[2020] IEHC 84

THE HIGH COURT

IN THE MATTER OF THE

EUROPEAN ARREST WARRANT ACTS 2003 AND 2012

[2017/55/EXT]

BETWEEN

THE MINISTER FOR JUSTICE AND EQUALITY

APPLICANT

AND

MACIEJ LEOPOLD

RESPONDENT

JUDGMENT of the Court delivered (ex tempore) on the 30th day of January, 2020 by Ms. Justice Donnelly

1. The European arrest warrant before the Court issued on 13th February, 2017 by an issuing judicial authority (hereinafter, "IJA") in Poland. The issuing authority seeks the surrender of the respondent to prosecute him there for six offences allegedly committed between 2002 and 2006.

2. There is a very long history in relation to this application. Over the past 10 years, Poland has sought the surrender of this respondent in relation to different matters on seven occasions. Some of these relate to other offences than the present offences and I will refer in more detail to the requests and various warrants below.

3. The issue that I am primarily dealing with in this judgment is the respondent's argument that the surrender is prohibited on the grounds of an issue estoppel, a *res judicata* or any form of abuse of process based upon the exceptional circumstances of this case. It is important therefore to deal with the chronology of what has occurred since European Arrest Warrants (hereinafter, "EAW's") were issued for this respondent in Poland.

Chronology

4. EAW 1 issued on the 11th May, 2010 and was endorsed on the 7th July, 2010. EAW 2 was issued on the 19th July, 2010 and was endorsed on the 22nd September, 2010. EAW 1 contained a single offence. EAW 2 referred to twelve offences. Only six of those offences are contained in the present offence which is called EAW 7.

5. The respondent was arrested on the 27th June, 2011 on foot of the two EAW's: EAW 1 and EAW 2. On the 7th December, 2011, the High Court ordered his surrender under s.16 in respect of the single offence on the 30th November, 2011. That Order for surrender concerned the two warrants [2010 71 EXT] (EAW 1) and certain of the offences outlined in the second warrant (EAW 2) [2010 352 EXT]. It is accepted that Edwards J. in the High Court refused to surrender the respondent on EAW 2 in respect of five of the six offences, the subject matter of the present application. Edwards J. ordered his surrender in respect of the other offences in EAW 2. What is relevant to the present proceedings is that his surrender was ordered on offence E (V), namely the offence allegedly committed on 24th March, 2005 in Poznan. This is the same offence as offence No. V in the present warrant (EAW 7), contained at part E (C) therein.

6. On 28th December, 2011, the High Court ordered the respondent's release pursuant to Article 40.4 of the Constitution. This appears to have been in circumstances where his surrender was not effected by Poland within the time allowed, and I will return to this later in the judgment. From the information before this Court it appears there has never been a clear indication from Poland as to why they did not effect surrender within that time period.

7. Since the release under Article 40 there have been a number of relevant events. These have been set out in a very comprehensive chronology prepared by the Chief State Solicitor's Office. I accept that chronology and it is incorporated into this judgment.

8. I will point to a number of brief matters. EAW 3 and 4 were issued in Jan/Feb 2012 and were endorsed in May/June 2012 by the High Court. EAW 3 contains the same six offences for which surrender was sought on EAW 1. A fifth EAW issued on the 7th January, 2013 and was endorsed on the 19th March, 2013. The respondent was arrested on the 23rd April, 2013 in respect of this EAW. EAW 5 also contained the same six offences as EAW 1 and EAW 7.

9. Over a number of months, these matters were adjourned. It appeared that the Polish authorities were seeking to replace EAW 3. On the 8th November, 2013 the Minister applied to withdraw EAW 3 on the basis of additional information provided by the Polish authorities.

10. The respondent was afforded opportunities by the High Court to engage with the IJA's. In Poland, he has engaged with the prosecutorial and judicial authorities in attempting to deal with offences underlying the warrants by way of applications to the Polish authorities. Over the course of his engagement, it was made known to this Court that he has been successful in many of the offences on the various warrants. For example, he reached agreement in respect of a large number of offences to be interviewed in the Polish Embassy in respect of same.

