

THE HIGH COURT

[2021] IEHC 838
[2021 No.201 EXT.]

BETWEEN

MINISTER FOR JUSTICE AND EQUALITY

APPLICANT

AND

TOMCZAK SLAWOMIR

RESPONDENT

JUDGMENT of Ms. Justice Caroline Biggs delivered on the 06th day of December 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 12th of January 2015 ("the EAW"). The EAW was issued by Elzbieta Makolus, Vice-President of the District Court, Torun, as the issuing judicial authority.
2. The EAW seeks the surrender of the respondent in order to enforce a sentence of imprisonment imposed upon the respondent on the 20th day of January 2009, of which two hundred and nine days remains to be served.
3. The EAW was endorsed by the High Court on the 19th day of July 2021 and the respondent was arrested and brought before the High Court on the 28th day of October 2021 on foot of same.
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. Part E of the warrant sets out the number and the circumstances in which the offences were committed. Part E reads as follows:

"E. Offence(s):

1. This warrant related to in total: 2 offences
2. Description of the circumstances in which the offence(s) was (were) committed:
 - an offence committed on 27 September 2007 in Torun – perpetration, case number X K 1617/07
 - an offence committed on 27 September 2007 in Torun – perpetration, case number X K 1617/07

3. Nature and legal classification of the offence(s):

- an offence under article 62 section 3 in connection with article 62 section 1 of Anti-Drug Abuse Act of 29 July 2005 – possession of intoxicants, act of a lesser significance court file No X K 1617/07
- an offence under of 178 a paragraph 2 of Penal Code and article 244 of Penal Code – riding a bicycle being drunken and not complying with the prohibition imposed by the court to drive mechanical vehicle or bicycles X K 1617/07.”

The latter offence is described in part E as follows:

“4. On 27 September 2007 in Torun he was riding a bicycle on the public road being drunken, i.e. I test – 0,58 milligram/ litre breath alcohol, II test – 0,54 milligram / litre of breath alcohol, and by which he did not comply to the prohibition imposed by the court in Torun by the verdict of 28 September 2005, court file number XK 967/05 to drive mechanical vehicles and bicycles for the period of 2 years .”

8. The respondent objected to surrender on a number of grounds, he submits that the court is prohibited from surrendering him pursuant to Section 45, 37 and 38 of the Act of 2003.

Whether surrender is prohibited by Section 45?

Section 45 of the 2003 Act sets out the following:

“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 or the Trade and Cooperation Agreement arrest warrant, as the case may be, was issued, unless in the case of a European arrest warrant, 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 and in the case of a Trade and Cooperation Agreement arrest warrant, the warrant indicates the matters required by paragraph 1(i) of Article LAW.SURR.81 of the Cooperation and Trade Agreement, as set out in the table to this section.”

9. Part D of the warrant states that Mr Tomczak appeared in person at the trial resulting in the decision, that being the decision on which the warrant is based, on the 1st of April 2008. It was unclear however from the warrant if Mr Tomczak was present on the 20th of January 2009 when an appeal took place and the actual sentence was imposed. The respondent swore an affidavit dated the 25th of November 2021, wherein he indicated that he had no recollection of the first instance hearing, but he does not contest that he was present, however he denies undertaking to furnish any address. Clarification was sought on this issue by way of Section 20 request on the 20th of July 2021. The reply dated the 7th of September 2021 stated as follows:

“Slawomir Tomczak failed to appear at the sitting of the Court on 20th January 2009.

The notification on the date of the sitting had been correctly delivered to the only address the Court was aware of. The convict twice failed to collect the letter which has been advised [sic], that was why, the notification on the day of the sitting was assumed as delivered. At the same time, the probation officer established at that time, that the then current residence address of Slawomir Tomczak was not known to him, as he learnt, from the step brother of the convict that Slawomir Tomczak had been already staying outside the territory of Poland.

During the proceedings relating to the change of the non-executed penalty of limitation of freedom into the replacement penalty of imprisonment, the convict did not avail himself from the assistance of the defence attorney.

The copy of the decision, together with the instructions relating to the manner and date of filing the appeal was delivered to the convict by a registered letter. Slawomir Tomczak, again failed to collect the letter which had been advised [sic], twice, and that was why, in accordance with the provisions in force, the notification on the day of the sitting was assumed as delivered. The letter was returned to the Court with the note: "addressee unknown".

