

THE HIGH COURT

[2021] IEHC 510
[2021 No. 1 EXT.]

BETWEEN

MINISTER FOR JUSTICE AND EQUALITY

APPLICANT

AND

ZDZISŁAW JANUSZ POPIEL

RESPONDENT

JUDGMENT of Mr. Justice Paul Burns delivered on the 14th day of July, 2021

1. In 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 27th October, 2020 ("the EAW"). The EAW was issued by Judge Andrzej Haliński of the District Court in Gdansk, as the issuing judicial authority. The EAW seeks the surrender of the respondent to enforce two sentences of imprisonment. The first sentence was imposed on 25th July, 2003, carries reference IV K 2140/02 and relates to a term of two years' imprisonment, all of which remains to be served. The second sentence was imposed on 20th June, 2007, carries reference II K 150/07 and relates to a term of two years' imprisonment, of which one year, five months and 24 days remains to be served.
2. The EAW was endorsed by the High Court on 11th January, 2021 and the respondent was arrested and brought before the High Court on 4th March, 2021.
3. 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 this respect.
4. 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 and that 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 have been met. Each of the sentences in respect of which surrender is sought is in excess of four months' imprisonment.
6. Sentence IV K 2140/02 relates to a single offence of breaking into a vehicle and attempting to steal objects from same. Sentence II K 150/07 is a composite sentence imposed in respect of three offences consisting of one offence of theft, one offence of breaking into a vehicle and attempting to steal a radio from same and, thirdly, an offence of attempted theft of clothing.

Section 11 of the Act of 2003

7. At part E of the EAW, a description of each of the offences is set out and in respect of each offence, the description commences:-

"On [date specified] in Gdańsk, acting jointly and in association with [named person or persons]..."

8. Counsel on behalf of the respondent submitted that as the respondent was not specifically named in the description of each offence, the requirements of s. 11(1A) of the Act of 2003 had not been complied with as it was not known what was alleged against the respondent as regards each offence. He referred the Court to the decision of the High Court in *Minister for Justice v. Kasprowicz* [2010] IEHC 207, in which Peart J. refused surrender in relation to one of the relevant offences on the basis that the description of the offence commenced as follows, as reproduced at para. 19:-

"19. This offence is set forth as follows:

'On 27th February 2006 Gorzow Wielkopolski, along with Tomasz Wisniewski in a Ford Fiesta car, registration number PZL 24EV, acting together and in collaboration, they possessed, without permission, a 'Valtro' gas pistol, model 8000 F.S. 9mm, calibre P.A. number 05886, Italian made, without having the required licence for that gun.'"

Peart J. noted that the only persons named were Gorzow Wielkopolski and Tomasz Wisniewski, while the requested person was not named at all and so could not be surrendered for that offence.

9. Counsel for the applicant submitted that in *Kasprowicz*, two persons had been named as the only participants in the offence and neither of them was the requested person. She submitted that the EAW before this Court was fundamentally different as it was clear that what was alleged was that someone had acted in concert with the named persons. Thus, there was no suggestion that the named persons were the only persons involved in committing each offence. She submitted that it was clear from the wording in the description of each offence that the respondent had acted with the named persons in carrying out each of the offences. The Court was referred to the decision of Edwards J. in *The Minister for Justice, Equality & Law Reform v. Machaczka* [2012] IEHC 434 in which the decision of Peart J. in *Kasprowicz* was distinguished. In *Machaczka*, the description of the offence was outlined by Edwards J. at para. 15:-

"15. The manner of pleading is to allege that between certain dates 'acting together and in collaboration with [four named persons, none of whom is the respondent], ..., ..., they caused the Central Leasing Society ... in Warsaw to unfavourably dispose of property of considerable value by concluding a bogus leasing contract ...'."

Edwards J. regarded that wording as completely different to the wording in *Kasprowicz* which had excluded the inference that the respondent had acted with the named persons. Such an inference was not excluded on the wording in *Machaczka* and Edwards J. inferred that it was alleged the requested person had acted with the named persons in committing the offence.

10. I am satisfied that the wording in the European arrest warrant in *Kasprowicz* is distinguishable from the wording in the EAW before this Court. On a straightforward reading of the description of each offence, it is clear that what is indicated is that the

respondent acted jointly and in association with the named individuals in order to commit each of the offences. In so far as it may be necessary to draw an inference to that effect, I have no hesitation in doing so. In passing, it should be noted that the offences referred to in this EAW are offences in respect of which the respondent has been convicted as opposed to alleged offences for which he is to be prosecuted. The respondent has sworn an affidavit herein in which he does not take issue with the facts as set out in the EAW or deny having committed the offences as set out at part E thereof.

