

THE HIGH COURT

[2021] IEHC 742
[2018 No. 151 EXT.]
[2018 No. 210 EXT.]
[2018 No. 211 EXT.]

BETWEEN

MINISTER FOR JUSTICE AND EQUALITY

APPLICANT

AND

LESZEK STEFAN LIZUREJ

RESPONDENT

JUDGMENT of Mr. Justice Paul Burns delivered on the 22nd day of November, 2021

1. By this application, the applicant seeks an order for the surrender of the respondent to the Republic of Poland ("Poland") pursuant to three European arrest warrants as follows:-
 - European arrest warrant dated 25th March, 2014, issued by Judge Rafal Wagnerowski, of the Regional Court in Tarnow, as the issuing judicial authority ("EAW 1") – Proceedings Record No. 2018/151 EXT;
 - European arrest warrant dated 13th December, 2012, issued by Judge Maria Derela, of the Third Criminal Division of the Regional Court in Kielce, as the issuing judicial authority ("EAW 2") – Proceedings Record No. 2018/210 EXT; and
 - European arrest warrant dated 23rd May, 2016, issued by Judge Renata Broda, of the Third Criminal Division Court in Sad Okregowy in Kielce, as the issuing judicial authority ("EAW 3") – Proceedings Record No. 2018/211 EXT.
2. The EAWs seek the surrender of the respondent in order to enforce sentences of imprisonment imposed upon him as follows:-
 - as regards EAW 1, a sentence of one-year imprisonment imposed on 16th December, 2010, of which 11 months and 28 days remains to be served (case reference number IIK 509/10);
 - as regards EAW 2, a sentence of three years' imprisonment imposed on 31st October, 2006, of which one year, two months and 24 days remains to be served (case reference numbers IIK 37/04, II K118/04 and IIK 673/04); and
 - as regards EAW 3, a sentence of four years' imprisonment imposed on 23rd February, 2006, of which two years and seven months remains to be served (case reference number IIK 90/05).
3. Each EAW was endorsed by the High Court as follows:-
 - EAW 1 was endorsed by the High Court on 14th May, 2018;
 - EAW 2 was endorsed by the High Court on 23rd July, 2018; and

- EAW 3 was endorsed by the High Court on 25th June, 2018.
- 4. The respondent was arrested on foot of all three EAWs on 13th June, 2021 and brought before the High Court on 14th June, 2021 on foot of same.
- 5. I am satisfied that the person before the Court, the respondent, is the person in respect of whom each of the EAWs has been issued. No issue was raised in this regard.
- 6. 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 these applications and surrender of the respondent is not precluded for any of the reasons set forth in any of those sections.
- 7. I am satisfied that the minimum gravity requirements of the Act of 2003 have been met. Each sentence in respect of which surrender is sought is in excess of four months' imprisonment.

EAW 1

- 8. At part E of EAW 1, it is stated that it relates to one offence. I am satisfied that correspondence can be established between that offence and an offence under the law of the State, namely unlawful possession of drugs contrary to s. 3 of the Misuse of Drugs Act, 1977, as amended. Correspondence was not disputed.
- 9. At part D of EAW 1, it is indicated that the respondent did not appear in person at the trial resulting in the decision. It is further indicated:-

"1.a. The person was summoned in person on 22.09.2010 and thereby informed of the scheduled date and place of the trial which he then attended, however, did not appear at the subsequent trials, namely, on 8.11.2010 and 16.12.2010, the last of which resulted in the above court decision, whereas the person had been informed that a decision may be adjudged even if he did not appear for the trial."
- 10. Also at part D, it is indicated:-

"the person did not request a retrial or appeal within the applicable time frame."
- 11. I am satisfied that the reference to the respondent not requesting a retrial or appeal within the applicable timeframe has not been properly invoked by the issuing judicial authority. That particular sub-point of part D of EAW 1 is only relevant where the issuing judicial authority has sought to rely upon point 1.d. of the Table set out in s. 45 of the Act of 2003, and, in this instance, the issuing judicial authority has not done so. Therefore, the reference to the respondent not requesting a retrial or appeal has no independent significance and has no legal effect. It can, therefore, be ignored by this Court. Counsel for the respondent submits that the invocation of the subpoint referring to a failure to apply for a retrial or appeal has introduced an unacceptable level of ambivalence or confusion into part D of EAW 1 and that this Court cannot rely upon the invocation of point 1.a. of same. I reject that submission. Reading EAW 1 as a whole, together with all

of the documentation before the Court, it is clear that point 1.a. at part D of EAW 1 has been appropriately indicated and relied upon by the issuing judicial authority.

