[2020] IEHC 59

THE HIGH COURT

[2019 No. 324 EXT]

BETWEEN

MINISTER FOR JUSTICE & EQUALITY

APPLICANT

AND

SEBASTIAN GORCZYCA

RESPONDENT

JUDGMENT of Mr. Justice Binchy delivered on the 10th day of February, 2020

1. By this application the applicant seeks an order for the surrender of the respondent to Poland pursuant to a European Arrest Warrant dated 3rd September, 2019 ("the EAW"). The EAW was issued by a The Regional Court of Toruń, as issuing judicial authority ("IJA").

2. The EAW was endorsed by the High Court on 8th October, 2019. The respondent was arrested and brought before the Court on 13th November, 2019. The application first opened before the Court on 3rd December, 2019, was then adjourned until 13th December, 2019, and adjourned again until the 20th December, 2019 following upon directions by this Court, pursuant to s. 20 of the European Arrest Warrant Act 2003 (as amended) (hereinafter "the Act of 2003").

3. At the opening of the application, I was satisfied that the person before the Court is the person in respect of whom the EAW is issued.

4. I was further satisfied that none of the matters referred to in ss. 21 A, 22, 23 and 24 of the Act of 2003 arise, and that the surrender of the respondent is not prohibited for any of the reasons set forth in any of those sections.

5. At para. B of the EAW regarding the decision on which the warrant is based it is stated that an enforceable court ruling suggesting provisional detention does not apply. At para. B.2 "reference number of case in which the decision was rendered" two case file references are given. The first is reference number II K 15/14, described as a cumulative judgment with the force of law of the District Court in Chelmno of 20th March, 2014 cumulating the sentences handed down in three earlier decisions:

    1. The District Court of Chelmno of 20th March, 2003 (II K 136/02)

    2. The District Court of Świecie of 29th May, 2008 (II K 280/06)

    3. The District Court of Grudziądz of 20th January, 2003 (II K 352/02)

6. The second decision is under case file reference number II K 222/04 described as judgment with the force of law of the District Court in Świecie of 18th April, 2013.

7. At para. C.2 of the EAW the length of custodial sentence or detention order imposed is outlined. For reference II K 15/14 this is a cumulative penalty of three years'

imprisonment, adjudicated by a cumulative judgment of the District Court in Chelmno of 20th March, 2014 cumulating the following penalties:

1. One year and six months' imprisonment handed down in case II K 136/02

2. Substitutive penalty of six months' imprisonment handed down in case II K 280/06

3. Two years' imprisonment handed down in case II K 352/02

8. The sentence handed down in case reference II K 222/04 is outlined as a cumulative penalty of one year and four months' imprisonment, by judgment of the District Court in Świecie of 18th April, 2013.

9. At para. C.3 the sentence remaining to be served for reference II K 15/14 is one year, two months and 20 days' imprisonment. For case reference II K 222/04 the remaining sentence is one year and 27 days' imprisonment.

10. In para. D of the EAW it is stated that:

    1. The respondent did not appear in person at the trial resulting in the decision in case file reference number II K 15/14, and nor did he appear in person at the trial resulting in the decision in case file reference II K 280/06.

    2. The respondent did appear in person at the trial resulting in the decisions in all other cases i.e. cases file reference numbers: II K 136/02, II K 352/02 and II K 222/04.

11. In relation to those cases at which he did not appear in person further information is provided in para. D. In the case of file reference number II K 15/14 it is stated that:

> *"The convict was notified, by post on 24th February 2014, about the date of the trial, during which the cumulative sentence was adjudicated. He collected the notification in person. His attorney was present at the trial on 20th March 2014. The cumulative judgment adjudicated by the District Court in Chelmno in case file reference number II K 15/14 was issued at the request of the convict. Thus, both the convict and his attorney were familiar with single sentences with the force of law, which were covered by the cumulative sentence; these sentences were not questioned."*

12. In case file reference number II K 280/06, it is stated that:

> *"The convict did not collect the correspondence, he did not stay at the place of his residence in Poland, his new place of stay was not known, the police officers established that, most probably, Sebastian Gorczyca was staying in the territory of Great Britain. With reference to the above, at the Court's sitting on 29th May 2008 penal judgment in the form of order was issued towards Sebastian Gorczyca. Then, the copy thereof was sent to the last known address of the convict in Poland; the*

convict did not collect the correspondence. The sentence became valid on 19th July 2008."

