireland has chosen not to opt out of the specialty provisions contained in the 2002/584/JHA Council Framework Decision of 13<sup>th</sup> June 2002 on the European arrest warrant and the surrender procedures between Member States, as amended by Council Framework Decision 2009/299/JHA of 26 February 2009. The rule of specialty applies unless, in response to a request in writing from the issuing state, it is waived by the High Court pursuant to the provisions of ss. 22 (6), (7) and (8) of the 2003 Act, which provide respectively:

*“(6) The surrender of a person under this Act shall not be refused under subsection (2) if the High Court –*

*(a) Is satisfied that –*

- (i) Proceedings will not be brought against the person in respect of an offence,*
- (ii) A penalty will not be imposed on the person in respect of an offence, and*
- (iii) The person will not be detained or otherwise restricted in his or her personal liberty for the purposes of an offence, without the issuing judicial authority first obtaining the consent thereto of the High Court,*

*(b) Is satisfied that –*

- (i) The person consents to being surrendered under section 15,*
- (ii) At the time of so consenting he or she consented to being so proceeded against, to such a penalty being imposed, or being so detained or restricted in his or her personal liberty, and was aware of the consequences of his or her so consenting, and*
- (iii) The person obtained or was afforded the opportunity of obtaining, or being provided with, professional legal advice in relation to the matters to which this section relates,*

*(c) Is satisfied that –*

- (i) Such proceedings will not be brought, such penalty will not be imposed and the person will not be so detained or otherwise restricted in his or her personal liberty before the expiration of a period of 45 days from the date of the person's final discharge in respect of the offence for which he or she is surrendered, and*
- (ii) During that period he or she will be free to leave the issuing state, except where having been so discharged he or she leaves the issuing state and later returns thereto (whether during that period or later), or*

*(d) Is satisfied that such proceedings will not be brought, such penalty will not be imposed and the person will not be so detained or restricted in his or her personal liberty unless*



- (i) *The person voluntarily gives his or her consent to being so proceeded against, such a penalty being imposed, or being so detained or restricted in his or her personal liberty, and is fully aware of the consequences of so doing,*
- (ii) *That consent is given before the competent judicial authority in the issuing state, and*
- (iii) *The person obtains or is afforded the opportunity of obtaining, or being provided with, professional legal advice in the issuing state in relation to the matters to which this section relates before he or she gives that consent.*

*(7) The High Court may, in relation to a person who has been surrendered to an issuing state under this Act, consent to –*

- (a) proceedings being brought against the person in the issuing state for an offence,*
- (b) the imposition in the issuing state of a penalty, including a penalty consisting of a restriction of the person's liberty, in respect of an offence, or*
- (c) proceedings being brought against, or the detention of, the person in the issuing state for the purpose of executing a sentence or order of detention in respect of an offence, upon receiving a request in writing from the issuing state in that behalf.*

*(8) The High Court shall not give its consent under subsection (7) if the offence concerned is an offence for which a person could not by virtue of Part 3 be surrendered under this Act.”*

The corresponding relevant provisions of the underlying Framework Decision are contained in Article 27 thereof, and, in particular, in Article 27(4). Article 27 states; -

*“1. Each Member State may notify the General Secretariat of the Council that, in its relations with other Member States that have given the same notification, consent is presumed to have been given for the prosecution, sentencing or detention with a view to the carrying out of a custodial sentence or detention order for an offence committed*

*prior to his or her surrender, other than that for which he or she was surrendered, unless in a particular case the executing judicial authority states otherwise in its decision on surrender.*

*2. Except in the cases referred to in paragraphs 1 and 3, a person surrendered may not be prosecuted, sentenced or otherwise deprived of his or her liberty for an offence committed prior to his or her surrender other than that for which he or she was surrendered.*

*3. Paragraph 2 does not apply in the following cases: (g) where the executing judicial authority which surrendered the person gives its consent in accordance with paragraph*

*4. A request for consent shall be submitted to the executing judicial authority, accompanied by the information mentioned in Article 8(1) and a translation as referred to in Article 8(2). Consent shall be given when the offence for which it is requested is itself subject to surrender in accordance with the provisions of this Framework Decision. Consent shall be refused on the grounds referred to in Article 3 and otherwise may be refused only on the grounds referred to in Article 4. The decision shall be taken no later than 30 days after receipt of the request.”*

**20.** Both the principle of mutual trust between Member States and the principle of mutual recognition, are, in EU law, of fundamental importance given that they allow an area without internal borders to be created and maintained. More specifically, the principle of mutual trust requires, particularly as regards the area of freedom, security and justice, that each Member State, save in exceptional circumstances, is to consider that all other Member States are in compliance with EU law and particularly, with the fundamental rights recognised by EU law. This is expressly stated in *Minister for Justice and Equality (Deficiencies in the system of Justice)* (C-216/18 PPU) wherein the Court stated at para. 36; -

*“[36] Both the principle of mutual trust between the Member States and the principle of mutual recognition, which is itself based on the mutual trust between the latter (see, to that effect, judgment of 10 August 2017, Tupikas, C-270/17 PPU, EU:C:2017:628, paragraph 49 and the case-law cited), are, in EU law, of fundamental importance given that they allow an area without internal borders to be created and maintained. More specifically, the principle of mutual trust requires, particularly as regards the area of freedom, security and justice, each of those States, save in exceptional circumstances, to consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognised by EU law (judgment of 10 November 2016, Poltorak, C-452/16 PPU, EU:C:2016:858, paragraph 26 and the case-law cited).”*

**21.** There is no evidence before this Court suggesting, much less confirming, that the issuing authority will not observe the rule of specialty, or that if the issuing judicial authority requires to proceed against the respondent in relation to that additional charge, that it will do so in violation of its obligations under the Framework Decision.

**22.** This Court should, and will, proceed on the basis of the principle of mutual trust and mutual recognition. If the issuing state seeks to prosecute the respondent for any other offences, this Court will operate on the basis that the issuing state will comply with its obligations in the Framework Decision.

**23.** In those circumstances, this Court will not issue a second Section 20 request, and this ground of objection is dismissed.

### **Conclusion**

**24.** I am satisfied that the surrender of the respondent is not precluded by reason of Part 3 of the Act of 2003 or another provision of that Act.

**25.** It, therefore, follows that this Court will make an order pursuant to Section 16 of the Act of 2003 for the surrender of the respondent to Romania.