11. On the 3rd December, 2012, EAW 4 was withdrawn at the request of the Minister following further information.

12. EAW 5 was adjourned repeatedly at the request of the respondent initially because of his application to the Polish Court, but later because of his desire to await the decision of the Supreme Court in the case of *Minister for Justice and Equality v Lipinski* [2017] IESC 26 (which was referred to the Courts of Justice of the European Union (hereinafter, "CJEU")), but was not decided by them in light of the intervening decision in the case of *Samet Ardic (Case C-571/17)*, ECLI:EU:C:2017:1026.

13. On the 30th May, 2016, the High Court endorsed EAW 6 dated the 8th April, 2016. EAW 6 contained the same six offences as EAW 1 and EAW 7. There was an application to withdraw EAW 5 on the 13th June, 2016 and that was granted. The respondent was arrested on EAW 6 on the 8th April, 2016. EAW 6 was then adjourned pending the determination of the Lipinski case.

14. EAW 7 was endorsed on the 13th March, 2017 and on that date, EAW 6 was withdrawn. The respondent was arrested on the same date on EAW 7. The matters then proceeded before this Court.

15. It is noteworthy that the cover letter sending the EAW states that this is a partially amended EAW because the Circuit Court in Poznan had decided to call off the search for the respondent in respect of matters A and B referred to in EAW 6. This was in response to the successful application by the respondent to deal with those matters in another manner.

16. The respondent sought time to deal with the outstanding matters on EAW 7 in Poland and in light of what had occurred, he was granted time. In relation to these offences this particular prosecutor would not agree to him being interviewed in the embassy in Dublin. The matter had a hearing date in March 2018 but the respondent sought to raise what I will term, a "*Celmer*" type argument about the situation in relation to judicial independence in Poland. The Court acceded to that adjournment and the matter was adjourned from time to time on that basis. It was only on the 28th January, 2020 that the matter was finally put in for hearing before me; the *Celmer* case having been finally determined by the Supreme Court. There being nothing advanced specifically with regard to this respondent's situation, and the risk to him personally of an unfair trial, I am satisfied that there is no reason by virtue of a fair trial reason as to why he cannot be surrendered to Poland, and indeed that has not been advanced in this particular case, apart from the earlier generalities.

17. The position therefore is that EAW 7 is to my best calculation, the fifth EAW for which his surrender has been sought in respect of these particular matters. It is also apparent that, subject to my further consideration of the initial decision of this Court to refuse surrender, that the reason why so many EAW's have issued is to take into account the domestic proceedings in which the respondent has successfully challenged the underlying orders. This resulted in the necessity for the Polish judicial authorities to reissue EAW's to take into account the changed requests for his surrender that were then being made. It is also the case that the respondent sought and was granted delays in the final determination of his cases on the basis of legal issues which required to be determined by the appellate courts.

18. The respondent seeks to argue that his surrender should be refused on the grounds that delay has led to an abuse of process and/or that to return him would be oppressive due to that delay, and/or due to the multiplicity of warrants as well as his own circumstances and also the fact that his surrender has previously been refused in relation to five out of six of these offences.

19. Further, the respondent seeks to argue that the High Court is bound by the finding of Edwards J. that the respondent could only be surrendered on one out of the six charges which are currently before the Court.

The Law

20. There is no disagreement between the parties that there is no prohibition or bar to a second, or indeed subsequent EAW's issuing in relation to the same proceedings. In *Minister for Justice and Equality v. Koncis* [2011] IESC 37, Denham C.J. stated: -

> *"While there is no express provision in the European Arrest Warrant Act 2003 as amended, referred to as 'the Act of 2003', for a second warrant to 'go again', it is not expressly excluded. I am of the opinion that as long as the procedures are in accordance with the Act of 2003 and that fair procedures have been followed that there is no reason why a second warrant on the same offences could not be issued, it would depend on all the circumstances of the case."*

21. The above dicta requires that the circumstances of every individual case must be the focus of any examination for the Court. It is also of significance that the CJEU has, in a decision of the 25th July, 2018 in the case of *A.Y. (Case C-268/17)*, ECLI:EU:C:2018:602, held that a judicial authority of an executing Member State is required to adopt a decision on any EAW forwarded to it, even where a ruling has been made on a previous EAW concerning the same person and the same acts and the second EAW was only issued on account of the indictment in the issuing Member State of the person concerned.

