

THE HIGH COURT

[2021] IEHC 840
[2019 No. 195 EXT.]

SUPREME COURT APPEAL NO. 2019/222

BETWEEN

MINISTER FOR JUSTICE AND EQUALITY

APPLICANT

AND

SŁAWOMIR WIKTUR PALONKA

RESPONDENT

Findings of Mr. Justice Paul Burns delivered on the 8th day of July, 2021

1. By Order of the High Court, Binchy J., dated 29th November, 2019, the surrender of the respondent to the Republic of Poland ("Poland") was ordered pursuant to a European arrest warrant dated 29th January, 2019 ("the EAW"). That Order is the subject of an appeal pending before the Supreme Court, which has remitted the matter back to the High Court in order to seek additional information from the issuing state and to make such further findings of fact as seem appropriate. This rather unusual procedure arises in circumstances where the Supreme Court was of the opinion that it did not have sufficient information before it to determine the issues on appeal and where the European Arrest Warrant Act, 2003, as amended ("the Act of 2003"), provides that it is for the High Court to request additional information from the Polish authorities. The role of this Court at this stage is limited to seeking additional information and making findings of fact, but not to determine any question of law or to make any order granting or refusing the requested surrender. The High Court Order of 29th November, 2019, remains a valid Order, although subject to a stay, unless set aside or varied by the Supreme Court.
2. The surrender of the respondent is sought to enforce a sentence of ten months' deprivation of liberty imposed on 23rd August, 2002, by the Regional Court in Hrubieszów (case reference number II K 415/02) in relation to an offence concerning the illegal importation of cannabis in July 1999.
3. The respondent had been the subject of an earlier European arrest warrant dated 6 November, 2012, seeking surrender in order to enforce a sentence of ten months' imprisonment imposed on 30th June, 2003 by the District Court in Nowy Tomyśl, as amended by the Regional Court in Poznań on 29th January, 2004. That sentence and warrant related to an offence concerning the illegal importation of cannabis in March 2003. Surrender pursuant to that warrant was refused by the Court of Appeal on 18th May, 2015. (*Minister for Justice v Palonka* [2015] IEHC 69.)
4. At part F of the EAW in these proceedings, it is indicated that the respondent had been present on 23rd August, 2002 when the sentence of ten months' deprivation of liberty was imposed, that the said sentence was conditionally suspended for 3 years and that "In connection with the fact that Sławomir Wiktor Palonka, in the period of trial, committed another offence", the Regional Court in Hrubieszów by decision dated 16th January, 2006 ruled that the sentence of 10 months' deprivation of liberty was to be executed.

5. The respondent was not present for any hearing in respect of the decision to order execution of the previously suspended sentence and it was argued on his behalf that surrender was precluded as the requirements of 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"), as incorporated into Irish law by s. 45 of the Act of 2003, had not been met. The High Court dismissed this objection on the grounds that the issue had been determined against the respondent by the Court of Justice of the European Union ("the CJEU") in *Ardic* (Case C-571/17 PPU) which, in general terms, ruled that Article 4a of the Framework Decision did not apply to a hearing involving the revocation of conditional suspension of a sentence on grounds of infringement of the conditions, provided the revocation decision did not change the nature or level of the penalty initially imposed.
6. The respondent had also argued, *inter alia*, that surrender was precluded on grounds of estoppel or as amounting to an abuse of process. The respondent relied upon the previous proceedings in which surrender had been refused and on the lapse of time between the commission of the offence and the issue of the EAW herein. These objections were also dismissed by the High Court.
7. The Supreme Court granted leave to appeal the High Court Order by a determination in *Minister for Justice and Equality v. Palonka* [2020] IESCDET 54, dated 24th April, 2020, in which the Supreme Court identified two points of law of general public importance:-

"1. whether on the facts of this case the issue of the second EAW, seven years after the issue of a warrant in this jurisdiction in relation to a separate offence, and four years after the refusal of surrender in that case, may be seen as an abuse of process, justifying refusal of surrender; and

2. whether surrender may be ordered in respect of the in absentia activation of a suspended sentence if such activation was triggered by an in absentia conviction for which surrender has been refused."

