[2020 Gib LR 141]

KATIC v. REPUBLIC OF CROATIA

SUPREME COURT (Ramagge Prescott, J.): April 23rd, 2020

Criminal Procedure—arrest—European arrest warrant—no requirement for guarantee under European Arrest Warrant Act 2004, ss. 8A and 12 from issuing state that Gibraltar resident will be returned to Gibraltar to serve custodial sentence in case of fugitive who had been sentenced to imprisonment in issuing state but absconded to Gibraltar and obtained residency here

The appellant appealed against a decision of the Magistrates' Court requiring him to be returned to Croatia pursuant to a European arrest warrant.

The appellant had been convicted in Croatia of being involved in the possession and supply of large quantities of cocaine and sentenced to 11 years in prison in June 2015. In 2018, his sentence was reduced to 10 years on appeal. The appellant had left Croatia without serving any of his sentence other than that served on remand. He claimed to have left Croatia in November 2015. He applied for residency in Gibraltar in 2017, which was successful.

A European arrest warrant ("EAW") was issued by a Croatian court in February 2019 and the appellant was subsequently arrested in Gibraltar. At that time, he was a resident of Gibraltar. At a hearing in the Magistrates' Court, the appellant submitted that the EAW was defective as it failed to comply with the European Arrest Warrant Act 2004 because the Croatian authorities had failed to issue a "guarantee."

Section 8A of the 2004 Act provided:

> "(1) The execution of a European arrest warrant transmitted in accordance with section 8 is subject to the conditions in subsections (2) and (3).
>
> . . .
>
> (3) Where the person named in the European arrest warrant is a Gibraltarian (as defined in section 4 of the Gibraltarian Status Act) or resident and he is to be surrendered to the issuing State, he must, after being heard, be returned to Gibraltar in order to serve a custodial sentence or detention order passed against him in the issuing State."

Section 12 provided:

"12.(1) Where a person does not consent to his surrender to the issuing State the magistrates' court may, after hearing that person,

make an order directing that the person be surrendered to such other person as is duly authorised by the issuing State to receive him.

(2) Subsection (1) shall apply subject to the following provisions, that is to say that—

(a) the European arrest warrant, transmitted in accordance with section 8 and, where appropriate, such undertakings or statements as are required under this Act are provided to the court . . ."

The Magistrates' Court held that a guarantee required by s.12(2)(a) of the Act as read with s.8A(3) was not necessary. The appellant appealed, submitting that a guarantee was necessary as (a) the Croatian authorities had acknowledged that the appellant had a right to be heard; and (b) he had been aware of the 2018 final decision of the Supreme Court of Croatia only when the EAW had been executed in Gibraltar.

After the appeal process was initiated, a guarantee was provided by the Croatian authorities. The court determined that if a guarantee was required by operation of law and had not been received with the EAW, the EAW would be defective and could not be cured retrospectively.

Held, dismissing the appeal:

On the face of s.8A of the European Arrest Warrant Act 2004, if the appellant were a resident of Gibraltar a guarantee was required from the issuing state that he would be returned to Gibraltar after being heard in the issuing state in order to serve any custodial sentence passed on him by the issuing state. At the time of the issue of the EAW, the appellant was a resident of Gibraltar and, taking the EAW at face value and giving the appellant the benefit of the doubt, the court proceeded on the assumption that he had the right to be heard upon his return to Croatia. However, that did not equate with the EAW being defective for lack of a guarantee. Where an individual intentionally absented himself from a jurisdiction so that a sentence could not be enforced against him, he should not be able to use that absence to frustrate his return, and nor should a person be allowed to rely on ignorance of a custodial sentence when he was aware there were proceedings against him. If the appellant left Croatia in November 2015, as he claimed, then at that time he was subject to serving an 11-year sentence. At the time of the final judgment in 2018, he was still subject to serving a custodial sentence, albeit reduced to 10 years. From June 2015 there was an operative custodial sentence, and well in advance of that the appellant knew of and participated in proceedings against him. The requirement or otherwise of a guarantee must be placed in its proper context. The interests of justice required the court to interpret s.8A in a purposive way. There was no doubt that s.8A was aimed at protecting the rights of an individual who was a national of the executing state. Entitlement to that protection was, however, questionable when residence in the executing state had been obtained with the consequence of avoiding a term of imprisonment following a conviction in the issuing state. Had the appellant disclosed to the Gibraltar authorities that, soon before

