

THE HIGH COURT

[2021] IEHC 506
[2021 No. 092 EXT]

BETWEEN

MINISTER FOR JUSTICE

APPLICANT

AND

KRZYSTOF MICHALCZEWSKI

RESPONDENT

JUDGMENT of Mr. Justice Paul Burns delivered on the 5th day of July, 2021

1. By this application, the applicant seeks an order for the surrender of the respondent to the Republic of Poland pursuant to a European arrest warrant dated 27th October, 2017 ("the EAW"). The EAW was issued by Aleksandra Sołtysińska-Łaszczycza, Judge of the District Court in Kraków, as the issuing judicial authority.
2. The EAW seeks the surrender of the respondent in order to enforce a sentence of one years and six months' imprisonment imposed on 28th October, 2011, all of which remains to be served.
3. The respondent was arrested on 19th April, 2021 on foot of a Schengen Information System II alert and brought before the High Court on the same day. The EAW was produced to the High Court on 22nd April, 2021.
4. I am satisfied that the person before the Court, the respondent, is the person in respect of whom the EAW was issued. No issue was raised in that regard.
5. I am 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 for consideration in this application and surrender of the respondent is not precluded for any of the reasons set forth in any of those sections.
6. I am satisfied that the minimum gravity requirements of the Act of 2003 have been met. The sentence in respect of which surrender is sought is in excess of four months' imprisonment.
7. At part D of the EAW, it is indicated that the respondent appeared in person at the trial resulting in the decision.
8. The respondent objects to surrender on the following grounds:-
 - (i) surrender is precluded by reason of s. 38 of the Act of 2003;
 - (ii) surrender is precluded by reason of s. 45 of the Act of 2003; and
 - (iii) The EAW lacks sufficient clarity to comply with the requirements of the Act of 2003, in particular, s. 11 thereof.

Section 38 of the Act of 2003 - Correspondence

9. At part E of the EAW, it is indicated that it relates to one offence and a description of the circumstances in which the offence was committed is set out thereat as follows: -
- "On 16 Jan. 2011, in Klucze, Małopolska Voivodeship, acting together and in conspiracy, and with intent to steal and break into a parish house, by trying to force open a window, as a result of which they destroyed a lower sash panel worth three hundred zlotys (PLN 300) belonging to the parish of the Virgin Mary in Klucze represented by Parish Priest Andrzej Ciszewski, they were heading direct towards the commission of the offence. The offence did not occur because the offenders were scared off."*
10. Section 38(1)(b) of the Act of 2003 provides that it is not necessary for the applicant to establish correspondence between the offences to which the EAW relates and offences under the law of the State where the offences referred to in the EAW are offences to which Article 2.2 of the European Council Framework Decision dated 13th June, 2002 on the European Arrest Warrant and the Surrender Procedures Between Member States, as amended ("the Framework Decision"), applies and carry a maximum penalty in the issuing state of at least three years' imprisonment. In this instance, at part E of the EAW, the issuing judicial authority has certified that the offence referred to in the EAW is an offence to which Article 2.2 of the Framework Decision applies, that same is punishable by a maximum penalty of at least three years' imprisonment and has indicated the appropriate box for "*organised or armed robbery*".
11. Counsel on behalf of the respondent took issue with the reliance by the issuing judicial authority upon Article 2.2. of the Framework Decision as regards the offence to which the EAW relates. He submitted that reliance upon the relevant box for "*organised or armed robbery*" was misconceived and inappropriate as, on the basis of the description of circumstances of the offence set out in the EAW, there was no justification for relying upon "*organised or armed robbery*".
12. By additional information dated 28th May, 2021, it was indicated that the respondent was convicted on 16th January, 2011, and sentenced on reoffending, i.e. after he had served a prison term (from 3rd August, 2008 to 1st December, 2010) for similar wilful offences (theft and burglary and theft). The circumstances of the offence are further clarified to the effect that the respondent, together with his brother and another, tried to force open a window in a parish house in order to gain entry, as a result of which the lower window frame was damaged. It further explains that the individuals in question, including the respondent, were wearing dark clothes with hoods on and were driving around the area under the influence of alcohol after leaving a disco and wanted to break into a house and chose the house in question.
13. I am satisfied that the description of the circumstances of the offence set out in the EAW and additional information indicates that the respondent was acting as part of a conspiracy and, therefore, the issuing judicial authority was entitled to regard the offence as being "*organised*". However, it is not clear from the description given in the EAW that the offence involved the use of any arms or that it involved any violence or threat of