13. At para. E of the EAW, it is stated that it relates to nine offences. Particulars of the nine offences are set out at para. E.2 of the EAW. However, notwithstanding that this is so, the IJA has also indicated the application of Article 2(2) of the Framework Decision by underlining two categories of offences in para. E.1 of the EAW. These are those relating to forgery of administrative documents and trafficking therein, and, separately, swindling.

14. As a result, there was uncertainty as to which offences the IJA was relying upon Article 2(2) of the Framework Decision. Accordingly, the central authority here sent a letter seeking further information in relation to this and other matters, to the central authority in Poland (in this case The Regional Court of Toruń) on 2nd August, 2019, asking the IJA to explain why a description of all of the offences for which the surrender of the respondent is requested is provided at para. E.2 of the EAW, when two offences on the list at para. E.1 had been selected. In its reply of 3rd September, 2019, the IJA stated that this was done in error, but the IJA did not clarify to which offences it intended the Article 2(2) offences of forgery and swindling to apply.

15. The matter first came on for hearing before this Court on 3rd December, 2019, and this Court directed that further information should be sought from the IJA, pursuant to s. 20 of the Act of 2003, in relation to this and other matters. In its reply of 10th December, 2019, the IJA effectively repeated the reply that it had given to the same inquiry in its letter of 3rd September, 2019. Accordingly, the Court was none the wiser in relation to this issue when the matter next came before the Court on 13th December, 2019 and accordingly this Court directed that yet another inquiry in relation to this matter to clarify those offences which the IJA intended to refer to in ticking the boxes in respect of forgery and swindling. This gave rise to a reply, by return, which stated simply that:

> *"In s. E.2 of the European Arrest Warrant the Court, indicated the detailed description of all deeds for the commission of which Sebastian Gorczyca was sentenced and all these deeds are covered by the European Arrest Warrant."*

Of course this did still not answer the question and so on 20th December, 2019, the Court directed that one last letter should be sent to clarify the issue, and adjourned the matter for one final occasion to 13th January, 2020. By letter dated 2nd January, 2020, the IJA stated that:

> *"…the offences for the commission of which the person described above was sentenced, and which are covered by the European Arrest Warrant are as follows: forgery of administrative documents and trafficking therein; fraud and obtaining of credit under false pretences, whereas in s. E.1 there in no field to contain the enumerated offence consisting in obtaining credit under false pretences and that is why, in s. E.2 the Court included detailed description of each of the offences committed by Sebastian Gorczyca."*

16. By this letter, the Court understands the IJA to state that because some of the offences referred to in the EAW did not fit into the categories of offences set out in para. E.1 (i.e. those referred to Article 2(2) of the Framework Decision), specifically those offences consisting of obtaining credit under false pretences, it decided to provide a detailed description of all offences in respect of which the surrender of the respondent is sought in para. E.2 of the EAW, although in its earlier correspondence it acknowledged that in so doing it did so in error.

17. It is well established that where there is a lack of clarity in an EAW as to those offences which an IJA intends to rely upon para. E.1 of the EAW, the Court will consider if the offences described in the EAW correspond to offences in the law of the state. This is apparent from the decision of Peart J. in *Minister for Justice, Equality & Law Reform v. Paulauskas* [2009] IEHC 32 and the decision of Donnelly J. in the case of *Minister for Justice & Equality v. Ludwin* [2018] IEHC 220 in which case, having found that the IJA had made a manifest error in ticking one of the offences in part E(1) of the EAW, she went on to say, at para. 13:

> *"A number of decided cases have dealt with the situation where the issuing judicial authority has completed part E(1), indicating reliance on Article 2(2) of the 2002 Framework Decision, and part E(II), indicating non-reliance. Following on from the decision of Peart J. in Minister v. Paulauskas [2009] IEHC 32 the High Court has accepted that this not a bar to surrender provided that correspondence has been met".*

18. In the descriptions of the offences provided in the EAW by the IJA, it has used the word "*forged*" on four different occasions, in relation to four separate offences.

19. At para. E.1 of the EAW it is stated that the warrant relates to nine offences. Even allowing for differences of procedures in jurisdictions, and the fact that sometimes separate incidents each of which would amount in itself to an offence are amalgamated so as to constitute a single offence, it is difficult reading this EAW to understand why it is stated to relate to nine offences.

