

THE HIGH COURT

[2023] IEHC 466

[2021 No. 107 EXT.]

BETWEEN

MINISTER FOR JUSTICE AND EQUALITY

APPLICANT

AND

RYSZARD ZBIGNIEW WISNIEWSKI

RESPONDENT

Judgment of Mr. Justice Kerida Naidoo delivered on the 27th day of March, 2023

1. By this application, the applicant seeks an order for the surrender of the respondent to The Republic of Poland pursuant to a European Arrest Warrant dated 4th April 2016. The EAW was issued by the President of the 3rd Penal Division of the Regional Court in Bydgoszcz as the Issuing Judicial Authority.
2. The EAW seeks the surrender of the respondent in order to enforce three sentences which were imposed on three separate occasions for convictions for 12 offences. The sentences were imposed over the course of three separate dates as follows:
 - I. The Judgment of the District Court in Bydgoszcz dated 25th February 2014, in File Ref III K 486/13 ("486") imposed a sentence of 2 years' imprisonment, the entirety of which remains to be served. That relates to offences 1-6.
 - II. The Judgment of the District Court in Naklo nad Notecią dated 15th October 2012, File Ref II K 527/12 ("527") imposed a sentence of 1 year 6 months' imprisonment, the entirety of which remains to be served. That relates to offences 7-8.
 - III. The Judgment of the 7th Penal Branch Division in Tuchola of the District Court in Świecie dated 11th June 2013, File Ref VII K 592/13 ("592") imposed a sentence of 2 years' imprisonment, the entirety of which remains to be served. That relates to offences 9-12.
3. The Issuing State has certified the relevant provisions of the Polish Penal Code pursuant to which the 12 offences were committed.
4. 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 same date. The EAW was produced to the High Court on 10th May 2021.
5. I am satisfied that the person before the court, the respondent, is the person in respect of whom the EAW was issued.
6. I am satisfied that none of the matters referred to in section 21A, 22, 23 and 24 of the European Arrest Warrant Act 2003, as amended ("the Act of 2003"), arise for

consideration in the application and surrender of the respondent is not precluded for any of the reasons set forth in any of those sections.

7. I am satisfied that the minimum gravity requirements of the Act of 2003 have been met. The sentences in respect of which surrender is sought are in excess of four months' imprisonment. No issue was raised in that regard.
8. I am satisfied that no issue arises under section 11 of the Act of 2003.

Correspondence

9. In relation to file ref III K 486/13, no correspondence issue was raised by the respondent. I am satisfied that correspondence can be established between those offences referred to in the EAW and offences under the law of this State, namely:
 - a. The offence of robbery contrary to section 14 of the Criminal Justice (Theft and Fraud Offences) Act 2001.
 - b. The offence of burglary contrary to section 12 of the Criminal Justice (Theft and Fraud Offences) Act 2001.
 - c. The offence of theft contrary to section 4 of the Criminal Justice (Theft and Fraud Offences) Act 2001.
10. In relation to file ref II K 527/21 no correspondence issue was raised by the respondent.
 - a. In relation to offence 7, pursuant to section 38(1)(b) of the Act of 2003, 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 three years' imprisonment and has indicated the appropriate box for "*kidnapping for ransom, illegal restraint and hostage-taking*". There is no manifest error or ambiguity in respect of the aforesaid certification as would justify this court in looking beyond same.
 - b. In relation to offence 8, I am satisfied that correspondence can be established between the offence referred to in the EAW and offences under the law of this State, namely, the offence of making threats to kill or cause serious harm contrary to section 5 of the Non-Fatal Offences Against the Person Act 1997.
11. The respondent raises the issue of correspondence in respect of two of the offences in file ref VII K 592/13.
12. The warrant sets out particulars of each of the four offences in case 592:
 - a. On 14th February 2013, at a particular location, acting jointly in concert with two named individuals, against the law, the respondent grew cannabis other than fibrous which could produce a significant amount of cannabis herb other than fibrous. I am satisfied that correspondence can be established between the offences referred to in the EAW and offences under the law of this State, namely cultivation

of any plant of the genus cannabis contrary to section 17 of the Misuse of Drugs Act, 1977, as amended. No issue was taken with correspondence in respect of that offence.