coming to Gibraltar and applying for residence, he had been tried and sentenced in Croatia to a lengthy term of imprisonment for the possession and supply of almost 200 kg. of cocaine, it was assumed he would have been denied residence. In any event there was an inherent injustice that a fugitive from justice such as the appellant should avail himself of the rights afforded by provisions which were formulated to benefit *bona fide* residents. To allow the appellant to rely on s.8A would be to enable him to manipulate the justice systems of both Croatia and Gibraltar in order to give himself the choice of where to serve his sentence. The court was of the firm view that a guarantee was not mandatory and the order issued by the Magistrates' Court was properly issued. The appeal would therefore be dismissed and the appellant would be surrendered to the Croatian authorities but not before the expiration of 28 days (paras. 7–8; para. 14; paras. 19–21; para. 26).

Cases cited:
(1) *IB*, Case C-306/09, E.C.J., October 21st, 2010, applied.
(2) *Poland* v. *Pawlikowska-Zawada*, [2019] EWHC 985 (Admin), considered.
(3) *Wisniewski* v. *Poland*, [2016] EWHC 386 (Admin), considered.

Legislation construed:
European Arrest Warrant Act 2004, s.8A: The relevant terms of this section are set out at para. 6.
s.12: The relevant terms of this section are set out at para. 6.
s.39: The relevant terms of this section are set out at para. 22.

Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, art. 5.3: The relevant terms of this article are set out at para. 20.

G. Gear for the prosecution;
C. Brunt for the defendant.

1 **RAMAGGE PRESCOTT, J.:** This is an appeal against a decision of the Magistrates' Court dated February 3rd, 2020. A European Arrest Warrant ("EAW") issued on February 7th, 2019 from the County Court of Zagreb 9, Croatia. On December 9th, 2019, the appellant was arrested in Gibraltar. On January 9th, the appellant gave notice that he did not consent to the surrender.

2 On January 27th, at a hearing in the Magistrates' Court the appellant submitted that the EAW was defective on two grounds:

(a) that the EAW failed to comply with the European Arrest Warrant Act 2004 ("the Act") because the Croatian authorities had failed to issue the requisite "guarantee," and

(b) that an order for the appellant's return would breach the provisions of s.33A of the Act.

3 The learned stipendiary magistrate ruled that there was no breach of s.33A. That decision is not challenged. With regard to the issue of the guarantee, the learned stipendiary magistrate held that a guarantee was not necessary.

4 On February 10th, 2020, a notice of appeal was filed. Evident from the information before me that the appellant's appeal is restricted to one ground, that the learned stipendiary magistrate erred when granting the order to execute the EAW because it did not have before it the guarantee required by s.12(2)(a) of the Act as read with s.8A(3).

5 After the appeal process was initiated, a guarantee was provided by the Croatian authorities on March 31st, 2020, although I am ignorant as to what motivated the Croatian authorities to submit the guarantee, whether it was at the request or prompting of the Gibraltar authorities or of their own initiative. In any event, I raised the question whether the guarantee, if required, could be provided retrospectively. Neither counsel has fully addressed this issue but, having given the matter some careful thought, I am of the view that if a guarantee was required by operation of law and was not received with the EAW, then the EAW would be defective and cannot be cured retrospectively. The only question for this court to determine is therefore whether a guarantee was in fact required.

Guarantee

6 Section 12(1) and (2)(a) of the Act provides:

> "12.(1) Where a person does not consent to his surrender to the issuing State the magistrates' court may, after hearing that person, make an order directing that the person be surrendered to such other person as is duly authorised by the issuing State to receive him.
>
> (2) Subsection (1) shall apply subject to the following provisions, that is to say that—
>
> (a) the European arrest warrant, transmitted in accordance with section 8 and, where appropriate, such undertakings or statements as are required under this Act are provided to the court . . ."

