

**THE HIGH COURT**

[2022] IEHC 50  
[2021 No. 108 EXT]

**BETWEEN**

**THE MINISTER FOR JUSTICE**

**APPLICANT**

**AND**

**SEBASTIAN RAFAL KASPRZYK**

**RESPONDENT**

**JUDGMENT of Mr. Justice Paul Burns delivered on the 31st day of January, 2022**

1. By this application, the applicant seeks an order for the surrender of the respondent to the Republic of Poland ("Poland") pursuant to a European arrest warrant dated 29th April, 2021 ("the EAW"). The EAW was issued by Judge Jerzy Zielinski, of the Circuit Court in Swidnica, as the issuing judicial authority.
2. The EAW seeks the surrender of the respondent in order to enforce a sentence of 2 years' imprisonment imposed upon him on 31st March, 2016, of which 1 year, 11 months and 27 days remain to be served.
3. The respondent was arrested on 29th April, 2021, on foot of a Schengen Information System II alert, and brought before the High Court on the following day, 30th April, 2021. The EAW was produced to the High Court on 11th May, 2021.
4. I am satisfied that the person before the Court, the respondent, is the person in respect of whom the EAW was issued. No issue was raised in that regard.
5. I am satisfied that none of the matters referred to in ss. 21A, 22, 23 and 24 of the European Arrest Warrant Act, 2003, as amended ("the Act of 2003"), arise for consideration in this application and surrender of the respondent is not precluded for any of the reasons set forth in any of those sections.
6. I am satisfied that the minimum gravity requirements of the Act of 2003 have been met. The sentence in respect of which surrender is sought is in excess of 4 months' imprisonment.
7. Part D of the EAW indicates that the respondent did not appear in person at the trial resulting in the decision:-

*"d. the person was served with the decision on the day of 21.04.2016 and was expressly informed about the right to a retrial or appeal, in which he or she has the right to participate and which allows the merits of the case, including fresh evidence, to be re-examined and which may lead to the original decision being reversed or modified."*

It further indicates that *"the person did not request a retrial or appeal within the applicable time frame"*.

8. Further at part D of the EAW, the following is also set out:-

*"Sebastian Kasprzych was not present at the court hearing on the 24th of March 2016, the Court decided to conduct the trial in the absence of the accused and to read out the explanations he had provided because he did not appear at the court hearing without providing any justification or good reason for his non-attendance. The delivery of the judgment was adjourned until the 31st of March 2016. The accused was not present when the judgment was announced. A true copy of the judgment dated the 31st of March 2016 and legal advice were sent by post to Sebastian Kasprzych at two addresses he had given and which had been put down in the interrogation record. The said postal mail was not collected by him within the applicable time frame, he was twice left a notice informing him of attempted service and then the said mail was returned to the Court. Pursuant to the provisions of law in force the said postal mail was deemed to have been duly delivered on the 21st of April 2016, the finality and legal validity of the judgment was ascertained on the 29th of April 2016."*

9. At part E of the EAW, it is indicated that the EAW relates to 3 offences. The first offence is an offence of driving a motor car while being in a state of insobriety with 1.19 mg of alcohol per litre of breath. The second offence consists of using a motor vehicle to commit an assault on police officers by deliberately crashing into a police car causing injury. The third offence essentially consists of failing to adjust the speed of a motor vehicle being driven by him to the existing road conditions, losing control of the vehicle and causing the vehicle to capsize as a result of which a passenger suffered injury. All 3 offences occurred on 20th June, 2008.
10. The respondent objects to surrender on the following grounds:-
  - (i) Surrender is precluded by reason of s. 38 of the Act of 2003; and
  - (ii) Surrender is precluded by reason of s. 45 of the Act of 2003;

**Section 38 of the Act of 2003 – Correspondence**

11. Counsel on behalf of the respondent submitted that correspondence could not be established between the first offence set out in the EAW and an offence under the law of the State. He conceded that, while there is an offence in this jurisdiction of driving with excess alcohol in one's breath, the reading as expressed in the EAW did not correlate with an excess of the limit set out in this jurisdiction. Counsel on behalf of the applicant submitted that the simple mathematical exercise of expressing the readings as set out in the EAW with the equivalent scale in this jurisdiction would give a reading of 119 mg of alcohol per 100 ml of breath and such reading would be in excess of the limit set in the Irish legislation at 22 mg of alcohol per 100 ml of breath as per s. 4(4)(a) of the Road Traffic Act, 2010.
12. I am satisfied that correspondence exists between the first offence set out in the EAW and an offence under the law of the State, namely driving with excess alcohol in one's breath contrary to s. 4(4)(a) of the Road Traffic Act, 2010. Furthermore, while it may be the case that the impermissible limit of alcohol in breath may vary between the two

jurisdictions or be expressed differently, I am satisfied that bearing in mind the reasoning of the Supreme Court in *Minister for Justice v. Szall* [2013] IESC 7, the offence in question consists of a breach of a regulatory regime in respect of which there is an equivalent regime in this jurisdiction so that correspondence is established.