Slawomir Tomczak did not submit any complaint against the decision of 20th January 2009."

On foot of this information the court sent a further section 20 request dated the 1st of November 2021, wherein the court asked:

- "1. On the 1st April 2008, when the court imposed a limitation of liberty, was Mr Tomczak informed that if he failed to comply with the terms of that penalty, he would receive a penalty of 209 days in default?
2. With regard to his address can you please clarify if Mr Tomczak provided authorities with an address that he would be contactable at in advance of his trial in relation to case reference number XK 1617/07 if so, please provide details of same?
3. If Mr Tomczak provided you with a pre-trial address, was he informed of any obligation on him to inform authorities of a change of address and to provide them with an updated address?
4. Did Mr Tomczak provide you with an updated address?

Can you please complete a new Part D in relation to the court appearance on the 20th January 2009?"

The reply was dated the 15th of November 2021 and states:

- "1. On 1st April 2008, i.e. on the day the sentence was adjudicated, the Court did not instruct the convict on the consequences of the failure to execute the penalty of limitation of freedom. The Court was not obliged to do that. The Court, however,

was obliged to instruct the convict on the manner and the deadline to submit the appeal which was done by the Court. Slawomir Tomczak was present at the publication of the sentence. Also, his defence attorney, appointed thereby was present and he submitted the appeal from the sentence. If the convict quotes his lack of knowledge as to the possibility to change the penalty of limitation of freedom to the replacement penalty of imprisonment, in his situation, taken into account the above, the principle "ignorantia iuris nocet" ("not knowing is harmful") should be applied.

2. When Slawomir Tomczak was interrogated as the suspect, he stated to the protocol two addresses – registered residence address – permanent stay at 7/9 Kochanowskiego Street, Torun and place of residence ("longer stay"): 12/21 Kosynierow Kosciuszkwskich, Torun.
3. *After the charges were presented thereto, Slawomir Tomaczak received a written instruction, and by the content thereof he had been informed on the duty to inform about change of residence or stay lasting longer than 7 days and in case of stay abroad the duty to indicate the addressee for services in Poland. In the files of the case there is the document – instructions containing the signature of Slawomir Tomczak. [emphasis added]*
4. Slawomir Tomczak did not collect the advised [*sic*] summons to the first date of trial set up for 2nd February 2008. The summons were sent to the address 12/21 Kosynierow Kosciuszkwskich, Torun. The Court summoned the convict to the next date sending the summons to the same address and additionally, it was ordered the summons be delivered by the Police. The summons were not delivered, however, the accused appeared at the trial with his defence attorney.

The Court of the 2nd Instance sent the notification on the date of the appellate trial to the accused to two addresses given thereby. None of the letters had been collected by Slawomir Tomczak. Also in the executory proceedings, i.e. after the sentence became valid, the convict failed to collect letters sent to two addresses stated thereby. Slawomir Tomczak did not inform about the change of his address."

In *Minister for Justice and Equality v. Zarnescu* [2020] IESC 59 ("*Zarnescu*"), the Supreme Court indicated that s. 45 of the Act of 2003 is to be given a purposive interpretation and that even though a particular set of circumstances may not fit neatly into one of the scenarios set out in Table D, it may nevertheless be permissible for the court to order surrender if satisfied that the requirements of s. 45 have been substantively met. However, as Baker J. pointed out in *Zarnescu*, the court, before making an order for surrender in such circumstances, must take a step back and satisfy itself that the defence rights of the respondent have not been breached and will not be breached.

