

**THE HIGH COURT**

[2021] IEHC 236  
[2019 No. 142 EXT.]

**BETWEEN**

**MINISTER FOR JUSTICE AND EQUALITY**

**APPLICANT**

**AND**

**NOEL MCGRATH**

**RESPONDENT**

**JUDGMENT of Mr. Justice Paul Burns delivered on 22nd day of March, 2021**

1. By this application the applicant seeks an order for the surrender of the respondent to the United Kingdom of Great Britain and Northern Ireland ("the UK") pursuant to a European arrest warrant dated 8th March, 2019 ("the EAW") issued by District Judge Conner, of Belfast Magistrates' Court, as the issuing judicial authority. The surrender of the applicant is sought in order to execute the remainder of a custodial sentence imposed upon him in respect of three offences, viz. robbery, carrying a firearm with an intent to commit an indictable offence and aggravated vehicle taking.
2. The EAW was endorsed by the High Court on 29th April, 2019 and the respondent was arrested and brought before this Court on 3rd June, 2020. The respondent was admitted to bail but failed to appear on 14th July, 2020, when it was initially intended to deliver this judgment. A bench warrant was issued and was executed on 18th March, 2021.
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 satisfied that the EAW indicates the matters required by s. 45 of the European Arrest Warrant Act, 2003, as amended ("the Act of 2003").
5. I am satisfied that the minimum gravity requirements of the Act of 2003 are met. The term of imprisonment in respect of which the respondent's surrender is sought amounts to 3 years, 11 months and 13 days.
6. The respondent filed points of objection to his surrender dated 12th June, 2020, which may be summarised as follows:-
  - i. the applicant had to prove all matters required under the Act of 2003;
  - ii. surrender is prohibited under s. 38 of the Act of 2003 due to a lack of correspondence as regards the offences set out in the EAW and offences in the State;
  - iii. surrender is prohibited by s. 22 of the Act of 2003 on the basis that, if surrendered, the respondent would be prosecuted in the UK for an offence other than the offences referred to in the EAW;
  - iv. the EAW did not contain sufficient detail as required by s. 11 of the Act of 2003;

- v. the sentence referred to in the EAW was not immediately enforceable and that it was not clear what length of sentence he was required to serve;
  - vi. surrender is prohibited by s. 37 of the Act of 2003 as it would be in breach of the respondent's rights under article 8 of the European Convention on Human Rights ("the Convention") and thus incompatible with the State's obligations under the Convention;
  - vii. the respondent would not be given credit for time spent in custody in this jurisdiction on foot of the EAW; and
  - viii. the respondent would be exposed to an unacceptable risk from the Covid-19 virus.
7. At hearing, counsel for the respondent indicated that he was pursuing points (ii), (iii), (iv) and (v).
8. In light of the objections and submissions made on behalf of the respondent, it is helpful to set out various particulars contained within the EAW. At part (e) of the EAW, a description of the circumstances in which the offences were committed is set out as follows:-

*"At 1:30 hours on 23 October 2012 the owner of a black Vauxhall Astra vehicle registration mark 05MN6002 discovered his vehicle had been stolen from outside his home at 22 Jerusalem Street, Belfast. On 25 October 2012 at 20:15 hours two males wearing balaclavas and latex gloves entered a Boots Chemist on Knockmore Road, Lisburn. One male approached the till and pointed a handgun at the pharmacist, Peter Johnston who was standing behind the counter. The male demanded that Mr Johnston come with him onto the shop floor. A sales assistant ran from the shop to raise the alarm. As Mr Johnston walked towards this male he noticed the other male removing perfume and aftershave from glass cabinets and placing them in a black holdall. The male with the handgun directed Mr Johnston to the left corner of the shop and asked him where his colleague was. Mr Johnston shouted for his colleague. The male then hit him behind the right ear and punched him to the right side of his face. The second male then said, 'Right where's the drugs, morphine, amphetamines? We want them all?' Mr Johnston opened the safe in the rear area and the second male removed the controlled drugs and placed them into the holdall. This male then ordered Mr Johnston onto the ground and instructed him not to get up. Both males then left the shop. As the shop assistant returned with others they observed a Vauxhall Astra registration 05MN6002 outside the shop. The engine was running; the doors were open and the lights were on. The two males ran out of the shop got into the vehicle and sped off onto the Knockmore Road travelling towards Laurel Hill School. At 20:20 hours the Police responded to the report of a robbery and observed this vehicle at the junction of the Nettlehill Road and Prince William Road, Lisburn with 3 persons aboard. The Police indicated for the Astra to stop. It failed to do so. The Astra travelled onto the Derriaghy Road and then the Milltown area. It was travelling on the wrong side of the road and its*

