THE HIGH COURT

[2023] IEHC 301

Record No. 2022/178 EXT

BETWEEN

MINISTER FOR JUSTICE

APPLICANT

AND

LUKASZ KLUSKA

RESPONDENT

JUDGMENT of Ms. Justice Stack delivered on 24 May, 2023.

Introduction

1. This is an application for surrender pursuant to s. 16 of the European Arrest Warrant Act, 2003, as amended, issued by the Polish authorities, and which relates to a sentence of one year and six months which was imposed by the Local Court in Bydgoszcz, Poland, on 4 December, 2017 (file reference number IV K 1096/16).

2. The sentence was a cumulative sentence imposed in respect of three offences, and there is no issue about correspondence in respect of the second and third offences. These are obviously recognisable as conduct which would comprise the offences of attempted theft and theft, respectively, in this jurisdiction. As the sentence imposed is one for more than four

months, and as it not necessary, in the case of a cumulative sentence, to prove that a sentence of at least four months was imposed in respect of each offence, there is no issue with *"minimum gravity"*, that is, with the requirements of s. 38 (1)(a)(ii) of the 2003 Act.

3. There are two issues raised by the respondent in opposition to the application for surrender. First, he says correspondence has not been shown in respect of the first offence and, as he is wanted to serve a cumulative sentence, this prohibits surrender: *Minister for Justice v. Ferenca* [2008] 4 I.R. 480, [2008] IESC 52.

4. Secondly, he says that he was not aware of the date and place of hearing where the decision to impose the sentence (the subject of the warrant) was made. The Polish authorities have indicated at point (d) of the Warrant that this decision was made *in absentia*. It is indicated in the warrant that the respondent was not personally summoned but was informed of the date of the hearing planned for 22 November 2017 by notice sent to the address where the respondent was residing. However, there is a significant dispute in this case about the correctness of the addresses used to notify the respondent of the criminal proceedings and the respondent submits that surrender is prohibited by s. 45 of the 2003 Act.

5. I will deal with these objections in turn.

Whether section 38 of the 2003 Act prohibits surrender

6. The first offence to which the warrant relates is described in the following terms:

> *"In the period from 25 July 2016 to 29 November 2016, in Bydgoszcz, taking advantage of the fact that he had a permit to temporarily leave the Custody Suite in Bydgoszcz starting from 22 July 2016 in order to perform work without supervision, he did not come back, without any justifiable excuse, within 3 days after the deadline*

at the latest, to the indicated penitentiary unit, which constituted an offence under article 242 section 2 of Penal Code."

7. The Minister has been put on proof of correspondence, that is, of compliance with the requirements of s. 38 (1)(b) of the 2003 Act, as amended.

8. The Minister initially submitted that the first offence corresponded to the offence of escape from lawful custody contrary to common law and to an offence of being unlawfully at large contrary to s. 6 of the Criminal Justice Act, 1960.

9. Section 6(2) of the 1960 Act provides that it shall be an offence to be unlawfully at large and s. 6(1) of the 1960 Act provides:

"A person who, by reason of having been temporarily released under section 2 or section 3 of this Act, is at large shall be deemed to be unlawfully at large if—

(a) the period for which he was temporarily release has expired, or

(b) a condition to which his release was made subject has been broken."

10. Section 2 (1) of the 1960 Act, as substituted by s. 1 of the Criminal Justice (Temporary Release of Prisoners) Act, 2003, with effect from 12 November, 20014 (S.I. 679 of 2004) provides:

"The Minister may direct that such person as is specified in the direction (being a person who is serving a sentence of imprisonment) shall be released from prison for such temporary period, and subject to such conditions, as may be specified in the direction or rules under this section applying to that person."