10. Baker J. analysed the relevant authorities as regards surrender of persons convicted or sentenced in absentia and the proper application of s. 45 of the Act of 2003 and held, inter alia, at para. 90;-

"[90] From this analysis the following emerges:

- (a) The return of a person tried in absentia is permitted;*
- (b) Article 4(6) of the 2002 Framework Decision permits the refusal to return where the requested state has a legitimate reason to refuse the EAW;*
- (c) A person tried in absentia will not be returned if that person's rights of defence were breached:*
- (d) Section 45 of the Act expressly identifies circumstances in which a person tried in absentia may be returned, primarily where there is evidence of service or where the person was legally represented or where it is shown that a right of retrial in the requesting state is available as of right;*
- (e) The examples outlined in section 45 as forming the basis of the analysis are not exhaustive, and the requested authority may look to the circumstances giving rise to the non-attendance of the accused person at the hearing;*
- (f) The requested state has a margin of discretion in how it approaches the facts, and whether to refuse return;*
- (g) In so doing the requested authority must be satisfied that it has been established unequivocally that the accused person was aware of the date and place of trial and of the consequences of not attending;*
- (h) Actual proof of service is not always required, and an assessment may be made from extrinsic evidence that the requested person was aware but nonetheless chose not to attend;*
- (i) Proof of service on a family member is not sufficient extrinsic evidence of that knowledge;*
- (j) The assessment is made on the individual facts but there must be actual knowledge by the requested person;*
- (k) Whether actual knowledge existed is a matter of fact and can be shown from extrinsic evidence;*
- (l) The purpose of the exercise is to ascertain whether the requested person who did not attend at trial has waived his or her right of defence;*
- (m) A waiver may be express or implicit from the circumstances, but an implication that a requested person has waived his or her rights to be present at trial is not to*

be lightly made and will not be made if it has not been unequivocally established that the person was aware of the date and place of trial;

(n) The degree of diligence exercised by a requested person in receiving notification of the date and place of trial may be a factor in the assessment of his or her knowledge of the date of trial:

(o) In a suitable case a manifest absence of diligence may lead a requested authority to the view that the accused person made an informed decision not to be present at trial, or where it can be shown that there was an informed choice made by the person to avoid service;

(p) The mere absence of enquiry as to the date or place of hearing in itself may not be sufficient, as it must be unequivocally shown that the requested person made an informed decision and, so informed, either expressly or by conduct waived a right to be present;

(q) It may in a suitable case be appropriate to weigh the degree of responsibility of the requesting state to notify an accused person of the date of trial against the accused's responsibility for the receipt of his or her mail;

(r) The enquiry has as its aim the assessment of whether rights of defence have been breached. It is not therefore a wide ranging or free-standing enquiry into the behaviour or lack of diligence of the requested person, and the purpose is to ascertain if rights of defence were adequately protected."

11. The court takes the view that the additional information received from the issuing authority confirms:

- (i) the respondent provided his addresses for the purpose of service of documents relating to the prosecution;
- (ii) he left his address in the knowledge that an appeal was lodged, and proceedings were pending;
- (iii) he was obliged to provide a new address to the relevant authorities;
- (iv) he was aware of the fact that he was obliged to provide an address to the relevant authorities;
- (v) he did not provide the relevant authorities with his new address;
- (vi) in such circumstances, it can be and is inferred that the respondent had made an informed decision to bring about a state of affairs in which it was not possible for the prosecution or judicial authorities to effect personal service upon him;
- (vii) in such circumstances, it can be and is inferred that the respondent had made an informed decision to deliberately and effectively avoid personal service;

- (viii) the respondent made an informed decision not to take any further part in person in the process, including attending any hearing in respect thereof; and
 - (ix) he unequivocally waived his right to notice of and to attend at the hearing of his appeal in the matter.
12. The rights of the defence have not been breached in these circumstances. I am satisfied that the requirements of Section 45 have been complied with and the court is disposed to dismiss this ground of objection.

13. Whether surrender is prohibited by section 37 of the Act of 2003?

Section 37 of The 2003 Act states as follows:

"37.—(1) A person shall not be surrendered under this Act if—

- (a) his or her surrender would be incompatible with the State's obligations under—
 - (i) the Convention, or
 - (ii) the Protocols to the Convention,
- (b) his or her surrender would constitute a contravention of any provision of the Constitution (other than for the reason that the offence specified in the relevant arrest warrant is an offence to which section 38 (1)(b) applies),
- (c) there are reasonable grounds for believing that—
 - (i) the relevant arrest warrant was issued in respect of the person for the purposes of facilitating his or her prosecution or punishment in the issuing state for reasons connected with his or her sex, race, religion, ethnic origin, nationality, language, political opinion or sexual orientation, or
 - (ii) in the prosecution or punishment of the person in the issuing state, he or she will be treated less favourably than a person who—
 - (I) is not his or her sex, race, religion, nationality or ethnic origin,
 - (II) does not hold the same political opinions as him or her,
 - (III) speaks a different language than he or she does, or
 - (IV) does not have the same sexual orientation as he or she does,

or

- (iii) were the person to be surrendered to the issuing state—
 - (I) he or she would be sentenced to death, or a death sentence imposed on him or her would be carried out, or
 - (II) he or she would be tortured or subjected to other inhuman or degrading treatment.