13. As regards the other two offences referred to in the EAW, I am satisfied that correspondence can be established between the second offence of using a motor vehicle to commit an assault on police officers by deliberately crashing into a police car causing injury and the offence in this jurisdiction of assault causing harm contrary to s. 3 of the Non-Fatal Offences Against the Person Act, 1997, and/or dangerous driving in its various forms contrary to s. 53 of the Road Traffic Act, 1961. I am satisfied that correspondence can be established between the third offence of failing to adjust the speed of a motor vehicle being driven by him to the existing road conditions and the offence in this jurisdiction of careless driving contrary to s. 52 of the Road Traffic Act, 1961.
14. I dismiss the respondent's objections based upon a lack of correspondence.

**Section 45 of the Act of 2003 – *In Absentia* Judgment**

15. Section 45 of the Act of 2003 transposes Article 4A of the European Council Framework Decision dated 13th June, 2002 on the European Arrest Warrant and the Surrender Procedures Between Member States, as amended ("the Framework Decision"), into Irish law and provides as follows:-

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

16. The respondent swore an affidavit dated 18th June, 2021 in which he avers that he has lived in Ireland since 2005, apart from a period in 2008 when he returned to Poland for a period of less than 3 months. He then moved to the United Kingdom for approximately 6 months and then returned to Ireland in early 2009 and has lived in this jurisdiction consistently since then. He avers that the statement at part D.1. of the EAW that he "was served with the decision on the day of 21.04.2016 and was expressly informed about the right to a retrial or appeal" is absolutely incorrect and that he never received any such notification. He also avers that he did not receive a summons to appear in court and was not otherwise notified of a trial scheduled against him. He avers that he does not know the 2 addresses referred to in part D of the EAW but that it may be that the historic address of his former family home was noted by the Polish police as that was the address on his national identity card, but his family had not lived there since 2006 and did not retain any lease on the property in 2008. He avers that he is absolutely certain that he did not positively provide that address to the Polish authorities.

17. By additional information dated 27th May, 2021, it is indicated that on 21st June, 2008, when interrogated in the preparatory proceedings, the respondent gave 2 addresses, *i.e.* his registered permanent residence 97/14 Dluja Street, Walbrzych and his usual address 101/10 Broniewskiego Street, Walbrzych. It is further indicated that during the first interrogation, the respondent was informed about his rights and duties and, in particular, about his obligation "*to inform the agency conducting the proceedings of every change of his place of residence/address or stay lasting longer than 7 days*" and that if he changed his place of residence/address without informing the authorities about his change of address, then any correspondence sent to the original address would be deemed to have been served. It is indicated that the notice of trial scheduled for 24th March, 2016 was sent to the respondent at both addresses by post and through the agency of the police, who had been asked to deliver the notice. Both posted mails were returned to the court with the annotation "*the addressee does not live here*". The police were unable to deliver the notice of trial and they established that he had not been living at the addresses given for over 6 years. It is confirmed that the respondent was not present at the trial on 24th March, 2016 or the pronouncement of judgment on 31st March, 2016.
18. The respondent swore a supplemental affidavit dated 24th June, 2021 in which he avers that his previous affidavit should have indicated that in 2008, he was in Poland for more or less 3 months and that he was there over the summer months of 2008, or something in the region of 3 months. As regards the address 97/14 Długa Street, Walbrzych, he avers that was the address of his former family home as per his national identity card but neither he nor any of his family had lived there since 2006. He once again avers that he did not provide that address to the Polish police. As regards the address 101/10 Broniewskiego Street, Walbrzych, he avers that is his grandmother's address and that he stayed there for the duration of his stay in Poland in 2008. He avers that when questioned by the police, he would have told the police that he was staying at that address and that it was his grandmother's address. He denies that he positively or actively provided his grandmother's address for service of court documentation or summonses and he did not expect to receive any notification of same at her address. He states that he has no recollection of being advised of a mandatory obligation to inform the police if he was changing address for longer than 7 days. He states that he remained in Poland for approximately 3 weeks following questioning by the police and then travelled to England. He states that his grandmother never indicated that the police called to her address looking for him and that she would have told him had they done so.
19. By additional information dated 8th July, 2021, the issuing judicial authority indicates that during his interrogation on 22nd June, 2008, the respondent was informed of his rights and obligations and of Article 75 of the Polish Code of Criminal Procedure, which provides that an accused is obliged to inform the prosecuting agency of every change of address or stay lasting longer than 7 days. A copy of the minutes of interrogation is enclosed which expressly states that the suspect was advised of his rights and obligations, including Articles 74 and 75 of the Polish Code of Criminal Procedure. It is also expressly recorded that the suspect, *i.e.* the respondent herein, provided personal details including the two addresses already referred to herein.