12. At part F of EAW 1, it is indicated as follows:-

"The convicted was not present at the trial at which the sentence was passed, although he had appeared at the first trial; and since he was properly summoned for subsequent trials at which he did not appear without presenting notes of excuse, the court continued the trial process in his absence. Pursuant to the Polish law the adjudged sentence was not passed in default. The court ruling was not effectively appealed. The convicted did not appear at penal institution and searching for him by means of the warrant notice was ineffective as well. The convicted Leszek Lizurej is probably staying on the territory of Ireland or England. The statute of limitation on execution of the sentence expires no earlier than on 24 December 2025 and no later than on 24 December 2035."

13. Counsel on behalf of the respondent submits that the reference to "trials" at part D and part F of EAW 1 raised the possibility that there may in fact have been a number of different trials in this matter and, therefore, it was not possible to ascertain which of the trials the summons referred to in part D applied to.

14. I am satisfied reading EAW 1 as a whole that the reference to "trials" is simply a reference to hearing dates in a single trial process. This is apparent from the wording at parts D and F of EAW 1. In particular, at part F of EAW 1 it is stated that, although the respondent appeared at the first trial, he did not appear thereafter and "*the court continued the trial process in his absence*". By additional information dated 12th July, 2021, it is confirmed that the reference to separate dates at parts D and F of EAW 1 are references to three dates in the main trial conducted within one and the same trial process.

15. The respondent has not disputed by way of any evidence that he was in fact summoned to appear at the trial and did in fact appear at the first scheduled date thereof as indicated in EAW 1. Such notice and appearance is sufficient to satisfy the requirements of s. 45 of the Act of 2003 (see *Minister for Justice v. Fiszer* [2015] IEHC 664 and *Minister for Justice and Equality v. Purse* [2020] IEHC 515). I dismiss the respondent's objections to surrender based on s. 45 of the Act of 2003.

EAW 2

16. At part D of EAW 2, the issuing judicial authority has indicated that the respondent did not appear in person at the trial resulting in the decision. The issuing judicial authority goes on to indicate that it is relying upon the equivalent of points 3.1a. and 3.2. of the Table set out in s.45 of the Act of 2003, as follows:-

"3.1a. the person was properly summoned 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;

...

OR

3.2. *being aware of the scheduled trial, the person had given a mandate to a legal counsellor, who was either appointed by the person concerned or by the State, to defend him at the trial, and was indeed defended by that counsellor at the trial.*"

17. The issuing judicial authority also indicated a reliance upon a part of point 3.3. of the Table as follows:-

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

For the reasons already indicated herein, I am satisfied that that particular part of Table D as completed by the judicial authority is of no legal significance and can effectively be discounted by this Court.