22. I am therefore satisfied that I must make a decision on this EAW in accordance with the law pertaining to EAW's. This does not mean that I have no regard to the legal requirements as to how I must approach the task in hand but I must engage at least with this EAW.

23. The Minister and the respondent have relied on many of the same cases often quoting similar *dicta*. These cases are *Bolger v. O'Toole* [2008] 4 I.R. 780, *Heywood v. Attorney General* [2008] IESC 60, *Minister for Justice and Equality v. Tobin* [2012] 4 I.R. 147, *Minister for Justice v. J.A.T. (No. 2)* [2016] 2 I.L.R.M. 262.

24. In my view, the case of *Minister for Justice and Equality v. Bailey* [2017] IEHC 482 also has relevance as does the decision of the Court of Appeal in *Minister for Justice and Equality v. Downey* [2019] IECA 182.

25. In relation to the position as to res *judicata*, I do not understand the respondent to press this issue with any seriousness. It is necessary to note the following: it is not the law that the question as to surrender is a matter that is finally decided when a surrender is refused. That is inherent in the decisions of *Koncis, Bolger* and *Heywood* cited above. While it may well be that some of the judgments refer to *res judicata* not applying where the issues are technical ones, I am not satisfied that this means that where there has been a decision on the merits of a particular case that that issue cannot be questioned at all. Indeed, in light of the decision in *A.Y.*, I am satisfied that an executing judicial authority charged with making a decision on an EAW is bound to act judicially in considering the matter. It may be that the principle of legal certainty or *stare decisis* may cover a point at issue, but that is different to saying the precise principle of res judicata applies.

26. In accordance with O'Donnell J. in *J.A.T. (No. 2),* I am satisfied that "*when a fresh warrant is issued, its validity becomes a separate issue. It is not res judicata because the issue under the new warrant has not been decided.*" In my view, that *dicta*, which accords with the decision in *A.Y.*, must be taken as superseding any reference in *Attorney General v. Gibson* (Unreported, Supreme Court, Keane C.J., 10th June, 2004) to the possibility of *res judicata* arising where there has been a final adjudication made within the jurisdiction. That latter case applied to extraditions rather than surrender under the 2003 Act. I do note that Murray J. in Tobin expressly stated that the issue of *res judicata* did not arise in *Tobin* as it had been conceded that it did not arise. I am satisfied however, that *res judicata* does not apply to my consideration of this issue.

27. In relation to the question of issue estoppel as distinct from abuse of process or *res judicata*, the Supreme Court authority is not so definitive. Murray J. in *Tobin* stated at para. 145 that *"res judicata should not be confused with the subsidiary principle of issue estoppel which would apply in extradition cases."*

28. Hunt J. in *Bailey* understandably had significant regard to this *dicta*. He considered that no other case clearly denied the applicability of issue estoppel in surrender cases. From the cases he cited, he was of the view that there was no reason to exempt extradition litigation from the rationale behind the issue of estoppel. He held that the fact that extradition litigation takes the form of an inquiry rather than an adversarial context makes no difference to this conclusion. There is, according to Hunt J. at para.15:-

> *"the same interest in finality and certainty in relation to the outcome of such inquiries as there is in other cases, together with the same necessity to avoid the parties to such inquiries and the courts conducting same being vexed repeatedly with issues previously and conclusively decided as between the same parties."*

29. In *Bailey*, the decision in question had been a reasoned one of the Supreme Court. I should note at this stage that Hunt J. separately held that the doctrine of *stare decisis* prevented surrender as he was bound by the decision of the Supreme Court.