- b. On 14th February 2013, at an identified location and acting jointly with two named individuals, the respondent was in possession of tools used for the production and processing of narcotic drugs. The respondent raises a correspondence issue in respect of that offence.
- c. On 14th February 2013, at an identified location, against the law, the respondent was in possession of a psychotropic substance in the form of an amphetamine with a specified weight which constituted an act of smaller significance. I am satisfied that correspondence can be established between the offences referred to in the EAW and offences under the law of this State, namely possession of a controlled drug contrary to section 3 of the Misuse of Drugs Act, 1977, as amended. No issue was taken with correspondence in respect of that offence.
- d. On 14th February 2013, at an identified location, the respondent was in possession of ammunition, a propellant in the form of powder, without the required licence. The respondent raises a correspondence issue in respect of that offence.

The possession of tools offence

- 13. A correspondence issue is raised in respect of the possession of tools offence. The description of the offence is that on 14th February 2013, at an identified location and acting jointly with other named individuals, the respondent was, *"in possession of tools used for production and processing of narcotic drugs."*
- 14. The respondent argues that correspondence has not been satisfied in relation to that allegation. He says there is no detail given of what tools were found. In my view the language used is to the effect that, whatever was actually found, they were tools that could be used to produce or process narcotic drugs.
- 15. The applicant submits that the corresponding offence is an offence contrary to section 183 of the Criminal Justice Act 2006, as amended by section 46 of the Criminal Justice Act 2007.
- 16. It is also submitted that the instant offence would also be a drug trafficking offence contrary to section 3 of the Criminal Justice Act 1994.
- 17. The relevant portion of section 46 of the Criminal Justice Act 2007 substitutes a new section for section 183 of the Act of 2006 and provides as follows:

"183. – (1) A person is guilty of an offence if he or she possesses or controls any article in circumstances giving rise to a reasonable inference that he or she possesses or controls it for a purpose connected with the commission, preparation, facilitation or instigation of -

(b) a drug trafficking offence within the meaning of section 3(1) of the Criminal Justice Act 1994"

18. Section 183(5) of the Act of 2006 defines an "article" broadly as meaning, "a substance, document or any thing".
19. The relevant portion of section 3(1) of the Criminal Justice Act 1994 provides as follows:

"3. - (1) "drug-trafficking offence" means any of the following -

 - (a) an offence under any regulations made under section 5 of the Misuse of Drugs Act, 1977, involving the manufacture, production, preparation, importation, exportation, supply, offering to supply, distribution or transportation of a controlled drug,*
 - (b) an offence under section 15 of that Act of possession of a controlled drug for unlawful sale or supply."*
20. Surrender is sought on the basis that the respondent was in possession of tools for the purpose of production and processing of narcotic drugs. I am satisfied that possession of an "article" for the purposes of the manufacture, production or preparation of a controlled drug contrary to section 3 or 15 of the Misuse of Drugs Act 1977, as amended, can be equated with "possession of tools used for the production and processing of narcotic drugs". I am also satisfied that "controlled drugs" as defined under Irish law encompasses narcotic drugs. Reading the warrant and additional information in their entirety, I am also satisfied that the narcotic drugs to which the offence relates are cannabis and/or amphetamines, which are both controlled drugs under the law of the State.
21. I am therefore satisfied that, in relation to case 592, correspondence can be established between the offence referred to in the EAW and offences under the law of this State, namely: the offence of possession of articles in connection with certain drug trafficking offences contrary to section 183 of the Criminal Justice Act 2006 as amended by section 46 of the Criminal Justice Act 2007.

The firearms offence

22. The respondent argues that correspondence has not been satisfied in relation to the offence that is particularised as follows: "On 14th February 2013 in Bydgoszcz, he was in possession of ammunition, a propellant in the form of powder, without the required licence."
23. The respondent submits there is uncertainty as to whether the powder as described is ammunition. In my view it is clear from the description read in its entirety that the propellant powder is ammunition.
24. The applicant submits the description of the acts involved corresponds with an offence in Irish law, namely; possession of ammunition contrary to section 2(1) of the Firearms Act 1925, which provides that:

"Subject to the exceptions from this section hereinafter mentioned, it shall not be lawful for any person after the commencement of this Act to have in his possession, use, or carry any firearm or ammunition save in so far as such possession, use, or carriage is authorised by a firearm certificate granted under this Act and for the time being in force."