11. The additional information dated 27 January, 2023, states that, on 22 July 2016, the respondent was serving the sentence of one year and two months' imprisonment imposed under the aggregate sentence of the District Court in Bydgoszcz of 2 July, 2015, file ref. IX K 39/15 ("the 2015 sentence"). I refer to the 2015 sentence in more detail below, in the context of argument made by reference to s. 45 of the 2003 Act. For now, it is sufficient to note that it

is conceded that the warrant is in error at this point as the term of that sentence was in fact one year and nine months. The warrant then continues:

> *"He was granted permission to leave the remand prison temporarily in order to work, while serving the above-mentioned sentence, under a system of work without an escorting officer. [The respondent] was to carry out work at the Complex of Care and Education Institutions in Bydgoszcz…. On 22 July 2016, at about 04.33 p.m."*

12. The additional information dated 27 January, 2023, goes on to set out the provisions of Polish law which provides for a convict's duty to perform work. It is clear from that that persons detained in semi-open or open prisons may be employed outside the prison without an escorting officer and that this is in fact the norm for inmates in open prisons. It is clear that the respondent was released temporarily for the purpose of working outside the prison and he was not escorted by an officer.

13. This purpose is different from the purposes of temporary release as set out in s. 2(2) of the 1960 Act, which include: the rehabilitation of prisoners, to help prepare them for life after prison, to allow them to assist in the investigation of crime, and more general purposes connected with the good management of the prison, but this is not really material. The Minister relies on the decision of the Supreme Court (*per* Clarke J.) in *Minister for Justice v. Szall* [2013] I.R. 470, [2013] IESC 7 where it was held (at para. 40):

> *"Where … the offence specified in the relevant European arrest warrant involves the same acts or omissions by reference to a regime in the requesting state then, at least at the level of principle, correspondence can be established provided that there is a sufficient similarity between the respective regimes to justify the conclusion that the substance of the acts or omissions which amount to offences in the respective jurisdictions is the same even though the specific relevant regimes will necessarily be,*

as a matter of law, different, emanating as they will from the legal systems of the two separate jurisdictions."

14. The additional information states:

"The head of the Remand Prison in Bydgoszcz … issued … a consent to employ [the respondent] at the Complex of Care and Education Institutions in Bydgoszcz … under a system of work without an escorting officer, and thus he allowed him to leave the remand prison temporarily, i.e. for the time of performance of work outside the remand prison."

15. It seems clear from that that the respondent was serving a sentence of imprisonment and was released for a specified time in order to work outside the prison, but failed to report back to the prison at the required date and time. In my view, this corresponds to a failure to return to prison on the expiry of a period of temporary release and would, in this jurisdiction, correspond to an offence contrary to s. 6 (2) of the 1960 Act.

16. The regime in Poland of release for work outside the prison is, to paraphrase Clarke J. at para. 41 of *Szall*, as a matter of substance, sufficiently similar to the Irish regime of temporary release that it can properly be said that it corresponds to the failure to return to prison in this jurisdiction after a period of temporary release pursuant to s. 2 of the 1960 Act. Allowing a prisoner out for the day would ordinarily occur as an aspect of temporary release pursuant to s. 2 of the 1960 Act. As the Supreme Court said at para. 59 of *Szall*, it is reasonable to conclude that the circumstances in which a person be *"temporarily but lawfully absent from prison during the currency of a sentence in Ireland are either exclusively to be found in the Act of 1960 or, as a matter of almost universal practice, come within that statute."*

17. I am therefore satisfied that s. 38 of the 2003 Act does not prohibit the surrender of the respondent to Poland as correspondence can be shown in respect of all three offences.

18. The Minister ultimately indicated that the common law offence would not be relied upon but, in any event, in view of my conclusions as set out above, it is not necessary to consider any common law offence for the purpose of considering whether surrender is prohibited by s. 38 of the 2003 Act.

Whether section 45 of the 2003 Act prohibits surrender.

19. Before considering whether the information given by the issuing judicial authority about the notification of the proceedings leading to the 2017 sentence is sufficient to satisfy s, 45, I will first deal with a discrete objection under this heading which was made on behalf of the respondent.

i. Preliminary issue – whether the Table at point (d) must be completed in respect of the 2015 sentence

20. It is stated at point (e). 2 of the warrant, in which the circumstances in which the three offences were committed are set out, that the second and third offences were committed within the period of 5 years from serving the 2015 sentence.