30. In respect of the question of whether an issue estoppel arises in the present case, it's important to note that the earlier decision of Edwards J. was a reasoned decision of the High Court in respect of the issue of correspondence of offences. His judgment, although *ex tempore*, had been given the following day after it appears, significant legal argument which spanned over two days. The judge made the decision within jurisdiction and while he may or may not have been correct or incorrect in that decision, it was one which affected the parties. The Minister never appealed that decision. It should also be noted that the decision was one made between the same parties *i.e.* the Minister and the respondent, and both parties had their opportunity to deal with this matter in terms of the facts and the law. I should also note that it has not been opened to me that the law on correspondence of offences has changed in the intervening time, although even if it had that would have invoked a different argument based upon the reasoning of two of the five Supreme Court judges in *Tobin.* I should also say that the issue of whether offences correspond to offences in this jurisdiction are matters which require deep consideration of

the ingredients of criminal offences in this jurisdiction when compared with the facts that are set out on the warrant requesting surrender. A decision on correspondence goes to the heart of the issue of whether surrender/extradition is permitted. It is not a technical issue of the type which had resulted in the District Court refusing the extradition in *Bolger*, by way of example. It is also important in that respect, that EAW 7 (the present EAW) does not "*correct*" any defect in the original warrant. There is no new information provided to this Court. It is the same request being repeated in exactly the same manner. This Court is being asked to decide exactly the same issue on the same facts, *i.e.* is there correspondence of offences? The Minister seeks to argue that at least another offence should be considered for the purpose of making a decision on whether there is actually correspondence of an offence. In so far as we are considering whether there is an issue estoppel, the situation is therefore, that all factors and all parties are the same, save that the Minister wants to put forward a new offence for consideration by the High Court, that is, a new legal argument for consideration. The Minister also makes the request, but the Minister also makes a request to this Court to carry out its own assessment of correspondence with regard to the full panoply of offences which could be covered, including those considered by Edwards J. but rejected by him.

31. In terms of the *ratio* of the decision in *Bailey*. It is striking that the Minister never appealed the decision of Hunt J. in *Bailey*. The principle of *stare decisis* applies to that decision. In *Re Worldport Ireland Limited (In Liquidation)* [2005] IEHC 467 Clarke J in the High Court stated: -

> *"I have come to the view that it would not be appropriate, in all the circumstances of this case, for me to revisit the issue so recently decided by Kearns J. in Industrial Services. It is well established that, as a matter of judicial comity, a judge of first instance ought usually follow the decision of another judge of the same court unless there are substantial reasons for believing that the initial judgment was wrong. Huddersfield Police Authority v. Watson [1947] K.B. 842 at 848, Re Howard's Will Trusts, Leven & Bradley [1961] Ch. 507 at 523. Amongst the circumstances where it may be appropriate for a court to come to a different view would be where it was clear that the initial decision was not based upon a review of significant relevant authority, where there is a clear error in the judgment, or where the judgment sought to be revisited was delivered a sufficiently lengthy period in the past so that the jurisprudence of the court in the relevant area might be said to have advanced in the intervening period. In the absence of such additional circumstances it seems to me that the virtue of consistency requires that a judge of this court should not seek to second guess a recent determination of the court which was clearly arrived at after a thorough review of all of the relevant authorities and which was, as was noted by Kearns J., based on forming a judgment between evenly balanced argument. If each time such a point were to arise again a judge were free to form his or her own view without proper regard to the fact that the point had already been determined, the level of uncertainty that would be introduced would be disproportionate to any perceived advantage in the matter being reconsidered."*

32. *Bailey* is a judgment which is binding on this Court unless there are substantial reasons for believing that the judgment is wrong. In my view, there is nothing obvious in the Irish decisions opened to me that suggests that there was a clear error in the application of the principle of issue estoppel. The only decision opened to this Court that might throw some further light on this issue was that *of A.Y.* which was decided subsequent to *Bailey*. I do not understand that decision to set aside principles of legal certainty such as those that may incorporate questions of issue estoppel. At least, it does not do so to the extent that I could be satisfied that there is a substantial reason to believe the decision of Hunt J. was wrong. In my view, all that *A.Y.* appears to state is that an executing judicial authority is required to take a decision on each EAW that is presented for execution. That does not however, say how or what legal principles must be applied to the taking of that decision.

