

**THE HIGH COURT
EXTRADITION**

[2021] IEHC 241

Record No.: 2020/326EXT

IN THE MATTER OF THE EUROPEAN ARREST WARRANT ACTS 2003 AND 2012

BETWEEN:

THE MINISTER FOR JUSTICE AND EQUALITY

APPLICANT

-AND-

TOMASZ WITKOWSKI

RESPONDENT

JUDGMENT of Mr. Justice Tony Hunt delivered on 26 March 2021

1. The applicant seeks an order for the surrender of the respondent to Poland pursuant to a European arrest warrant ("the EAW") dated 12 August 2020 issued by Judge Pawel Tobala of the Second Penal Division of the District Court of Zamosc. The warrant seeks enforcement of a sentence imposed by the Regional Court of Zamosc on 31 August 2018, consisting of a joint penalty of 4 years and 10 months of deprivation of liberty imposed in respect of five offences. 1 year and 11 months and 6 days of this sentence remain to be served.
2. The EAW was indorsed by the High Court on 9 November 2020 and the respondent was arrested and brought before the Court on 11 December 2020. I am satisfied that the person now before the Court is the person in respect of whom the EAW was issued. Identity was not put in question by the respondent. Equally, there is no issue as to compliance with the minimum gravity requirements of the 2003 Act.
3. Mr. Mark Byrne (of the Outer Bar) appeared for the applicant and Mr. Kieran Kelly (also of the Outer Bar) appeared on behalf of the respondent. Mr. Kelly helpfully distilled the written objections to surrender lodged down to two grounds. The first relates to whether the respondent's trial in absentia was in accordance with the requirements of the 2003 Act. The second relates to the requisite correspondence of one of the five offences listed in the EAW with an offence in Irish law. Mr. Kelly properly conceded that the issue of correspondence did not arise in respect of the remaining four "ticked-box" offences listed in the EAW.

Correspondence

4. The correspondence issue arises in respect of the offence set out at Point IV of para. E2 of the EAW. The EAW recites that this offence in Polish Law is "*contrary to Article 14 Section 1 of the Penal Code in connection with the Article 203 Section of the Penal Code - Offence against sexual freedom and morals (forcing to prostitution)*". The particulars of the offence committed by the respondent are set forth in the EAW as follows:-

"In December 2004, date not closely established, in Zamosc, Province of Lublin, acting jointly and in consent with Andrzej Bucior, using illegal threat, he tried to lead (a female named E.S.) to do prostitution in the way that he threatened her with beating and body damaging in order to force her to have paid sexual (sic) relations with men in his escort agency, however it did not happen, since the

harmed woman refused to do so and she did not start prostitution in his escort agency;”.

5. Mr. Byrne submitted that the information supplied in the EAW corresponded with either an attempt and/or a conspiracy to commit an offence contrary to the provisions of s. 9(c) of the Criminal Law (Sexual Offences) Act 1993. In effect, this provides that a person who, for gain, compels or coerces a person to be a prostitute shall be guilty of an offence. As an alternative, he relied on a corresponding offence of making a threat to cause serious harm contrary to the provisions of s. 5 of the Non-Fatal Offences Against the Person Act 1997.
6. As to the latter suggestion, Mr. Kelly submitted that correspondence was not made out because the information supplied did not establish all of the necessary statutory ingredients of that offence. In particular, he proposed that the information did not describe the necessary level of serious harm specified by the definition of that term in the 1997 Act. As to correspondence with the statutory sexual offence relied on by Mr. Byrne, Mr. Kelly submitted that the information supplied did not go so far as to establish that a completed offence had occurred, or that there was any gain by the respondent, and could be interpreted to mean that E.S. was being compelled to work in the respondent’s escort agency rather than to engage in prostitution generally. In this regard, he argued that the domestic offence criminalised coercion into prostitution, rather coercion to engage in prostitution in a particular location. As he put it, the offence distinguished between coercing somebody “*to make a career choice*” and the coercion of a person already engaging in prostitution.
7. Mr. Byrne responded that “gain” was not confined to monetary gain, and the information supplied suggested that the respondent attempted to obtain an advantage by having E.S. work in his escort agency as opposed to elsewhere.