21. The 2015 sentence was a cumulative sentence, that is, it was in turn based on two earlier sentences imposed on 25 January, 2013 (file reference number XVI 3594/12) and on 13 March, 2013 (file reference number XVI K 259/13).

22. It was argued that, because the 2015 sentence forms part of the sentence or contributed to the sentence for which the respondent is now wanted in Poland, the Table in

point (d) of the Warrant should be completed in relation to not only the 2015 sentence itself, but also the two earlier sentences imposed in 2013 and on which the 2015 sentence is based.

23. However, I think that this argument is based on a misreading of the warrant. There is nothing in the warrant to say that the two sentences imposed in 2013, which were aggregated into a sentence of one year and nine months in the decision of 2 July, 2015, formed part of the composition of the sentence of one year and six months for which the surrender of the respondent is now sought.

24. On the contrary, it seems that the fact that the respondent committed the second and third offences to which this Warrant relates within five years of serving part of the 2015 sentence was a factor which contributed to a higher sentence in respect of the offences to which this warrant relates. This is not entirely clear, but this is not material unless the lack of clarity is such as to leave open the possibility that, as submitted on behalf of the respondent, the 2015 sentence was a component of the sentence.

25. However, there is nothing on the face of the warrant which would suggest that the respondent is wanted to serve any part of the 2015 sentence. On the contrary, at point (c) of the Warrant, it is confirmed that the respondent is required to serve a period of one year and six months sentence imposed by the Local Court in Bydgoszcz, in proceedings bearing file reference no. IV K 1096/16. There is no mention of the 2015 sentence or of proceedings bearing file ref. no. IV K 39/15.

26. Furthermore, the reference to the 2015 is in point (e) of the Warrant where it is referred to as part of the circumstances material to the second and third offences, but not the first offence. If the 2015 sentence was a component part of the single, cumulative sentence imposed in relation to the three offences to which the Warrant relates, one would expect it to be mentioned in relation to all three offences at point (e) of the Warrant.

27. In my view, although the precise effect of committing the second and third offences is not clear from the Warrant, it is nevertheless clear that the respondent is not wanted to serve any part of the 2015 sentence. As the 2015 sentence does not form part of the sentence to which the Warrant relates, there is, therefore, no requirement to complete the Table in point (d) of the Warrant in relation to the hearings leading to the 2015 sentence, or the earlier 2013 sentences on which it was based, as it is not necessary for the Minister to demonstrate compliance with s. 45, or Article 4a of the Council Framework Decision of 13 June, 2002 on the European Arrest Warrant and the surrender procedures between member states ("the Framework Decision") in respect of any of these sentences.

28. It was for this reason that I indicated on 28 April, 2023, when the matter was listed before me, that I would not request additional information in respect of this matter pursuant to s. 20 of the 2003 Act, as amended.

ii. application of s. 45 to the sentence to which the Warrant relates

29. Turning to the substance of the s. 45 objection as it relates to the sentence of one year and six months to which the Warrant relates, there is quite evidently an issue pursuant to s. 45, as is clear from the face of the warrant itself. At point (d) of the Warrant, the issuing judicial authority indicates that the respondent was not present when the hearing leading to the imposition of that sentence took place.

30. According to point (b) of the Warrant, the decision to impose that sentence was made on 4 December, 2017. At point (d) of the warrant, it is stated that while the respondent was not summoned in person he was *"officially informed on 27 October 2017 of the date and place of the hearing of Local Court in Bydgoszcz where the decision was rendered in the case IV K 1096/16, which indicated unambiguously that the person knew of the hearing, and that*

the person was informed that the decision could be rendered in absentia". At point (d).2 of the warrant it is stated that the respondent *"knew of the ongoing proceedings. A notification of the date of the hearing where the court proceedings were closed planned for 22 November 2017 was sent to the convicted person's residence address. Despite a double advise (sic) note it was not collected by the addressee personally from the nearest post office."*

31. In the additional information dated 27 January, 2023, the Polish authorities stated that the respondent was sent a notice by the District Court in Bydgoszcz of the hearing to be held on 5 April, 2017, and the indictment and instructions to him on the rights and obligations of the accused were sent to *"both addresses indicated by him"*. They say that he did not collect from either address because he had left Poland and did not inform the law enforcement authorities about the change of his place of residence, despite having been instructed to do so.