33. In those circumstances, I am of the view that I am bound by the decision of Edwards J. in so far as there was an issue estoppel involved as regards the correspondence of offences. Therefore, I must refuse his surrender on offences C/ I, II, III, IV and the single offence in D.

34. The only remaining offence is Offence V. I have carefully considered the transcript of Edwards J. He gave full consideration to the question of correspondence and found correspondence with the offence of an attempt to make a gain or cause a loss by deception contrary to s. 6 of the Criminal Justice (Theft and Fraud) Offences Act, 2001. On the basis of the decision in *Bailey*, I am also bound to follow the decision of Edwards J. as there is an issue estoppel between the parties. That is not the end of the matter however as I now must consider whether it would be an abuse of process not to surrender him.

Abuse of Process

35. Peart J. in *Downey* stated at para.19 as follows:-

> *"It is clear from J.A.T (No. 2) that there can be circumstances which justify the High Court refusing an application for surrender on the basis of abuse of process. But it is equally clear firstly that such cases require some exceptional circumstance to justify such refusal, but, and critically, that the abuse asserted to exist must be of the processes of the High Court here dealing with the application for surrender, and therefore must relate to the application for surrender itself, and not to the prosecution of the offences which the respondent will face if he/she is surrendered. The different question whether there might be an abuse of process were the respondent put on trial for the offences for which surrender is sought is not a matter for determination in this jurisdiction on an application for surrender. Absent any suggestion that there is no possibility of a fair hearing of any application to have his trial on these offences stayed, and there has been no such suggestion made by the appellant, it is in my view clear that any such question of abuse of process will be a matter to be pursued by the appellant before the courts in the requesting jurisdiction."*

36. Both sides agree that the abuse of process jurisdiction exists and there is no question in the present case as regards abuse of process in relation to the respondent's trial in Poland and I have dealt with the fair trial issues. What is at issue is whether it is an abuse of process to surrender him; in other words, is it an abuse of the High Court's process.

37. In my view the most authoritative *dicta* on abuse of process comes from the decision of the Supreme Court in *J.A.T. (No.2).* O'Donnell J. with whom the other members of the Court agreed, stated that something is either an abuse of process or it is not. He cautioned courts to be wary of introducing a concept of duty of care into the consideration of warrants. He also acknowledged the considerable weight to be attached to the public interest in ensuring that persons charged with offences face trial and referred to international and EU obligations on Ireland under extradition and surrender agreements.

38. In upholding the decision to refuse surrender, O'Donnell J. referred to three factors which were asserted cumulatively as leading to an order to refuse to surrender. With regard to the first factor he stated as follows: -

> *"The first factor is the undoubted fact that the first warrant was found to be defective by order of this Court, and this is a repeat application. It is important, in my view, to maintain, however, the clear distinction between the principles of res judicata and the closely associated principles established in Henderson v. Henderson and A.A. v. The Medical Council [2003] 4 IR 302, on the one hand, and the law relating to warrants on the other. Henderson v. Henderson deals with the question of a full inter partes hearing of civil proceedings under a process designed to ensure that the true issues between the parties are identified (if necessary by amendment of pleadings) and determined. The position in relation to warrants is fundamentally different. Importantly, there is no process of amendment. The issue is the validity of the warrant as issued. Strictly speaking, when a fresh warrant is issued, its validity becomes a separate issue. It is not res judicata because the issue under the new warrant has not been decided. Technically (and this is a technical issue) the issue now is the validity of the new warrant. Nor is it appropriate to try to apply the concepts of bringing all claims at the same time. In the case of warrants, that would amount to saying that only one warrant could ever be issued. For these reasons and more, it has always been held that the fact that an initial warrant has been found to be defective does not preclude the issuance of a further warrant. (See ex tempore judgment of Denham J. in Bolger v. O'Toole (Unreported, Supreme Court, 2nd December, 2002) and ex tempore judgment of Keane C.J. in Attorney General v. Gibson, (Unreported, Supreme Court, 10th of June, 2004). Indeed, it could be said that this is part and parcel of the law which also requires that warrants should be scrutinised with rigour. For my part, therefore, I do not think that concepts such as oppression and harassment by repeated application, which employs part of the language used in Henderson v. Henderson, should be used in dealing with warrant issues. There may be circumstances in which the repeated issuance of warrants may be prohibited, either because of bad faith, the seeking of tactical advantage, or otherwise. It may also*

be appropriate to consider the impact on an individual of repeated applications. But those situations require to be analysed in the context of the law relating to warrants, and not of some hybrid version incorporating the principle in Henderson v. Henderson."