*speed increased to 70 mph. The lights were off and the driver attempted to collide the car with the Police vehicle. The Astra overtook a number of vehicles travelling dangerously towards the 'Cutts' area. Police deployed a stinger device and subsequently caused the Astra to stop by overtaking and pulling in front of it. Police entered the Astra. Noel Charles McGrath was sitting in the rear of the vehicle holding a black handgun in his right hand which he then dropped. Police arrested him for armed robbery, possession of a firearms/imitation firearm whilst committing an offence, aggravated taking and obstructing Police. Latex gloves were retrieved from the property of Noel Charles McGrath. The Astra was searched by Police and perfume, aftershave and controlled drugs were recovered. Blood swabs taken from a tub of Diazepam located in the Vauxhall Astra 05MN6002 matched that obtained from a sample attributed to Peter Johnston. In the opinion of Jonathan Greer, Senior Scientific Officer, the black firearm meets the definition of an imitation firearm. Mr Johnston was treated for a fractured nose, bruises and swelling to the face. The controlled drugs were valued at £5,000.00 and the aftershave and perfumes were valued at £4,000.00. Boots staff have confirmed that the controlled drugs taken were methylphenidate, morphine and oxycodone. Noel Charles McGrath was accused of the 3 offences the subject of this warrant on 20 June 2013 and sentenced on 3 October 2013 to 4 years' imprisonment and 4 years on licence. He is currently unlawfully at large."*

### **Correspondence**

9. There was a degree of overlap between the objection as regards lack of detail as required by s. 11 and the correspondence issue under s. 38 of the Act of 2003. Counsel for the respondent accepted that correspondence existed as regards the offence of robbery. In relation to the firearms offence and the offence of aggravated vehicle taking, it was submitted that the details set out in the EAW did not contain sufficient particulars to allow the Court to assess what precisely the offences consisted of and what precisely the respondent was alleged to have done. He submitted that it was not clear if it was alleged that it was the respondent who actually had the firearm, whether it was alleged to be a real or imitation firearm or whether it was alleged the respondent had actually taken the vehicle.
10. Counsel on behalf of the applicant submitted that from reading the EAW, it is clear that the actions of the respondent would amount to offences in this jurisdiction; such as offences contrary to s. 27B of the Firearms Act, 1964, s. 9A of the Firearms and Offensive Weapons Act, 1990 and s. 112 of the Road Traffic Act, 1961. Reliance was placed upon part (e)II of the EAW which stated "*carrying an imitation firearm with intent to commit an indictable offence, namely robbery...*". It was submitted that, on the facts as set out in the EAW, the respondent was part of a joint enterprise to carry out a robbery using an imitation firearm and using a motor vehicle in the course of same. It was submitted that it was irrelevant whether the respondent had physical possession of the imitation firearm or had personally stolen the motor vehicle in circumstances where he was acting in concert with others in a joint enterprise which encompassed the said acts.

11. In *Minister for Justice v. Dolny* [2009] IESC 48, the Supreme Court emphasised that when considering correspondence, the question should be asked in general terms as to whether the conduct set out in the warrant is contrary to the criminal law of the State. Denham J. outlined at para. 38:-

*"[38] In addressing the issue of correspondence it is necessary to consider the particulars on the warrant, the acts, to decide if they would constitute an offence in the State. In considering the issue it is appropriate to read the warrant as a whole. In so reading the particulars it is a question of determining whether there is a corresponding offence. It is a question of determining if the acts alleged were such that if committed in this jurisdiction they would constitute an offence. It is not a helpful analogy to consider whether the words would equate with the terms of an indictment in this jurisdiction. Rather it is a matter of considering the acts described and deciding whether they would constitute an offence if committed in this jurisdiction."*

12. I am satisfied upon reading the EAW in its totality that correspondence has been made out between the offences referred to in the EAW and offences in the State. On the facts as set out in the EAW, the respondent was engaged in a joint enterprise to rob a pharmacy and it is clear that the use of an imitation firearm and a motor vehicle were integral parts of that joint enterprise. I have no doubt that the facts as set out in the EAW would amount to an offence contrary to s. 27B of the Firearms Act, 1964 of carrying a firearm or imitation firearm with intent to commit an indictable offence, to wit: robbery. I am satisfied that it is clear from the EAW, in particular section (e)II, that it is alleged that the weapon in question was an imitation firearm. The conduct set out in the EAW would also amount to an offence contrary to s. 9A of the Firearms and Offensive Weapons Act, 1990, namely possession of a realistic imitation firearm in a public place. I am further satisfied that as regards the use of the motor vehicle as set out in the EAW, this would amount to an offence contrary to s. 112 of the Road Traffic Act, 1961, namely (a) using a mechanically propelled vehicle without the consent of the owner or other lawful authority and/or (b) allowing oneself to be carried in a mechanically propelled vehicle where possession of same was taken without the owner's consent.

