



**AN CHÚIRT UACHTARACH
THE SUPREME COURT**

**Clarke CJ
Charleton J
Baker J**

Supreme Court appeal number: S:AP:IE:2019:000222

[2020] IESC 000

High Court record number 2019 195 EXT

[2019] IEHC 803

BETWEEN

THE MINISTER FOR JUSTICE AND EQUALITY

APPLICANT/RESPONDENT

- AND -

SŁAWOMIR WIKTUR PALONKA

APPELLANT/RESPONDENT

Judgment of Mr Justice Peter Charleton delivered on Tuesday, July 14th 2020

1. By order of Binchy J in the High Court, dated 29 November, a European arrest warrant of 29 January 2019 issued by Poland was ordered to be enforced. A prior request in respect of the appellant on another European arrest warrant had failed due to legal challenge. Thus, this was the second request, but, unusually it is in respect of an earlier offence. The subject of the warrant, the appellant, was remanded in custody by the High Court with consent to bail. Leave to appeal directly to this court was sought on 18 December 2019 and by determination was granted on 24 April 2020. The Court identified these points of law of general public importance:
 1. whether on the facts of this case the issue of the second EAW, seven years after the issue of a warrant in this jurisdiction in relation to a separate offence, and four years after the refusal of surrender in that case, may be seen as an abuse of process, justifying refusal of surrender; and
 2. whether surrender may be ordered in respect of the *in absentia* activation of a suspended sentence if such activation was triggered by an *in absentia* conviction for which surrender has been refused.
2. What has now happened is that facts which were unclear in the High Court are now sought to be clarified in this Court by way of a request for further information to the Polish authorities. Since this court cannot ordinarily hear evidence and does not have the

responsibility of finding facts, it has been decided to revert the case to the High Court so that further information may be sought. This should not have happened. But in the extraordinary circumstances of the case, this Court will keep the appeal on the stated grounds but leave the High Court to ask appropriate questions and find relevant facts so that the appeal can then proceed with appropriate clarity. While it is possible for this Court to consider new evidence, it is undesirable that potentially important facts come for the first time to be considered by the court of final appeal, or indeed on any appeal. Further facts may be enquired into since extradition, of which European arrest warrants is a sub-species, is broadly an enquiry. This procedure of the court of its own motion seeking further information is possible under the European Arrest Warrant Act 2003 s 20. This provides:

- (1) In proceedings to which this Act applies the High Court may, if of the opinion that the documentation or information provided to it is not sufficient to enable it to perform its functions under this Act, require the issuing judicial authority to provide it with such additional documentation or information as it may specify, within such period as it may specify,
 - (2) The Central Authority in the State may, if of the opinion that the documentation or information provided to it under this Act is not sufficient to enable it or the High Court to perform functions under this Act, require the issuing judicial authority to provide it with such additional documentation or information as it may specify, within such period as it may specify.
 - (3) In proceedings under this Act, evidence as to any matter to which such proceedings relate may be given by affidavit or by a statement in writing that purports to have been sworn—
 - (a) by the deponent in a place other than the State, and
 - (b) in the presence of a person duly authorised under the law of the place concerned to attest to the swearing of such a statement by a deponent,howsoever such a statement is described under the law of that place.
 - (4) In proceedings referred to in subsection (3), the High Court may, if it considers that the interests of justice so require, direct that oral evidence of the matters described in the affidavit or statement concerned be given, and the court may, for the purpose of receiving oral evidence, adjourn the proceedings to a later date.
3. It may be noted that this applies to the High Court, which is the court for the administration of extradition and pursuant to European arrest warrants. The parties should be aware of the relevant procedure, which also applies to extradition, and seek to ask the High Court to use it where there is some unclarity that might seriously impact on the outcome of the case. It is only because the interests of justice may require the exceptional use of this procedure that it may ever be countenanced.