20. In a second supplemental affidavit dated 21st July, 2021, the respondent avers that he was involved in a road traffic accident on 20th January (*sic.*), 2008 whilst drink-driving and required hospital treatment for facial bruising. He avers that he was detained for 2 nights in police custody and on 22nd June, 2008 he was brought before a prosecutor. He avers that he recalls signing the minutes of interrogation but that he was not specifically told about his obligation to notify of change of address and he did not read the "warning". He avers that the focus of the minutes of interrogation was his statement in which he gave explanations for his conduct and mitigating factors. He avers that he was brought before a judge on the following day, 23rd June, 2008, and while he cannot recall what directions he was given he states that he was not told that he had to inform the prosecutor of a change of address. He avers that his understanding was that he had been released and was free of all obligations in respect of the case. He concludes by stating that he has retained a lawyer in Poland to seek to have the sentence commuted or suspended.
21. By additional information dated 30th July, 2021, the issuing judicial authority confirms that the respondent was apprehended on 20th June, 2008. He was interrogated on 21st June, 2008 when he provided two addresses, *i.e.*:-
- (a) his registered permanent residence: 97/14 Długa Street, Walbrzych; and
  - (b) his usual address: 101/10 Broniewskiego Street, Walbrzych.

It is confirmed that the respondent was informed about his rights and duties, particularly about the content of Article 75(1) of the Polish Code of Criminal Procedure, pursuant to which he was obligated to inform the agency conducting the proceedings of every change of his place of residence/address or stay lasting longer than 7 days and about the content of Article 139(1) of the Polish Code of Criminal Procedure, which provides that if a party has changed his place of residence/address without informing of his new address or does not reside at the address he had provided as his, including the situation of being remanded in custody or imprisoned in another case, any correspondence sent to the original address is deemed to have been served. On 22nd June, 2008, the prosecutor applied to the district court for an order of provisional detention in respect of the respondent on grounds that he was likely to hide or escape. The respondent appeared in person at that court hearing and again provided the same two addresses. It is stated that owing to the respondent's statement that his permanent residence was in Poland, among other things, the district court did not grant the request for detention of the respondent. It is indicated that the respondent was indeed released from custody but that he was well aware that this was only a part of ongoing preparatory proceedings which precede the court proceedings, all the more so because the respondent had already been convicted by the court in the past and he knew particular stages of the proceedings making up a whole criminal justice process. It was once again emphasised that the respondent was obligated to live/stay at the address he had given as his and to inform the agency conducting the proceedings of every change of his place of residence/address or stay lasting longer than

7 days, which he failed to do. The minutes of the court hearing are enclosed. These minutes expressly record the respondent answering questions of the court including:-

*"... At present I live at 101/10 Broniewskiego Street, Wałbrzych. Earlier I was registered to reside at 99/4 Długa Street, Wałbrzych. In July I am to start a job. I have a girlfriend to provide for, she is pregnant, we are living together, please, do not order a provisional detention for me. I had been convicted by the court in the past but it was when virtually I was just a kid and it was all down to my stupidity."*

22. I am satisfied on the basis of the additional information provided by the issuing judicial authority that the respondent provided the prosecuting authorities with the two addresses referred to herein. I am further satisfied that he again provided the same addresses when he appeared before the court on 23rd June, 2008 and did so specifically in the context of contesting an application by the prosecution for his provisional detention. I reject the respondent's averments that he did not provide the said addresses to the authorities.
23. I am further satisfied that the respondent was advised of his obligations as a suspect, including his obligation to inform the prosecuting authority of any change of address.
24. In *Minister for Justice v. Zarnescu* [2020] IESC 59, the Supreme Court held that s. 45 of the Act of 2003 is to be given a purposive interpretation so that a failure on the part of the applicant to establish circumstances which fit neatly into one of the points set out at the table to s. 45 may not necessarily result in a refusal of surrender. Where the Court is satisfied that the requirements of s. 45 of the Act of 2003 have been met substantively and that the defence rights of the respondent have been respected and given effect to by the issuing state, then surrender may take place even though the circumstances do not fit neatly into one of the points set out in the Table at s. 45.
25. In *Zarnescu*, 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."*