20. This is so because particulars of the convictions giving rise to the sentences for which the surrender of the respondent is sought are provided in para. E of the EAW, and it appears to me that there are no less than fifteen incidents, each of which constitutes an offence. The respondent was convicted of these offences over the course of four different court proceedings, under the file references set out at para. 5 above. While there is some uncertainty as to those offences upon which the IJA relies upon Article 2(2) of the Framework Decision, there cannot be the slightest doubt but that in relation to those offences in which it is expressly alleged that the respondent either forged a document or made use of a forged document, the IJA intended to rely upon the offence described as forgery of administrative documents and trafficking therein in the Article 2(2) list of offences. It would in my view be absurd to conclude that the requesting state could not rely upon the ticking of that box in relation to those offences.

21. In relation to all other offences however, these must comprise a mixture of offences in respect of which the IJA intended to rely upon the Article 2(2) offence of swindling, and others in respect of which it did not intend to rely upon the Article 2(2) list at all. It is no function of this Court to attempt to distinguish one from the other. Where there is a lack of clarity about those offences in respect of which an IJA is relying upon the Article 2(2) list, the executing state cannot place any reliance on the latter and must instead consider whether or not the acts comprising those offences as set out in the EAW (and, if applicable, additional information) would, if committed in the State, constitute an offence in this jurisdiction.

22. So far as these proceedings are concerned, the upshot of the above is as follows. Case file reference II K 280/06 refers to two offences. The first was committed on 12th July, 2000 and it is stated that in committing this offence, the respondent made use of a forged employment certificate. In the second offence of 27th September, 2000, it is stated that the respondent had "*previously forged the certificate"* (this appears to refer also to an employment certificate). Accordingly, it is not necessary for the applicant to demonstrate correspondence in relation to the offences the subject of file reference II K 280/06.

23. Under the heading of file reference II K 352/02, particulars of four offences are provided. The first of these offences is stated to have occurred in 23rd November, 2001, and it is stated that the respondent forged the signatures of two persons on the contract of sale of a vehicle. The applicant is not required to prove correspondence as regards this offence.

24. Under the same file reference, the EAW then describes two offences of car theft, one that occurred on 27th January, 2002, and another that occurred on 5th February, 2002. These acts would clearly correspond to offences under s. 4 of the Criminal Justice (Theft and Fraud) Offences Act 2001 ("the Act of 2001").

25. The final offence described under case reference II K 352/02 states that the respondent, acting in concert with others, and in order to gain material benefit, demanded from the owner of a stolen vehicle a sum of money for the return of the illegally seized vehicle. Counsel for the applicant submitted that this would constitute an offence under s. 18 of the Act of 2001, relating to the possession of stolen property. He also suggested that it may be an offence under s. 17 of the Criminal Justice (Public Order) Act 1994 which creates the offence of making an unwarranted demand with menaces. Since there is no indication of menaces in the acts as described, I think it unlikely that the acts as set out could constitute an offence under the latter section. However, the acts described would, I believe, constitute an offence under s. 18 of the Act of 2001, and it was not argued to the contrary.

26. Under file reference II K 136/02, there is a description of just one offence in which it is stated that the respondent acted so as to gain material benefit, and in concert with another, he "*had the personnel of the shop dispose disadvantageously of the property at the amount of 2370.74 PLN, which resulted in conclusion of the credit contract he had no intention to pay back*". It is reasonable to infer that this means that the respondent obtained goods from a shop pursuant to some kind of credit agreement which he had no

intention of honouring. Counsel for the applicant submitted that this would constitute an offence under s. 6 of the Act of 2001. That section provides that "*A person who dishonestly, with the intention of making a gain for himself or herself or another, or of causing loss to another, by any deception induces another to do or refrain from doing an act is guilty of an offence"*. I agree that on the basis of the brief description of the acts set out in the EAW, they would constitute that offence if committed in this jurisdiction. Counsel for the respondent did not submit otherwise.

27. Particulars of eight offences are provided under file reference no. II K 222/04. In three of these, being offences committed on 29th December, 1999, 4th April, 2000 and September, 2000 (the precise date is not provided) it is stated that the respondent used (on each occasion) a forged employment certificate. It is not necessary to prove correspondence in relation to these offences. As regards the other offences:

28. It is stated that on 10th May, 1999 the respondent "*misleading the wronged bank as to the fact of having resources on the bank account, which in fact he had not, he cashed five cheques for the total amount of 1,456.48 PLN.*" It is submitted that this would constitute an offence under s. 6 of the Act of 2001. It was not argued otherwise, and I agree.

