

THE HIGH COURT

[2020] IEHC 531

RECORD NUMBER 2019/187 EXT

BETWEEN

MINISTER FOR JUSTICE AND EQUALITY

APPLICANT

AND

DARIUSZ ZEGAREK

RESPONDENT

Judgment of Mr. Justice Paul Burns delivered on the 20th day of October, 2020

1. By this application the applicant seeks an order for the surrender of the respondent to the Republic of Poland ("Poland") pursuant to a European Arrest Warrant dated 30th July, 2018 ("the EAW") issued by Katarzyna Capałowska, Judge of the Regional Court in Warsaw, as the issuing judicial 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. The file reference of the EAW is VIII Kop 183/18.
2. The EAW was endorsed by the High Court on 27th May, 2019, and the respondent was arrested and brought before the High Court on 13th January, 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. The sentence in respect of which surrender is sought is described under part B of the EAW as follows:-

"... the judgement of District Court for the Capital City of Warsaw of 20th February, 2015, files no III K 1086/08 by which Dariusz Zegarek was sentenced to the collective penalty of 1 year and 10 months of imprisonment. The judgment enforced on 18th September, 2015."

7. At part E of the EAW, it is indicated that the warrant relates to two offences in total, namely:-

"(a) On 16.01.2007 in Warsaw, in the area of the Mall – Factory Ursus in Warsaw, acting jointly and in co-operation, he stole a wallet with money of unspecified amount but ca 10.000,00 zloty to the detriment of Jarosław Urban; moreover, he committed this offence within the period of 5 years after serving of the penalty of at least 6 months of imprisonment, been formerly sentenced for an intentional crime of similar type;

(b) *in the period from 14th/15th to 18th January, 2007, he purchased a digital photo-camera branded Digimax, manufacturers number 15553829 of the value of 1399,00 zloty originating from a theft; moreover, he committed this offence within the period of five years after serving of the penalty of at least 6 months of imprisonment, being formerly sentenced for an intentional crime of similar type."*

I am satisfied that the offence at (a) corresponds to an offence in this State, namely an offence of theft contrary to s. 4 of the Criminal Justice (Theft and Fraud Offences) Act, 2001 ("the Act of 2001") and that the offence at (b) corresponds to an offence in this State, namely the offence of possessing stolen property contrary to s. 17 and/or handling stolen property contrary to s. 18 of the Act of 2001.

8. At part F of the EAW, it is indicated that the sentence imposed on 20th February, 2015, file number III K 1086/08, was kept enforced by a judgment of the Regional Court in Warsaw of 18th September, 2015, file number IX Ka 783/15.
9. At part D of the EAW, it is indicated that the respondent was not present at the trial when the judgment was issued. It outlines:-

"c. *knowing about the scheduled trial in the case, the person granted the power of attorney to his attorney of defence, who was appointed by him or ex officio to defend him at the trial and this attorney of defence defended him in practice at the trial."*

The EAW then goes on to state:-

- "e. *the person concerned was not served the judgement in person, but:*
- *the judgement will be served to the person immediately after being surrendered, and*
 - *following the serving of the judgement the person concerned will be clearly instructed upon the right for re-examination of the case or upon submitting a complaint that the person has got the right to participate and which allow for re-examining of the case against the merits and including any evidence that could provide for reversal or change of the original judgement."*

It is further indicated:-

"The convict got his counsel of defence appointed by the court, who represented him in the proceedings and was present at the trial when the judgement was issued. The counsel of defence appointed by the court, on behalf of the convict, submitted the appeal against the issued judgement but the verdict of the First Instance Court was not reverted."

10. By letter from the Central Authority dated 7th November, 2018, it was pointed out that section (d), as completed in the EAW, appeared to refer to the trial at first instance and

as there was an appeal, section (d) should be completed in respect of the appeal in accordance with the relevant European Court of Justice jurisprudence. Further information was sought in respect of the offence concerning possession of the camera.