(2) In this section—

“Convention” means the Convention for the Protection of Human Rights and Fundamental Freedoms done at Rome on the 4th day of November, 1950, as amended by Protocol No. 11 done at Strasbourg on the 11th day of May, 1994; and

“Protocols to the Convention” means the following protocols to the Convention, construed in accordance with Articles 16 to 18 of the Convention:

- (a) the Protocol to the Convention done at Paris on the 20th day of March, 1952;
- (b) Protocol No. 4 to the Convention securing certain rights and freedoms other than those already included in the Convention and in the First Protocol thereto done at Strasbourg on the 16th day of September, 1963;
- (c) Protocol No. 6 to the Convention concerning the abolition of the death penalty done at Strasbourg on the 28th day of April, 1983;
- (d) Protocol No. 7 to the Convention done at Strasbourg on the 22nd day of November, 1984.”

14. In this regard the respondent submits as follows:

- (i) There has been a very lengthy delay in this case and the offences can only be described as very minor.
- (ii) The court is dealing with offences committed 14 years ago. The warrant, which notes that the respondent was believed to be living in the UK or Ireland, is dated the 12th of January, 2015.
- (iii) The respondent has been living openly in Ireland and paying tax since his arrival.

As such, the respondent argues that his surrender is prohibited by s. 37 of the Act as it would be in breach of the State’s obligations and he further submits that same would be wholly disproportionate.

15. In relation to this objection, the court notes the decision of the Supreme Court in *Minister for Justice & Equality -v- Vestartas* [2020] IESC 12 and in particular the comments of MacMenamin J. at paragraph 68 as follows;-

"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. When faced with an application under the EAW, an Irish court should not carry out a general proportionality test on the merits of the application; but rather, it should apply the specific terms of the Act, albeit subject to a careful consideration of whether, if necessary, applying a proportionality test to an Article 8 Convention right, to order surrender would involve a violation of that ECHR right to the extent of being incompatible with the State's obligations under the Convention."

Further, MacMenamin J. stated at paragraph 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. The High Court judgment holds that there had been a significant dilution of the public interest which would ordinarily apply (para. 37). It posed what was characterised there as a modified and weakened public interest in surrender, evidenced by the elapses of time and other factors. Against this, it posed the private and family factors in the case (para. 38). But for the reasons set out above, there was a misapprehension as to the nature of the assessment. This is not a balancing exercise where public and private interests are placed equally on the scales. It is nonetheless necessary to have regard to the circumstances."

Further, MacMenamin J. stated at paragraph 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."

16. In the *Minister for Justice and Equality -v- Ostrowski* [2013] IESC 24, the Supreme Court stated; -

"30. Once an EAW meets the minimum gravity test for an offence set out in the Framework Decision and the Act of 2003, it is not for the High Court to create and apply a proportionality test to a potential sentence."

17. In *Minister for Justice and Equality -v- Smits* [2021] IESC 27, O'Malley J. stated at paragraph 54 of the judgment; -

*"54. Many more recent cases have been based, in particular, on claimed violations of Article 8 rights with reference to the principle of proportionality. The role of this principle may require to be clarified, in the context of the instant case, in that the concern here is with the decision to issue an EAW and not with the sentence applicable to the actual offence. It is true that the issuing judicial authority is obliged to act proportionally in making a decision whether or not to issue a warrant. However, it is not for the courts of the executing State to subject a sentence, whether already imposed or sought to be imposed, to a review for proportionality. Thus, in *Minister for Justice and Equality v. Ostrowski* [2013] 4 I.R. 206 (*"Ostrowski"*) this Court held that the High Court had erred in conducting an assessment of proportionality by reference to what the trial judge considered to be the trivial nature of the offence concerned and the likelihood that a custodial sentence would not be imposed in the issuing State. Subject to s.37 of the Act of 2003, a court is required to order surrender if the provisions of the Act are otherwise complied with."*