Background

4. Concerned in the request here is an offence committed in July 1999, all of 21 years ago, one of possession of drugs. Then, the appellant was 18 years old. On 23rd August 2002 there was a sentence hearing on that offence and a 10-month sentence was imposed by the Polish courts for the 1999 offence, but was stayed: "execution was conditionally stayed for the period of three years of trial". One matter that is unclear, is if that 2002 sentence was revoked on 16th January 2006, because the appellant committed another offence, again possession of drugs, during the three years of the suspension. It appears so, but it is unclear. Further, this 1999 offence is the offence on which extradition is now sought on a European arrest warrant, the second in respect of this appellant. There was another offence, which seems to have activated this 1999 suspended sentence, and that was the subject of another extradition request for that later offence. The request succeeded in the High Court. On appeal it failed in the Court of Appeal. The appellant was the subject of this previous request from Poland for his surrender in 2012. His surrender was sought in order that he might serve 6 months and 27 days that remained extant of a 10-month sentence imposed on appeal in Poland in his absence, but apparently represented, on 29th January 2004, for an offence committed on 23rd March 2003. The High Court had ordered surrender on foot of the 2012 request, that is the first request on an European arrest warrant. The Court of Appeal, however, allowed the appeal and held that surrender of the appellant was prohibited under s 45 of the 2003 Act.
5. On considering this request, the second but in respect of the earlier offence, in the High Court, Binchy J was uncertain whether the appellant's in absentia conviction for the 2003 offence, which grounded the 2012 request, was the "trigger" for the 2006 activated sentence for the 1999 offence. Binchy J's view was that that he did not think that "anything of significance" turned on it. In the High Court, the Minister addressed the court on the basis that the appellant "committed an offence while his sentence was suspended and for that reason that suspended sentence" was activated. Those other proceedings on the earlier 2012 request indicate that there was another offence committed in period of suspension of sentence for the 1999 offence. There was no explanation for the delay in the case, one case already having failed, but there is nothing to indicate that an explanation was sought from Poland.
6. In so far as the papers seem to confirm every aspect of the following chronology prepared on behalf of the Minister, it is now reproduced in an uncorrected form:

Date	Event
6 th March 1981	Appellant born
July 1999	The 1999 Offence
23 rd August 2002	10-month suspended sentence imposed for 1999 Offence and conditionally stayed for 3 years (i.e. the 2002 Stayed Sentence).
30 th August 2002	The 2002 Stayed Sentence is legally valid

23 rd March 2003	Date of offence in 2012 EAW (hereafter " 2003 Offence ")
30 th June 2003	Judgment of District Court for 2003 Offence whereby a fine was imposed.
29 th January 2004	Amendment of Judgment of District Court by Regional Court for 2003 Offence and sentence imposed is 10 months imprisonment (of which 6 months and 27 days were extant when 2012 EAW issued).
2005	Appellant in the State
18 th March 2005	Domestic warrant issues in Poland for 2003 Offence.
16 th January, 2006	The court that imposed the 2002 Stayed Sentence for the 1999 Offence " <i>rules against the convict execution of the penalty of 10 months of deprivation of liberty ...</i> " (i.e. 2006 Revoked Sentence).
17 th July 2006	Polish court rules " <i>his search by a wanted notice</i> " in respect of the 1999 Offence.
6 th November 2012	Date of 2012 EAW
22 nd January 2013	2012 EAW endorsed by High Court for execution in the State. See [2014] IEHC 515
28 th December 2013	Appellant arrested on 2012 EAW See [2014] IEHC 515
4 th November 2014	High Court orders surrender on 2012 EAW. See [2014] IEHC 515
20 th November 2014	High Court certifies appeal to Court of Appeal against order for surrender on 2012 EAW. See [2015] IECA 69 (judgment of Finlay Geoghegan J.)
18 th May 2015	Court of Appeal refuses surrender on 2012 EAW.
29 th January 2019	Date of 2019 EAW
20 th June 2019	2019 EAW endorsed for execution in the State
31 st October 2019	Appellant arrested on 2019 EAW. Remanded in custody with consent to bail.
14 th November 2019	Points of Objection
14 th November 2019	Appellant's solicitor's affidavit sworn
19 th November 2019	Appellant's affidavit sworn. Section 16 hearing. Appellant admitted to bail.
22 nd November 2019	Judgment of Binchy J. on section 16 application on 2019 EAW.
29 th November 2019	Binchy J. makes orders <i>inter alia</i> under section 16(1) and section 16(11) of the 2003 Act for the surrender of the appellant and refusing a certificate for leave to appeal to the Court of Appeal.
18 th December 2019	Stay on surrender order pending appeal.
4 th February 2020	Appellant granted bail
24 th April 2020	Supreme Court grants leave to appeal against order for surrender on 2019 EAW.

