

THE HIGH COURT

[2018 NO. 316 EXT.]

BETWEEN

MINISTER FOR JUSTICE AND EQUALITY

APPLICANT

AND

DARIUSZ TADEUSZ FAŁROWICZ

RESPONDENT

JUDGMENT of Mr. Justice Paul Burns delivered on the 15th day of December, 2020

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 9th September, 2018 ("the EAW") issued by Judge Anna Hevler of the Regional Court in Nowy Sącz, Poland, as the issuing judicial authority. The EAW indicates that the surrender of the respondent is sought to enforce a sentence of 3 years' imprisonment, of which 2 years, 1 month and 25 days remains to be served.
2. The EAW was endorsed by the High Court on 19th November, 2018 and the respondent was arrested and brought before the High Court on 14th January, 2020.
3. I am satisfied that the person before the Court is the person in respect of whom the EAW was issued. This was not put in issue by the respondent.
4. I am further 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 and that the surrender of the respondent is not prohibited for the reasons set forth therein.
5. I am satisfied that the minimum gravity requirements of the Act of 2003 are met. The sentence in respect of which surrender is sought is in excess of 4 months' imprisonment.
6. I am satisfied that correspondence exists between the offences set out in the EAW and offences under the law of the State, namely theft contrary to s. 4 of the Criminal Justice (Theft and Fraud Offences) Act, 2001, as amended ("the Act of 2001"), burglary contrary to s. 12 of the Act of 2001 and criminal damage contrary to s. 2 of the Criminal Damage Act, 1991. No issue was taken in respect of correspondence.
7. A notice of objection to surrender dated 24th January, 2020 was delivered but at hearing, counsel for the respondent confirmed that only one point of objection was being pursued, namely that surrender was precluded under s. 45 of the Act of 2003.
8. At part B of the EAW, the enforceable judgment is stated as:-

"A cumulative judgement of Sąd Rejonowy [District Court] in Nowy Targ dated 4 June 2014, case ref. no. II K 285/14."
9. At part D of the EAW, the relevant sections are highlighted to indicate as follows:-

"No, the person did not appear in person at the trial resulting in the decision in the case II K 285/14

the person was not summoned in person but by other means actually received official information of the scheduled date and place of the trial in the case ref. no. II K 285/14 which resulted in the decision, in such a manner that it was unequivocally established that he was aware of the scheduled trial, and was informed that a decision may be handed down if he does not appear for the trial."

10. By way of information as to the matters indicated above, it was further stated in the EAW:-

"Despite being notified twice by the postal services of the correspondence waiting to be collected and containing a notice concerning the date and place of the hearing in the case ref. no. II K 285/14 as well as relevant instructions, Dariusz Fąfrowicz did not collect the correspondence. In accordance with the Polish criminal procedure, such service is considered effective. Furthermore, the appearance of an accused person at a hearing concerning a cumulative judgement is not obligatory unless the court decides otherwise, which did not happen in this particular case. Thus, Dariusz Fąfrowicz's appearance at the hearing in question was not obligatory."

11. By way of a response to a request for additional information, the issuing judicial authority indicated by letter dated 30th August, 2018 that the respondent had not applied for the cumulative sentence; that the Court had a discretion at the cumulative hearing as to what penalty to impose and that the cumulative penalty related to two separate penalties previously imposed in case reference number II K 613/11 and case reference number II K 814/11, which improved the position of the respondent. The letter set out that the respondent did not appear in person at either of those two underlying trials and referred to a previous European arrest warrant which had been issued in respect of those underlying sentences before the cumulative judgment was imposed. A previous European arrest warrant dated 7th March, 2013 had been issued seeking the respondent's surrender to serve the two underlying sentences but the High Court had declined to endorse same, although neither the applicant nor the respondent were able to say why this had occurred.
12. By letter dated 1st November, 2018, the issuing judicial authority was requested to provide additional information as to how the defence rights of the requested person had not been breached, as the evidence before the Court did not unequivocally establish that he was aware of the scheduled date and place of the trial resulting in the judgment of 4th June, 2014. The issuing judicial authority responded by letter dated 2nd November, 2018, pointing out that the relevant Polish law had been complied with. It pointed out that the respondent had failed to collect the notification in person because he had been hiding from law enforcement since 2012 and so it was out of his own free will that he did not participate in the hearing.