Section 8A(1) and (3) of the Act provides:

> "8A.(1) The execution of a European arrest warrant transmitted in accordance with section 8 is subject to the conditions in subsections (2) and (3)."
>
> "(3) Where the person named in the European arrest warrant is a

> Gibraltarian (as defined in section 4 of the Gibraltarian Status Act) or resident and he is to be surrendered to the issuing State, he must, after being heard, be returned to Gibraltar in order to serve a custodial sentence or detention order passed against him in the issuing State."

7 On the face of s.8A, therefore, if the appellant is a resident of Gibraltar a guarantee is required from the issuing state that he will be returned to Gibraltar after being heard in the issuing state in order to serve any custodial sentence passed on him by the issuing state.

8 The issue of residency can be dealt with swiftly. Although there is no consensus on the date upon which the appellant arrived in Gibraltar (he submits it was November 2015), there is consensus that he filed an application for residency on March 8th, 2017, which was ultimately successful, so that at the time of the issue of the EAW, he was a resident of Gibraltar. The appellant has submitted wage slips, utility bills and contract of employment although all relate to 2019.

9 The next issue to determine is, given that the appellant has already been tried and sentenced in Croatia, would any right of appeal which he may have before the Croatian court come within the scope of "being heard" as referred to in s.8A of the Act? Ms. Gear has helpfully referred me to case *IB* (1) and the answer to that question is clearly "yes." It is against these circumstances that I consider whether a guarantee is required.

10 In the course of this ruling, I will refer to some background which I draw from the EAW dated December 11th, 2019 and from the letter dated March 11th, 2020 from the issuing Judge Marsic from the County Court of Zagreb.

11 The appellant was arrested and tried for being involved in the possession and supply of 74 kg. of cocaine and 101 kg. of cocaine. He was sentenced to 11 years' custody which was later reduced on appeal to 10 years. He left Croatia without serving his sentence other than that which was served on remand prior to his trial.

12 For the appellant submitted that the information contained in the EAW demonstrates that a guarantee is required because at para. (d)2 it is stated that the appellant did not appear in person at trial and at para. 3.4 that:

> "[T]he person was not personally served with the decision, but
>
> —the person will be personally served with the decision without delay after the surrender, and
>
> —when served with the decision, the person will be expressly informed of his or her right to a retrial or appeal, in which he or she

has the right to participate and which allows the merits of the case, including fresh evidence, to be re-examined, and which may lead to the original decision being reversed, and

—the person will be informed of the timeframe within which he or she has to request a retrial or appeal, which will be *1 (ONE) year.*"

13 The appellant submits that all this taken together shows that the Croatian authorities acknowledge that the appellant has a right to be heard upon being served personally with the final decision of the court, and therefore it follows that a guarantee is necessary. That said, it may be that, pursuant to Croatian law, the right to be heard may not depend upon personal service of the decision but upon the time at which the appellant became aware of the decision. The Croatian authorities have drawn our attention with emphasis to art. 497 of their Criminal Offences Act which they tell us provides that the appellant has one year from the moment he became aware of the final judgment within which to submit a motion to the Croatian court for a renewal of the procedure. The appellant submits by way of undated affidavit that he became aware of the final decision only when the EAW was executed in Gibraltar in December 2019, this notwithstanding that he was present for most of his trial at first instance, and attended court in Croatia on June 15th, 16th and 18th, 2015. He did not attend on June 19th due to illness but once recovered did not attend thereafter on June 23rd or 24th, 2015 when judgment was handed down. After the conclusion of the hearing at first instance, the appellant appealed against that judgment and instructed counsel who appeared on his behalf at the appeal hearing on March 20th, 2018. At the end of that hearing, also on March 20th, 2018, the court ruled on the appeal. Submitted for the appellant that given that he was only aware of the final decision of the Supreme Court of Croatia when he was served with the EAW in Gibraltar on December 10th, 2019, the one-year period in which to make the application for an appeal/retrial does not expire until December 20th, 2020.

