

THE HIGH COURT

[2022] IEHC 93
[2021 No. 101 EXT.]

BETWEEN

MINISTER FOR JUSTICE

APPLICANT

AND

PAWEL MOTYL

RESPONDENT

JUDGMENT of Mr. Justice Paul Burns delivered on the 14th day of February, 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 4th July, 2018 ("the EAW"). The EAW was issued by Witold Wojtylo, Judge of the District Court, as the issuing judicial authority.
2. The EAW seeks the surrender of the respondent in order to prosecute him for a forgery-type offence allegedly committed on 23rd January, 2006 in Legnica. The EAW is based upon a domestic arrest warrant of the Regional Court of Legnica dated 30th May, 2014.
3. The respondent was arrested on 22nd April, 2021 on foot of a Schengen Information System II alert and brought before the High Court on the same day. The EAW was produced to the High Court on 4th 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 offence in respect of which surrender is sought carries a maximum penalty in excess of 12 months' imprisonment.
7. At part E of the EAW, the issuing judicial authority certified that the offence referred to in the EAW is an offence 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, that same is punishable by a maximum penalty of at least 3 years' imprisonment and has indicated the appropriate box for "*swindling*". By virtue of s. 38(1)(b) of the Act of 2003, reliance upon such a procedure by the issuing judicial authority obviates the need for the applicant to establish correspondence between the offence to which the EAW relates and an offence under the law of the State. However, by additional information dated 5th July, 2021 the issuing judicial authority has indicated that the ticking of the box for swindling was a typographical error. In such circumstances it is necessary for the applicant to establish correspondence. By additional information dated 9th August, 2021 further details of the

circumstances of the alleged offence are set out. Taking into account all of the information provided as regards the alleged offence referred to in the EAW and the additional information, I am satisfied that correspondence can be established between the offence referred to in the EAW and an offence under the law of the State, viz. an offence of forgery contrary to s. 25 of the Criminal Justice (Theft and Fraud Offences) Act, 2001 and/or the offence of deception contrary to s.6 of the same Act. Lack of correspondence was not vigorously pursued by the respondent.

8. As surrender is sought to prosecute the respondent, no issue arises in respect of s. 45 of the Act of 2003.
9. The respondent's principal objection to surrender is that it would amount to an abuse of process as he has already been the subject of two previous applications for surrender pursuant to European arrest warrants in circumstances where the offence to which this EAW relates was not, but could have been, included in the previous applications.
10. The respondent swore an affidavit dated 18th May, 2021 in which he avers that he came to Ireland on 16th July, 2007. He avers that a European arrest warrant was issued by the Polish authorities dated 31st July, 2008 relating to 17 offences dating from November 1997 to April 2006. Surrender in respect of this warrant was refused by the High Court on 23rd March, 2010. A further European arrest warrant was issued by the Polish authorities dated 2nd June, 2009 relating to four offences dating from December 2006 to March 2007 and surrender on foot of same was ordered only in respect of one of the offences. The respondent avers that upon surrender in respect of that single offence relating to forgery of a certificate of employment in March 2007, he pleaded guilty and received a sentence of one year's imprisonment suspended for two years, following which he returned to Ireland in May 2010. He avers that he was informed by the Polish authorities that he was free to leave Poland and continue with his life in Ireland. He avers that he returned to Ireland in the firm belief that he had put all the criminal matters behind him. The respondent avers that three further European arrest warrants were issued by the Polish authorities on 24th June, 2014 and that these warrants referred to offences which had already been the subject matter of the earlier warrants. The High Court refused surrender in respect of these further three warrants on 30th November, 2016.
11. The respondent avers that the repetitive issuing of European arrest warrants has cost him significant stress and anxiety. He avers that he struggles with mental health issues and has been admitted to hospital in respect of same in 2015 and 2016. He avers that in 2015 he moved to Donegal where he met his current partner.
12. The respondent states that surrender was refused by the High Court in respect of the last three warrants on foot of an argument of abuse of process and in particular the fact that this was a second request for surrender, the amount of time that had passed since the offences, that no explanation had been provided for the delay and that the impact of same upon his mental health difficulties and the fact that the offences did not involve violence.