18. Counsel for the respondent took issue with the fact that the issuing judicial authority had not provided any information at point 4. of the Table at part D of EAW 2 as is required when point 3.2. is invoked. However, in this instance, the issuing judicial authority has invoked both point 3.1a. and point 3.2. of the Table. Assuming counsel for the respondent's submission to have any substance or validity and the Court were to discount the reliance on point 3.2. of the Table in part D of EAW 2, point 3.1a. as completed by the issuing judicial authority would still be valid. Point 3.1a. of the Table indicates that the respondent was notified of the scheduled date for the hearing and the consequences of failing to attend. The veracity of this has not been contested by any evidence on the part of the respondent. In such circumstances, I am satisfied that the requirements of s. 45 of the Act of 2003 have been met.
19. I should also say that, in the particular circumstances of this case, the further information that would be required at point 4. of the Table at part D in respect of point 3.2. has in fact been supplied at point 3.1a. Again, the respondent has not put in evidence anything to contest the veracity of point 3.2. as relied upon by the issuing judicial authority. In such circumstances, I am satisfied that point 3.2. has also been validly invoked by the issuing judicial authority and that compliance with s. 45 of the Act of 2003 can also be established in that regard.
20. I am satisfied that the defence rights of the respondent were respected and given effect to in this instance. I am also satisfied that the mischief which 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"), and s. 45 of the Act of 2003 seek to prevent have not arisen in respect of this matter. By additional information dated 16th July, 2018, it is indicated that the respondent's lawyer was present at the hearing immediately preceding the announcement of the judgment but was not present for the actual judgment.
21. I dismiss the respondent's objections to surrender based upon s. 45 of the Act of 2003.

22. At part E of EAW 2, it is indicated that it relates to three offences as follows:-

- (i) robbery of a mobile phone on 19th December, 2003;
- (ii) riding a bicycle under the influence of alcohol on 2nd June, 2004; and
- (iii) robbery of a phone on 2nd August, 2004.

23. Counsel agreed that, this sentence being an aggregate sentence, unless correspondence could be established as between all three offences to which EAW 2 relates and offences under the law of the State, then in line with the reasoning of the Supreme Court in *Minister for Justice, Equality and Law Reform v. Ferenca* [2008] 4 I.R. 480, surrender would have to be refused. Counsel on behalf of the respondent conceded that correspondence could be established between offences (i) and (iii) and the offence under the law of this State of robbery contrary to s. 14 of the Criminal Justice (Theft and Fraud Offences) Act, 2001. However, he disputed whether correspondence could be established between offence (ii) above and an offence under the law of the State.

24. The circumstances of offence (ii) are set out at part E of EAW 2 as follows:-

"on 2 June 2004, in Staszów, Świętokrzyskie Province, he was riding on a Author bicycle on a public road while being under the influence of alcohol (0.93 mg/l of alcohol in exhaled air)."

25. Counsel on behalf of the applicant initially proposed correspondence with an offence contrary to s. 6 of the Road Traffic Act, 2010 which provides:-

"6.— (1) A person shall not, in a public place—

...

(b) drive or attempt to drive a pedal cycle, while he or she is under the influence of an intoxicant to such an extent as to be incapable of having proper control of the vehicle or cycle....

(3) A person liable to be charged with an offence under this section shall not, by reference to the same occurrence, be liable to be charged under section 12 of the Licensing Act 1872 with the offence of being drunk while in charge, on a highway or other public place, of a carriage."

26. The Court sought further details as to the circumstances in which the commission of offence (ii) occurred and by additional information dated 14th July, 2021, the issuing judicial authority indicated that there was no evidence regarding the influence of alcohol on the responsibility to exercise proper control over the bicycle as these circumstances are not part of the offence in Poland. It was indicated that the respondent was arrested on suspicion of the theft of a bicycle and was in a state of intoxication (0.93 mg/l). It was

indicated that the respondent admitted the offence and explained that he had cycled 150 to 200 metres having previously drunk six to seven bottles of beer.

27. In light of this additional information counsel for the applicant proposed s. 12 of the Licensing Act, 1872 as the corresponding offence in this State. She submitted that the court could infer that the respondent was drunk on the basis of the additional information provided, which refers to him having drunk six to seven bottles of beer prior to cycling the bicycle and having a reading of 0.93 mg/l in the exhaled breath.

28. Section 12 of the Licensing Act, 1872 states:-

"12. Every person found drunk in any highway or other public place, whether a building or not, or on any licensed premises, shall be liable to a penalty not exceeding ten shillings, and on a second conviction within a period of twelve months shall be liable to a penalty not exceeding twenty shillings, and on a third or subsequent conviction within such period of twelve months be liable to a penalty not exceeding forty shillings.