14 Counsel in Croatia can only have been acting upon the instructions of his client on the appeal hearing in March 2018; it is therefore somewhat disingenuous to suppose that the appellant would not have been aware of the proceedings or been made aware of the result of the appeal by his counsel. In the circumstances, it may be that the time for the appellant to be heard upon his return to Croatia may have expired. In any event, I guard against the danger of attempting (with limited guidance) to interpret the reaches of Croatian laws. Taking the EAW at face value, and giving the appellant the benefit of the doubt, I shall proceed on the assumption that he has the right to be heard upon his return. However, in my view that does not equate with the EAW being defective for lack of a guarantee.

15 The appellant (together with others) faced trial in Croatia for very serious cocaine related offences. He had legal representation from his defence attorney, Mr. Novak. After having been on remand for four years, he had served the maximum period allowed for remand under Croatian law and so was admitted to bail on June 13th, 2015. His trial commenced on June 15th, 2015. He and his lawyer attended court on June 15th, 16th and 18th. On June 19th, he failed to attend on the grounds of ill health; upon further investigation the court held he had a justifiable reason for not attending. The hearing was adjourned to June 23rd. On that date, the appellant again did not attend; the court conducted a medical assessment with the help of a medical court-appointed expert, Dr. Gostovic, who certified the appellant fit to attend court. Police were sent to his address to bring him to court but he was absent from his address. The trial concluded on June 23rd, and the next day, June 24th, the judgment of the court was handed down and the appellant sentenced in his absence to 11 years in prison. The appellant appealed that decision and the appeal was heard on March 20th, 2018. Mr. Novak again appeared for the appellant. The appeal met with some success in that the custodial sentence was reduced from 11 years to 10 and there was some modification of a confiscation order.

16 The case of *Poland.* v. *Pawlikowska-Zawada* (2), whilst not strictly on point, nevertheless provides invaluable guidance. The issue under consideration in that case was that Pawlikowska was challenging extradition on the grounds of the passage of time. She had been convicted of 18 offences in Poland and had been sentenced to a term of imprisonment. She appealed against the decision of the Polish court but left Poland without knowing of the outcome of the appeal. She came to believe that the appeal must have been successful. The district judge concluded that Pawlikowska was not a fugitive in the sense that that word was used in case law and that to extradite her to Poland would be oppressive. That decision was overturned on appeal.

17 The court in *Pawlikowska* considered the case of *Wisniewski* v. *Poland* (3); that case concerned an individual who was the subject of a suspended sentence, the conditions of which included conditions that he notify the authorities of a change of address and pay compensation. He left Poland and settled in the UK and the sentence was activated in his absence. He was unaware that the sentence had been activated and had not notified the authorities of a change of address. The appeal court agreed with the decision of the Divisional Court that Wisniewski was unlawfully at large and should be extradited. Lloyd Jones, L.J. as he then was, stating ([2016] EWHC 386 (Admin), at paras. 58–60):

> "58. 'Fugitive' is not a statutory term but a concept developed in the case law, in particular in *Gomes and Goodyer* which elaborates the principle stated in *Kakis*. In the context of Part 1 of the 2003 Act it describes a status which precludes reliance on the passage of time

under section 14. Before this rule can apply, a person's status as a fugitive must be established to the criminal standard (*Gomes and Goodyer* at [27]).

59. On behalf of the appellants, Mr. Jones submits that in the passage in his speech in *Kakis* referred to in *Gomes and Goodyer* as Diplock 1, Lord Diplock was limiting the concept of a fugitive to cases where the person had fled the country, concealing his whereabouts or evading arrest. However, I consider that these were merely examples of a more general principle underlying *Kakis* and *Gomes and Goodyer*. Where a person has knowingly placed himself beyond the reach of a legal process he cannot invoke the passage of time resulting from such conduct on his part to support the existence of a statutory bar to extradition. Rather than seeking to provide a comprehensive definition of a fugitive for this purpose, it is likely to be more fruitful to consider the applicability of this principle on a case by case basis . . .

60. . . . The activation of the sentence is the risk to which the person has knowingly exposed himself. In my view, such a situation falls firmly within the fugitive principle enunciated in *Kakis* and *Gomes and Goodyer.* The fact, if it be the case, that a person's motive for leaving the jurisdiction was economic and not a desire to avoid the sentence, does not make the principle inapplicable."