39. I must therefore take into account the various issues in this case.

40. The first issue I have regard to is that this is the fifth application for his surrender in respect of this matter. While the fact of repeated warrants is not determinative of the issue, it must be noted that this is certainly an unusual number of requests. It is however important to note that the main reason (apart from the first to which I will return) for this number of warrants is that he has been successful in domestic proceedings and/or applications to reduce the number of offences for which his surrender is sought. In favour of the respondent is that it appears there may well have been less intrusive means of pursuing him in respect of these offences in the first place.

41. It is of considerable importance that his extradition was ordered on this matter on the 30th November, 2011. A stay was put on the order for surrender later, but by 16th December, 2020 the order for surrender was operable. He was not surrendered in time and on the 28th December, by consent, his Article 40 application was conceded and he was released. He had spent some time in custody.

42. On considering this matter over the past two days, I came across a reference to a letter that the Minister for Justice and Equality had sent to the Polish IJA. It occurred to me that this might have explained why the respondent had not been surrendered. By letter contained at page 183 of the booklet, the Polish IJA had noted that EAW 1 "*could not be executed due to the formal reasons on your side, which you informed this Court about in your letter of 9th January 2012*". I now have the letter of the 9th January, 2012 and it gives to the Polish authorities an explanation as to why the Minister thought he had further time in which to effect the surrender. It appears that a surrender date had actually been agreed for the 28th December, 2011 which is the date he was actually released pursuant to an order under Article 40.4 of the Constitution. It cannot be said that the Polish authorities were in default by not surrendering him in time, and it is clear that the Minister appears to have made an error based on a misinterpretation of a new piece of legislation. In that regard, I want to make it clear that I do not consider that the error was grossly negligent or made through want of diligence but was simply an error of interpretation that unfortunately but perhaps unsurprisingly in the context of complex legislation, can occur.

43. After being notified of the problem with surrender, it seems that there was reasonable diligence by the Polish IJA thereafter and the warrant was transmitted in due course and endorsed. The respondent was not arrested until sometime later in October, 2012 and I have no explanation as to why it took those months to arrest him, because it appears that he was arrested by arrangement at the CCJ.

44. The subsequent delays are as set out above.

45. Nowhere in the voluminous set of papers that I have, does it explain why the Polish authorities were of the view that they were entitled to seek his extradition for the other offences, the offences for which Edwards J. had refused to surrender. According to *A.Y.,* it seems that no matter what, there is an onus on this Court to take a decision. I have not been provided with any correspondence that would indicate that the Polish authorities were told of the refusal of surrender for some of these offences. I do note however that at the beginning of the proceedings on EAW 7, it appears that both the Minister and respondent were operating on the basis that there had been a surrender in relation to five out of six offences, and not a refusal of five out of the six offences.

46. There has been a subsequent delay due to *Lipinski* and *Celmer*. In relation to the *Celmer* issue, I am not of the view that this is a matter to which this Court must pay attention. That occurred by necessary effluxion of time for proper consideration by a variety of courts of what were difficult issues.

47. I am satisfied that most of the delay was actually due to the respondent seeking to have the other offences for which his surrender was sought, dealt with by means other than recourse to the EAW. There is therefore an explanation, together with the *Celmer* delay for the vast bulk of the delay including the delay in the beginning on the surrender which seems to have been due to an error of interpretation.

48. In relation to the offence for which he is sought, the maximum penalty is eight years. He will have to be given credit for the time spent in custody which is about 28 days subsequent to the order of surrender. The offence is attempted fraud. It dates back to March 2005 which is now almost 15 years ago. It is clearly not a crime of violence, however it is not an insignificant crime and it is one which carries a sentence of 8 years' imprisonment.