32. Essentially, what is said is that the respondent was taken into custody on 29 November, 2016. While in custody the respondent was notified of his legal obligation to furnish his place of residence to the Polish authorities and he was informed that if he did not update his address, or if he left the country, then his last address in Poland would be his address of service and the hearing could proceed in his absence without any further notice to him. The Polish authorities supplied notice of rights which has been signed by the respondent, and the respondent has not denied in his affidavit that that is his signature.

33. The information given to the court on this point identifies two addresses. First, the Polish authorities say that the respondent provided the address of 55/20 Powstańców Wielkopolskich when he was arrested. This is also the only address given at point (a).11 of the Warrant.

34. Secondly, the issuing judicial authority also says that that the respondent supplied the address 5/52 Czackiego on leaving detention on 13 January, 2017. This address is not identified anywhere in the Warrant as being the respondent's last known place of residence.

35. The Polish authorities say that they sent notification of the date of the court hearings by post to both of these addresses and that they were effectively delivered in accordance with a method which is deemed by Article 133 of the Polish Code of Criminal Procedure to be good service. This apparently permits service by means of an advice notice sent to the address provided by an accused, and which informs the addressee that a letter may be collected at a local post office. It is the letter which needs to be collected which advises the addressee of the hearing date.

36. I have no difficulty in accepting that where an accused was advised - as the respondent clearly was - that there is an obligation on him to furnish an address and where he was advised - as he clearly was - that notifications would be sent to that address and that hearings could proceed in his absence (and indeed the time for appeal could expire) if he did not attend to his correspondence, then failure to collect post or respond to post at that address would constitute an *"unequivocal waiver"* of his right to be present at the trial. This would be sufficient for the purposes of Article 4a of the Framework Decision and s. 45 of our own 2003 Act, which are informed by the requirements of Article 6 of the European Convention on Human Rights.

37. The only issue, therefore, is one of fact, namely, whether the notifications were sent to an address which the respondent had furnished for service. If the relevant notification is not sent to the address as furnished, then, short of proving actual receipt of the notification, the issuing judicial authority cannot establish that the requested person has *"unequivocally waived"* his right to attend his trial, as required by Article 4a of the Framework Decision, Article 5 of the Charter of Fundamental Rights, and Article 6 of the European Convention on Human Rights.

38. The respondent in his affidavit says that his girlfriend and his three young children, with whom he now lives in this State, were evicted from their rented property at 55/20

Powstańców Wielkoprlskich on or around 30 November, 2016, following - and as a result of - his arrest. He said he provided this address to the police upon his arrest but not at the end of the interrogation on 1 December, 2016. The Additional Information of 17 October, 2022, states that the respondent was interrogated on 1 December, 2016, and *"during the interrogation he personally indicated the address of domicile in Bydgoszcz at Powstańców Wielkopolskich 55/20."*

39. At para. 6 of his replying affidavit, the respondent states that he lived at this address and continues:

> *"My partner and children were evicted by the landlord of the property in or around the 30th November, following, and as a result of, my arrest. I provided this address to the police upon my arrest but not at the end of the interrogation. I did not provide this as my future address at the end of my interrogation on 1st December [2016]."*

By saying that he did not provide this as his *"future address"*, the respondent seems to be saying that he did not give it as his address for service. However, this is not entirely clear.