18 The court in *Pawlikowska* (2) followed the approach in *Wisniewski* stating that ([2019] EWHC 985 (Admin), at para. 30):

"In general, in circumstances, where an individual knows that a sentence of imprisonment will be activated if an appeal fails, and if that individual leaves the jurisdiction and the judicial authorities are unable to locate the individual and unable to enforce the sentence, events occurring during the passage of time after dismissal of the appeal and when the individual cannot be located will not give rise to a claim that it would be oppressive or unjust to extradite the individual. Although the individual is not prohibited from leaving the country, if the individual does not take steps to find out the outcome of the appeal, or do not provide the authorities with an address in the new country of residence (even if not obliged to notify the authorities of a change of address), the individual has by his or her own actions made it difficult or impossible for the authorities to enforce the sentence. In those circumstances, the individual cannot, as a general rule, rely on events occurring during the passage of time after the dismissal of the appeal when the individual is out of the country and the authorities cannot enforce the sentence because they do not know where the individual is."

19 The general principle that can be derived from *Pawlikowska* and applied to the present case is that where an individual intentionally absents himself from a jurisdiction so that a sentence cannot be enforced against him, he should not be able to use that absence to frustrate his return, nor should a person be allowed to rely on ignorance of the existence of a custodial sentence when he was aware there were proceedings against him. Mr. Brunt attempts to distinguish *Pawlikowska* from the present case on the grounds that, in *Pawlikowska*, the person left Poland after the final judgment, and in this case the appellant left Croatia before the final judgment. The distinction is of little consequence. If the appellant is truthful when he says he left in November 2015, then at that time he was subject to serving an 11-year custodial sentence. At the time of the final judgment in 2018 he was still subject to serving a custodial sentence, albeit a slightly reduced one of 10 years. From June 24th, 2015, there was an operative custodial sentence, and well in advance of that the appellant knew of and participated in proceedings against him. In *Pawlikowska*, the point was developed thus (*ibid.*, at para. 32):

> "Furthermore, the District Judge erred in basing her conclusion on her view that the respondent 'genuinely believed that the appeal must have been successful' and the respondent 'reasonably believed that her appeal was successful'. The genuineness of the belief is not the issue. The issue is, ultimately, whether the respondent created the state of affairs whereby the authorities were unable to enforce the sentence in the event that her appeal was dismissed. She did. The District Judge also erred in her conclusion that the respondent reasonably believed that the appeal had been successful. The respondent had done nothing (apart from one telephone call) to establish the result of the appeal."

20 The requirement or otherwise of a guarantee must be placed in its proper context. As a starting point, a referral to the Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, is useful. Article 5.3 provides that a resident of the executing member state "may" be subject to the condition that he is returned to the executing member state after being heard, to serve there the custodial sentence. The transposition of that provision into Gibraltar legislation has a marked difference in that s.8A provides that where a Gibraltar resident is surrendered to the issuing state he "must" after being heard be returned to Gibraltar to serve the sentence here. Although s.8A is more absolute in nature than the corresponding provision in the Council Framework Decision, in my view the interests of justice make it necessary to interpret s.8A in a purposive way.

21 There is no doubt that s.8A is aimed at protecting the rights of an individual who is a national or a resident of the executing state. However, entitlement to that protection becomes questionable when the residence in

the executing member state has been obtained with the consequence of avoiding a term of imprisonment following a conviction in the issuing state. Had the appellant disclosed to the Gibraltar authorities that, soon before coming to Gibraltar and applying for residence here, he had been tried and sentenced in Croatia to a lengthy term of imprisonment for the possession and supply of almost 200 kg. of cocaine, I venture to assume that he would have been denied residence. But in any event, in my view there is an inherent injustice that a fugitive of justice should avail himself of the rights afforded by these provisions which are formulated to benefit *bona fide* residents. I consciously refer to the appellant as a fugitive from justice because there is no doubt in my mind that he is precisely that, in the sense that, by absenting himself from Croatia before the conclusion of his trial and later knowing that an appeal had been lodged, he is a fugitive in that he has placed himself outside the reach of the Croatian authorities. To allow him to rely on s.8A would be to allow him to manipulate the justice systems of both Croatia and Gibraltar in order to give himself the choice of where to serve his sentence. For these reasons, I am of the firm view that a guarantee is not mandatory and that the order issued by the Magistrates' Court was properly issued. Before I conclude, however, I must deal with some further submissions filed yesterday on behalf of the appellant.

