

THE HIGH COURT

[2022] IEHC 59
[2021 No. 098 EXT]

BETWEEN

MINISTER FOR JUSTICE

APPLICANT

AND

ADAM JAN SZADKOWSKI

RESPONDENT

(No. 2)

JUDGMENT of Mr. Justice Paul Burns delivered on the 31st day of January, 2021

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 the 30th March, 2021 ("the EAW"). The EAW was issued by Judge Agnieszka Aniol, seconded to the District Court in Krakow, as the issuing judicial authority.
2. The EAW seeks the surrender of the respondent in order to enforce a sentence of 3 years and 8 months' imprisonment imposed upon the respondent on 24th June, 2020 (case reference number II K 3/17/K), of which 3 years, 7 months and 26 days remain to be served.
3. The EAW was endorsed by the High Court on 26th April, 2021 and the respondent was arrested and brought before the Court on 26th April, 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 4 months' imprisonment.
7. Part D of the EAW indicates that the respondent appeared in person at the trial resulting in the decision.
8. At part E of the EAW, it is indicated that it relates to 2 offences, both committed in May 2007. Section 38(1)(b) of the Act of 2003 provides that it is not necessary for the applicant to establish correspondence between the offences to which the EAW relates and offences under the law of this State where the offences referred to in the EAW are offences to which Article 2.2. 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"), applies and carry a maximum penalty in the issuing State of at least 3 years' imprisonment. In this instance, the issuing judicial authority has certified that the offences referred to in the EAW are offences to

which Article 2.2. of the Framework Decision applies, that same are punishable by a maximum penalty of at least 3 years' imprisonment and has indicated the appropriate box for "organised or armed robbery". While the offences in respect of which the EAW was issued were committed by the respondent in concert with another person on each occasion, I have some reservations as to whether the procedure provided for at s. 38(1)(b) of the Act of 2003 has been properly invoked as regards offence (a) at part E of the EAW. However, as set out below, in the absence of reliance upon such procedure, I am satisfied that correspondence can be established between the offences in the EAW and offences under the law of this State.

9. At part E of the EAW, a description of the circumstances in which each of the offences were committed is set out. I am satisfied that correspondence can be established between the offences referred to in the EAW and offences under the law of this State:-

- As regards offence (a), I am satisfied that correspondence can be established between that offence and the offence under the law of this State of criminal damage contrary to s. 2 of the Criminal Damage Act, 1991 and/or the common law offence of attempted theft contrary to s. 4 of the Criminal Justice (Theft and Fraud Offences) Act, 2001; and

- As regards offence (b), I am satisfied that correspondence can be established between that offence and the offence under law of this State of robbery contrary to s. 14 of the Criminal Justice (Theft and Fraud Offences) Act, 2001 and/or theft contrary to s. 4 of the Criminal Justice (Theft and Fraud Offences) Act, 2001.

10. The respondent objects to surrender on the following grounds:-

1. Surrender is precluded by virtue of s. 45 of the Act of 2003 as, contrary to what is stated in the EAW, the respondent was not present at the hearing;
2. Surrender is precluded by reason of an unacceptable lack of clarity in the EAW;
3. Surrender is precluded by virtue of s. 37 of the Act of 2003 due to the lapse of time since the date of the offences and/or that surrender would constitute a breach of the respondent's right to a private and family life; and
4. Surrender is precluded by reason of the respondent having applied for a pardon in respect of the offences.

11. The respondent swore an affidavit dated 4th May, 2021 in which he avers that he was not present for the hearing on 24th June, 2020 and that he has not returned to Poland since 2007. He denies receiving any notice of the hearing. He avers that he has instructed a lawyer in Poland to make enquiries in respect of the matters referred to in the EAW and to take whatever steps are necessary to challenge the sentence. He refers to an affidavit in which he set out his personal family circumstances, sworn in respect of separate European Arrest Warrant Act proceedings being heard alongside these proceedings.