40. As regards the second address, the respondent says at para. 7 of his replying affidavit that he was incarcerated in Bydgoszcz prison until 13 January, 2017 and:

> *"I did not provide the address of Bydgoszcz Ul. Czackiego 5/52 to the police, prosecution or prison authorities at any stage. I am unfamiliar with the address. I have never been at Bydgoszcz, Ul. Czackiego 5/52".*

41. While there is a principle of mutual trust and confidence and accordingly a presumption that the information stated in the Warrant, and indeed in the additional information supplied pursuant to s. 20 of the 2003 Act, is all accurate, nevertheless if there is a complete and quite specific denial of a relevant fact, then it is reasonable to seek objective evidence, such as contemporaneous documentary records, in order to resolve that issue of fact.

42. There is certainly a complete conflict of fact on the issue of whether the respondent ever mentioned the address of Ul. Czackiego 5/52 at any time, let alone provided it for service. As regards the address of Powstańców Wielkopolskich 55/20, there is a dispute as to the point in the interrogation at which it was mentioned and whether it was furnished for service.

43. I requested additional information pursuant to s. 20 of the 2003 Act, and this was communicated to the Polish authorities by letter from the Minister dated 19 December, 2022. This letter pointed out that some of the additional information dated 17 October, 2022, had been contradicted by the respondent in his affidavit sworn on 2 December, 2022, (which was enclosed).

44. It is convenient to deal first with the address at Ul. Czackiego 5/52. As part of the request for additional information dated 19 December, 2022, the issuing judicial authority was asked:

> "*Please provide evidence that the requested person indicated on 13 January 2017 that his address was Bydgoszcz, Ul, Czackiego 5/52 and please provide a copy of any written notification of that address which was given or signed by him."*

45. A response was received on 27 January, 2023, the material portion of which, states as follows:

> *"Information obtained from the NOE-SAD system shows that on 12/01/2017, before [the respondent] was released from custody, he had declared before the staff of the Remand Prison in Bydgoszcz that his address after his release would be 5/52 Czackiego street in Bydgoszcz."*

There is then a page reference which appears to refer to a file compiled either by the police or by the Remand Prison where the respondent was detained from 1 December, 2016 to 12 January, 2017. (As it relates to a declaration allegedly made in the Remand Prison, it seems it

is more likely to be held by that institution, but nothing turns on this other than it might explain to some extent the difficulty in producing it.)

46. The issuing judicial authority has therefore indicated that the records confirming that this address were furnished by the respondent were with the Remand Prison. However, despite a reminder and the lapse of a sufficient period of time to allow these records to be produced, no documentary evidence to explain how this address was associated with the respondent and used to notify him of his criminal trial has been forthcoming.

47. As the matter had been listed for hearing on 24 March, 2023, the Minister sent a reminder by letter dated 13 March, 2023, reminding the Polish authorities that the information should be obtained from the relevant Remand Prison and it should be forwarded to the Minister and it was asked that this would be done by close of business on 17 March, 2023. However, no such information has been received.

48. A response dated 16 March, 2023 was received from the District Court in Bydgoszcz saying that the Regional Court would respond to the request for information but they needed to get it from the Remand Prison in Bydgoszcz.

49. A similar letter dated 23 March, 2023 was received, presumably by email, in which the District Court informed the Minister that the Regional Court was still preparing a response to the letter of 13 March, 2023 and asking if it was possible to set a longer deadline for the response. A response dated 21 April 2023, passed to me on Friday 12 May, 2023, but this does not deal with the address 5/52 Czackiego nor are any documents demonstrating that the respondent furnished it as his address supplied.

50. It therefore seems that the issuing judicial authority is not in a position to provide any further information which would lead me to reject the very clear averments of the respondent in his replying affidavit that this address is completely unknown to him. Had such further

information or documentation been provided, then my finding on this point might be different: *Minister for Justice v. Minierski* [2022] IEHC 634.

51. I am satisfied that the evidence before me in these proceedings is to the effect that the respondent did not in fact furnish the address of Ul. 5/52 Czackiego to the authorities in the remand prison or indeed to the police, and that the sending of notification to this address does not assist in establish that the respondent unequivocally waived his right to be present at his trial.