25. Section 1 of the Firearms Act 1925, as amended by section 26 of the Criminal Justice Act 2006, defines "ammunition" as follows:

"ammunition" (except where used in relation to a prohibited weapon) means ammunition for a firearm and includes –

- (a) grenades, bombs and other similar missiles, whether or not capable of being used with a firearm,*
- (b) any ingredient or component part of any such ammunition or missile, and*
- (c) restricted ammunition, unless the context otherwise requires."*

26. In the Act "ammunition" has a specific definition in Irish law. The court must give the word "ammunition" in the Irish act its technical meaning. The definition captures any ingredient of any ammunition, whether or not the ingredient is capable of being used with a firearm.
27. The particulars of the offence set out in the warrant is possession of ammunition, a propellant in the form of powder, without the required license. In the context of the language used in the warrant it is appropriate for this court to give the word "ammunition" in the warrant its ordinary everyday meaning. The specific item to which the request refers is a propellant in the form of a powder. Again, it is appropriate for this court to give those words their ordinary meaning. Taking that approach, I am satisfied that the propellant powder referred to is ammunition in powder form capable of imparting motive force when used in a projectile weapon.
28. The definition of ammunition in the Firearms Act 1925 includes an ingredient for ammunition that is capable of being used with the firearm. I am satisfied that the substance to which the request refers is therefore a powder propellant that could be used in a firearm.
29. The description of the offence in the warrant includes the requirement that the possession be without the required license. Giving the word license its ordinary meaning, I am satisfied that the requirement to have a license in relation to the offence described in the warrant is the equivalent of the requirement in the Firearms Act 1925 that possession be authorised by a "firearm certificate".
30. I am therefore satisfied that correspondence can be established between the offence referred to in the EAW and offences under the law of this State, namely possession of ammunition contrary to section 2(1) of the Firearms Act 1925.

Section 45

31. No issue is raised under section 45 of the Act in cases file ref III K 486/13 and file ref VII K 592/13.
32. At Part D of the EAW, it is indicated that the respondent appeared at the hearing which resulted in the decision that is sought to be enforced in the case tried by the District Court Bydgoszcz, file ref III K 486/13 and in the case tried by the 7th Penal Branch Division in Tuchola of the District Court in Swiecie, file ref VII K 592/13.
33. I am satisfied no issue under section 45 of the Act in either of those cases.
34. An issue is raised pursuant to section 45 of the Act in case file ref II K 527/12. Part D of the EAW indicates that the respondent did not appear in person at the hearing which resulted in the decision that is sought to be enforced in that case. It was tried by the District Court in Naklo nad Notecią.
35. The Issuing Judicial Authority has indicated that it relies on Part D.1 of the warrant:
- "the person concerned did not apply for the re-examination of the case nor did they submit an appeal within the statutory time limit."*
36. The Issuing Judicial Authority has also indicated that it relies on Part D.2:
- "In the case tried by the District Court in Naklo nad Notecią, file ref II K 527/12, the summons to the hearing where the judgement was delivered was properly served on Ryszard Zbigniew Wisniewski to the address indicated by him in the course of penal proceedings. In the judgement delivered, the court considered Ryszard Zbigniew Wisniewski's request, agreed upon with the public prosecutor, for voluntary submission to punishment."*
37. In a reply dated 16th June 2021, the Issuing Judicial Authority also provided additional information about the *in absentia* decision in case 527.
38. The respondent swore an affidavit dated 17th May 2021. In it he says he came to Ireland in October 2014. He then sets out his personal circumstances including the fact that for over six and a half years he has committed no crime while living in Ireland and was working and paying taxes until he had a bicycle accident and suffered a serious injury to his leg. That averment is supported by medical evidence. He also says that he has a separate problem with his left knee and is awaiting consultation with a specialist to see if he will need surgery. He asserts that if imprisoned in Poland he would not be able to address his medical problems. No independent evidence is advanced to support that assertion. He also says that he is undergoing significant dental treatment.
39. In his affidavit the respondent does not engage in any way with the factual circumstances that underpin the submission that his surrender should be refused in case 527 under section 45 of the Act of 2003. Specifically, he does not dispute that he engaged with the prosecution in a process that resulted in him submitting voluntarily to the punishment in case 527. Nor does he deny giving the address to which the notification that was sent. He

does not assert that he did not in fact receive the notification or that he was unaware of the hearing on 15th October 2012 that gave effect to the punishment imposed.