13. The respondent swore an affidavit dated 27th January, 2020 in which he averred, *inter alia*, that he had come to Ireland in 2012 and had not received any notice concerning the hearing, thus he was unaware of the hearing in case reference number II K 285/14 in which the cumulative sentence was imposed. It is noted that the respondent did not deny knowledge of the underlying sentences imposed upon him in 2011 prior to the cumulative hearing in 2014.
14. By way of a further request for additional information, the Court asked the issuing judicial authority to set out the basis on which it believed the respondent was hiding from law enforcement at the time and any information indicating the respondent had unequivocally waived his entitlement to be informed of the relevant hearing. By letter dated 16th October, 2020, the issuing judicial authority responded as follows:-
- "B. *in both cases the court imposed on Dariusz Fąfrowicz penalties of imprisonment which were not suspended. He was obliged to inform the judicial authorities of any change of his whereabouts in order to enable the judicial authorities to summon him at prison effectively;*
- D. *as was stated in your correspondence, Dariusz Fąfrowicz claims that he moved to Ireland in 2012. His statement is also an evidence that he deliberately moved to another country despite the fact that he was convicted to imprisonment. In case ref. no. II K 814/11 he even agreed with the Public Prosecutor his penalty – which was indicated in the first EAW issued on 07/03/2013;*
- G. *as early as prior to his first questionings in cases II K 613/11 and II K 814/11. Dariusz Fąfrowicz had been instructed, inter alia, about his obligation to inform the authority conducting the cases of each change of his residence address and – in the event of the residing abroad – to designate an addressee for the service of documents in Poland. He confirmed the receipt of such instructions with his own signature.*
- The convicted is still under this obligation."*
15. The response of 16th October, 2020 indicates that as a result of a change in Polish law, the Court was obliged to issue another judgment, namely the cumulative sentence of 4th June, 2014 (case reference number II K 285/14), and to issue a new European arrest warrant based on that judgment.
16. Counsel for the respondent submitted that the relevant hearing for the purposes of s. 45 of the Act of 2003 was the hearing of 4th June, 2014, and that attempting to deliver the notification at the respondent's last known address did not constitute a summons in person. It was submitted that the issuing judicial authority was not able to establish unequivocally that the respondent was aware of the scheduled hearing. She submitted that unless it could be established that the respondent had waived his right to be notified of the hearing and to participate in same, the Court had no option but to refuse surrender. In that regard, she submitted that the respondent could not waive his right to

notice of the hearing as he was totally unaware of same and would have had no reason to believe that such further hearing would take place. If the further hearing of 4th June, 2014 could not have been within his contemplation then he could not, expressly or impliedly, have waived his rights in respect of same.

17. On behalf of the applicant, counsel accepted that the relevant hearing for the purposes of s. 45 of the Act of 2003 was that of 4th June, 2014. He also accepted that the attempted service of notification by way of posting to the last known address of the respondent could not be regarded as being summoned in person, and that the issuing state had not unequivocally established that the respondent was aware of the scheduled hearing. However, counsel for the applicant submitted that the material before the Court established that the respondent had effectively waived his right to such notice and to participate in the hearing. He referred the Court to the earlier European arrest warrant dated 7th March, 2013 and submitted that the documentation before the Court established that in relation to the initial or underlying sentences set out therein, the requirements of s. 45 of the Act of 2003 had been met. As regards case reference number II K 613/11, the respondent was summoned in person on 22nd August, 2011 and as regards case reference number II K 814/11, the respondent had agreed the penalty with the public prosecutor. Furthermore, he submitted that the issuing judicial authority had stated that the respondent had been informed in respect of both matters of his obligation to inform the authority conducting the cases of any change in address and, in the event of residing abroad, to designate an address in Poland for the service of documents. This had not been denied by the respondent. It was submitted that in such circumstances, the respondent was guilty of such a lack of diligence that he could not complain as to the failure to notify. It was submitted that the respondent had full knowledge that there were criminal proceedings in being against him in Poland and he had simply failed to participate in same and came to Ireland to avoid the punishment arising out of such proceedings. In such circumstances, it was submitted, the respondent could be taken to have unequivocally waived his right to notice of, and participation in, any hearing relating to the said proceedings, including the cumulative sentence hearing of 4th June, 2014.
18. Both parties referred the Court to *Minister for Justice v. Zarnescu* [2020] IESC 59, in which the Supreme Court considered the requirements of s. 45 of the Act of 2003. Baker J. held, *inter alia*, at para. 90:-