- O'Malley J. went on to state at paragraph 74; -

"74. I think it necessary to observe that a lawfully issued EAW in respect of a sentence does not somehow become legally invalidated by subsequent delay. The presumption that guides the courts of the executing State is that a sentenced person has enjoyed all 24 necessary guarantees in the process leading to the imposition of the sentence and that the decision to issue the warrant involved an assessment of proportionality, with appropriate judicial protection. If that presumption is not rebutted, the decision to issue the warrant must be seen as valid. A valid order does not, by passage of time, "become" either incorrect, unlawful or void. Use of the word "stale" does not assist with the legal analysis. It is well established that delay is not, in itself, a ground for refusal of surrender unless it is so egregious that the application for surrender amounts to an abuse of process."

18. This court accepts that offences which are the subject matter of this EAW are relatively minor, that there has been some delay and that the respondent has lived openly in this jurisdiction. However, these are not matters that are outside the norm or truly exceptional. There is no evidence that there has been an abuse of process. The court must determine under Section 37 if surrender of the respondent would be incompatible with the obligations of the State under the European Convention on Human Rights ("ECHR"), the protocols thereto or the Constitution. I am satisfied that surrender would not be incompatible with such obligations and I dismiss the respondent's objection to surrender based on Section 37 of the Act of 2003.

19. Whether the respondent's surrender is prohibited by Section 38 of the Act of 2003?

The respondent submits that the Minister could not show correspondence in this jurisdiction with the offence of riding a bicycle while being drunk and not complying with the prohibition imposed by the court to drive a mechanical vehicle or a bicycle.

20. It is necessary for correspondence to be established in this case as the issuing judicial authority did not invoke the tick box procedure. The applicable principles relevant to the issue of correspondence were set out by Ms Justice Denham in *Minister for Justice Equality and Law Reform -v- Dolny* [2009] IESC 48, at para 14; -

"14. In addressing the issue of correspondence it is necessary to consider the particulars on the warrant, the acts, to decide if they would constitute an offence in the State. In considering the issue it is appropriate to read the warrant as a whole. In so reading the particulars it is a question of determining whether there is a corresponding offence. It is a question of determining if the acts alleged were such that if committed in this jurisdiction they would constitute an offence. It is not a helpful analogy to consider whether the words would equate with the terms of an indictment in this jurisdiction. Rather it is a matter of considering the acts described and deciding whether they would constitute an offence if committed in this jurisdiction." (per Denham J. in *Minister for Justice Equality and Law Reform -v- Dolny* [2009] IESC 48, at para. 14).

21. The relevant statutory provision is section 38 of the Act of 2003 which provides that "a person shall not be surrendered to an issuing state under this Act in respect of an offence unless (a) the offence corresponds to an offence under the law of the state".

22. The Minister submits that correspondence can be established with the following offence, having regard to the overall description of the acts of which the offence was made up:

Section 6 of the Road Traffic Act 2010, as amended, Prohibition on driving animal drawn vehicle or pedal cycle while under influence of intoxicant, which is defined as:

"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."

23. It is accepted by the applicant that the offence contrary to section 6 of the Road Traffic Act 2010 is only committed where the person is under the influence of an intoxicant to such an extent as to be incapable of having proper control of the vehicle or pedal cycle. As a result, it is submitted that the court can infer the lack of proper control from the alcohol readings provided in the description of the offence.

24. By way of assistance to the court in this regard, the applicant refers to section 4 (4) of the Road Traffic Act 2010, which deals with the prohibition on driving mechanically

propelled vehicles while under the influence of intoxicants or if exceeding alcohol limits. It states; -

“(4) A person shall not drive or attempt to drive a mechanically propelled vehicle in a public place while there is present in his or her body a quantity of alcohol such that, within 3 hours after so driving or attempting to drive, the concentration of alcohol in his or her breath will exceed a concentration of—

(a) 22 microgrammes of alcohol per 100 millilitres of breath, or

(b) in case the person is a specified person, 9 microgrammes of alcohol per 100 millilitres of breath.”