13. The respondent avers that the current EAW is grounded on a decision made by the District Court in Legnica dated 30th May, 2014 for pre-trial detention in respect of an offence which is alleged to have occurred on 23rd June, 2006. He stresses that he cannot understand why having been surrendered to Poland in 2010 and having been the subject matter of numerous applications for surrender, he is only now being sought for an offence which is alleged to have been committed in 2006. In particular, he states that the European arrest warrant which issued on 2nd June, 2009 captured offending which post-dated the offending in relation to the current EAW but did not include the offence for which his surrender is now sought. He further avers that in respect of the latter three European arrest warrants, these were based on a decision of the District Court in Legnica of 30th May, 2014 which appears to be the same decision as a decision made on the same day by the same court which grounds the current application for surrender.
14. The respondent avers that he has a history of depression including a number of suicide attempts. He exhibits reports from Dr. John Bannon, his GP and Dr. Paul O'Connell, Consultant Forensic Psychiatrist, dated 2016.
15. By affidavit dated 24th June, 2021, the solicitor for the respondent, Ms. Aoife Kavanagh, exhibits a report from Dr. Bannon dated 16th June, 2021. This report refers to the earlier report of Dr. Bannon in 2016 and how the respondent had described a history of recurrent depression, two previous suicide attempts and that he had spent ten years in jail in Poland when younger. It is confirmed that the respondent was admitted to the psychiatric unit in Letterkenny Hospital and while he initially appeared to improve, he then suffered a relapse and made a serious suicide attempt in January 2016. He had a further voluntary admission to the psychiatric unit in Letterkenny Hospital in January 2016 and his discharge summary refers to anger traits and antisocial traits, maladaptive coping strategies, impulsive behaviour and poly-substance abuse. He was admitted to Whiteoaks Rehabilitation Centre in 2017 and did well with this intervention. However, he suffered some suicidal ideation during his stay. In September 2017, he presented to the out-of-hours service in Donegal with suicidal ideation and low mood. On psychiatric assessment he was anxious and tearful and required hospital admission. He admitted overuse of alcohol and dependence on cannabis and his diagnosis was mood and behavioural disorder secondary to polysubstance misuse/dependence. The respondent did well for some time after this but unfortunately in March 2020 he was again admitted to the psychiatric unit in Letterkenny Hospital with a relapse in polysubstance abuse and suicidal ideation. His depression had worsened. He had presented himself to An Garda Síochána who accompanied him to the emergency department. He has remained since then under the regular review of the community mental health team and despite advice to the contrary, he continues to use alcohol and cannabis. He disengaged from addiction counselling prior to completion of treatment. It is stated that the respondent continues to work in a local factory and is doing reasonably well at present. He continues to suffer from recurrence of a depression and anxiety likely to have been contributed to by his previous experiences in Poland and exacerbated by his continued substance misuse. Dr. Bannon opines that the proceedings against him are likely to result in a deterioration in his mental state.

16. It is undoubtedly the case that a refusal of surrender on foot of a particular European arrest warrant does not automatically operate as a bar to a future application for surrender in respect of the same offence. This is particularly so where the refusal was based on some technical defect in the initial warrant. On the other hand, the doctrine of issue estoppel may apply in extradition cases as in other matters where there is a determination of a matter of substance in respect of which the respondent is entitled to retain the benefit thereof. As regards the current EAW, the question of issue estoppel does not arise as the offence in respect of which the EAW issued is not an offence covered by any of the previous warrants.
17. The issue of abuse of process in the context of the Act of 2003 came before the Supreme Court in *Minister for Justice and Equality v. J.A.T. No. 2* [2016] ISEC 17. That case concerned an application on behalf of the United Kingdom ("the UK") for the surrender of the respondent to face prosecution in respect of what were referred to in the European arrest warrant as 'tax fraud offences', which were alleged to have occurred between 1997 and 2005. A European arrest warrant seeking the respondent's surrender was issued on 7th March, 2008. The respondent was arrested on foot of same and his surrender was refused by the Supreme Court on 21st December, 2010. A second European arrest warrant was issued and the respondent was arrested on foot of same on 24th July, 2012. The UK authorities stated that the second warrant had taken into account the judgment of the Supreme Court in the first set of proceedings. His surrender was ordered by the High Court despite a finding of abuse of process. On appeal, the Supreme Court refused surrender, with no dissenting judgments.
22. Denham C.J. was satisfied that there was an evidential basis upon which the High Court could, and did, find that there was an abuse of process. She was satisfied not to interfere with that finding. She regarded the issue which the Supreme Court had to determine as whether, in light of the findings of the High Court, it was sufficient or appropriate for the High Court to simply admonish the parties responsible while surrendering the appellant.
23. As regards delay, Denham C.J. was of the opinion at para. 65 of her judgment that:-
- "65. The time which has passed since the alleged offences, the first arrest on the first EAW, the second EAW, and the hearing of this appeal, is not of itself a factor upon which a request for surrender would be refused. However, this time period has to be considered in light of all the circumstances of the case."*
24. In terms of how a court should normally deal with an abuse of process, she further stated at paras. 72-77:-
- "72. In general, if there is an abuse of process by authorities they should not benefit. The rule of law, and the right to fair procedures, requires that such a general principle be applied.*
- 73. Of course, there may be circumstances where a court considers that there has been an abuse of process, but to a limited degree, and applying the principle of*