**Section 11 of the Act of 2003/Whether Sentence is Immediately Enforceable**

13. The respondent submitted that the EAW does not contain sufficient information to comply with the requirements of s. 11(1A)(e) of the Act of 2003 which sets out:-

*"11.(1A)(e) that a conviction, sentence or detention order is immediately enforceable against the person, or that a warrant for his or her arrest, or other order of a judicial authority in the issuing state having the same effect, has been issued in respect of one of the offences to which the European arrest warrant relates."*

14. Section (b) of the EAW states that the respondent was convicted on 3rd October, 2013 and sentenced to a determinate custodial sentence of 4 years' imprisonment with a further period of 4 years' imprisonment subject to release on licence. His licence was revoked on 9th November, 2016 and he is considered to have been unlawfully at large

since then. Section (c) of the EAW sets out that the respondent has a period of 3 years, 11 months and 13 days' imprisonment remaining to be served and that is the maximum period he could be required to serve.

15. It was submitted that the sentence in respect of which the surrender of the respondent is sought was not immediately enforceable as the revocation of the licence was subject to confirmation by the Parole Commissioners pursuant to article 28(4) of the Criminal Justice (Northern Ireland) Order 2008. The respondent relied upon an affidavit of laws sworn by Ms. Kelly Doherty B.L., dated 18th June, 2020. In the affidavit, Ms. Doherty B.L. explained that under the law as applicable in Northern Ireland, a determinate custodial sentence, such as that imposed upon the respondent, comprised of a "*custodial period*" and a "*licence period*". At the end of the custodial period, the offender is released on licence which includes a number of standard conditions and may also include particular conditions. Standard conditions include matters such as residing at a particular address approved by a probation officer, obtaining permission prior to a change of address and not travelling outside the UK without prior permission. Article 28 of the Criminal Justice (Northern Ireland) Order 2008 provides that the Department of Justice may decide to revoke the licence of an offender and recall the offender to custody. While this is usually done on foot of a report from the Parole Commissioners of Northern Ireland, the Department may do so without first receiving a recommendation where it is considered expedient in the public interest. Once the offender's licence is revoked, the offender is liable to be detained in pursuance of the sentence and, if at large, is to be treated as being unlawfully at large. There is no legal requirement that the offender be notified in advance that a decision on revocation is being considered. On returning to prison, the offender is informed of the reasons for the recall and may at that stage make representations in writing in respect of the decision. The recall must be referred to the Parole Commissioners for review and the commissioners must decide whether to confirm the decision to revoke the licence or to direct the offender's immediate release. The Department of Justice is obliged to follow such direction. If the decision to revoke is confirmed, the offender then becomes liable in principle to spend the remainder of the licence period in custody, however the commissioners will set a review date in respect of same. Thus, it does not automatically follow that where the Department of Justice revokes a licence and recalls an offender under article 28(2) of the Criminal Justice (Northern Ireland) Order 2008, the licence portion of the sentence will be served in its entirety.
16. The respondent submits that by virtue of the manner in which the revocation of licence operates, as set out above, the sentence is not immediately enforceable and/or that there is not sufficient certainty concerning the penalties of which the sentence consists as referred to in s. 11(1A)(g)(iii) of the Act of 2003.
17. I am satisfied that the EAW contains sufficient details as required by s. 11 of the Act of 2003.

18. It is clear from the EAW that the respondent was sentenced to a determinate custodial sentence of 4 years' imprisonment with a further period of 4 years' imprisonment subject to release on licence. It is also clear from the EAW that he was released on licence on 24th October, 2016 and that his licence was revoked on 9th November, 2016 by the Department of Justice because the risk of harm he poses the public has increased more than minimally since he was released on licence and the risk could no longer be managed in the community. The maximum remaining period to be served in custody is 3 years, 11 months and 13 days. He is considered by the Northern Ireland authorities to be unlawfully at large. Therefore, as matters stand, the respondent's licence has been revoked and he is required to serve the remainder of his sentence in custody until and unless the Parole Commissioners direct or recommend his release. The remaining sentence is immediately enforceable as he is considered to be unlawfully at large. The fact that the revocation of his licence or the amount of the remaining period to be served is subject to review by the Parole Commissioners does not take away from the fact that at the current time the sentence is immediately enforceable. Similarly, the fact that he may benefit from a decision to release him under licence at some stage does not take away from the fact that he is currently required to serve the remaining period of his sentence as set out in the EAW, i.e. 3 years, 11 months and 13 days' imprisonment. I dismiss the respondent's objections in this regard.