Trial in *absentia*

8. The second issue raised by the respondent relates to the fact that his trial in Poland took place in absentia. In this regard, he rested his objection to surrender on the provisions of s. 45 of the 2003 Act. On this issue, Mr. Byrne relied on the contents of Parts D and F of the EAW, pointing out that the respondent had not taken issue with the contents of the warrant, whether by affidavit or otherwise. Mr. Kelly also referred to the same parts of the warrant and the fact that the Polish court had proceeded with the trial, notwithstanding the return of the summons to the respondent in respect thereof. However, Mr. Kelly also conceded that the respondent was not in a position to contradict the statement in the EAW that he had been represented by counsel at the trial where the relevant sentence was imposed.

Decision

9. As to the correspondence issue, I believe that Mr Kelly is correct in relation to absence of correspondence with an offence of threatening to cause serious harm contrary to s.9 of the 1997 Act, for the reason that “serious harm” is defined in s.1 of that Act as “*injury which creates a substantial risk of death or which causes serious disfigurement or*

impairment of the mobility of the body as a whole or of the function of any particular bodily member or organ." Within the broad spectrum of possible bodily injury this definition applies a relatively high threshold. On balance, I think that a threat described as extending simply to "*beating and body damaging*" probably falls short of being an offence under the suggested statutory provision.

10. On the other hand, I believe that Mr Byrne correctly identified a corresponding offence by reference to an attempt to commit an offence contrary to the provisions of s. 9 of the 1993 Act. "Gain" is not specifically defined in that Act, but the natural and ordinary meaning of that term encompasses both financial profit and other forms of non-pecuniary advantage or benefit. I doubt that the respondent would have attempted to secure the services of E.S. for his escort agency unless he perceived that her recruitment would be to his advantage in some material way. In the circumstances, it is highly probable that the perceived advantage was, in fact, financial in nature.
11. As to the point that the coercion was directed to coercing prostitution within a particular context rather than coercing entry into that activity, I do not think that this is a valid distinction. Even if it is, it does not avail the respondent, because in those circumstances, his offence would correspond with either an attempt to commit an offence or a completed offence, contrary to s. 9(a) of the 1993 Act, which provides that it is an offence to control or direct the activities of a prostitute in respect of prostitution. If the point is that E.S. was already a prostitute at the time of the threat, (a fact that is not clear from the information to hand), then the Polish offence corresponds with an offence contrary to s.9(a) of the 1993 Act. If she was not, s. 9(c) covers the situation described in the EAW. In my view, the requisite correspondence is established in either event. In those circumstances, I am satisfied that there is no bar to surrender by virtue of the provisions of s. 38(1)(a) of the 2003 Act.
12. As to the trial *in absentia* point, in essence s. 45 of the 2003 Act prohibits surrender where the requested person did not appear in person at the proceedings resulting in the sentence or detention order in respect of which the European arrest warrant was issued, unless one of the alternatives specified in the Table in the section is applicable. In this case, the EAW relies on two of those alternatives. The first alternative is that the respondent received official information of the schedule, date and place of the trial and therefore had the necessary awareness of the trial and the potential consequences thereof. The second alternative is that the respondent was aware of the scheduled trial, arranged for legal representation at the trial in the light of that knowledge, and was actually represented at the trial on foot of those arrangements.
13. On this issue, whereas I am in doubt as to the applicability of the first alternative relied upon by the requesting authority, having regard to the return of the summons by the postal authorities, I am satisfied that the information set out in the warrant demonstrates that the second alternative relied on in the EAW has been established. I am satisfied from the information set out in the warrant as a whole that the respondent has been represented at various stages of the Polish proceedings, including at the trial resulting in

the decision sought to be enforced by the EAW. In those circumstances, I am satisfied that there is no bar to surrender having regard to the provisions of s. 45 of the Act of 2003.

14. As neither of the objections to surrender raised at the s. 16 hearing have been made out, and as I am otherwise satisfied that the applicant has demonstrated compliance with the provisions of the 2003 Act required for an order of surrender, and such an order is not otherwise barred by the statute, it follows that I must order the surrender of the respondent to Poland pursuant to s. 16(1) of that Act for the purpose of service of the remaining sentence specified above, and subject to any credit due to him for time served in this jurisdiction.