Every person who in any highway or other public place, whether a building or not, is guilty while drunk of riotous or disorderly behaviour, or who is drunk while in charge on any highway or other public place of any carriage, horse, cattle, or steam engine, or who is drunk when in possession of any loaded firearms, may be apprehended, and shall be liable to a penalty not exceeding forty shillings, or in the discretion of the court to imprisonment with or without hard labour for any term not exceeding one month.

Where the court commits any person to prison for nonpayment of any penalty under this section, the court may order him to be imprisoned with hard labour."

29. Very late in the proceedings, and subsequent to submissions having been exchanged, the respondent swore an affidavit dated 23rd September, 2021 in which he avers that he had only drunk the alcohol after he had arrived in the pub with the bicycle and that he was 100% sober when in possession of the bicycle. He avers that the police suspected he had stolen the bicycle and took him to the station where his alcohol limit was tested and he confessed to the offence of riding the bicycle while over the limit even though he had been sober when in possession of the bicycle. He states that the Polish court sentenced him for something he hadn't done.

30. It is clear from the information before the Court that the respondent pleaded guilty to the offence in question and was duly convicted and sentenced in respect of same by the court in Poland. It is not for this Court to revisit the issue as to whether or not the respondent was guilty of the offence in respect of which he was convicted. I regard the contents of the respondent's affidavit with considerable scepticism, coming as it does so late in the day and obviously sworn with a view to putting the facts of the respondent's conviction outside the scope of the offence provided for at s. 12 of the Licensing Act, 1872.

Nevertheless, the Court must be satisfied as to correspondence before making an order for surrender.

31. It was agreed between the parties that in order for correspondence to exist, a pedal cycle would have to be regarded as a "carriage" for the purposes of s. 12 of the Licensing Act, 1872 and the respondent would have to be regarded as "drunk" for the purposes of that section.
32. Counsel were unable to turn up any Irish authority regarding whether or not a pedal cycle is to be regarded as a carriage for the purposes of the Licensing Act, 1872. Section 6 of the Road Traffic Act, 2010 provides:-

"6.— (1) A person shall not, in a public place—

- (a) drive or attempt to drive, or be in charge of, an animal-drawn vehicle, or*
- (b) drive or attempt to drive a pedal cycle,*

while he or she is under the influence of an intoxicant to such an extent as to be incapable of having proper control of the vehicle or cycle.

(2) A person who contravenes subsection (1) commits an offence and—

- (a) if the offence relates to an animal-drawn vehicle, he or she is liable on summary conviction—*
 - (i) in the case of a first offence, to a fine not exceeding €3,000 or to imprisonment for a term not exceeding 1 month or to both, and*
 - (ii) in the case of a second or subsequent offence, to a fine not exceeding €5,000 or to imprisonment for a term not exceeding 3 months or to both,*
- or*
- (b) if the offence relates to a pedal cycle, he or she is liable on summary conviction to a fine not exceeding €2,000.*

- (3) A person liable to be charged with an offence under this section shall not, by reference to the same occurrence, be liable to be charged under section 12 of the Licensing Act 1872 with the offence of being drunk while in charge, on a highway or other public place, of a carriage.*
- (4) Where a member of the Garda Síochána is of opinion that a person is committing or has committed an offence under this section, he or she may arrest the person without warrant."*

It is noted that subs. 6(3) above provides that a person liable to be charged with an offence under that section is not to be charged under s. 12 of the Licensing Act, 1872. This may indicate that the Oireachtas was of the view that a carriage for the purposes of

the Licensing Act, 1872 could extend to a pedal cycle or it may be that the Oireachtas regarded a carriage as including an animal-drawn vehicle only.