7. But, for all of that, the case can be reduced to simple terms. In March 2003, the appellant committed an offence. Sentence was in June 2003, it appears, and was a fine. But in January 2004, that became a prison sentence, possibly because of the prior record on the 1999 offence, which may only have been discovered then. That is uncertain. Surrender was sought for the March 2003 offence from Ireland to Poland but that application failed in May 2015. Surrender on the 1999 offence, which it seems the March 2003 offence resulted in the suspension of the earlier sentence being revoked in January 2006, was then sought in June 2019. Meanwhile, the appellant has claimed not to have returned to Poland since 2005 and hence claims to have been absent for the hearing on the 2003 offence and for the suspension being lifted on the 1999 offence, resulting in the 1999 sentence of 10 months becoming active. Indications on the paperwork, however, are that he was represented by a lawyer in the process. In this country, practice indicates that an accused must plead personally to an indictment and be in court but, for a summary offence, an accused may send in a solicitor and not be present. Was this what happened in Poland? Why were the authorities seeking surrender on the 1999 offence only when the surrender for the 2003 offence failed?
8. In Case C-571/17 *Openbaar Ministerie v Ardic* the Court of Justice of the European Union concluded that the principles governing *in absentia* trials do not apply to the activation of suspended sentences. That is one definite situation. But, here it is unclear if the accused who claims he was not present for the process of March 2006 was subject to a form of substituted service presence, perhaps through his former legal advisor, or whether he had actually instructed a lawyer to appear in his absence, or whether he had no knowledge of the process of suspension, or that it can be proved that he did know and chose to ignore proper service. That matter is important. Counsel for the accused asserted that the documentation presented to the High Court did not make it clear that the applicant merely had the July 1999 offence penalty turned from a suspended sentence into one that had to be served by reason of a simple breach of condition. Another offence seemed to be involved, that is the one from March 2003.
9. The Minister does not consider that further findings of fact by the High Court based on new information are inescapably necessary. The Minister's primary case is that the law is clear and that a process giving rise to the reactivation of what would be termed in this jurisdiction a suspended sentence does not come within the ambit of the *in absentia* rules which apply in relation to European arrest warrants. However, counsel noted that the appellant wished to put forward an argument that would refine that proposition to some extent. The appellant will urge on this Court that, where it is the conviction for another offence that activates a previously suspended sentence, and where that other offence is tried *in absentia*, the *in absentia* rules which apply in the context of a European arrest warrant should apply. Counsel for the Minister indicated that he would suggest to the Court that this proposition was not correct in law but, quite properly, acknowledged that the Court might be persuaded otherwise. This could happen in one of two ways. Either the Court might be persuaded that the argument of the appellant was correct. Alternatively, and

perhaps more likely, the Court might be persuaded that the question was not *acte clair* and thus feel that it was required to make a reference to the Court of Justice of the European Union under Art. 267 of the Treaty on the Functioning of the European Union.

10. On that basis, counsel for the Minister accepted that there were possible scenarios in which additional facts would be necessary if this Court was not persuaded by his primary submission. While counsel did not, therefore, accept that further information was necessarily required he did accept that there were circumstances in which it might be important to have further information in the event that his primary submission was rejected. Counsel also drew attention to the possibility that some of the arguments which might be advanced by the appellant might ultimately not be sustainable in the event that the further information removed the possible factual basis for any aspect of the case advanced.