8. In a decision dated 14 July, 2020, (*The Minister for Justice v. Palonka* [2020] IESC 40), the Supreme Court indicated that it did not have sufficient clarity as to the relevant facts in order to dispose of the appeal before it. As stated earlier herein, the matter was remitted to the High Court to seek further information, if persuaded of the necessity to do so, and the Supreme Court suggested some possible queries that could be raised as follows:-

"1. Was the suspension of the July 1999 sentence of 10 months lifted, and thus became operative, due to the commission of another offence in March 2003?

2. When and why did that happen?

3. There was a hearing for the offence of March 2003. That happened in June 2003 and January 2004. Why were there two hearings?

4. Was the appellant present for either or both hearings? If he was absent, was he served with legal notice of the hearing, and if so, how? Was he represented and if so on the basis of what instructions given to a lawyer representing him?

5. In January 2006, the suspended sentence for the July 1999 offence appears to have been lifted, thus becoming a jail sentence of 10 months instead of a suspended sentence. Was the appellant present for the hearing? If he was absent, was he served with legal notice of the hearing, and if so, how? Was he represented and if so on the basis of what instructions given to a lawyer representing him?

6. In May 2015, the application for surrender of the appellant on the March 2003 offence was refused in Ireland. The Polish authorities then sought surrender on the basis of the July 1999 offence by request dated January 2019 for the July 1999 offence. Why did the authorities in Poland wait until after the failure of the surrender request in respect of the March 2003 offence to seek surrender on the July 1999 offence?"

9. The Supreme Court also indicated that:-

"It is to be emphasised, however, that the High Court should make such additional findings of fact as appeared to that court to be appropriate on the basis of the evidence, including such additional information as may come from the Polish authorities. Insofar as findings may be required they should relate to such facts as might reasonably be necessary to enable an assessment to be made of the legal issues, including the possible necessity for a reference to the Court of Justice of the European Union on the imposition of a sentence, or activation of a sentence, in absentia and on the issue of abuse of process."

10. When the matter was remitted to the High Court as aforesaid, Binchy J. had been elevated to the Court of Appeal and so it fell to this Court to deal with the matter. Having heard substantial submissions from the parties over a number of dates, the Court engaged in a lengthy process of seeking additional information. The correspondence was as follows:-

Regional Court Hrubieszów (RCH); Issuing judicial authority, District Court in Zamosc (IJA);

23/09/20 Request for additional information;

12/10/20 Reply from Regional Court Hrubieszów;

16/10/20 reply from District Court in Zamosc ;

11/12/20 Request for additional information;

30/12/20 Reply from Regional Court Hrubieszów;

08/01/21 Reply from District Court in Zamosc ;
10/02/21 Request for additional information;
16/02/21 Reply from Regional Court Hrubieszów;
18/02/21 Reply from District Court in Zamosc;
04/03/21 Request for additional information;
10/03/21 Reply from Regional Court Hrubieszów;
12/03/21 Reply from District Court in Zamosc;
14/04/21 Request for additional information;
16/04/21 Reply from District Court in Zamosc;
07/05/21 Request for additional information;
11/05/21 Reply from District Court in Zamosc;
21/05/21 Request for additional information;
26/05/21 reply from District Court in Zamosc.

11. I do not propose to go through the details of each request and reply as these documents will be available to the Supreme Court when it recommences hearing the appeal.
12. In terms of additional pleadings since the matter was remitted from the Supreme Court, the respondent swore an affidavit dated 17th November, 2020 and the solicitor for the respondent, Mr. Shane McMahon, swore an affidavit dated 8th December, 2020.

The Questions Proposed by the Supreme Court

13. Turning to the questions proposed by the Supreme Court, on foot of the additional information received, I answer same as follows:-

Q. 1. Was the suspension of the July 1999 sentence of 10 months lifted, and thus became operative, due to the commission of another offence in March 2003?