Correspondence

11. I am satisfied that correspondence can be established between the offences in the EAW and offences under the law of the State as follows:-

- (i) as regards case reference IV K 2140/02, the offence corresponds with the offence of criminal damage contrary to s. 2 of the Criminal Damage Act, 1991 and/or an offence at common law of attempted theft contrary to s. 4 of the Criminal Justice (Theft and Fraud Offences) Act, 2001; and
- (ii) as regards case reference II K 150/07, offence a) corresponds with the offence of theft contrary to s. 4 of the Criminal Justice (Theft and Fraud Offences) Act, 2001; offence b) corresponds with the offence of criminal damage contrary to s. 2 of the Criminal Damage Act, 1991 and/or with the common law offence of attempted theft contrary to s. 4 of the Criminal Justice (Theft and Fraud Offences) Act, 2001 and offence c) corresponds with the common law offence of attempted theft contrary to s. 4 of the Criminal Justice (Theft and Fraud Offences) Act, 2001.

Section 45 of the Act of 2003

12. Section 45 of the Act of 2003 transposes Article 4a 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"), into Irish law and provides:-

"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..." [Table (d) set out thereafter]

13. At part D of the EAW, the issuing judicial authority has indicated that as regards sentence IV K 2140/02, the respondent did not appear in person at the trial resulting in the decision and has indicated the equivalent of point 3.1a. of the table in s. 45 of the Act of 2003 as follows:-

"the person was summoned in person on 22 July 2003 and thereby informed of the scheduled date and place of the trial which resulted in the decision and was informed that a decision may be handed down if he or she does not appear for the trial."

14. By affidavit dated 12th April, 2021, Mr. Pádraig O'Donovan, solicitor for the respondent, avers that the sentence IV K 2140/02 imposed upon the respondent on 25th July, 2003 was initially a suspended sentence and exhibited a copy of an order making reference to same. In such circumstances, the Court sought additional information as regards the decision to revoke the suspension of the sentence in order to determine if the requirements of s. 45 of the Act of 2003 have been met. By way of a supplemental affidavit dated 8th July, 2021, Mr. O'Donovan exhibits a more legible copy of the order of the Polish court.
15. By additional information dated 26th April, 2021, it is indicated that the respondent was sentenced on 25th July, 2003, in case reference no. IV K 2140/02, to deprivation of liberty for two years with conditional suspension of the penalty for a trial period of five years. Owing to the respondent having committed a similar offence for which he was sentenced on 30th March, 2006 to ten months' imprisonment (case reference no. II K 871/05), the regional court for Gdańsk-South on 14th November, 2007 ordered the enforcement of the suspended sentence (case reference no. XI Ko 1750/07). It is indicated that that was an obligatory order for enforcement and that the respondent did not appear although two advice notes had been posted out and returned uncollected.
16. By further additional information dated 10th June, 2021, the details of the offence which led to the activation of the two-year sentence are set out. This essentially consisted of criminal damage to a vehicle and attempted theft therefrom of which the respondent was found guilty on 30th March, 2006 (case reference no. II K 871/05). The trial took place on 29th March, 2006 and the respondent was present. At that trial, the court proceedings were closed and the issuing of a verdict was adjourned until 30th March, 2006. The respondent was notified of the date of the verdict but did not appear. The issuing judicial authority has completed a Table D in respect of the decision of 30th March, 2006, indicating that the respondent was summoned in person on 29th March, 2006 and thereby informed of the scheduled date and place of the trial which resulted in the decision and was informed that a decision may be handed down if he or she does not appear for the trial.
17. As regards sentence IV K 2140/02, I am satisfied that the relevant hearing in respect of that sentence is the hearing of 25th July, 2003. I am satisfied that there is no basis for the Court looking beyond what has been set out by the issuing judicial authority at part B of the EAW in respect of that hearing date. The respondent has not put before the Court any evidence to contradict what is set out at part D of the EAW as regards that hearing. I am satisfied that the hearing at which the suspended sentence was activated was not a hearing for the purpose of Article 4a of the Framework Decision or s. 45 of the Act of 2003. As confirmed by the Court of Justice of the European Union ("the CJEU") in *Ardic (Case C-571/17 PPU)* and the Supreme Court in *Minister for Justice & Equality v. Lipinski* [2017] IESC 26, such a revocation hearing is not a hearing for the purposes of Article 4a of the Framework Decision, or s. 45 of the Act of 2003, where the revocation occurs as a result of a breach of the probation and the nature and length of the initial sentence are not changed. In this instance, it is clear from the information provided by the issuing

judicial authority that the court was obliged to activate the suspended sentence and that the nature and length of the initial sentence were not changed. I am satisfied that as regards sentence IV K 2140/02, the requirements of s. 45 of the Act of 2003 have been met.

