

THE HIGH COURT

[2021] IEHC 413
[2021 No. 102 EXT]

BETWEEN

THE MINISTER FOR JUSTICE

APPLICANT

AND

ŁUKASZ MICHAŁ TOMKOWIAK

RESPONDENT

JUDGMENT of Mr. Justice Paul Burns delivered on the 11th day of June, 2021

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 December, 2017 ("the EAW"). The EAW was issued by Judge Tomasz Borowczak, of the Regional Court in Poznań, as the issuing judicial authority.
2. The EAW seeks the surrender of the respondent in order to enforce a sentence of two years' imprisonment, of which one year, seven months and nine days remains to be served.
3. The respondent was arrested on 22nd April, 2021 on foot of a Schengen Information System II alert and brought before the High Court on the same day. The EAW was produced to the High Court on 4th May, 2021.
4. I am satisfied that the person before the Court is the person in respect of whom the EAW was issued. No issue was raised in that regard.
5. I am satisfied that none of the matters referred to in ss. 21A, 22, 23 and 24 of the European Arrest Warrant Act, 2003, as amended ("the Act of 2003"), arise for consideration in this application and surrender of the respondent is not precluded for any of the reasons set forth in any of those sections.
6. I am satisfied that the minimum gravity requirements of the Act of 2003 have been met. The sentence in respect of which surrender is sought is in excess of four months' imprisonment.
7. I am satisfied that correspondence can be established between the offences referred to in the EAW and offences under the law of this State, viz. burglary contrary to s. 12 of the Criminal Justice (Theft and Fraud Offences) Act, 2001. No issue was raised in respect of correspondence.
8. Part B of the EAW indicates that on 29th July, 2004, the District Court in Poznań sentenced the respondent to two years' imprisonment, conditionally suspended for five years' probation. It is further indicated that, pursuant to the decision of the District Court in Poznań-Nowe Miasto and Wilda in Poznań dated 20th May, 2008, execution of the custodial sentence was ordered.
9. At part D of the EAW, it is indicated that respondent appeared at the hearing that resulted in the decision which is sought to be enforced.

10. The respondent objects to surrender on the grounds that there is insufficient clarity in the documentation before the Court to allow it to be satisfied that the requirements of s. 45 of the Act of 2003 have been met and, in particular, that the order requiring the suspended sentence to be executed did not vary the nature or level of the sentence previously imposed. He also objects to surrender on the basis that same would amount to a disproportionate interference with his right to a private and family life given the lapse of time as regards the issue of the EAW and the respondent's establishment of strong family ties in this jurisdiction.
11. The respondent swore an affidavit dated 1st June, 2021, in which he implicitly accepts that he received a two-year suspended sentence and indicates that he had been in contact with his probation curator in Poland but had not been made aware of the order for execution of the custodial sentence in May 2008. He avers that due to the passing of time, he cannot recall whether or not the revocation hearing, of which he was not aware and at which he was not present, varied the nature or length of the sentence initially imposed upon him. He takes issue with the reference in the EAW to him evading the sentence which was the basis for extending the period within which to enforce the sentence. He avers that he has engaged with the Polish authorities in terms of seeking a new passport and a new driver's licence. He avers that he has a son who was born in Ireland and is now approximately seven years old. While the relationship with the mother of his son has broken down, custody is shared and he sees his son on a daily basis. He avers that his son spends every weekend with him. He emphasises that he was approximately 19 years old when the suspended sentence was imposed upon him.
12. It is clear from the EAW that the initial sentence imposed upon the respondent was that of two years' imprisonment suspended. It is also clear from the EAW that, in revoking the suspension of the sentence and ordering execution of same, the nature or length of the sentence was not varied. At part C of the EAW, it is indicated that the remaining term of imprisonment to be served is one year, seven months and nine days' imprisonment due to the fact that the period of detention between 15th October, 2002 and 5th March, 2003 was credited towards the custodial sentence. It is clear therefrom that the nature and length of the sentence remained two years' imprisonment with credit being given for time already served in respect thereof.
13. In accordance with the reasoning of the Court of Justice of the European Union in *Samet Ardic* (Case C-571/17 PPU) and the Supreme Court in *The Minister for Justice & Equality v. Lipinski* [2018] IESC 8, a revocation hearing at which a suspended sentence is ordered to be served but the nature or length of the initial sentence imposed, but suspended, is not changed, is not to be regarded as a hearing for the purpose of article 4a of the European Council Framework Decision dated 13th June, 2002 on the European Arrest Warrant and the Surrender Procedures Between Member States, as amended ("the Framework Decision"), or s. 45 of the Act of 2003,. In such circumstances, the relevant hearing date for the purpose of article 4a of the Framework Decision and s. 45 of the Act of 2003 is the original trial resulting in the imposition of the initial suspended sentence. At part D of the EAW, it is stated that the respondent appeared in person at the trial