11. By reply dated 30th January, 2019, as regards section (d) of the EAW, it was stated:-

"The prosecuted was not present at the appeal trial at Regional Court. The notification about the trial date was delivered at the address which had been provided by the prosecuted in the course of the proceedings as the post serving address. The Court delivery was notified twice and was not received in due time, therefore it was recognized as duly served – pursuant to Art. 113 §§ 1 and 2 Code of Criminal Proceedings. The appeal trial was not attended by the counsel of defence of the prosecuted, either. The notification for the counsel of defence about the appeal trial date was receipted by an employee of the Attorney's Office administrated by the counsel of defence of the prosecuted."

The reply also contained further information concerning the offence relating to possession of the camera.

12. The respondent delivered points of objection dated 24th February, 2020 in respect of this EAW and a second European arrest warrant which had been issued in respect of separate matters. In respect of this EAW, file reference VIII Kop 183/18, the respondent claimed:-

- (a) that the procedures adopted in the requesting state amounted to an unjustifiable interference with his right to liberty and fair procedures, finality and certainty, where the offences dated back to 2007 and he had been in custody from 2007 until 2014 but the sentence was not finalised until 2015, he had not been advised of any outstanding proceedings upon his release from prison in 2014 and had returned to Poland on many occasions without notification of the said sentence;
- (b) that surrender would be in breach of his right to a family and private life, particularly in light of the delay in executing the sentences and due to the personal circumstances of the respondent and his partner; and
- (c) that surrender would be contrary to s. 45 of the Act of 2003.

13. By letter dated 20th February, 2020, further information was sought by the High Court from the requesting state in respect of this EAW as follows:-

- (a) whether the respondent had been in custody from April 2007 to January 2014;
- (b) whether on leaving prison, the respondent was told of outstanding criminal proceedings or further sentences to be served;
- (c) seeking an explanation for the delay in the prosecution of the offences; and

- (d) seeking comment as regards the respondent's assertion that he was unaware of these proceedings when he left Poland and moved to Ireland in 2015.

14. By reply dated 6th March, 2020, the Polish authorities indicated that:-

"Mr. Dariusz Zegarek attended in person the first date of the trial on 12 Oct 2010 in the case under court file no. III K 1086/06, at the time being remanded in custody in a different case, and he was convoyed from Warsaw Mokotów Remand Facility.... The subsequent dates of the trial he also attended in person, convoyed from a penitentiary facility; also from the very beginning he was assisted by legal aid appointed for him by the court. The (sic.) pleaded in person before the Court. After being discharged from the penitentiary facility on 21 August 2014, he also attended subsequent dates of the trial, on 9 Sep 2014 and 1 Oct 2014; he arrived voluntarily. He did not attend a subsequent (the last) date of the trial, and the pronouncement of the judgment; he had been duly notified of the dates. The judgment of 20 February 2015 sentenced him to 1 year and 10 months custodial sentence. The defence lawyer of Dariusz Zegarek appealed against the judgement concerned. The Warsaw Regional Court... in its judgement of 18 Sep 2015, upheld the judgement of the Court of first instance. From that date, i.e. the date the judgement became final and non-appealable, runs the primary 15 years period of limitation for execution of the custodial sentence. At the time of sentencing, neither were the offences, Dariusz Zegarek, had been charged with, statute barred.

On 18 Nov 2015 the convict Dariusz Zegarek submitted an application with this Court requesting that his 1 year and 10 months custodial sentence be furloughed, invoking among others that fact that he was in Ireland and he was working there. At that time he notified an address in Poland and in Ireland. The prison furlough request was not admitted by the Court in its decision of 16 Feb 2016 (the decision became final and non-appealable on 2 Apr 2016). Darius Zegarek would not collect his correspondence, posted to him by the Court to his address in Poland, and in Ireland. He was also given a notice to surrender to custody to these addresses, however he failed to surrender and he did not serve his sentence. Since 11 Oct 2016, enforcement proceedings in the case vs. Dariusz Zegarek have remained suspended due to his evasion of serving the sentence."