violence so as to constitute robbery. In so far as there might be thought to be an ambiguity about the certification in the EAW, it should be borne in mind that the effect of any manifest error or ambiguity in such certification merely means that the applicant has to establish correspondence in accordance with s. 38(1)(a) of the Act of 2003. I am satisfied that such correspondence can be established between the offence to which the EAW relates and an offence under the law of this State, viz. the common law offence of attempted burglary contrary to s. 12 of the Criminal Justice (Theft and Fraud Offences) Act, 2001 and/or criminal damage contrary to s. 2 of the Criminal Damage Act, 1991.

14. I dismiss the respondent's objection to surrender based upon s. 38 of the Act of 2003.

Section 45 of the Act of 2003

15. Section 45 of the Act of 2003 transposes Article 4A of the Framework Decision into Irish law and provides as follows:-

"45. — A person shall not be surrendered under this Act if he or she did not appear in person at the proceedings resulting in the sentence or detention order in respect of which the European arrest warrant ... was issued, unless... the warrant indicates the matters required by points 2, 3 and 4 of point (d) of the form of warrant in the Annex to the Framework Decision as amended by Council Framework Decision 2009/299/JHA ... as set out in the table to this section."

[Table set out thereafter]

16. While part D of the EAW indicates that the respondent was present at the proceedings resulting in the decision, the solicitor for the respondent, Mr. Tony Hughes, swore an affidavit dated 4th May, 2021 in which he set out the respondent's instructions to the effect that the respondent was not in attendance at the relevant hearing and was, in fact, in the Netherlands at the time. He exhibited a copy of the respondent's "sofie" number dated 11th October, 2011 (stated to be the equivalent to a PPS number), a copy of a contract of employment and payslips bearing dates between 24th October and 13th November, 2011. Mr. Hughes avers that the respondent travelled from Poland to the Netherlands in September 2011 and then came to Ireland on 13th January, 2012 and that he did not return to Poland in the interim.
17. The respondent swore an affidavit dated 7th May, 2021 confirming the contents of the affidavit of Mr. Hughes.
18. The additional information dated 28th May, 2021 indicates that the respondent was heard in the course of the proceedings as a suspect after he had been arraigned. He admitted the charges and a preventive measure was ordered, i.e. police supervision. He was advised of his rights and obligations and of the consequences of failing to comply with such requirements. He did not inform the prosecuting authority that he was changing his place of residence and did not provide a new address for service of process despite an obligation to do so. He did not collect court communications at the address he had provided. The case file shows that a separate investigation against him was pending at

that time, concerning unlawful possession of a significant amount of narcotic drugs. In the course of that separate investigation, he was arrested on 14th September, 2011 in Kraków and gave the same address in that investigation as he gave in respect of the matter, the subject matter of the EAW. In that separate investigation, a preventive measure was likewise ordered, i.e. police supervision. He did not comply with the supervision order, did not stay at his residential address and did not inform the prosecution or court of changing address. It was further indicated that:-

"It is important to note that he nevertheless received personally a summons for the trial on 28 Oct. 2011 (i.e. the sentencing hearing in case II K 609/11). The verdict was handed down in his absence, in line with the code of criminal procedure. A copy of the verdict was sent to the address he had indicated but the defendant did not claim it and did not appeal. He did not use counsel services, did not file for the court to appoint counsel."