**Specialty and s. 22 of the Act of 2003**

19. The respondent submitted that, if surrendered, it was the intention of the authorities in Northern Ireland to prosecute him for an offence of assault, and therefore his surrender was prohibited by s. 22 of the Act of 2003. While s. 22(3) provides that it shall be presumed that the issuing state does not intend to prosecute, sentence or detain or otherwise restrict the requested person in his personal liberty in respect of an offence other than the offences specified in the EAW, such presumption is rebuttable.
20. In an affidavit sworn by Ms. Jenny McGeever, solicitor for the respondent, dated 17th June, 2020, she exhibited, *inter alia*, an email from the Public Prosecution Service of Northern Ireland, dated 15th June, 2020, confirming:-
- "that a decision to prosecute was issued for the offence of common assault on 22nd January 2017. At this stage it would be our intention to proceed with the prosecution".*
21. The affidavit of laws furnished by Ms. Doherty B.L. set out the circumstances in which a surrendered person may be prosecuted in the UK for an offence other than that specified in the European arrest warrant on foot of which such person was surrendered. The offence of common assault carries a maximum penalty of six months' imprisonment. Section 146 of the UK's Extradition Act, 2003 deals with the rule of specialty in relation to a person who is extradited to the UK from a category 1 territory, such as Ireland, in pursuance of a European arrest warrant. Such person may be prosecuted for an offence committed before his extradition if the offence is one falling within s. 146(3) or the condition in s. 146(4) is satisfied.

22. The offences falling within s. 146(3) of the UK Extradition Act, 2003 are as follows:-

*"(3) The offences are—*

- (a) the offence in respect of which the person is extradited;*
- (b) an offence disclosed by the information provided to the category 1 territory in respect of that offence;*
- (c) an extradition offence in respect of which consent to the person being dealt with is given on behalf of the territory in response to a request made by the appropriate judge;*
- (d) an offence which is not punishable with imprisonment or another form of detention;*
- (e) an offence in respect of which the person will not be detained in connection with his trial, sentence or appeal;*
- (f) an offence in respect of which the person waives the right that he would have (but for this paragraph) not to be dealt with for the offence."*

23. The conditions set down in s. 146(4) are that the person has been given an opportunity to leave the UK and has not done so before the end of the permitted period, or has done so before the end of the permitted period and has returned to the UK. The permitted period is 45 days starting on the day on which the person arrives in the UK.

24. In this jurisdiction, s. 22(6) of the Act of 2003 provides as follows:-

*"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 purpose 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,...*

*(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...*

25. Section 22(7) of the Act of 2003 provides that the High Court may consent to proceedings being brought upon receiving a request in writing from the issuing state in that behalf. No such request has been received in this matter.

26. Article 27 of the Council Framework Decision dated 13th June, 2002 on the European Arrest Warrant and the Surrender Procedures Between Member States, as amended ("the Framework Decision"), deals with circumstances in which a surrendered person may be prosecuted for an offence other than that set out in the EAW. Article 27(1) allows for Member States to notify the General Secretariat that its consent to such prosecution can be presumed unless it states otherwise on surrender. Ireland has not given such consent. Article 27(2) of the Framework Decision provides that except for the cases referred to in articles 27(1) or 27(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. Article 27(3) of the Framework Decision provides that article 27(2) does not apply in certain circumstances as follows:-

"3. *Paragraph 2 does not apply in the following cases:*

- (a) *when the person having had an opportunity to leave the territory of the Member State to which he or she has been surrendered has not done so within 45 days of his or her final discharge, or has returned to that territory after leaving it;*
- (b) *the offence is not punishable by a custodial sentence or custodial order;*
- (c) *the criminal proceedings do not give rise to the application of a measure restricting personal liberty;*
- (d) *when the person could be liable to a penalty or a measure not involving the deprivation of liberty, in particular a financial penalty or a measure in lieu*

*thereof, even if the penalty or measure may give rise to a restriction of his or her personal liberty;*

*(e) when the person consented to be surrendered, where appropriate at the same time as he or she renounced the speciality rule, in accordance with Article 13;*

*(f) when the person, after his/her surrender, has expressly renounced entitlement to the speciality rule with regard to specific offences preceding his/her surrender. Renunciation shall be given before the competent judicial authorities of the issuing Member State and shall be recorded in accordance with that State's domestic law. The renunciation shall be drawn up in such a way as to make clear that the person has given it voluntarily and in full awareness of the consequences. To that end, the person shall have the right to legal counsel;*