49. I have to consider his personal circumstances. He is settled in Ireland for a considerable period of time, although it is not entirely clear how long. He lives here with his wife and child. His mother in law is also in this jurisdiction. His father and mother separated when he was young but he saw his father weekly. His father died in 2003. His mother has MS and he does his best to help her in Poland. He was married in Poland in 1998 and they had one son but this marriage only lasted until 2002 when his wife became involved with someone else.

50. He says it was because of this acrimonious divorce that he had problems with the law. He later had problems with securing employment due to a combination of market conditions and interference by his in-laws. He says he has resided in this jurisdiction since November 2006 and has lived here in his own name, registered with the appropriate authorities and went on holidays. He became involved in a second relationship here and says he registered his second child's birth with the Polish embassy in this jurisdiction. He did not hide from the law and refers to his seven weeks in custody.

51. In my view, there is little if anything in his circumstances that is exceptional or even unusual or in any way raises real concerns about respect for his private and family life I

accept that exceptionality is not the criteria for the enquiry under Article 8. If there were solely an Article 8 application I would have no hesitation in saying that the public interest in his surrender far outweighed his private interests. There may have been some delay but this has mostly been explained. Although his surrender is sought for only one offence it is not a minor one and carries a penalty of up to 8 years. In light of this offence, there is a high public interest in his surrender. It will undoubtedly be difficult for his wife and child if he were to be surrendered, but this is an unfortunate consequence of the public's interest in ensuring that alleged offences are prosecuted. Even after all this time reliance on Article 8 would not avail him.

52. Much of the respondent's claim to an abuse of the process centred on the fact that he had succeeded previously in resisting surrender on five out of six of these offences. That argument falls away now that I have refused his surrender in relation to the others.

53. The strength of his argument lies in the fact that he was not surrendered in time. I do not accept that this gives rise to an abuse of process by itself. I also do not accept that the delay gives rise to an abuse of process. It is generally well explained. The short period of unexplained time in 2012 between the endorsement and his arrest does not bring this within the sphere of an abuse of process.

54. The Polish authorities have repeatedly asked for his surrender on offences for which he was refused, and of course I have to take into account that it is only one offence now and that he has been successful in relation to the others. I do not accept that that in and of itself amounts to an abuse of process. It is not clear that the IJA were told about the refusal initially but it certainly appears that having asked again, they were not told by the Minister or this Court or even the respondent that they should not pursue him. In any event, even if they had been told, I do not think that it is an abuse of process *per se* for an IJA to make a repeat request where it has been refused. The decision in *A.Y.* makes clear that there is an onus to deal with warrants and it doesn't say that there cannot be a further request. Moreover, an IJA cannot be taken to understand that a particular Member State's legal system may operate such matters as issue estoppel or in other jurisdictions *res judicata* and that further requests would be refused if not based on simple technical matters.

55. Even when taken cumulatively, I am satisfied that there is no abuse of process in relation to any of the factors the respondent has raised. I am satisfied there is no *mala fides* or improper motive or indeed any real culpability. It is not, in my view or in the words of O'Donnell J., a situation where it "*can nevertheless be said that to permit proceedings to continue would be an abuse of the Court's process in the sense that it would no longer be the administration of justice.*" There was a failure to surrender him, the next EAW issued promptly but was not executed because of the various reasons as set out above. The respondent has as I have said, no substantive Article 8 issues in his case. The offence, although not one of violence is reasonably serious. There is a high public interest in surrender even in a case such as this. Nothing in the behaviour of either the Polish authorities or the Minister brings this into the realm of an abuse of process. There was no

mala fides and even if there was some want of care in certain periods, there is nothing coming close to this request for surrender no longer being the administration of justice. In short, there is no abuse of process.

56. I therefore order his surrender in respect of Count V in the EAW before me.

57. For the avoidance of doubt, I will also say that I am satisfied that his surrender is not prohibited on any other ground as set out in s. 16 of the 2003 Act.

58. I therefore am satisfied that I can order his surrender in respect of the sole Count V in the EAW before me. I therefore make the order under s. 16(1) that Mr. Leopold be surrendered to such other persons as is duly authorised by the issuing state to receive him.