26. At first glance, it may seem difficult to reconcile the seemingly absolute requirement of actual knowledge for a waiver to be found as set out at sub-para. (m) of Baker J.'s judgment with the enquiry as to diligence referred to in the later sub-paragraphs, as clearly any lack of diligence is only relevant where actual knowledge cannot be established. On closer perusal, while the lack of diligence issue may feed into an assessment of knowledge, it may also be relevant as to whether the requested person has brought about a situation of deliberate or wilful ignorance of the date and place of trial. However, even where the Court finds such deliberate or wilful ignorance has been brought about by the requested person, it should not simply find a waiver of the right to be present, but should still consider whether the rights of defence were adequately protected or breached.

27. Having carefully considered all of the materials before the Court and bearing in mind the Supreme Court decision in *Zarnescu* and the authorities referred to therein, I am satisfied that this case falls within the category of cases set out at sub-para. (o) of para. 90 of Baker J.'s judgment:-

"[90] ...

- (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."*

28. I am satisfied that this is such a suitable case in circumstances where I find:-

- (i) The respondent provided both the prosecuting authority and the court in Poland with 2 addresses for the purposes of the criminal process. In particular, he provided the court with those addresses in the specific context of contesting an application for provisional detention;
- (ii) The respondent left Poland in the knowledge that he was the subject of a criminal process;
- (iii) In full knowledge of his obligation to provide details of a change of address within Poland or an address in Poland for service if he left that jurisdiction, the respondent did not provide any such details;



- (iv) The respondent had been informed and understood that in the absence of providing such details, then service at the address on the case file would be sufficient service;
  - (v) 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 Polish authorities to effect personal service upon him;
  - (vi) In such circumstances, it can be, and is, inferred that the respondent had made an informed decision to deliberately and effectively avoid service; and
  - (vii) In such circumstances, it can be, and is, also inferred that having left Poland in the circumstances outlined herein, the respondent made an informed decision not to take any further part in the process, including attending any hearing in respect thereof.
29. Having evaluated all of the information before the Court, I am satisfied that the respondent deliberately brought about a situation in which it was not possible for the prosecution authority to notify him of the relevant hearing date and that he did so in the knowledge that he was subject to an ongoing criminal process so that by doing so he can be taken to have unequivocally waived his entitlement to notice of and to attend at the hearing of the matter.
30. I have not come to the above conclusions lightly and I have taken a step back to consider whether, in the circumstances, I can be satisfied that the rights of defence have not been breached and were adequately protected. The respondent made an informed decision not to take any further part in the process and not to provide details of any change of address in circumstances where he knew a failure to do so would result in service at the address on the case file. I am satisfied that the respondent's defence rights were adequately protected and were not breached.
31. I dismiss the respondent's objection to surrender based on s. 45 of the Act of 2003.

#### **Application to Polish Court**

32. In the affidavit of Ms. Ciara Burke, dated 23rd September, 2021, it is indicated that an application was made to the court in Poland to postpone execution of the respondent's sentence which, if successful, is expected to lead to the withdrawal of the EAW. This Court adjourned this matter to afford the respondent a reasonable opportunity to process the said application. By a third supplemental affidavit dated 13th December, 2021, the respondent exhibited correspondence from a Polish lawyer indicating that a date for hearing the application in Poland was still awaited and sought a further adjournment. The respondent was granted an adjournment until 31st January, 2022. On that date the Court was informed that the respondent's application in Poland had been unsuccessful but that he was now seeking to appeal same. The respondent has been afforded ample time in which to deal with matters in Poland. Applications are to be dealt with as a matter of urgency. The Court declined to grant any further adjournments.

#### **Conclusion**

33. I am satisfied that surrender of the respondent is not precluded by reason of Part 3 of the Act of 2003 or any other provision of that Act.
34. Having dismissed the respondent's objections to surrender it follows that this Court will make an order pursuant to s. 16(1) of the Act of 2003 for the surrender of the respondent to the Poland.