15. At the hearing of submissions before the High Court on 2nd July, 2020, the respondent relied upon a report from Pietrzak Sidor & Wspolnicy, a law firm based in Poland, dated 19th March, 2020. The report indicated that the first court hearing had taken place on 12th October, 2010 with judgment delivered on 18th September, 2015. The first court hearing on 12th October, 2010 was adjourned because the respondent requested a court-appointed defence counsel. On 29th April, 2011, the court delivered the case back to the prosecutor to complete gaps in the evidence, namely obtaining evidence from an expert witness, and after the case was re-submitted for trial, on 20th September, 2013, the court decided to obtain additional evidence. The delay was also due to the absence of witnesses during court hearings and the injured party only appeared before the court on

9th September, 2014. This delay in proceedings did not constitute an independent ground of appeal under Polish law and neither did it reverse the judgment. It was open to the respondent to complain about the length of the proceedings but neither he nor his defence counsel had done so. Defence counsel had appealed the first instance judgment, and the regional court upheld the judgement. The respondent did not attend the appellate hearing. According to the case file, notification of the appeal was sent twice to the respondent by post but was not in fact delivered. The respondent's defence counsel was notified by letter, which was delivered, but he did not attend. Attendance was not obligatory. A copy of the appellate judgment was sent by the court to the respondent (although it was not clear if he was actually served) and his defence counsel, who requested the written reasoning for the judgment. However, the defence counsel failed to specify the scope of the request despite requests from the court to do so. The law firm opined that theoretically, the respondent still had the possibility to request the ombudsman to submit a cassation on his behalf, but as the respondent was present during most of the proceedings and was represented by defence counsel, who submitted an appeal on his behalf, an assessment of whether there are grounds to submit such a request would require detailed analysis. It would not be possible to reopen the proceedings, but in theory it was possible to lodge an extraordinary appeal.

16. In light of the aforesaid report, the High Court sought further information concerning this EAW by letter dated 6th July, 2020, and in particular details as to any appeal the respondent may have in relation to the decision of the appellate court of 18th September, 2015 and any other comments or observations the issuing authority might have in relation to the said report.
17. By reply dated 6th August, 2020, the Polish authorities indicated they were upholding their response dated 6th March, 2020 and that the respondent was not eligible for raising an appeal from the judgment of 20th February, 2015 for the following reasons:-
 - (a) that judgment had already been the subject matter of an appeal;
 - (b) the respondent had been represented by professional defence counsel who had exercised the right of appeal;
 - (c) there is no obligation to specifically serve the judgment; and
 - (d) the court "is not authorized to issue assessments in respect to existence of premises for the accused or his defense counsel for raising an extraordinary appellate measure against a legally binding judgment".

Section 45 of the Act of 2003

18. I must consider this matter in light of all the documentation furnished by the issuing state. From that documentation, it is clear that despite his averment, he knew nothing about the matters referred to in the EAW, the respondent was aware of the trial at first instance, attending a number of hearings in respect of same and was legally represented at same. An appeal against the decision of the court of first instance was lodged by his

counsel and was unsuccessful. In effect, it is the decision of the appellate court which is the subject matter of the EAW and which should be the focus of whether or not s. 45 of the Act of 2003 has been complied with. The EAW as issued was directed towards the judgment at first instance. Subsequent information has established that there was an appeal, and that the respondent did not attend the appeal which was taken on his behalf by his counsel who had also represented him at first instance. That appeal was unsuccessful. He is not entitled to a further appeal as he has already had an appeal. The reference to an appeal in part D of the EAW was in error. Subsequent to the unsuccessful appeal, the respondent communicated with the Polish courts, seeking to have his imprisonment furloughed but was unsuccessful in that regard.