"[90] From this analysis the following emerges:-

- (a) *The return of a person tried in absentia is permitted;*
- (b) *Article 4(6) of the 2002 Framework Decision permits the refusal to return where the requested state has a legitimate reason to refuse the EAW;*
- (c) *A person tried in absentia will not be returned if that person's rights of defence were breached:*

- (d) *Section 45 of the Act expressly identifies circumstances in which a person tried in absentia may be returned, primarily where there is evidence of service or where the person was legally represented or where it is shown that a right of retrial in the requesting state is available as of right;*
- (e) *The examples outlined in section 45 as forming the basis of the analysis are not exhaustive, and the requested authority may look to the circumstances giving rise to the non-attendance of the accused person at the hearing;*
- (f) *The requested state has a margin of discretion in how it approaches the facts, and whether to refuse return;*
- (g) *In so doing the requested authority must be satisfied that it has been established unequivocally that the accused person was aware of the date and place of trial and of the consequences of not attending;*
- (h) *Actual proof of service is not always required, and an assessment may be made from extrinsic evidence that the requested person was aware but nonetheless chose not to attend;*
- (i) *Proof of service on a family member is not sufficient extrinsic evidence of that knowledge;*
- (j) *The assessment is made on the individual facts but there must be actual knowledge by the requested person;*
- (k) *Whether actual knowledge existed is a matter of fact and can be shown from extrinsic evidence;*
- (l) *The purpose of the exercise is to ascertain whether the requested person who did not attend at trial has waived his or her right of defence;*
- (m) *A waiver may be express or implicit from the circumstances, but an implication that a requested person has waived his or her rights to be present at trial is not to be lightly made and will not be made if it has not been unequivocally established that the person was aware of the date and place of trial;*
- (n) *The degree of diligence exercised by a requested person in receiving notification of the date and place of trial may be a factor in the assessment of his or her knowledge of the date of trial;*
- (o) *In a suitable case a manifest absence of diligence may lead a requested authority to the view that the accused person made an informed decision not to be present at trial, or where it can be shown that there was an informed choice made by the person to avoid service;*

- (p) *The mere absence of enquiry as to the date or place of hearing in itself may not be sufficient, as it must be unequivocally shown that the requested person made an informed decision and, so informed, either expressly or by conduct waived a right to be present:*
- (q) *It may in a suitable case be appropriate to weigh the degree of responsibility of the requesting state to notify an accused person of the date of trial against the accused's responsibility for the receipt of his or her mail:*
- (r) *The enquiry has as its aim the assessment of whether rights of defence have been breached. It is not therefore a wide ranging or free-standing enquiry into the behaviour or lack of diligence of the requested person, and the purpose is to ascertain if rights of defence were adequately protected."*

19. In the present case, the applicant accepts that it cannot be established unequivocally, either by personal service or extrinsic evidence, that the respondent had actual knowledge of the scheduled hearing. At sub-para. (m) as quoted above, the Supreme Court has expressly stated:-

"[90]

- (m) *A waiver may be express or implicit from the circumstances, but an implication that a requested person has waived his or her rights to be present at trial is not to be lightly made and will not be made if it has not been unequivocally established that the person was aware of the date and place of trial."* (emphasis added)

This appears to be an absolute prohibition on implying a waiver where the fact of knowledge of the date and place of trial cannot be established by personal service or extrinsic evidence. However, the Supreme Court went on to consider the issue of lack of diligence on the part of a requested person in terms of that being a factor in assessing the requested person's knowledge of the date of trial. It pointed out that manifest absence of diligence could support a view that the requested person had made an informed decision not to be present at trial or to avoid service, so as to unequivocally establish that an informed decision had been made by the requested person to waive the right to be present at the hearing, as per sub-paras. (n)–(q). It is necessary in conducting an inquiry into the alleged lack of diligence on the part of a requested person to always bear in mind that the aim is to assess whether rights of defence have been breached or were adequately protected, as opposed to a general enquiry into the behaviour of the requested person, as per sub-para. (r).