11. In the High Court, Binchy J dealt with the issues of delay, holding against the applicant, and of trial in the absence of the applicant, similarly holding for the Minister thus:

16. The Court was also referred to the decision of the Supreme Court in the case of *Minister for Justice & Equality v. J.A.T.* No. 2 [2016] IESC 17. In that case, surrender of the respondent was refused for a combination of reasons. Firstly, the High Court determined that there had been an abuse of process on part of the applicant and the Supreme Court did not interfere with this finding. Secondly, there had been a significant delay in that application also. The crimes alleged dated back to 1997. The first EAW in that case issued on 7th March, 2008 and the second issued on 13th June, 2011. There was also a lapse of time between the first and second EAW. Thirdly, the respondent had significant health difficulties, in addition to which he was effectively the sole care giver for his son who, because of difficulties of his own, was particularly reliant on that care. In his judgment, O'Donnell J. stated at para.s 10 and 11:-

"10. 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. 11. In any future case, where all or any of the above factors may be relied on, it would not, in my view, be necessary to carry out any elaborate factual analysis or weighing of matters unless it is clear that the facts come at least close to a case which can be said to be truly exceptional in its features. Even in such cases, which must be rare, it is important that the considerations raised are scrutinised rigorously."

17. Earlier in that judgment, at para. 4, O'Donnell J. had stated:-

"An important starting point, in my view, is that considerable weight is to be given to the public interest in ensuring that persons charged with offences face

trial. There is a constant and weighty interest in surrender under an EAW and extradition under a bilateral or multilateral treaty. People accused of crimes should be brought to trial. That is a fundamental component of the administration of justice in a domestic setting, and the conclusion of an extradition agreement or the binding provisions of the law of the European Union means that there is a corresponding public interest in ensuring that persons accused of crimes, in other member states or in states with whom Ireland has entered into an extradition agreement, are brought to trial also. There is an important and weighty interest in ensuring that Ireland honours its treaty obligations, and if anything, a greater interest and value in ensuring performance of those obligations entailed by membership of the European Union.”

18. There are some similarities between the facts of this case and those pertaining in J.A.T. No. 2. The lapse of time in this case is even longer than the delay in J.A.T. No. 2, where the delay between the offence and warrant was 14 years. In this case the delay was 20 years. This is also a second application, although it must be observed that in this case, the second application arises out of a different offence. However, counsel for the respondent urges that the issuing judicial authority in this application should have been on notice of the whereabouts of the respondent by reason of the first EAW proceedings, and should have moved swiftly. The respondent has a dependant son.
19. On the other hand, there are also significant differences between the circumstances pertaining in these proceedings and those pertaining in J.A.T. No. 2. The respondent does not have health difficulties in this case, and while he has a dependent son, he does not have a dependent son with an unusual dependence upon him, and nor is he the sole provider of care to his son. Indeed, it appears that his son is in the primary custody or care of his mother. I think it is correct to say that the respondent’s family circumstances are not out of the ordinary, and the impact of his surrender both on the respondent himself and on his family will be typical of the impact that surrender will have on any family. Indeed, it is probably not very different to the impact that imprisonment in this jurisdiction would have on the respondent and his family if he were required to serve a similar sentence for similar offences here, save for the obvious difference that it would be far more difficult for his family to visit him for the duration of his 10-month sentence. As Edwards J. stated at para. 15 of his decision in BH, reliance on matters which could be said to typically flow from arrest, detention, or surrender without more, will little avail the effected person. It seems to me that whether one takes the approach set out by O’Donnell J. in J.A.T. No. 2 or follows the principles in BH, the result is the same.
20. As to the question of proportionality, when one weighs the “considerable weight” to be given to the public interest in the surrender of the respondent to serve a sentence for the offences of which he is convicted on the one hand with the interference with his family life, which I have found to be the normal consequences that inevitably flow

from surrender, on the other hand, it is difficult to see how the surrender of the respondent could be considered disproportionate. While it was argued that it does not appear that the offences of which the respondent was convicted were particularly serious, it is difficult to know at this remove just how serious they were and the extent to which the respondent was engaged in importation of drugs for personal use or for supply to others. The fact is that trafficking in drugs at any level is treated with seriously, and even if the respondent's activities are at the lower end of that particular scale, the offences could not be regarded as trivial or such as to diminish the public interest in enforcing the penalty imposed on him for his conviction of those offences, in circumstances where the impact on the respondent and his family is that which typically flows from surrender and detention.