A. 1. Yes.

Q. 2. When and why did that happen?

A. 2. The suspension of the July 1999 sentence of ten months' imprisonment was lifted by order dated 16th January, 2006. A dispute of fact arose as to whether the suspension was revoked because the respondent was convicted of having committed an offence in March 2003, or was only revoked upon a custodial sentence being imposed in respect of that offence. This was of some significance as it was submitted on behalf of the respondent, before this Court, that the

respondent had attended the trial at first instance in respect of the offence of March 2003 along with his lawyer and had pleaded guilty, but that only a fine was imposed and no custodial sentence was imposed. It was submitted that the decision was appealed as regards sentence only, and on appeal a custodial sentence was imposed by decision dated 29th January, 2004. However, by additional information dated 11th May, 2021 and 26th May, 2021, it is clear that at first instance on 30th June, 2003, a sentence of 6 months' imprisonment was imposed for importing narcotics on 23rd March 2003, and a further sentence of six months' imprisonment was imposed for possession of narcotics on 23rd March, 2003. These sentences were aggregated into a sentence of ten months' imprisonment with credit given for time served. At appeal on 29th January, 2004, it was determined that the two offences constituted one offence and a sentence of ten months' imprisonment was imposed in respect of the single offence and the respondent was further ordered to pay PLN 180 in respect of the costs of the appeal.

Thus, the respondent's contention that no custodial sentence was imposed at first instance on 30th June, 2003 is erroneous.

In the additional information dated 11 May, 2021, at point A.2., the judgment dated 30th June, 2003 is referred to as:

"a legally binding and enforceable judgment made on 30 June 2003 in case Court File Ref. No. II K 112/03 by Sąd Rejonowy [Regional Court] in Nowy Tomyśl".

However, at point A.3., it is stated:

"Pursuant to Article 75(1) of the Penal Code, the Court shall order the enforcement of the sentence if the convicted person, during the trial period, has committed a similar intentional offence for which a sentence of imprisonment without conditional suspension of its execution was imposed with a legally binding and enforceable judgment. The judgment made in case Court File Ref. No. II K 112/03 (pursuant to which Sławomir Wiktor Palonka was sentenced to absolute imprisonment) became legally binding and enforceable on 29 January 2004, i.e. as from the date of the judgment by the Court of Second instance. The final judgment, combined with the imposition of an absolute sentence of imprisonment, was the basis for ordering on 16 January 2006 the enforcement of the sentence of imprisonment made in case Court File Ref. No. II K 415/02. The fact that Sławomir Wiktor Palonka lodged an appeal against the judgement made in case Court File Ref. No. II K 112/03 was not relevant in this particular case." (emphasis added)

From the foregoing, I am satisfied that the suspension of the July 1999 sentence of ten months' imprisonment was lifted, and the said sentence became operative, due to the commission of other offence(s) in March 2003. As regards the offence(s) in March 2003, the respondent pleaded guilty at first instance and was sentenced to an aggregate penalty of ten months' imprisonment. On appeal by the respondent, the two offences were treated as one offence and a single sentence of ten months' imprisonment was imposed.

Thus, guilt was finally determined at first instance and sentence was finally determined on appeal. The order on appeal of 29th January, 2004, is stated by the issuing state to be the basis for ordering the execution of the July 1999 sentence and I am satisfied that this is so.

Q. 3. There was a hearing for the offence of March 2003. That happened in June 2003 and January 2004. Why were there two hearings?

A. 3. The hearing on 30th June, 2003 was a hearing at first instance and the hearing on 29th January, 2004 was a hearing on appeal.

Q. 4. Was the appellant present for either or both hearings? If he was absent, was he served with legal notice of the hearing, and if so, how? Was he represented and if so on the basis of what instructions given to a lawyer representing him?

A. 4. On June 26th, 2003, the respondent appeared at the trial in the Regional Court in Nowy Tomyśl and he was represented by his defence counsel. Thus, he was aware of the fact that he was legally represented and either expressly or implicitly accepted that representation. He does not contend that the lawyer at first instance was not mandated by him. He pleaded guilty in respect of two offences which occurred on 23rd March, 2003. On 30th June, 2003, a judgment was pronounced. The respondent did not appear for the sentencing judgment but his counsel was present. The respondent appealed that sentence and, on 29th January, 2004, the appeal was heard by the District Court in Poznań. The appeal had been lodged on behalf of the respondent. The respondent did not appear at the appeal hearing although he had been duly advised of it by receiving the summons by post which the respondent collected, and signed for, on 13th January, 2004. The respondent has averred that he has no recollection of authorising the appeal but does not contend that he did not do so. By additional information dated 16th April, 2021, the District Court in Zamość indicates that in the initial hearing before the Regional Court in Nowy Tomyśl, the respondent was represented by an attorney named Rafał Jujka who had been authorised to act by the respondent's mother (it should also be borne in mind that the respondent attended that court in person with that lawyer). For the appeal before the District Court in Poznań, the respondent was represented by Monika Urbańska who was given a substitute power of attorney by Rafał Jujka. Copies of the relevant authorisations are enclosed with the additional information, as is the receipt for notice/summons for the appeal hearing signed for by the respondent on 13th January, 2004.