12. The respondent's solicitor, Mr. Edward King, swore an affidavit dated 6th May, 2021 in which he exhibits documentation from the respondent's employer showing that the respondent was not in Poland at the time of the judgment in question. He avers that he has been contacted by the respondent's lawyer in Poland who has informed him that he intends to challenge the issue of the EAW.
13. By additional information dated 28th May, 2021 it is confirmed that, as per part C of the EAW, the judgment of 24th June, 2020 in case reference number II K 3/17/K imposed an aggregate sentence in respect of the offences referred to in the EAW. It indicates that, contrary to part D of the EAW, the respondent did not attend court for the sentencing hearing on 24th June, 2020 and that a notice of the hearing was delivered, via substituted service, by posting same to the address the respondent had provided when interviewed by police on the 5th and 20th May, 2007, respectively. It is indicated that the respondent signed the text of advisement that if he changed address, and failed to provide a new address, communications sent to the last known address would be deemed served. The additional information indicates that no petition for executive clemency or restitution of the time limit to appeal the judgment had been received. It also confirms that private counsel appointed by the respondent reviewed the case file on 14th May, 2021.
14. Also by additional information dated 28th May, 2021, the issuing judicial authority confirms that the respondent did not attend the hearing on 24th June, 2020. It confirms that substituted service was deemed effected after 2 missed delivery notes were left at the address he had provided in May 2007, having signed advice that that address would be used for service if he failed to provide a change of address. It is indicated that no counsel was appointed and no copy of the verdict was served.
15. Mr. King swore a supplemental affidavit dated 18th June, 2021 in which he avers that the underlying criminal proceedings against the respondent in respect of the offences in question were suspended by the Polish authorities on 8th August, 2008 due to his absence and he received no notification concerning same. He avers that Polish law was amended in 2015 so as to allow for the conduct of proceedings *in absentia* and the proceedings in this instance were resumed on 24th June, 2020. He points out that the respondent was not notified of the resumed proceedings and that the respondent's mother had told the Polish authorities he had not lived at her address since 2007. He exhibits a translation of the minutes of the hearing on 24th June, 2020, although these may be incomplete. Mr. King avers that the respondent's lawyer in Poland intended to apply for an extension of time in which to appeal the judgment but was awaiting a response from the Polish authorities before he could file same. He exhibits a memo from the Polish lawyer in which it is opined that the requirements for the EAW no longer exist as the initial order for pre-trial detention has been revoked. However, it should be noted that the pre-trial order has been replaced with a sentence.
16. In a further affidavit dated 15th November, 2021, Mr. King avers that the application to extend time within which to appeal was refused by the Polish courts.

Section 45 of the Act of 2003

17. Section 45 of the Act of 2003 transposes Article 4a of the Framework Decision into Irish law, and provides:-

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

18. The relevant portion of Article 4a of the Framework Decision provides as follows:-

"Article 4a

Decisions rendered following a trial at which the person did not appear in person

1. *The executing judicial authority may also refuse to execute the European arrest warrant issued for the purpose of executing a custodial sentence or a detention order if the person did not appear in person at the trial resulting in the decision, unless the European arrest warrant states that the person, in accordance with further procedural requirements defined in the national law of the issuing Member State:*

(a) *in due time:*

(i) *either was summoned in person and thereby informed of the scheduled date and place of the trial which resulted in the decision, or by other means actually received official information of the scheduled date and place of that trial in such a manner that it was unequivocally established that he or she was aware of the scheduled trial;*

and

(ii) *was informed that a decision may be handed down if he or she does not appear for the trial ..."*

19. In *Minister for Justice and Equality v. Zarnescu* [2020] IESC 59, the Supreme Court considered the requirements of s. 45 of the Act of 2003. Baker J. held, *inter alia*, at para. 90 of her judgment:-

"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."*

20. In this matter the offences date back to May 2007. At that time the respondent was 19 years old. He was arrested and questioned in respect of the offences by police on 5th and 20th May, 2007, respectively. He was advised that if he did not inform the authorities of any change in address then the address provided by him would be used for service. He appears to have left Poland in the knowledge that there was an ongoing legal process although no charges had been laid at that stage. Due to a legal impediment the prosecution could not proceed in his absence. The legal impediment was removed by a change in the law in 2015 and he was tried in his absence in 2020 as set out hereinbefore. No personal service was effected upon him and he was unrepresented. It seems that there is no appeal open to him.
21. I accept that in many instances where a party leaves a jurisdiction in the knowledge that he or she is subject to a legal process, then he or she may be taken to have waived his or her right to take part in same or be personally notified of same. This is particularly so where the person is notified of the obligation to inform of a change of address and the consequences of a failure to do so. However, the finding of such an unequivocal waiver is not to be lightly made. Moreover, before coming to such a finding the Court should satisfy itself that the defence rights of the accused have been respected and have not been breached. In the particular circumstances of this case, I am not satisfied that there was a sufficient lack of diligence on the part of the respondent such as would show unequivocally that he had expressly or by conduct waived his right to be informed of the hearing date. The trial was held approximately 12 years after the legal process had been put in abeyance and only after a change in the relevant law. Personal service was not effected. The respondent was unrepresented. Notice of the result of the trial was not served personally on the respondent. An application to extend time for bringing an appeal was refused. In such circumstances, I am not satisfied that the requirements of s.45 of the Act of 2003, looked at literally or purposively, have been met in this instance. I am not satisfied that the mischief which Article 4a of the Framework Decision and s. 45 of the Act of 2003 seek to avoid has not arisen in this case.

22. By reason of the foregoing surrender is precluded by reason of s. 45 of the Act of 2003.

Section 37 of the Act of 2003

23. In light of the above, it is not necessary to deal at length with the objection to surrender based on s. 37 of the Act of 2003. Another request for the surrender of the respondent to Poland in respect of other matters, bearing Record Number 2020/400 EXT, was heard alongside these proceedings and for the reasons set out therein, surrender of the respondent is not precluded by reason of s. 37 of the Act of 2003 on grounds of the respondent's personal or family circumstances.

Conclusion

24. I am satisfied that surrender is precluded by reason of Part 3 of the Act of 2003, in particular s. 45 thereof, and so I must refuse the application.