proportionality, a surrender procedure could proceed. However, such a finding would arise only in a situation where a process was found to be an abuse, but in a limited manner, and with limited effect.

74. In this case there is an accumulation of factors.

75. It is clear, and remains the law, that simply because a second European arrest warrant is issued that does not of itself indicate any abuse of process. See Bolger v. O'Toole, unreported, Supreme Court, 2nd December, 2002, and Gibson v. Gibson, ex tempore, Supreme Court, 10th June, 2004, Keane C.J..

76. In analysing a case where there has been a finding of an abuse of process, the circumstances of each case are relevant and critical to the ultimate decision.

77. I have reviewed the circumstances of this appeal, which include the following factors:-

- (a) this is the second EAW issued in relation to the offences alleged;*
- (b) failings in the first EAW could have been addressed in the first application;*
- (c) a considerable time has passed since the alleged offences and a considerable time has passed since the arrest of the appellant on the first EAW;*
- (d) the medical condition of the appellant, who is a vulnerable person;*
- (e) the medical condition of the appellant's son, for whom the appellant is a significant carer;*
- (f) the family circumstances;*
- (g) the oppressive effect which the two sets of EAWs have had on the appellant; on his son; and on his family;*
- (h) no explanation has been given for delays;*
- (i) there has been no engagement by the authorities with the issues as to the first EAW or the delays;*
- (j) the Central Authority has a duty to bring to the attention of the issuing State authorities defects or internal contradictions in a warrant, and to consider whether all the documentation is complete and clear, before being relied upon for the purpose of seeking to endorse an EAW;*
- (k) the duty of the Court to protect fair procedures; and*
- (l) the principle that a party in litigation should not benefit from proceedings which were de facto abusive of the Court's process."*

25. Having taken such factors into account, Denham C.J. concluded at para. 85:-

"85. While no single factor, as set out above, governs this appeal, in circumstances where the High Court has found, correctly in my view, that there has been an abuse of process, I am satisfied that the factors, referred to in this judgment, taken cumulatively, are such that there should not be an order for the surrender of the appellant."

26. From the foregoing, it is clear that Denham C.J. accepted that there had been an abuse of process and regarded the listed factors as relevant matters in determining that the appropriate judicial response to same was to refuse surrender.

27. O'Donnell J., with whom MacMenamin and Laffoy JJ. concurred, reluctantly agreed that the appropriate judicial response was to refuse surrender at para. 1 of his judgment:-

"1. I was myself doubtful, however, that even cumulatively, the matters relied on by the appellant were sufficient to justify a refusal of surrender in this case. But in the light of the views of my colleagues, and the judgment of the Chief Justice, I do not dissent from the Order proposed. I would, however, emphasise that this is a rare, and indeed exceptional case. While exceptionality is not in itself a test, it can be a useful description, and it is, in my view, only cases which can truly be so described that will be those rare cases in which it may be said that surrender would offend due process and interfere with the rights of the appellant to such an extent that it must be refused."

28. O'Donnell J. sought to identify the principles involved, to identify the factors grounding a refusal and to determine the weight to be accorded to them. He doubted whether it was appropriate or useful to introduce the concept of a 'duty of care' on the part of requesting authorities or the Irish authorities. He emphasised that the law of European arrest warrants was intended to provide a new and streamlined process for surrender between Member States and represented a significant departure from the earlier approach. In his view, the starting point was that considerable weight is to be given to the public interest in ensuring that persons charged with offences face trial. As a decision to refuse surrender will often provide a form of limited immunity to a person so long as they remain in this jurisdiction, he stressed it is only if some quite compelling feature, or combination of features, is present that it would be appropriate to refuse surrender on grounds of due process or interference with rights. At para. 4, he emphasised it was important that the court should rigorously scrutinise the factual basis for any such claims against that background.