40. The obligation is on the applicant to prove that surrender is not prohibited under section 45 of the Act.
41. The respondent submits that the information contained in the warrant is not sufficient for the purposes of section 45 given that it is accepted that he was not present at the hearing. He argues that section 45 of the Act has not been satisfied because the information as originally presented in Part D of the warrant is insufficient and that the additional information does not cure that deficiency.
42. A European arrest warrant must be read in totality including any additional information that has been provided by the Issuing Judicial Authority. I am satisfied that the court has been provided with sufficient information by the IJA to carry out its functions under the Act of 2003 and specifically pursuant to section 45 of the Act. I am also satisfied that the respondent has sufficient information about the nature and circumstances of commission of the alleged offences to understand the nature of the offences and to challenge his surrender.
43. The parties agree that case 527 falls to be considered in accordance with the *Zarnescu (Minister for Justice v. Zarnescu* [2020] IESC 59) decision in which the Supreme Court indicated that section 45 of the Act of 2003 is to be given a purposive interpretation and that even though a particular set of circumstances may not fit neatly into one of the scenarios set out in Table D, it may nevertheless be permissible for the court to order surrender if it is satisfied that the requirements of section 45 have been substantially met. However, as Baker J. pointed out in *Zarnescu*, before making an order for surrender in such circumstances the court must take a step back and satisfy itself that the defence rights of the respondent have not been breached and will not be breached.
44. Based on the totality of the information I am satisfied that the relevant facts in case 527 are:
 - a. At a hearing on 15th October 2012 the District Court in Naklo Nad Notecią imposed a sentence of 1 year 6 months' imprisonment upon the respondent. That is the relevant judicial decision upon which the warrant is based.
 - b. The respondent gave an address for service during the pre-trial hearing and was instructed that all notices would be sent to that address.
 - c. Notification of the hearing was served at the address supplied by the respondent.
 - d. The notice of the date of the hearing in the case was collected by the respondent's wife at that address.
 - e. The respondent did not appear at the hearing on 15th October 2012 and was not represented.

- f. The respondent made a "*statement on voluntary submission to the penalty*" during the pre-trial proceedings. Prior to the hearing on 15th October 2012, the respondent had engaged with the prosecution authorities of the requesting State and agreed to voluntarily submit to the sentence that was subsequently imposed.
 - g. The District Court in Naklo Nad Notecią granted the application for voluntary submission to penalty.
 - h. The consequence of the request for voluntary submission of the penalty is that once the court grants the request, the sentence imposed must be in accordance with the terms of the request.
 - i. The court therefore did not have any discretion to vary that sentence.
 - j. The hearing on 15th October 2012 did not vary the duration or nature of the agreed sentence.
 - k. Being aware that sentence was going to be imposed, the respondent chose not to appeal it.
 - l. The respondent will not be entitled to submit a request for reconsideration of the decision in case 527. In other words, there would be no appeal if surrendered.
45. I find the facts are not sufficient to definitively conclude that the respondent personally received notification of the hearing on 15th October 2012.
46. Although the respondent was not present or legally represented at the hearing on 15th October 2012, I am satisfied that he had fully engaged in the process that led to the imposition of that sentence and knew what the nature and duration of the penalty would be.
47. 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, in the circumstances outlined above, I am satisfied that, if the respondent did not in fact receive notification of the date, or was otherwise unaware of it due to a failure to affect personal service, that was because the respondent made an informed decision to bring about a state of affairs in which it was not possible for the authorities in the requesting State to affect personal service upon him. The respondent had provided an address for service and was aware that notification of any court proceedings would be delivered to that address and treated as sufficient service by the relevant authorities.
48. Perhaps more importantly, I am satisfied that the respondent was fully aware what sentence would be imposed. The imposition of the sentence resulted from a process of engagement between the respondent and the prosecuting authorities in the requesting State. I am also satisfied that the respondent's defence rights were adequately protected and were not breached in relation to case 527.

49. In arriving at the above conclusion, I am fully aware of the central importance in any fair criminal procedure that an accused person is given the opportunity to be present at any hearing that will affect his fundamental rights. I have therefore carefully considered whether, in the circumstances, I can be satisfied that the respondent's rights to defence have not been breached and were adequately protected. In the circumstances I am so satisfied.
50. I therefore dismiss the respondent's objection to surrender in case 527 based on section 45 of the Act of 2003 and Article 4A of the Framework Decision.
51. A transfer of sentence issue was raised in the notice of objection. It is not being pursued.
52. I am satisfied that surrender of the respondent is not precluded by reason of Part 3 of the Act of 2003 or another provision of that Act.
53. It, therefore, follows that this court will make an order pursuant to section 16 of the Act of 2003 for the surrender of the respondent to The Republic of Poland.