33. In *Corkery v. Carpenter* [1950] 2 All E.R. 745, the evidence was that the accused was drunk while pushing his bicycle along a road. He was charged with an offence contrary to s. 12 of the Licensing Act, 1872. It was held by the Court of Appeal of England and Wales that the word "carriage" in s. 12 of the Act of 1872 was wide enough to include a bicycle. Lord Goddard C.J. was of the view that it was clear that the word "carriage" is wide enough to include a bicycle for the purposes of s. 12 of the Act of 1872 although it does not follow that, in every act of parliament, a bicycle is a carriage. He was of the view that the issue depended upon the words of the act in question, bearing in mind that the section was passed for the protection of the public.
34. Counsel for the applicant urged this Court to infer that the respondent was drunk within the meaning of s. 12 of the Licensing Act, 1872 on the occasion of his offending in Poland. He had consumed six to seven bottles of beer prior to cycling although the timeframe for same is not known. He had a reading of 0.93mg of alcohol per 1000ml of exhaled breath. That appears to be the equivalent of 9.3mgs of alcohol per 100ml of breath.
35. Counsel on behalf of the respondent submits that there was no evidence that the respondent was drunk at the time. He also submitted that the concept of being "drunk" in s. 12 of the Licensing Act, 1872 had to be read in its context and must therefore be determined in terms of a person's capacity to exercise safe control over a bicycle. In the alternative, he submitted that the offence was so vague that it rendered the offence under s. 12 of the Licensing Act, 1872 inconsistent with the Constitution and was thus not carried over into law when the Constitution was adopted.
36. There is no information before the Court as to the behaviour, lucidity or physical and mental capacity of the respondent at the time of the offence. In such circumstances, I am reluctant to infer that he was "drunk" within the meaning of the Licensing Act, 1872. The mere consumption of alcohol is not sufficient to constitute drunkenness. There are no breath alcohol levels set out in the Road traffic Act, 2010 as regards pedal cycles (I note that for the purposes of driving or attempting to drive a mechanically propelled vehicle the breath alcohol limit under the Road Traffic Act, 2010 is 22mgs of alcohol per 100ml of breath, or in the case of a specified person, 9mgs of alcohol per 100mls of breath. Specified person includes a holder of a learner permit, a recently qualified driver, persons having PSV licences or having no licence. Thus, the respondent would have been just over the limit for specified persons but under the limit generally as regards driving or attempting to drive a mechanically propelled vehicle. As regards a person in charge of a mechanically propelled vehicle and intending to drive, the limits are 50mgs of alcohol per 100ml of blood, or for specified persons 20mgs of alcohol per 100mls of blood. Thus, it would appear that the respondent was under the limit for persons in charge of and intending to drive a mechanically propelled vehicle.)
37. On the basis of the information before me, I am not satisfied to draw the inference that the respondent was drunk at the time of his offending in Poland and therefore, I find that

correspondence has not been established. In such circumstances, it is not necessary to consider whether a pedal cycle is a "carriage" for the purposes of s. 12 of the Licensing Act, 1872 or the constitutionality of s. 12 of said Act.

38. It follows that surrender in respect of EAW 2 must be refused.

EAW 3

39. At part E of EAW 3, it is indicated that it relates to 11 offences. Counsel on behalf of the respondent conceded that correspondence could be established between all of those offences and an offence under the law of this State, save for offence number four which is set out in the EAW as follows:-

"4. *In the period from 16 to 17 September 2011 in Staszów, the Świętokrzyski administrative district, he assisted Paweł Szaniawski to hide the mobile phone brand 'Fillips' value of PLN 678, which on the basis of the surrounding circumstances he could and should have assumed that it was obtained through an offence.*"

40. I am satisfied that offences 1, 2 and 3 in EAW 3 correspond with the offence under the law of the State of assault occasioning harm contrary to s. 3 of the Non-Fatal Offences Against the Person Act, 1997. I am satisfied that offences 5.1, 5.2, 5.3, 5.6 and 5.7 correspond with the offence under the law of this State of theft contrary to s. 4 of the Criminal Justice (Theft and Fraud Offences) Act, 2001. I am satisfied that offence 5.4 corresponds with the common law offence in this State of attempted theft contrary to s. 4 of the Criminal Justice (Theft and Fraud Offences) Act, 2001. I am satisfied that offence 5.5 corresponds with the offence under the law of this State of burglary contrary to s. 12 of the Criminal Justice (Theft and Fraud Offences) Act, 2001.