29. It is stated that on 27th March, 2000 the respondent, acting so as to gain material benefit, concluded a credit contract for the purchase of goods "*as a result of misleading as to the possibility and intention to fulfil the obligation incurred, by which he caused the losses at the amount of 555.98 PLN to the detriment of the wronged party*". Again it is argued that this would be an offence under s. 6 of the Act of 2001, and again it was not argued otherwise. It is clear that this paragraph states that the respondent mislead another party when he entered into a credit contract to purchase goods, and caused that party a loss. Such acts, if committed in this jurisdiction, would in my view amount to an offence under s. 6 of the Act of 2001.

30. It is stated that on 7th July, 2000, acting in concert with another, he certified an untruth in a document relating to remuneration gained, which document was used to mislead the "wronged party" as a result of which the respondent obtained credit in the amount of 800 PLN. This again would correspond to an offence under s. 6 of the Act of 2001.

31. An almost identical offence is stated to have occurred on 16th October, 2000 which would also constitute an offence under s. 6 of the Act of 2001.

32. Finally, it is stated that in a period between July and August, 2000 the respondent *"implementing the premeditated intent, he aided another person to sell and hide diesel and heating oil originating from the offence of the value not less than 14,400 PLN."* Counsel for the applicant submitted that the acts as described indicate that the respondent was convicted of handling stolen property, contrary to s. 17 of the Act of 2001. Counsel for the respondent on the other hand submitted that the acts do not indicate any such thing. I agreed with counsel for the respondent that the particulars provided are inadequate to establish correspondence with any offence in this jurisdiction, and so I directed that a request for further information should be made for greater details

of the particulars of this offence. This request was made by letter from the central authority here on 3rd December, 2019, to which a reply was given on 10th December, 2019 in relation to this and other matters. As regards this matter it is stated:

> *"In July, 2000, Dariusz Peron concluded the contract with Szostka Production and Commercial Enterprise Limited Liability Company in Swiecie; pursuant to this contract the payment for the taken fuel was to be paid within 7 days from issuing of the invoice. In the period from July 2000 to 23rd August 2000 Dariusz Peron collected in total 11,400 litres of fuel from this enterprise. Sebastian Gorczyca helped him to sell the oil and he knew oil was obtained by a prohibited act. On 18th April, 2013 at the trial in case file reference number II K 222/04 Sebastian Gorczyca pleaded guilty to the commission of all deeds charged thereto."*

33. In my opinion, these particulars establish no more than that the respondent assisted another person to sell oil for which he knew that other person had not yet paid the supplier. While it is stated that the oil was "*obtained by a prohibited act*", it is unclear precisely what is said to have constituted the prohibited act. The person with whom the respondent was working acquired the oil pursuant to a contract. He did not pay for the oil within the period stipulated. It is difficult to see how any of this could constitute an offence on the part of the respondent, if those acts were carried out in this jurisdiction. That being the case, the respondent cannot be surrendered in relation to his conviction for this offence in Poland. It is then necessary to consider the implications of this in relation to all of the other offences which are mixed together with this offence for the purposes of the imposition of a cumulative penalty of one year and four months under case file reference no. II K 222/04.

34. Before doing that however, it is necessary to address another difficulty that arises in the context of s. 45 of the Act of 2003. From the particulars furnished, it appears to this Court that there were five different occasions that would fall within the description of a "trial resulting in the decision" as that term has been interpreted by the Court of Justice of the European Union in the case of *Tupikas* (C 270/17 PPU). The respondent was present in court for three of those occasions. The two occasions on which he was not in court were for the decisions given under file reference no.s II K 15/14, and II K 280/06. As regards the first of these, the file reference no. II K 15/14, this is described as being a *"cumulative judgment with force of law of the District Court in Chelmno of 20th March, 2014 cumulating the following sentences*", and it then goes on to refer case file references no.s II K 136/02, II K 280/06 and II K 352/02. Later in the EAW, it is stated that this cumulative judgment was issued "*at the request of the convict*", the EAW then goes on to state "*thus, both the convict and his attorney were familiar with single sentences with a force of law, which were covered by the cumulative sentence; these sentences were not questioned*". As regards the notification for these proceedings under file reference II K 15/14 it is stated that the respondent was notified by post and it is further stated that he collected the notification in person, and that his attorney was present at the trial on 20th March, 2014. That in my view disposes of any difficulty as

regards the non-attendance by the respondent himself at these proceedings, i.e. the proceedings resulting in the judgment of 20th March, 2014, under reference II K 15/14.