I am satisfied that the respondent personally received notice of the date of the appeal hearing, having signed for receipt of same. Although the precise contents of the notice cannot be established, as a copy of same is not available, the respondent has not averred that the notice did not tell him of the scheduled date and that a decision might be given in his absence. There is nothing before this Court to indicate that the respondent withdrew his instructions between the hearing at first instance and the lodging of the appeal. I am satisfied as a matter of probability that

the lawyer was continuing to act on the authority of the respondent in lodging the appeal. A copy of the judgment was not served on the respondent because the rules of Polish criminal procedure did not require it. The judgment became final on January 29th, 2004 and there are no means of further appeal.

In short, I am satisfied that the respondent appeared in person at first instance, an appeal was lodged on his behalf by his mandated lawyer, he was notified of the date scheduled for the appeal hearing and signed for receipt of such notice.

There is no evidence before this Court as to the specific instructions given by the respondent to his lawyer and it is not for this Court to speculate in respect of same. The respondent was personally notified of the date set for the appeal. The respondent's mother gave an authorisation to act to Mr. Jujka in respect of the matter. Mr. Jujka acted at first instance at which the respondent was present and Mr. Jujka gave a substitute authorisation to Ms. Urbańska on the date of the appeal hearing.

Q. 5. In January 2006, the suspended sentence for the July 1999 offence appears to have been lifted, thus becoming a jail sentence of 10 months instead of a suspended sentence. Was the appellant present for the hearing? If he was absent, was he served with legal notice of the hearing, and if so, how? Was he represented and if so on the basis of what instructions given to a lawyer representing him?

A. 5. The respondent was not present and was not represented at the hearing on 16th January, 2006, which lifted the suspension of the sentence for the July 1999 offence. Notice of the hearing was sent by post to the respondent but was not collected.

Q. 6. In May 2015, the application for surrender of the appellant on the March 2003 offence was refused in Ireland. The Polish authorities then sought surrender on the basis of the July 1999 offence by request dated January 2019 for the July 1999 offence. Why did the authorities in Poland wait until after the failure of the surrender request in respect of the March 2003 offence to seek surrender on the July 1999 offence?

A. 6. No simple or straightforward answer has been provided in respect of this question. It does not appear to be accepted by the issuing state that it "waited" until after the failure of the said surrender request before seeking surrender for the July 1999 offence. There undoubtedly was a significant lapse of time between the 2006 activation of the sentence in respect of the July 1999 offence and the issue of the EAW in respect of same. The documentation before this Court establishes the following:

a. After the suspended sentence was activated on 16th January, 2006, an order issued on 17th February, 2006 against the respondent to report to the penal institution in Hrubieszów. When he did not appear, a warrant for compulsory

appearance issued and an additional search was initiated. As he could not be located, enforcement proceedings were suspended by the Regional Court in Hrubieszów on 17th July, 2006. A wanted notice issued on 18th July, 2006.