18. As regards sentence II K 150/07, at part D of the EAW, the issuing judicial authority has indicated that the respondent did not appear in person at the trial resulting in the decision and has indicated the equivalent of point 3.2. of the table in s. 45 of the Act of 2003 as follows:-

"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 was indeed defended by that counsellor at the trial."

That the issuing judicial authority is relying on that particular point of the table can be inferred from the fact that it has not been crossed out. However, the issuing judicial authority has also failed to cross out the equivalent of one of the sub-clauses of point 3.3. of the table as follows:-

"the person did not request a retrial or appeal within the applicable time frame."

19. At the equivalent of point 4 of the table in s. 45 of the Act of 2003, the issuing judicial authority has set out further information as to how the relevant point relied upon has been complied with. The respondent was represented at the trial by a defence counsel of his own choosing, Andrzej Car. The original decision was appealed. The respondent did not appear personally at the appeal, but again he was represented by his defence counsel. The appeal was rejected as groundless and the decision at first instance was upheld.
20. Other than indicating that he came to Ireland following a conversation with his father in 2006, the respondent did not take issue with the facts as set out in the EAW as regards part D. Counsel for the respondent indicated that the respondent accepted that he was represented by Andrzej Car. However, he submitted that by failing to cross out the reference to not bringing an appeal in time, the issuing judicial authority had introduced an unacceptable level of ambiguity and/or uncertainty into the EAW. I dismiss the respondent's submission in this regard. Reading part D of the EAW as a whole, it is clear that the equivalent of point 3.2. of the table in s. 45 of the Act of 2003 has been properly invoked and relied upon by the issuing judicial authority. I am satisfied that, in line with the reasoning of Donnelly J. in *Minister for Justice v. Fiszer* [2015] IEHC 664, given that the condition precedent in point 3.3. of the table was crossed out, the remainder of that part has no standalone effect. I am satisfied the issuing judicial authority did not intend to rely upon point 3.3. to establish that the requirements of table D have been met. I am satisfied that point 3.2. has been properly invoked and relied upon by the issuing judicial authority. Furthermore, I am satisfied that the respondent's defence rights were respected and were not breached. I am satisfied that the surrender of the respondent in

respect of sentence II K 150/07 is not precluded by s. 45 of the Act of 2003 and that the requirements of that section have been met.

Section 37 of the Act of 2003

21. It was submitted on behalf of the respondent that surrender is precluded by s. 37 of the Act of 2003 as it would amount to a disproportionate and unjustified interference with the respondent's right to a private and family life under article 8 of the European Convention on Human Rights ("the ECHR").
22. The respondent swore an affidavit dated 18th March, 2021 in which he sets out his early life, his drug abuse and involvement in petty crime. In 2006, his father, who was living in Ireland, advised him to move to Ireland, which he did. He got a PPS number and did various jobs until opening a garage business with another person which is still in operation. He got involved in local sports clubs. He met his partner in 2008. She has two children from a previous relationship and two children with the respondent. They live as a family unit. The couple's youngest daughter is three years old and was born with a chromosome problem. She has a heart condition and is currently using leg braces to assist with mobility. The respondent's partner is said to be unwell at present. They plan to marry later this year.
23. The respondent's solicitor swore an affidavit dated 19th March, 2021 exhibiting medical records relating to the youngest daughter.
24. It should be borne in mind that rights under article 8 ECHR are not absolute, but rather are expressly stated to be subject to interference by public authorities where necessary in a democratic society. Article 8 ECHR provides:-
 - "1. *Everyone has the right to respect for his private and family life, his home and his correspondence.*
 2. *There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."*
25. In *Minister for Justice & Equality v. Vestartas* [2020] IESC 12, MacMenamin J. stated as follows at para. 68:-
 - "68. *In carrying out an assessment in our law for the purposes of s.16 of the Act, therefore, it is not accurate to speak of the task as one which is not governed by any predetermined approach, or pre-set formula, balancing competing public and private interests. In fact, the constant and weighty public interest in ordering surrender is not only underlined by Article 8(2) considerations such as necessity under law, freedom and security, but the words of ss.4A and 10 of the Act. The test must be seen in light of the clear exposition in the judgments in Ostrowski. A court may often have to take private and family rights considerations into account. But it*

can only do so having regard to the limitation contained in Article 8(2) of the ECHR, and the public interest considerations inherent in the Act and the Framework Decision. To surmount these, in any case, would necessitate that the evidence requirement be high. The assessment does not involve a balance between the rights of the public and those of the individual. It is one, rather, where, as the Act provides, a court shall presume that an issuing state will comply with the requirements of the Framework Decision - unless the contrary is shown on the basis of cogent evidence..."