25. The respondent submits that there is no offence of drunken cycling simpliciter as described in the warrant. As such he submits there is no correspondence. The respondent further submits that there is no offence of riding a bicycle and not complying with the prohibition imposed by the court to drive mechanical vehicles or bicycles. In relation to the latter, in the court’s view, the correspondence does not need to go this far.
26. Considering the matters that the Minister must demonstrate, the court sought further information regarding the respondent’s “inability to have proper control” in relation to the circumstances of the offence. In that regard a s.20 request was addressed to the issuing judicial authority for the circumstances of the offence to be clarified. The said request dated the 16th of November 2021 was in the following terms:

“1. Can you please provide further information regarding the circumstances of the offence of riding a bicycle whilst being drunk, particularly; -

a. the state of intoxication that the respondent was in whilst riding the bicycle and,

b. outline any observations made regarding his ability to have proper control of the bike.”

The issuing judicial authority replied on the 23rd of November 2021 and stated as follows:

“1. On 27th September 2007, Slawomir Tomczak was arrested by the Police officers while riding his bike on the pavement. Testing of the contents of alcohol in the breathed out air showed at 3:04 a.m. – 0.58 milligrams per cubic decimetre and on 8:13 a.m. – 0.54 milligrams per cubic decimetre.

2. Pursuant to Article 115 paragraph 16 subparagraph 2 of the Polish Penal Code, the condition of intoxication occurs when the contents of alcohol in 1 cubic decimetre in the breathed out air exceeds 0.25 milligrams or leads to the concentration exceeding this value. Pursuant to Article 115 paragraph 16 subparagraph 1 of the Polish Penal Code this value corresponds to 0.5 per mille of alcohol in blood. The Legislator decided that exceeding of these values always causes worsening of capacities of proper control over the vehicle.”

27. In the court's view, the answer provided on the 23rd of November 2021 did not advance matters in any meaningful way. Notwithstanding, the applicant submits that the court can take into account the fact that Polish law infers that, once one has exceeded the legal limit of alcohol intake, there is an inference that one's ability to control the vehicle worsens. The applicant acknowledged that, while there are no breath alcohol levels set out in the Road Traffic Act 2010 with regard to pedal cycles, having directed the Court to the permitted alcohol levels in Ireland when driving a vehicle, the court could take into account the fact that the respondent had a reading of 0.54mg of alcohol per litre or 0.54 milligrammes per 1000 millilitres of exhaled breath. The applicant submits that the respondent's breath alcohol level converts from 540 microgrammes per 1000 millilitres to 54 microgrammes per 100 millilitres.
28. In this regard the applicant drew the court's attention to the fact that, as noted above, under Irish Law the relevant breath alcohol level under the Road Traffic Act 2010 for the purposes of driving or attempting to drive a mechanically propelled vehicle is 22 microgrammes of alcohol per 100 millilitres of breath or in the case of a specified person 9 microgrammes of alcohol per 100 millilitres of breath. "Specified person" includes holders of a learner permit, a recently qualified driver, persons having PSV licences or having no licence.
29. Thus, the applicant contends that the respondent would have been considerably over the limit for persons in charge of or intending to drive a mechanically propelled vehicle. Therefore, the central point being made by the applicant is that the court can infer that the respondent was drunk at the time of cycling the bicycle based on the alcohol reading provided, and that the court can draw a further inference that because of being drunk the respondent did not have proper control of the bicycle.
30. During the oral hearing on this matter a question arose as to whether the court should seek an expert report to establish prohibited levels of alcohol that would be required in this jurisdiction. The Court notes at this juncture the views of Mr Justice Binchy in *Minister for Justice and Equality -v- Krupa* [2019] IEHC 433, wherein the court refused surrender in circumstances where the applicant was unable to put forward any evidence to the court to demonstrate that the level of alcohol identified in the breath sample provided by the respondent exceeded the levels permitted in this jurisdiction. It seems to the court that the latter case very much turned on its own facts and is not authority for a general proposition, that expert Irish evidence is required in cases involving drink driving to demonstrate that the level of alcohol identified in the breath sample provided by the respondent exceeded the levels permitted in this jurisdiction. This view would be consistent with the judgment of the Supreme Court in *Minister for Justice Equality and Law Reform -v- Szall* [2013] IESC 7 ("*Szall*"). At paragraph 4.19, Mr Justice Clarke stated; -