19. The respondent did not put in a further affidavit challenging the information furnished by the issuing authority. He has not sought to establish that his legal counsel was acting without a mandate. It is reasonable in the circumstances to conclude that the respondent mandated his counsel to conduct the proceedings on his behalf and did not withdraw that mandate before the appeal. Therefore, the issuing authority has established, and appropriately indicated, that as regards the appeal hearing, the requirements of table (d) as set out in s. 45 of the Act of 2003 were complied with. As per table (d)2, the respondent was not present for the appeal, and as per table (d)3.2, being aware of the scheduled trial, the person had given a mandate to a legal counsellor who was either appointed by the person concerned or by the State to defend him or her at the trial, and he was indeed defended by that counsel at the trial.
20. Counsel on behalf of the applicant submitted that the contradictions between the details set out in the EAW and the additional information furnished was so significant that the Court should refuse surrender and it would then be up to the issuing state to issue a fresh warrant containing the correct particulars. I reject that submission. The purpose of s. 20 of the Act of 2003 is to allow the Court to seek such additional information as is necessary to allow the Court to carry out its functions under the Act, including seeking additional information to clarify obvious contradictions or ambiguities in the warrant. In this instance, the details in the EAW as regards the requested person, the judgment to be enforced, the sentence to be served and the offences to which the EAW relates, were all correctly set out in the EAW. Part D of the EAW was completed incorrectly and the correct particulars have now been furnished. The Court is entitled to have regard to the additional information in order to clarify and correct any further matters in the EAW, particularly as regards compliance with s. 45 of the Act of 2003 which is a frequent source of difficulty as regards applications before the Court.
21. I am of the opinion that there is no basis for regarding the defence rights of the respondent as having been violated. Further, in my opinion the mischief which article 4a of the Council Framework Decision, dated 13th June, 2002 on the European Arrest Warrant and the Surrender Procedures Between Member States ("the Framework Decision") and s. 45 of the Act of 2003 seek to avoid does not arise in this case.

Delay and the Right to a Private and Family Life

22. As regards the delay in this matter, I am satisfied that a reasonable explanation for same has been given by the issuing authority and the surrounding circumstances have been adequately explained in the report of the Polish law firm relied upon by the respondent. The respondent's rights regarding his family and private life do not appear to raise any exceptional aspect which could justify refusal of surrender. In his affidavit dated 27th February, 2020, the respondent states that he has been living in Ireland since 2015, he is in employment, he is in a long-term relationship and acts as a father figure to his partner's children who are aged 14 and 19. His partner underwent spinal surgery and is on disability allowance, and he avers that she requires constant care. His partner, Katarzyna Legut, in her affidavit dated 11th February, 2020, confirms that the respondent takes care of her and the children, that she recently underwent serious spinal surgery and suffers from depression and fibromyalgia. A short medical report is exhibited in her affidavit which indicates that she underwent a C5/6 decompression in 2013 and suffers from arthritis of the knee, fibromyalgia and depression.
23. In *Minister for Justice and Equality v. Vestartas* [2020] IESC 12, the Supreme Court emphasised the public interest considerations inherent in the Act of 2003 and the Framework Decision, and that a high threshold had to be reached before a court would refuse surrender on grounds such as delay or article 8 rights under the European Convention on Human Rights. MacMenamin J. stated:-
- "[89] Though a matter of legitimate concern, in this case the delay is to be viewed against the respondent's private and family circumstances. Unless truly exceptional or egregious, delay will not alter the public interest, although there may come a point where the delay is so lengthy and unexplained as to constitute an abuse of process, or to raise other constitutional or ECHR issues."*
- It is a reality that the imposition of a term of imprisonment is disruptive of family life and will have adverse consequences, not only for the person convicted, but also in many cases for other family members. The circumstances as set out in the affidavits of the respondent and his partner fall far short of being truly exceptional or egregious so as to justify a refusal to surrender.
24. I dismiss the respondent's objections to surrender.
25. I am satisfied that the requirements of s. 45 of the Act of 2003 have been met.
26. I am satisfied that the surrender of the respondent is not prohibited under part 3 of the Act of 2003.
26. It follows that this Court will make an order pursuant to s. 16 of the Act of 2003 for the surrender of the respondent to Poland.