20. At first glance, it may seem difficult to reconcile the seemingly absolute requirement of actual knowledge for a waiver to be found as set out at sub-para. (m) with the enquiry as to diligence referred to in the later sub-paragraphs as clearly, any lack of diligence is only relevant where actual knowledge cannot be established. On closer perusal, while the lack of diligence issue may feed into an assessment of knowledge, it may also be relevant as

to whether the requested person has brought about a situation of deliberate or wilful ignorance of the date and place of trial. However, even where the Court finds such deliberate or wilful ignorance has been brought about by the requested person, it should not simply find a waiver of the right to be present, but should still consider whether the rights of defence were adequately protected or breached.

21. Counsel for the applicant submitted that the respondent had sufficient knowledge of the hearings as regards the initial underlying sentences and could be taken to have waived his right to be present at same. He submitted that the respondent's conduct in failing to attend, and in subsequently leaving the jurisdiction of the issuing state, amounted to a clear and unequivocal decision to not only waive his right to attend those initial hearings, but also any further proceedings which might arise out of same, including the separate cumulative sentence proceedings initiated in 2014. He submitted that the respondent had deliberately brought about a position of deliberate and wilful ignorance of the court hearing and in such circumstances, his defence rights had not been breached and had been adequately protected. Reliance was placed upon the decision of this Court in *Minister for Justice and Equality v. Purse* [2020] IEHC 515. However, in that case Mr. Purse had been informed of, and attended, the early sittings of the court including arraignment, but failed to attend the scheduled hearing date of which he was aware and a bench warrant was issued. Mr. Purse was not apprehended on foot of the bench warrant. As matters turned out, the trial did not in fact proceed on the scheduled day but did proceed at a later date. Mr. Purse was legally represented throughout the proceedings, up to and including sentence. In those circumstances, it was unequivocally established that he was aware of the scheduled date and place of trial, and that he had waived his right to attend same. However, those facts are different from the circumstances of the present case. *Purse* involved a single set of proceedings at first instance in which the requested person had personally participated to begin with, and in which his legal representatives participated up to conclusion. The present case involves a new set of proceedings of which the respondent was unaware and played no part in, either personally or through legal representation.
22. I am satisfied that in relation to the hearing which led to the initial sentence in case reference number II K 613/11 dated 19th October, 2011, it is unequivocally established that the respondent was aware of same by way of personal service.
23. I am satisfied that in relation to the hearing which led to the initial sentence in case reference number II K 814/11 dated 19th November, 2011, the respondent was aware that he was subject to criminal proceedings in which he had agreed a penalty with the prosecutor, that he had provided an address and was informed of his obligation to notify the prosecutor of any change of address. He left Poland without notifying the prosecutor of any change of address, and there is no evidence from him of making any provision for receiving post. In those circumstances, he can be said to have unequivocally waived his right to attend and/or he had deliberately avoided service.

24. In respect of both initial sentences, I am satisfied that the defence rights of the respondent were not breached and were adequately protected. Thus, if the Court were called upon to surrender the respondent on foot of a warrant to enforce those two judgments, I would dismiss the objection based on an alleged failure to comply with s. 45 of the Act of 2003.
25. However, it is agreed that the hearing with which the Court is concerned in this application is neither of the two hearings referred to above, but rather surrender is sought to enforce a judgment based on a hearing of 4th June, 2014. Although counsel for the applicant submits that, on the basis of the reasoning in *Zarnescu* and *Purse*, the waiver or lack of diligence simply carries through to the third hearing on 4th June, 2014. I am not satisfied that this is necessarily so. Unlike the earlier two sets of proceedings, the respondent was not only unaware of the hearing date but was unaware of the existence of any such proceedings at all. Indeed, it seems that in the absence of the change in Polish law around 2014, there would never have been a third hearing.
26. Such hearing was not simply a formality; nor was it the application of a fixed mathematical calculation or the mere lifting of a suspension. The hearing on 4th June, 2014 required the court to exercise a discretion as to the new penalty to be imposed. In such circumstances, the respondent had a right to be present at same. Given that such a hearing was not, and could not reasonably be expected to have been, within the contemplation of the respondent, or the prosecutor, when the respondent left Poland, it is difficult to see how he could be said to have taken an informed decision to waive his right to attend same. Similarly, it is difficult to regard any lack of diligence on his part in respect of his address or post as amounting to a deliberate avoidance of service or wilful ignorance of that hearing, as it cannot reasonably be said to have been within his contemplation. The fact that the hearing in question imposed a penalty which was more favourable to the respondent than the previous penalties is not a relevant factor. The respondent either had the right to attend this sentence hearing or he did not. I am satisfied he had such a right. Ultimately, the issue is whether that right was adequately protected in all of the circumstances. In the rather unusual facts of this matter and, in particular, the circumstances in which the third hearing came about, including the remove in time of same from the original proceedings, I am not satisfied that it would be safe to treat the respondent as having made an informed decision to waive his right to be present or that it would be safe to conclude that his defence rights were adequately protected as regards the hearing of 4th June, 2014.
27. Further additional information was received from the issuing judicial authority dated 27th November, 2020, again making the argument that the respondent had waived his right to notice of the hearing on 4th June, 2020, but more importantly, confirming that the respondent would have a right to submit a request to have the proceedings re-opened and that such right was unlimited in time (emphasis added). If the Court decides to re-open the proceedings, the merits of the case concerning the cumulative sentence, including fresh evidence, will be re-examined and the respondent will have a right to participate in the new proceedings and a new judgment might be issued. In addition, it