"4.19 [...] The proper approach is to regard an Irish regime case as amounting, for the purposes of correspondence and of s. 5 of the 2003 Act, to an offence where the act or omission concerned is defined by reference to a lawful regime rather than

the specific Irish regime. Where, therefore, the offence specified in the relevant European Arrest Warrant involves the same acts or omissions by reference to a regime in the requesting state then, at least at the level of principle, correspondence can be established provided that there is a sufficient similarity between the respective regimes to justify the conclusion that the substance of the acts or omissions which amount to offences in the respective jurisdictions is the same even though the specific relevant regimes will necessarily be, as a matter of law, different, emanating as they will from the legal systems of the two separate jurisdictions."

Mr Justice Clarke continued at paragraph 6.2; -

"6.2 The real question which must be asked is as to whether those statutory regimes themselves are sufficiently similar so that breach of one may be taken to correspond to breach of the other even though the schemes are not, for obvious reasons, the same scheme.

31. In any event, the court is satisfied that expert evidence is not required in the circumstances of this case, while both sides disagreed as to the methodology employed in arriving at the figure of 54 microgrammes per 100 millilitres, they did agree ultimately that that figure was correct.
32. The height of the applicant's case therefore is that the respondent was approximately two and a half times over the legal limit for driving a mechanically propelled vehicle, at the time he rode the pedal cycle. For several reasons these figures alone do not, in the court's view, allow the court to infer that the respondent was not in control of a pedal cycle. The levels of alcohol permitted in this jurisdiction to drive a car only assist in a very limited way, as obviously the skill and awareness levels that a person will require to drive a car will ordinarily be far greater than the skill and awareness levels that a person would require to ride a bicycle. Notwithstanding the latter point the court derives some guidance on the issue of ability to control, albeit involving a mechanically propelled vehicle, in the case of *The Attorney General (Inspector P Ruddy) -v- James Kenny* [1960] 94 I.L.T.R 185 ("Kenny"), in that case Mr Justice Kingsmill Moore noted; -

"It must be such a condition as to amount to incapacity for exercising effective control over a mechanically propelled vehicle when in motion. Such a definition excludes the very mild early stages which it is customary to call "euphoria" and which leaves judgment and muscular co-ordination unimpaired. Effective control depends on correct judgment and good muscular co-ordination. But these elements themselves can only be estimated by observation of the mental reactions and physical movements of the person. A doctor may be able to apply more exact methods of testing muscular co-ordination and may be able to devise more searching questions to test the mental reactions. In describing the tests, the questions, the result of the tests, and the response to his questions he is giving evidence only of his observations as any ordinary witness may do. He is allowed to express a general opinion, as to whether a man is capable of exercising effective

control or not, only because his training in anatomy, physiology and mental processes is considered to render him expert beyond the ordinary man, or even the tribunal, in evaluating the total result of his observations. Therefore the tribunal may be guided by his opinion. No special expertness can be attributed to the ordinary man. His opinion, if he has formed one, must be based on what he has seen, heard, felt and smelt, on the appearance of the suspect person, his behaviour, his movements, the manner and context of his speech and his emotional response to the situation as evidenced by those observable facts. He can put the tribunal in possession of all the facts he has observed and the tribunal must be assumed to be at least equally as skilled as the witness in evaluating them, and more detached and impartial."

This court has no evidence to support the assertion that the respondent did not have correct judgment and did not have good muscular co-ordination. This court has no evidence of the mental reactions and physical movements of the person. This court has no evidence whatsoever to support the contention that the respondent was not in control of the pedal cycle. Therefore, in the court's view on the facts of this matter, the applicant cannot show correspondence with an offence under Section 6 of the Road Traffic Act 2010.

33. The applicant further proposed s. 12 of the Licensing Act, 1872 as the corresponding offence in this State. Counsel for the applicant submitted that the court could infer that the respondent was drunk based on levels of alcohol found in his system. 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 non-payment of any penalty under this section, the court may order him to be imprisoned with hard labour."