41. As regards offence 4, counsel for the applicant proposed correspondence under the law of this State of handling stolen property contrary to s. 17 of the Criminal Justice (Theft and Fraud Offences) Act, 2001 which provides:-

"17—(1) *A person is guilty of handling stolen property if (otherwise than in the course of the stealing) he or she, knowing that the property was stolen or being reckless as to whether it was stolen, dishonestly—*

(a) *receives or arranges to receive it, or*

(b) *undertakes, or assists in, its retention, removal, disposal or realisation by or for the benefit of another person, or arranges to do so.*"

42. By additional information dated 9th May, 2018, the following further details are set out as regards offence 4:-

"The mobile phone was obtained as a result of violating the law, i.e. the result of the offence of theft specified in article 278 § 1 of the Criminal Code. The circumstances that allowed the defendant to come to the conclusion that the mobile

phone was obtained as a result of violation of the law, i.e. the previous theft of that mobile phone results from the explanations of the defendant, Leszek Stefan Lizurej, who helped to hide that phone and they result from the explanation of the defendant, Paweł Szaniawski, who stole that phone."

43. I am satisfied on the basis of all of the documentation before the Court that the circumstances pertaining to the commission of offence 4 as set out in EAW 3 correspond to an offence under the law of this State of handling stolen property contrary to s. 17 of the Criminal Justice (Theft and Fraud Offences) Act, 2001. The respondent assisted in hiding a mobile phone which he knew to be stolen. In such circumstances, I have no difficulty in inferring that he did so dishonestly.
44. Counsel on behalf of the respondent submits that as regards each of the offences set out at part E of EAW 3, there was an unacceptable lack of clarity as to the respondent's involvement in the said offences. He submitted that the references to "he" and "they" could not be taken to refer to the respondent or to include a reference to the respondent. He referred the Court to *Minister for Justice v. Kasprowicz* [2010] IEHC 207.
45. I am satisfied that the judgment in *Kasprowicz* turns on its own very specific facts and the specific manner in which the offences were referred to therein. I am satisfied that similar reasoning does not apply to the manner in which the offences have been set out in EAW 3. I am satisfied that on an ordinary reading of part E of EAW 3, the word "he" can be taken to refer to the respondent and the word "they" can be taken to include the respondent. I note that the decision in *Kasprowicz* has been distinguished on a number of occasions.
46. At part D of EAW 3, it is indicated that the respondent did not appear in person at the trial resulting in the decision. The issuing judicial authority has indicated reliance upon the equivalent of point 3.1a. of the Table set out at s. 45 of the Act of 2003 as follows: -
- "1.a.. the person was summoned in person on 2 February 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."*
47. The issuing judicial authority has also indicated reliance upon the equivalent of point 3.1.c. of the Table set out at s. 45 of the Act of 2003 as follows: -
- "3.1.c. 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."*
48. Counsel on behalf of the respondent made similar submissions in respect of s. 45 as regards part D in EAW 3, as he had made in respect of EAW 1 and EAW 2, save that, in EAW 3, the issuing judicial authority had not indicated any reliance upon the failure to

appeal. For the reasons already set out herein, I reject the respondent's objection to surrender based upon s. 45 of the Act of 2003. The respondent did not dispute by way of any evidence the veracity of the matters set out at part D of EAW 3.

Conclusion

49. I am satisfied that surrender of the respondent on foot of EAW 1 is not precluded by reason of Part 3 of the Act of 2003 or any provision of that Act.
50. I am satisfied that surrender of the respondent on foot of EAW 2 is precluded by reason of s. 38 of the Act of 2003.
51. I am satisfied that surrender of the respondent on foot of EAW 3 is not precluded by reason of Part 3 of the Act of 2003 or any provision of that Act.
52. Having dismissed the respondent's objections to surrender in respect of EAW 1 and EAW 3, it follows that this Court will make an order for surrender in respect of each of those EAWs pursuant to s. 16 of the Act of 2003.
53. As regards EAW 2, it follows that this Court will refuse to make an Order for surrender.