52. The evidence of the respondent in relation to Powstańców Wielkopolskich 55/20 is less clear. The respondent says that he provided it on his arrest but not at the end of the interrogation. However, he is also very unforthcoming about whether he ever gave it as an address for service at a time before or after 1 December, 2016, or whether he gave another address to either the police or the prison authorities when he discovered his family had been evicted from that address. He does not state where his family lived between his release from custody on 12 January, 2017, and his departure for Ireland on an unidentified date in February, 2017.

53. I should first say that the information received from the Polish authorities about the obligations on detainees to notify the authorities as to the address at which they can be contacted (it appears to include telephone numbers and emails as well as physical addresses) makes it clear that this obligation extends to any change of that address. It is also clear that the respondent was informed in writing of this obligation and the Polish authorities have sent a copy a notification of rights signed by the respondent. The respondent does not deny that he received and signed this written notification. I am therefore satisfied that the respondent was fully aware of his obligation to give and, if necessary, update his address, that post concerning the criminal proceedings against him could be sent to that address, and that the

proceedings would continue in his absence and could result in a conviction and sentence, and that the time for appeal of any such conviction and sentence could expire.

54. In particular, I am satisfied from the information provided by the issuing judicial authority that, in the statement of rights and obligations of suspected persons in criminal proceedings, which was signed by the respondent on 29 November, 2016, the date of his arrest, it was specifically stated that the suspect was required to:

> *"Indicate the address (i.e. a person or institution with address details) for service in the country when he or she stays abroad; otherwise, a letter sent to the last known address in the country will be considered effectively served and the action or court hearing will be conducted in the absence of the suspected person…."*

55. In this case, the respondent does not deny that he gave an address for service, in fact he does not comment on it one way or the other. Strangely, he does not say what address he gave for service. In particular, he does not say that he gave an address when he left the country on an unidentified date in February, 2017.

56. The additional information quoted above makes it clear that letters about his criminal proceedings would be sent to *"the last known address in the country"*. Reading the evidence as a whole, including the Warrant itself, it seems that this was the address at Powstańców Wielkopolskich 55/20. The additional information makes it clear that notifications of the criminal proceedings were sent to that address.

57. Implausibly, the respondent says that, when he moved to Ireland with his family in February, 2017, says that he did not believe he would be the subject of a criminal trial. The detailed statement of rights which he was given and which he signed makes it perfectly clear that he was advised of his obligation to give an address and that this was done in the context of a criminal investigation. He provides no corroborating evidence or indeed detail of the basis upon which he apparently came to believe that he would not be prosecuted.

58. On a separate note, his statement that he travelled with Ryanair to Ireland using his valid identity card has nothing to do with whether he updated his address as he was obliged to do under Polish law and certainly does not constitute any notice to the Polish authorities that he was leaving the country.

59. Giving effect to the principle of mutual trust and confidence between this court and the issuing judicial authority means that there is an onus on a respondent to provide cogent and specific evidence of the grounds for such a belief. It seems utterly implausible that a person interrogated for three criminal offences, one of which was an offence of remaining at large contrary to an obligation to return to prison, would have any reasonable belief that he would not be prosecuted for the offences the subject of the Warrant and for which he had so recently been detained. It is not open to a respondent to rely on general assertions as these are insufficient to discharge the evidential onus on him in light of the presumption that the information given by the issuing judicial authority is correct.

60. In those circumstances, I am satisfied that the Polish authorities sent notification of the various hearing dates to 55/20 Powstańców Wielkopolskich and that this was the only address given by the respondent as his address for service. His failure to update that address in accordance with the legal obligation on him to do so, and of which he had been informed, in circumstances where it is evident that he was aware that he was the subject of criminal proceedings means that he consciously and unequivocally waived his right to be notified of the hearings and therefore to be present at the hearings. Rather than engage with the criminal procedures and update his address, he simply moved to Ireland in February, 2017.

Conclusion and proposed Order

61. In those circumstances, both objections fail and I will make an order pursuant to s. 16 of the 2003 Act for the surrender of the respondent to the Polish authorities.