34. 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.

35. The applicant was unable to present any Irish authority regarding whether a pedal cycle is to be regarded as a carriage for the purposes of the Licensing Act, 1872 but referred the court to the case of *Corkery v. Carpenter* [1950] 2 All E.R. 745. The evidence was that the accused was drunk while pushing his bicycle along a road.

In that case, 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. In light of this court's findings on the issue of drunkenness, it has not been necessary for this court to determine the issue as to whether a pedal cycle can be regarded as a carriage for the purpose of the Licensing Act 1872.

36. In relation to the issue of drunkenness the court has considered the helpful judgment of Mr Justice Burns in *Minister for Justice Equality and Law Reform -v- Lizurej* [2021] IEHC 742 ("*Lizurej*"). In that case Mr Justice Burns considered similar issues to the issues in this case. While the level of alcohol differed in that case, Mr Justice Burns refused to order surrender in circumstances where he noted; -

" 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."

37. Like the situation in *Lizurej*, this court, despite requests, has no information in relation to the behaviour, lucidity or physical and mental capacity of the respondent at the time of the offence. Further, while the levels of alcohol may have exceeded the levels of alcohol found in the *Lizurej* case, the court cannot infer from those levels alone that the respondent was drunk. The concept of drunkenness is widely understood. In this jurisdiction, drunkenness is not so exceptional or so much outside the experience of the ordinary individual as to require an expert to diagnose it. The concept of drunkenness was considered in the case of *Kenny*, previously referred to at para. 31 of this judgment, in which Mr Justice Kingsmill Moore stated; -

" The first objection to admitting evidence of an opinion that a person was drunk lies in the vagueness of the term, the different meanings which it conveys to different witnesses, the variety of the symptoms and the gradualness of the progression, under the influence of alcohol, from "stone cold sober" to "dead drunk." At one end of the scale there is no more than a slight increase in geniality and expansiveness which only the most embittered teetotaler would regard as amounting to inebriety, at the other a paralysis of mental and bodily functions which the most hardened toper would not hesitate to call drunkenness. In between are innumerable gradations and the most experienced, honest and responsible witnesses will vary in the standards they apply, and in their opinions as to whether a person can or cannot be categorised as drunk. Before a tribunal of fact can acquire any assistance from the expression of opinion that a man was drunk, it

would have to enter into a preliminary inquiry as to what the witness understood to amount to drunkenness. It is simpler, more satisfactory, and may be in the end more expeditious, to get the witness to describe the appearance, behaviour, movements, reactions and utterances of the person alleged to be drunk, for it is on those observations that his opinion must be based. It is also more consonant with the general principles underlying our law of evidence that a witness speaks only as to observed facts, and leaves inferences of fact and the ultimate conclusion to the tribunal."

Further and of limited assistance the Cambridge dictionary defines drunkenness as "*the state of being drunk, under the influence of alcohol*", drunk is then defined in the Cambridge dictionary as "*unable to behave correctly or as usual because of drinking too much alcohol*".

38. An amount or level of alcohol may be present in a person, but whether that causes the person to be drunk, giving that word its ordinary and natural meaning, depends on all manner of variables including but not confined to:

- size,
- weight,
- metabolic rate,
- emotional state,
- whether the person is a habitual, regular or occasional drinker,
- whether the person is a seasoned or novice drinker,
- whether the person is on other forms of medication,
- whether the person has eaten food and when.

The court has no information in relation to these matters. The court has no information in relation to appearance, behaviour, movements, reactions and utterances of the person alleged to be drunk. Simply put this court cannot determine if the respondent was drunk at the time of the offence. There may of course be cases where the level of alcohol is so high that a court is perfectly entitled to infer that a respondent is drunk, and so drunk to be incapable of exercising control over a vehicle or a pedal cycle, however this is not one of those cases. Therefore, on the facts of this case, the court does not find correspondence with the offence contrary to Section 12 of the Licensing Act 1872.

39. The court does not find correspondence with offences under the law of the State.

40. As severance is not possible in the circumstances of this case by reason of the composite or aggregate sentence having regard to the decision in *Minister for Justice Equality and*

Law Reform -v- Ferenca [2008] IESC 52, this court must refuse to surrender the respondent.