was stated that the respondent could request the Attorney General or the Commissioner for Citizens' Rights to bring the extraordinary cassation appeal from the decision of 4th June, 2014, which is unlimited in time, and also the extraordinary complaint to the Supreme Court which may be submitted until 3rd April, 2021.

28. In light of the additional information dated 27th November, 2020, the Court requested clarification of the right to appeal. There is clearly a significant distinction between a right to request an appeal or re-hearing and a right to an appeal or re-hearing (emphasis added). Article 4a of the Framework Decision and table (d) as set out in s. 45 of the Act of 2003 both refer to a "right to a retrial or appeal". By letter dated 2nd December, 2020, the Court sought clarification in the following terms:-

"The letter dated 27th November 2020, at point IV states that the respondent will have a right to submit a request to re-open the court proceedings. As you are aware article 4a of the Framework decision requires that the person surrendered 'will be expressly informed of his or her right to a retrial, or an appeal' (emphasis added). Please clarify whether the respondent, if surrendered, will have a right to an appeal or re-hearing or merely a right to request an appeal or re-hearing."

By reply dated 8th December, 2020, the issuing judicial authority stated:-

"I clarify that Dariusz Fąfrowicz, if surrendered, will have a right to request an appeal or re-hearing."

It is clear from the reply that the respondent does not have a right to an appeal or re-hearing as envisaged by article 4a of the Framework Decision or s. 45 of the Act of 2003.

29. Having decided that the hearing on 4th June, 2014, conducted in the absence of the respondent, was a hearing in respect of which the respondent had a right to be present and participate in, it falls upon the issuing state to demonstrate compliance with the requirements of article 4a of the Framework Decision as enacted in s. 45 of the Act of 2003, or alternatively to unequivocally establish a waiver of the right to be present. The issuing state has failed to unequivocally establish a waiver of the right to be present. It has also failed to demonstrate compliance with the requirements of s. 45 of the Act of 2003 and in such circumstances, surrender is precluded.
30. I emphasise that this case turns upon the rather unusual circumstances in which the hearing of 4th June, 2014, came about. It appears that as a result of a change in Polish law, it was necessary to revisit two previous sentences imposed a number of years earlier upon the respondent. Such re-visitation was outside the reasonable contemplation of the respondent, and most likely the prosecution also, at the time of the original sentences. At such hearing, the court had a discretion as to what substituted penalty to impose. While it imposed a lesser penalty than the two earlier sentences, it is possible that if the respondent had been in attendance and participated, either personally or through a legal representative, a greater reduction may have been imposed. The respondent was not notified of the hearing, was not legally represented at same and was not informed of the

outcome of same so that he could appeal within time. Upon his surrender, he will have no automatic right to a retrial or to appeal the decision but merely a right to submit a request for a retrial or appeal. In such circumstances, I am not satisfied that the rights of defence were or are adequately protected.

31. Having found that the requested surrender of the respondent is precluded by virtue of s. 45 of the Act of 2003, it follows that this Court will make an order refusing surrender.