*(g) where the executing judicial authority which surrendered the person gives its consent in accordance with paragraph 4."*

27. Counsel on behalf of the applicant submitted that in light of article 27 of the Framework Decision and the provisions of s. 22 of the Act of 2003, the prohibition on prosecution or requirement for consent was not engaged until such time as the issuing Member State intended to impose a custodial sentence or otherwise restrict the personal liberty of the person surrendered. Reliance was placed upon the decision of the Court of Justice of the European Union ("the CJEU") in *Leymann and Pustovarov* (Case C-388/08 PPU) which states at para. 76:-

*"... the exception in Article 27(3)(c) of the Framework Decision must be interpreted as meaning that, where there is an 'offence other' than that for which the person was surrendered, consent must be requested, in accordance with Article 27(4) of the Framework Decision, and obtained if a penalty or a measure involving the deprivation of liberty is to be executed. The person surrendered can be prosecuted and sentenced for such an offence before that consent has been obtained, provided that no measure restricting liberty is applied during the prosecution or when judgment is given for that offence..."*

28. Reliance was also placed upon *Minister for Justice and Equality v. Sliwa* [2016] IEHC 185, where Donnelly J. expressed at para. 64:-

*"[64] ... The correct interpretation of the relevant provisions of s. 22, both in their plain and ordinary meaning and indeed when subjected to a confirming interpretation with Article 27 of the 2002 Framework Decision, is that their surrender is not prohibited where a person will be proceeded against and indeed sentenced but no measure restricting his or her personal liberty will be applied in the issuing state ..."*

29. The decision of the High Court in *Sliwa* was appealed and in *Minister for Justice and Equality v. Sliwa* [2016] IECA 130, while the Court of Appeal did not directly address the issue, Hogan J. stated at para. 5:-

*"[5] The situation in respect of petitions 4 and 7 is (or, at least, pending further clarification, may be) different in that it appears that the authorities in those cases have proceeded before the Polish courts in these two cases. It is, however, agreed that the steps taken to date do not infringe Article 27 of the Framework Decision as construed by the Court of Justice in Case C-388/08 Leymann [2008] E.C.R. I-8983. As these matters are not before this Court, we refrain from exercising any view in respect of these two petitions."*

30. I do not regard the relevant UK legislation as inherently inconsistent with the Framework Decision and in particular article 27 thereof. Ms. Doherty B.L. does not suggest that the UK legislation is not in conformance with the Framework Decision. While it may be the intention of the Northern Ireland authorities to prosecute the respondent for the offence of common assault, there is no suggestion or reason to believe that it is intended that such prosecution will take place in breach of article 27 of the Framework Decision. It may indeed be the case that at some stage in the future, such a prosecution can take place without any breach of article 27 of the Framework Decision. I am satisfied that the relevant UK legislation is not such that this Court is obliged to refuse surrender pursuant to s. 22(2) of the Act of 2003.
31. Furthermore, on the basis of the decision of the CJEU in *Lehmann and Pustavarov*, there is no bar to the prosecution of the surrendered person by the issuing state provided no restriction is placed upon his personal liberty as a result of that prosecution.
32. For the reasons set out herein, I am satisfied that the surrender of the respondent is not prohibited by virtue of s. 22 of the Act of 2003.

**Matters Not Pursued at Hearing**

33. For the sake of completeness, I should say that I am satisfied that surrender of the respondent would not constitute a breach of the respondent's rights under article 8 of the Convention and would not be incompatible with the State's obligations under the Convention or the Constitution. There is no reason to believe, and no evidence to support the suggestion, that the respondent will not be given credit for any time spent in custody in this jurisdiction on foot of the EAW. The respondent has not adduced any evidence to support the contention that surrender would expose him to inhuman or degrading treatment, or in any other way breach his rights under the Convention, including rights under articles 3 and 8 thereof. There is no evidence before the Court that the respondent would be exposed to an unacceptable risk from Covid-19 virus such that his surrender would be incompatible with the State's obligations under the Convention or the Constitution.
34. I am satisfied the surrender of the respondent is not precluded by reason of ss. 21A, 22, 23 and 24 of the Act of 2003.

35. I am satisfied that the surrender of the respondent is not prohibited by part 3 of the Act of 2003 or any of the provisions set out thereat.
36. I dismiss the respondent's objections to his surrender.
37. It follows that this Court will make an order under s. 16(1) of the Act of 2003 for the surrender of the respondent to the UK.