26. As regards delay, MacMenamin J. stated at para. 89 that:-

"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."

27. It is clear that there is a significant public interest in surrender where the requirements of the Framework Decision are met. How s. 37 of the Act of 2003 is to be approached in light of this significant public interest, particularly as regards Article 8 ECHR, is set out by MacMenamin J. in *Vestartas* at para. 94:-

"94. The contrast with the exceptional facts in J.A.T. is plain. For an Article 8 defence to succeed, it can only be on clear facts based and cogent evidence. The evidence must be sufficient to rebut the presumption contained in s.4A of the Act (see, para. 41 above). The circumstances must be shown to be well outside the norm; that is, truly exceptional. In the words of s.37(1), they must be such as would render an order for surrender 'incompatible' with the State's obligations under Article 8 of the ECHR. This would necessitate that the incursion into the private and family rights referred to in Article 8(1) was such as to supervene the limitations on the right contained in Article 8(2), and over the significant public interest thresholds set by the 2003 Act itself..."

28. In the current matter, there has been a significant lapse of time between the date of the offending/date of sentence and the issuing of the EAW. There has been no significant delay in the prosecution of the EAW proceedings. Bearing in mind the reasoning of the Supreme Court in *Vestartas*, I do not regard the said lapse as so egregious in itself as to justify refusal of surrender. It is extremely unfortunate that the respondent's offending when he was much younger has come back against him many years later when he has successfully turned his life around and has a family to support, including a young child with particular medical needs. The Court has considerable sympathy for the respondent. However, taking the delay along with the respondent's personal circumstances into account, I am not satisfied that the circumstances of this matter are so egregious or exceptional that a refusal of surrender is justified under s. 37 of the Act of 2003. The EAW was issued approximately six months ago by a judge. In such circumstances, the Court can assume that the judge issuing same considered proportionality. Section 37 of the Act

of 2003 does not give this Court a jurisdiction to simply substitute its own view of proportionality for that of the issuing judicial authority. Whilst surrender will be disruptive of the respondent's current circumstances, I do not regard such disruption as being truly exceptional so as to justify refusal of surrender. Significant disruption to the private and family life of an accused or requested person is almost an inevitable consequence of criminal or surrender proceedings.

29. Ultimately, bearing in mind the terms of s. 37 of the Act of 2003, this Court must determine whether the respondent's circumstances are such as would render an order for surrender incompatible with the State's obligations under article 8 ECHR. While acknowledging and commending the efforts the respondent has made to turn his life around, I am satisfied that an order for surrender would not be incompatible with those obligations. I dismiss the respondent's objections to surrender based on s. 37 of the Act of 2003. The Court can only hope that once back in Poland, the relevant authorities will have regard to the respondent's personal and family circumstances when determining how long he is to actually spend in detention, however that is entirely a matter for those authorities.

Other Matters

30. Late in the proceedings, counsel on behalf of the respondent raised a number of other matters, including a reference in the additional information dated 26th April, 2021 to the term of imprisonment being "*of a solitary character*" and "*isolation for society*". Clarification was sought as to what was meant by the term "solitary character" referred to therein. By additional information dated 10th June, 2021, it is clarified that the term refers to:-

"a penalty of deprivation of liberty, which implies the sentenced person being placed in a penitentiary, subjecting the stay there to a particular regime, depriving of liberty to decide on the place of stay and isolation from society."

I am satisfied that the phrase refers to the fact that the imprisonment of the respondent will involve him being deprived of his liberty and isolated from society, as opposed to being further isolated within the prison confines. I am satisfied that it is not a reference to solitary confinement.

31. Counsel for the respondent also referred the Court to the fact that at part F of the EAW, three separate dates are set out for the limitation date for execution of the penalty imposed in respect of case reference no. II K 150/07. I am satisfied that this is a reference to the limitation dates for each of the original sentences which make up the aggregate sentence. Whilst it would be more appropriate to have set out a single date for the limitation period in respect of the aggregate sentence, I am not satisfied that surrender should be refused on that basis. The aggregate sentence was imposed in circumstances where the respondent was represented by a defence counsel of his own choice. The respondent does not seek to make the case that the aggregate sentence is unenforceable due to having expired. I do not believe the respondent is at any prejudice as a result of the particulars as set out at part F of the EAW.

Conclusion

32. I am satisfied that surrender in respect of the EAW is not precluded under Part 3 of the Act of 2003 or any part of that Act.

33. 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 Poland.