35. However, as regards the proceedings under file reference no. II K 280/06, the sentence for which formed part of the consideration of the court under file reference no. II K 15/14, it is stated that the respondent did not collect correspondence notifying him of the trial of these proceedings which took place 29th May, 2008. This appears to be the date upon which the respondent was convicted of this offence. It is further stated that a copy of the judgment was sent to the respondent at his home address, but he did not collect the correspondence, and that the sentence then handed down became valid on 19th July, 2008.

36. From all of the above, the following emerges. The surrender of the respondent is sought in connection with two court judgments, reference number II K 15/14 and reference number II K 222/04. The first of these judgments arose from an application made by the respondent himself to "cumulate" three different sentences previously imposed upon him in case file reference numbers II K 136/02, II K 352/02 and II K 280/06. The issue of the guilt/innocence of the respondent in connection with the offences with which he was charged at these trials underlying case reference number II K 15/14 was not addressed at that trial, which appears to have been concerned only with the amalgamation of penalties imposed in the underlying trials. Although it is not stated in this case, in other cases this "accumulation" or aggregation of sentences frequently results in a reduction in the overall sentence, but whether or not it did so in this case is not material to the decisions the court must make.

37. I am satisfied that the requirements of the Act of 2003 have been met as regards the judgment resulting from case file reference number II K 15/14, and the underlying trials (i.e. arising from case file reference numbers II K 136/02, II K 280/06 and II K 352/02) in all bar one respect, and that is the respondent was not in attendance at the trial at which his guilt was determined in case file reference number II K 280/06. Nor have any of the circumstances set out in the table attached to s. 45 of the Act of 2003 (as amended) been indicated as being of application. This means that the surrender of the respondent in connection with his conviction for the offences to which case file reference number II K 280/06 is prohibited. This is because while s. 45 of the Act of 2003 is satisfied as regards the penalty ultimately imposed in respect of this and other matters on 20th March, 2014, it is not met as regards the hearing at which the guilt of the respondent was determined in respect of this matter, on 29th May, 2008.

38. This results in a further complication by reason of the fact that his sentence in respect of those proceedings has become enmeshed with the sentence imposed on him in connection with the offences, the subject of case file reference numbers II K 136/02 and II K 352/02. It is clear from the decision of the Supreme Court in *Minister for Justice, Equality and Law Reform v. Ferenca* [2008] IESC 52 that, in such circumstances, surrender is usually prohibited in respect of all offences because it is not possible to

disentangle the penalty imposed in connection with the offence for which surrender is prohibited, from those in respect of which surrender may be allowed.

39. A similar difficulty arises in connection with one of the incidents giving rise to the conviction of the respondent in case file reference number II K 222/04. It will be recalled that I have ruled that one of the incidents concerned is neither covered by the invocation of Article 2(2) of the Framework Decision, and nor do the facts giving rise to the conviction for that offence correspond to an offence in this jurisdiction. Since the penalty for this matter is also a cumulative penalty imposed on the respondent in connection with seven other incidents, it is not possible to disentangle the matter in respect of which surrender is prohibited from those in respect of which it is permitted.

40. That said, however, this Court was previously informed in other proceedings where a similar difficulty arose, that in those proceedings it would be open to the respondent concerned to make application to have the penalty imposed on him pursuant to the cumulative judgment reduced proportionately to reflect the fact that he was not being surrendered for one of the offences to which that cumulative penalty related. On that basis, in those proceedings, surrender was ordered. This does not appear to have been an option in the proceedings before the Supreme Court in *Ferenca*.

41. In case such a mechanism is available in this case, I will make a further request for information of the IJA, pursuant to s. 20 of the Act of 2003 and I will defer making a decision on the surrender of the respondent pending receipt of an answer to these questions which are:

    1. If the surrender of the respondent is refused in connection with any one or more of the offences of which the respondent has been convicted, but in respect of which he has received a cumulative penalty, is it open to the respondent to make application to the court to have the cumulative penalty imposed upon him reduced proportionately to reflect the fact that his surrender has been refused in connection with a specified offence or offences?

    2. If it is open to the respondent to make such an application to court, is he assured that the relevant sentence or sentences will be reduced proportionately so that the sentences that he will be required to serve will relate only to those offences for which he has been surrendered?

    3. If such an application to court is available to the respondent, will it be conducted by way of an oral hearing at which the respondent may be present and represented by a lawyer of his choosing?

42. If the court can be satisfied that, if surrendered, the respondent is assured that his sentences will be reduced proportionately to reflect the decision of this Court that he is not being surrendered in connection with the offences to which I have referred, then I will direct his surrender in connection with all other offences.