19. The additional information dated 28th May, 2021 did not comment upon the affidavits sworn by and on behalf of the respondent to the effect that he had not been present in Poland at the relevant time. The respondent swore an affidavit dated 9th June 2021, in which he avers that he went to the Netherlands around the end of September 2011. He avers that prior to going to the Netherlands he was advised he would receive a suspended sentence. He avers that he was in the Netherlands on 28th October, 2011. He denies any knowledge of being under police supervision following his arrest. He sets out his family circumstances.
20. A further request for additional information was made and by reply dated 28th June, 2021, it was emphasised that the summons for the hearing on 28th October, 2011 was served on the defendant personally at his residence and the signed receipt is enclosed with the additional information. The signed receipt is dated 21st September, 2011. It is further indicated that the original summons for the hearing on 18th August, 2011, was received by the respondent's brother and the hearing was deferred. On 16th September, 2011 the respondent did not attend court as he had been arrested on suspicion of another offence on 14th September and was not released until 16th September, 2011. The summons for the hearing on 28th October, 2011, was received by the defendant personally, as stated above. The defendant's brother Tomasz Michalczewski stated at the hearing on 28th October, 2011 that the respondent did not appear because he had gone to Wrocław to see a friend. Also enclosed with the additional information is a copy of the guidelines on the suspect's rights and duties given to the respondent on 8th April, 2011, receipt of which is acknowledged by the respondent's signature. In this document it is made clear that the suspect is under an obligation to notify the prosecuting authority of each change of address for longer than seven days and, if abroad to indicate a domestic address for service or process, failing which correspondence shall be deemed served when delivered to the last known domestic address, and if no such address is available then the address attached to the case file.

21. Also enclosed with the additional information of 28th June, 2011 is a copy of the order for police supervision dated 8th April, 2011 and a copy of the transcript of suspect interview, also dated 8th April, 2011, in which the respondent's permanent address is set out. In the interview the respondent admits attempting to break in, having already been to the parish priest in Klucze to apologise, and he states he will be exercising his right to a final presentation of evidence.
22. In light of the additional information, counsel for the respondent informed the Court that the respondent now accepts that he did sign for collection of the summons but he may not have opened the letter. He also now accepts that he was under police supervision and had been advised to inform the prosecuting authority of any change in address, although he had no memory of same. Counsel stated that the respondent accepts that his failure to appear at the hearing on 28th October, 2011 was entirely down to his own behaviour.
23. Contrary to what is set out at part D of the EAW, the respondent did not appear in person at the hearing resulting in the sentence which is sought to be enforced. However, on the basis of the additional information furnished, I am satisfied that the respondent was personally summoned to attend the hearing on 28th October, 2011.
24. Furthermore, insofar as the respondent alleges that he was not present in Poland at any relevant time in respect of the proceedings, I am satisfied that upon his arrest he was advised of his obligation to notify the prosecuting authority of any change of address and, in particular, if travelling abroad he was to furnish an address in Poland for the purposes of service in respect of the proceedings, failing which service at the last known address would be deemed sufficient service. I am also satisfied that the respondent was arrested on 14th September, 2011 and provided the same address to the prosecuting authority as he did in respect of the proceedings which are the subject matter of this EAW.
25. I am satisfied that the respondent failed to attend the hearing on 28th October, 2011 despite having received a summons to do so and that, as he now accepts, that situation was brought about by his own conduct. I am satisfied that in so far as the respondent failed to appear at the hearing, this amounted to an unequivocal waiver of the right to be present on his part. This waiver occurred in circumstances where he had been summoned personally and failed to appear, most likely having left the issuing state shortly before the hearing. He did so in breach of his obligation to inform of a change of address and knowledge of the consequences of doing so.
26. I am satisfied that the requirements of s. 45 of the Act of 2003 have been met in substance and that the mischief which that section and Article 4a of the Framework Decision seek to avoid does not arise in this matter. I am satisfied that the defence rights of the respondent were respected and were not breached in this matter.
27. I dismiss the respondent's objection to surrender based upon s.45 of the Act of 2003.

Section 11 of the Act of 2003

28. Counsel on behalf of the respondent had initially submitted that the EAW was lacking in detail concerning the degree, if any, of participation of the respondent in the offence, the subject matter of the EAW, and also that the reference to "*aggregate sentence*" at part C of the EAW suggested that the sentence was imposed in respect of more than the single offence as set out in the EAW. Further details of the offence were provided including the extent of the respondent's participation therein by way of additional information dated 28th May, 2021. It was clarified that the reference to "*aggregate sentence*" at part C of the EAW was a translation error and the word "*aggregate*" did not appear in the Polish version.
29. I am satisfied that sufficient particulars have been provided and that there is no lack of clarity in the EAW such as would justify this Court in refusing surrender. I dismiss the respondent's objection based on s. 11 of the Act of 2003.

Conclusion

30. I am satisfied that surrender of the respondent is not precluded by reason of part 3 of the Act of 2003 or any other provision of that Act.
31. Having dismissed the respondent's objections, 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 the Republic of Poland.