- b. The Regional Court in Hrubieszów requested the District Prosecutor's Office in Zamość to issue a European arrest warrant against the respondent. By letter dated 21st September, 2006, the District Prosecutor in Zamość refused to apply for a European arrest warrant, stating that the case files did not provide information about the place the respondent was staying at and that there was no evidence that the wanted person was staying abroad.
- c. The District Court in Poznań had issued a European arrest warrant (III Kop 31/06) seeking surrender of the respondent on 6th March, 2006 ("the 2006 warrant"). This warrant was never executed. The 2006 warrant was sent to Ireland but, by letter dated 17th October, 2012, the Irish authorities asked the issuing judicial authority to provide an amended warrant incorporating the changes to the form of the warrant brought about by European Council Framework Decision 2009/299/JHA. The Polish authorities sent a fresh warrant which issued on 6th November, 2012 ("the 2012 warrant"). In the 2012 warrant, it was indicated that the respondent may be residing in the Netherlands.
- d. After the decision of the District Prosecutor in Zamość to refuse to issue a European arrest warrant (see point b. above), the respondent was still being sought by way of wanted notice. In 2012, the Regional Court in Hrubieszów started requesting documents that were necessary to apply for a European arrest warrant. At the same time, the County Police Headquarters in Hrubieszów were trying to establish where the respondent was staying. The Regional Court in Hrubieszów was advised that the respondent was being sought on the basis of the European arrest warrant issued by the District Court in Poznań on 6th March, 2006 reference III Kop 31/06.
- e. On 12th October, 2012, Police Headquarters in Hrubieszów received information via Interpol that the respondent was staying in Ireland at apartment 19 Preston Mills, Drogheda. Having received this information, the Regional Court in Hrubieszów decided not to issue a European arrest warrant in respect of the convicted person because on the same day, the Court was advised that a European arrest warrant had already been issued in respect of the respondent by the District Court in Poznań. The reason given for the Regional Court in Hrubieszów not issuing or seeking to issue a European arrest warrant in respect of the sentence activated by order of 16th January, 2006 is that if the respondent was surrendered on foot of the 2006 warrant, issued by the District Court in Poznań, it would be possible to execute that activated sentence if the Respondent consented to it, which is provided for in Polish law.
- f. On 26th March, 2018, the Regional Court in Hrubieszów received a copy of the 2006 warrant but was not aware of, and did not have a copy of, the 2012 warrant.

- g. The Regional Court in Hrubieszów indicates that it was not aware of the arrest of the respondent in Ireland until it was informed by letter dated 27th March, 2018 by the Regional Police that the respondent had been arrested and detained on foot of a European arrest warrant, had lodged an appeal against his surrender and that the extradition procedure had been withheld (in fact, surrender of the respondent on foot of the 2012 EAW was ordered by the High Court but subsequently refused by the Court of Appeal on 18th May, 2015). The Regional Court in Hrubieszów indicates that it was not aware that the respondent's detention in Ireland was on foot of the 2012 EAW (presumably, as opposed to the 2006 warrant).
 - h. The police were responsible for all searches for the respondent. In the course of the police investigations, it was established that the respondent was probably in the Netherlands and then in Ireland. The Respondent was arrested in Ireland on foot of the 2012 EAW on 28th December, 2013 but the Regional Court in Hrubieszów indicates it was not aware of this fact until 27th March, 2018.
 - i. On 15th June, 2018, the Regional Police applied to the Regional Court in Hrubieszów for the issue of an European arrest warrant in respect of the sentence activated by order dated 16th January, 2006. The procedure meant requesting information from relevant institutions and sending necessary documents concerning the convicted person. Waiting for the said documents appears to have taken a long time. Not until all the information and documents were collected did the Regional Court in Hrubieszów file a request with the District Court in Zamość to issue the EAW, which issued on 23rd January, 2019.
 - j. In Poland, the police are responsible for making enquiries as to the whereabouts of wanted persons. A list of wanted persons in connection with European arrest warrants is not publicly available in Poland. In order to find out whether a European arrest warrant has been issued against a particular person, a search is performed, presumably by an authorised person such as a police officer, on the National Criminal Register, to establish if there were domestic warrants or wanted notices in respect of a person. If a warrant or wanted notice is turned up, an inquiry can then be made for information as to whether a European arrest warrant has been issued by the relevant Court.
14. By way of background, it is the experience of this Court that, unlike Ireland, there is not a single issuing judicial authority in Poland for the purposes of issuing European arrest warrants. There appear to be a number of issuing judicial authorities in that Member State depending upon which court in Poland is dealing with the prosecution of the offence or enforcement of the sentence. The experience of this Court is that where a requested person is sought in respect of multiple offences to be prosecuted in, or multiple sentences imposed by, courts in different areas in Poland this can lead to a multiplicity of warrants before this Court, necessitating communication with a number of different issuing judicial authorities which appear, to a large extent, to operate independently of one and other.