21. As to delay, it is well settled that delay in and of itself does not constitute a basis for refusal to surrender. Taken together with other factors, when present, it may result in a refusal of surrender that would not otherwise result if delay were not also present. But in this case, the other factors are not present.
 22. Finally, as regards the s. 45 argument advanced on behalf of the respondent, this depends not upon his conviction for the offences in respect of which his surrender is sought, but upon his conviction of another offence which resulted in the revocation of the suspension of the sentence imposed upon him. This issue is dealt with resolutely in the decision of the European Court of Justice in the case of Ardic [Case C-571/17] in that case, the ECJ held: "Where a party has appeared in person in criminal proceedings that result in a judicial decision which definitively finds him guilty of an offence and, as a consequence, imposes a custodial sentence the execution of which is subsequently suspended in part, subject to certain conditions, the concept of 'trial resulting in the decision', as referred to in Article 4a(1) of Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, as amended by Council Framework Decision 2009/299/JHA of 26 February 2009, must be interpreted as not including subsequent proceedings in which that suspension is revoked on grounds of infringement of those conditions during the probationary period, provided that the revocation decision adopted at the end of those proceedings does not change the nature or the level of the sentence initially imposed."
 23. It is not in dispute that the decision to revoke the suspension of sentence in this case did not change the nature or the level of the sentence initially imposed upon the respondent. Accordingly, the argument that the respondent's surrender would be contrary to s. 45 of the Act of 2003 must also be rejected.
12. What concerns this Court now is that the High Court may not have had sufficient information on which to rule. What is regrettable is that the appellant did not make an application for further information in the High Court, which alone has that jurisdiction, but considered it necessary to seek further information on appeal. The same applies to the State.

13. It is for the High Court to make the request to the Polish authorities. The parties have furnished several suggestions. This Court considers that the following information should be sought from the Polish authorities but leaves it open to the parties to seek further information should the High Court be persuaded of the necessity. These are suggestions since the final authority is the High Court and the process is an enquiry:
1. Was the suspension of the July 1999 sentence of 10 months lifted, and thus became operative, due to the commission of another offence in March 2003?
 2. When and why did that happen?
 3. There was a hearing for the offence of March 2003. That happened in June 2003 and January 2004. Why were there two hearings?
 4. Was the appellant present for either or both hearings? If he was absent, was he served with legal notice of the hearing, and if so, how? Was he represented and if so on the basis of what instructions given to a lawyer representing him?
 5. In January 2006, the suspended sentence for the July 1999 offence appears to have been lifted, thus becoming a jail sentence of 10 months instead of a suspended sentence. Was the appellant present for the hearing? If he was absent, was he served with legal notice of the hearing, and if so, how? Was he represented and if so on the basis of what instructions given to a lawyer representing him?
 6. In May 2015, the application for surrender of the appellant on the March 2003 offence was refused in Ireland. The Polish authorities then sought surrender on the basis of the July 1999 offence by request dated January 2019 for the July 1999 offence. Why did the authorities in Poland wait until after the failure of the surrender request in respect of the March 2003 offence to seek surrender on the July 1999 offence?
14. This Court therefore sees the necessity to seek that information through the High Court but will, nonetheless, retain the appeal. It is to be emphasised, however, that the High Court should make such additional findings of fact as appeared to that court to be appropriate on the basis of the evidence, including such additional information as may come from the Polish authorities. Insofar as findings may be required they should relate to such facts as might reasonably be necessary to enable an assessment to be made of the legal issues, including the possible necessity for a reference to the Court of Justice of the European Union on the imposition of a sentence, or activation of a sentence, *in absentia* and on the issue of abuse of process.