resulting in the decision and, while the respondent in his affidavit avers that he was not present at the revocation hearing, he does not deny being present at the initial hearing when the suspended sentence was imposed. In fact, he avers that, on foot of that sentence, he engaged with his probation curator. I am satisfied that the requirements of s. 45 of the Act of 2003 have been met.

14. As regards the respondent's personal and family circumstances, including the lapse of time, I am satisfied that same do not constitute a bar to surrender of the respondent.
15. It is inherent in the criminal process and extradition system that the personal and family life of an accused or surrendered person and his immediate family will be disrupted and often significantly so. It is unfortunate that the actions of the respondent when he was 19 years old have come back against him so many years later. However, as pointed out in *Minister for Justice & Equality v. Vestartas* [2020] IESC 12, it is only where the personal and family circumstances of the requested person are truly exceptional that same could be regarded as possibly justifying refusal of surrender.
16. In *Vestartas*, MacMenamin J., delivering the judgment of the Supreme Court, stated at para. 23:-

"23. Article 8(1) ECHR guarantees the right to respect for an individual's private and family life, home and correspondence. But that guarantee is subject to the proviso that public authorities shall not interfere with the exercise of that right, except such as in accordance with law, and is necessary in a democratic society in the interests of national security, public safety, the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others (Article 8(2)). The terms of Article 8(2) are, therefore, sufficiently broad to encompass orders for extradition, or in this case, surrender. But as will be seen, these Article 8 considerations arise within a statutory framework which it is now necessary to consider."

17. As regards delay or lapse of time, MacMenamin J. stated at para. 89:-

"89. Though a matter of legitimate concern, in this case the delay is to be viewed against the respondent's private and family circumstances. Unless truly exceptional or egregious, delay will not alter the public interest, although there may come a point where the delay is so lengthy and unexplained as to constitute an abuse of process, or to raise other constitutional or ECHR issues. The High Court judgment holds that there had been a significant dilution of the public interest which would ordinarily apply (para. 37). It posed what was characterised there as a modified and weakened public interest in surrender, evidenced by the elapses of time and other factors. Against this, it posed the private and family factors in the case (para. 38). But for the reasons set out above, there was a misapprehension as to the nature of the assessment. This is not a balancing exercise where public and private interests are placed equally on the scales. It is nonetheless necessary to have regard to the circumstances."

18. At para. 94, MacMenamin J. stated:-

"94. The contrast with the exceptional facts in J.A.T. is plain. For an Article 8 defence to succeed, it can only be on clear facts based and cogent evidence. The evidence must be sufficient to rebut the presumption contained in s.4A of the Act (see, para. 41 above). The circumstances must be shown to be well outside the norm; that is, truly exceptional. In the words of s.37(1), they must be such as would render an order for surrender 'incompatible' with the State's obligations under Article 8 of the ECHR. This would necessitate that the incursion into the private and family rights referred to in Article 8(1) was such as to supervene the limitations on the right contained in Article 8(2), and over the significant public interest thresholds set by the 2003 Act itself."

19. Bearing in mind the wording of s. 37 of the Act of 2003, this Court must determine whether surrender of the respondent is incompatible with the State's obligations under ECHR, the protocols thereto and/or the Constitution. I am satisfied that surrender is not incompatible with the State's obligations in that regard. Therefore, I dismiss the respondent's objections to surrender grounded upon his private and family life and/or the lapse of time in this matter.

Conclusion

20. I am satisfied that surrender of the respondent is not precluded by part 3 of the Act of 2003 or any other provision of that Act.

21. Having dismissed the respondent's objections to surrender it follows that this Court will make an order pursuant to s. 16 of the Act of 2003 for the surrender of the respondent to the Republic of Poland.