29. As regards the case before him, O'Donnell J. identified three factors as having been asserted as cumulatively leading to an order refusing surrender, namely the fact that it was a repeat application, delay/lapse of time and Article 8 of the European Convention on Human Rights ("the ECHR")/personal and family rights aspects. He emphasised that a repeat application based on a fresh warrant could not in itself be regarded as an abuse of process. Dealing with delay/lapse of time, he was not satisfied that, taken alone or in

conjunction with the repeat application, delay/lapse of time in the circumstances constituted an abuse of process or justified refusal of surrender, as outlined at para. 9 of his judgment. Turning to the remaining factor of rights pursuant to Article 8 ECHR, O'Donnell J. noted that the respondent was in a very difficult health situation but emphasised that the matter was not to be tested against some generalised consideration of personal sympathy, but rather as to whether the circumstances were such that it rendered it unjust to surrender the respondent. He noted that the respondent was the primary and, effectively, the sole caregiver for his son, in circumstances where that care was particularly important, and that his son would undoubtedly suffer very severely if the appellant was surrendered for trial. He stated that, on their own, such matters would not justify refusal of surrender.

30. He then set out what he considered to be the relevant factors to be weighed cumulatively at para. 10:-

"10. It seems to me to be relevant that this is a second application, and moreover, that there has been avoidable delay on the part of the authorities in both jurisdictions in the preparation, submission, and execution of the second warrant, even though the evidence of the respondent's circumstances, and those of his son, had been adduced in the first European Arrest Warrant proceedings. These factors - repeat application, lapse of time, delay, impact on the appellant's son, and knowledge on the part of the requesting and executing authorities of those factors - when weighed cumulatively, are powerful. Even then, and without undervaluing the offences alleged here, it is open to doubt that these matters would be sufficient to prevent surrender for very serious crimes of violence. This illustrates that the decision in this case is exceptional, and even then close to the margin."

31. As regards matters that could be properly addressed by admonishment, O'Donnell J. doubted whether same would amount to an abuse of process at all.
32. From the foregoing, it appears that O'Donnell J. ultimately agreed that the facts in *J.A.T. No. 2* constituted an abuse of process, as he refused surrender. While he disagreed with the separate judgment of Denham C.J. on some of the issues which she had included in her estimation of relevant factors, he expressly prefaced his judgment by indicating that, in light of the views of his colleagues and the judgment of the Chief Justice, he did not dissent from the decision to refuse surrender. He was clear that each of the factors said to constitute an abuse of process would not in itself justify a refusal to surrender and, even taken cumulatively, the matter was close to the margin.
33. Having regard to the public interest in ensuring that persons charged with offences face trial, O'Donnell J. expressed doubt as to whether such factors would be sufficient to prevent surrender for very serious crimes of violence. However, he fell short of saying that such factors could never be sufficient to prevent surrender. He stated at para. 3, *"Something is either an abuse of process, or it is not"*, while he went on to indicate at para. 12:-

"12. But the normal and logical remedy for an abuse of process is the striking out or staying of the proceedings constituting abuse."

O'Donnell J. therefore appears to have left open the possibility that if the factors constituting abuse of process were sufficiently exceptional, the appropriate remedy would be to strike out or stay the proceedings.

34. In the present case, the offence in respect of which the EAW was issued dates back to 23rd June, 2006. Since that date the respondent has been the subject of five separate European arrest warrants issued by the Polish authorities, none of which referred to that offence although that offence predates the offending which was the subject matter of those other warrants. The offence in question does not consist of a serious offence of violence. Despite being called upon to do so, the issuing judicial authority has furnished no reason for the delay in seeking the surrender of the respondent in respect of the relevant offence but has simply said that it issued same on foot of an application from the prosecutor. No explanation as to why the alleged offence was not included in previous warrants has been provided. The respondent suffers from serious mental health problems. The Irish authorities informed the Polish authorities by letter dated 14th February, 2017 of the outcome of the earlier applications for surrender including reference to the respondent's mental health. There is evidence before the Court that repeat applications for surrender are likely to result in a deterioration in the respondent's mental health.
35. Taking all of the circumstances into account, I am satisfied that this matter is one of the rare cases in which, due to the combined effect of all of the above matters, surrender of the respondent would amount to an abuse of process. I should emphasise that while the phrase 'abuse of process' has been used to broadly describe the circumstances in which surrender has been refused, there is no question as to the *bona fides* of the Polish authorities in seeking the surrender of the respondent or the Irish authorities in moving the application for same.