22 The appellant appeals the decision of the Magistrates' Court pursuant to s.38 of the Act. Pursuant to s.39(1), on such an appeal the Supreme Court may allow the appeal or dismiss the appeal and, pursuant to sub-s. (2), the court may allow the appeal only if the conditions in sub-s. (3) or (4) are satisfied. Those conditions are that:

"(3) The conditions are that—

(a) the magistrates' court ought to have decided a question before it at the surrender hearing differently; or

(b) if the court had decided the question in the way it ought to have done, the court would have been required to order the person's discharge.

(4) The conditions are that—

(a) an issue is raised that was not raised at the surrender hearing or evidence is available that was not available at the surrender hearing;

(b) the issue or evidence would have resulted in the magistrates' court deciding a question before the court differently; or

(c) if the court had decided the question in that way, it would have been required to order the person's discharge."

23 Mr. Brunt filed further skeleton submissions yesterday by which he argued for the first time that the court cannot receive new evidence at the appeal; I assume he refers to the letter of March 11th, 2020 from the Croatian authorities. He submits that by s.39(1), the court has no power to rehear evidence but is restricted to reviewing the decision of the stipendiary magistrate unlike an appeal under s.40 by the issuing state. I must admit to failing to see any material difference between procedure. In any event, it seems to me that provisions applicable to both appeals by a person and appeals by an issuing state (ss. 39(4)(a) and 41(4)(a), respectively) provide that the court can take into account evidence which is available now but was not available at the surrender hearing. The only relevant evidence which we are discussing, which I have, but the Magistrates' Court did not, is the letter from the Croatian judge of March 11th, 2020. In actual fact, that constitutes no material new evidence; it simply expands upon the content of the EAW. For the avoidance of doubt, it is important to note that I have referred to parts of that letter as background information to provide a bigger picture but this decision would be no different in the absence of that letter and is based upon the information in the EAW which sets out in some detail the facts leading to the appellant's arrest, the time he spent on remand prior to trial, the initial sentence he received, the reduction of that sentence on appeal, and the fact that he left Croatia without serving the sentence. Whether the appellant knew or not of the outstanding custodial sentence, whether the final sentence was imposed before or after he left Croatia, whether the trial was strictly or not in his absence are not matters which I need to determine and are not matters which would impact upon my decision.

24 Mr. Brunt emphasizes that the appeal should be allowed because, pursuant to s.39(3)(a), the learned stipendiary magistrate ought to have decided the question of whether a guarantee was required differently. Ms. Gear points out that at the surrender hearing the learned stipendiary magistrate addressed his mind to what "being heard" in s.8A meant, and asked for guidance from counsel. Counsel for the appellant at that hearing stated that it meant "after submissions here, now," there was no mention that "being heard" was in reference to an appeal to be made by the appellant before the Croatian court upon his surrender. Following submissions, the learned Stipendiary Magistrate ruled thus:

> ". . . in my Judgment its scope is limited to persons whose return is sought in order for them to stand trial. The section clearly deals with future possibilities. The section provides that a Gibraltarian or a resident 'must, after being heard be returned to Gibraltar in order to serve a custodial sentence or detention passed against him in the issuing state'. Mr Katic has been sentenced; there is nothing for him to say but to complete his sentence. The Croat courts have done their

work now it is time for the Croat prison system to continue to do theirs."

25 Although the learned stipendiary magistrate may have erred in his approach as to the applicability of s.8A because he was not sufficiently addressed upon it, and although I reach my decision based upon different submissions and reasons, the ultimate decision to give effect to the EAW is correct.

26 The appeal is dismissed and the appellant is to be surrendered to the Croatian authorities but not before the expiration of 28 days from today.

Appeal dismissed.