

THE HIGH COURT

[2021] IEHC 461  
[2020 No. 218 EXT.]

BETWEEN

MINISTER FOR JUSTICE AND EQUALITY

APPLICANT

AND

SŁAWOMIR SCHWEISSING

RESPONDENT

**JUDGMENT of Mr. Justice Paul Burns delivered on the 28th day of June, 2021**

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 11th May, 2020 ("the EAW"). The EAW was issued by Judge Jarosław Całbecki, of the Regional Court in Bydgoszcz, as the issuing judicial authority.
2. The EAW seeks the surrender of the respondent in order to enforce a sentence of six years' imprisonment imposed upon the respondent on 3rd June, 2016, of which five years and 11 months remains to be served.
3. The EAW was endorsed by the High Court on 22nd September, 2020 and the respondent was arrested and brought before the High Court on 29th November, 2020.
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 this 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. Surrender of the respondent is sought in order to enforce a sentence in excess of four months' imprisonment.
7. By virtue of s. 38(1)(b) of the Act of 2003, it is not necessary for the applicant to establish correspondence between an offence referred to in the EAW and an offence under the law of the State if the offence referred to in the EAW is an offence to which article 2.2. 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"), applies and is punishable in the issuing state with a maximum penalty of at least three years' imprisonment. In this instance, the issuing judicial authority has certified that the offence referred to in the EAW is an offence to which article 2.2. of the Framework Decision applies and that the offence is punishable by a maximum penalty of at least three years' imprisonment in the issuing state. The issuing judicial authority has ticked the relevant box at part E of the EAW for "*murder or grievous bodily injury*". I am satisfied that there is no apparent mistake or ambiguity about such certification. No issue was raised in respect of correspondence.

8. At part D of the EAW, it is indicated that the respondent did not appear in person for the hearing at which the decision was rendered and the issuing judicial authority has indicated that it is relying upon the equivalent of point 3.1b. of the table set out at s. 45 of the Act of 2003 as follows:-

*"1b. the person concerned has not been summoned in person but otherwise officially informed of the date and place of the hearing where the decision was rendered, which indicated unambiguously that the person knew of the hearing, and that the person was informed that the decision could be rendered in absentia."*

9. By way of further information at part D of the EAW, it was indicated:-

*"Sławomir Schweissing appeared at the hearing on 30 September 2014; he failed to appear for the subsequent hearings, despite being properly notified. The convicted person appeared at the hearing on 04 November 2015. Despite being notified of subsequent hearings, he failed to appear, so on 10 May 2016, in accordance with Article 402 § 1 of the Polish Code of Penal Procedure, the Court waived the obligation to notify the aforementioned person. During the hearing on 21 May 2016, the Court deferred passing sentence until 03 June 2016. The convicted person did not appear for the announcement of the sentence."*

10. I am satisfied that the requirements of s. 45 of the Act of 2003 have been complied with and that the respondent's defence rights were adequately protected and given effect to. No issue was taken in respect of s. 45 of the Act of 2003. Insofar as the respondent failed to appear on certain dates in the proceedings, I am satisfied that this was an unequivocal waiver of his right to be present.
11. The respondent objects to surrender on the grounds that the failure of the State to transpose the provisions of European Council Framework Decision 2008/909/JHA into Irish law has denied the respondent of his right to apply to have his sentence completed in Ireland and, in such circumstances, his surrender constitutes a breach of his right to a private and family life, as protected by article 8 of the European Convention on Human Rights ("the ECHR").
12. It appears to be common case between the parties that, despite an obligation to do so, Ireland has failed to transpose European Council Framework Decision 2008/909/JHA into law. If European Council Framework Decision 2008/909/JHA were so transposed into Irish law, then a legal mechanism would be in place whereby the respondent might be permitted to serve the remainder of his sentence in this jurisdiction, as opposed to being surrendered to the issuing state for that purpose. The respondent received a decision of the Regional Court in Bydgoszcz, the issuing judicial authority, dated 8th February, 2021, to the effect that the respondent's circumstances would justify the respondent serving the remainder of his sentence in Ireland, but acknowledging that would only be possible if the Irish State consented and the necessary legal requirements were complied with. Due to Ireland's failure to transpose European Council Framework Decision 2008/909/JHA into Irish law, it is not possible for such an arrangement to be given legal effect.

13. A framework decision has a legal character that is distinct and wholly different from other sources of European Union ("the EU") law. Rights provided for under a framework decision are not enforceable by private individuals in national courts against the Member State which has failed to transpose that framework decision. A private citizen cannot bring an action before the national courts to compel the State to transpose a framework decision into its national law, nor can the Court give effect to rights conferred by a framework decision in the absence of such transposition. This principle has been recognised by Coffey J. in *Campbell v. Ireland & Anor* [2021] IEHC 162, where he dismissed the plaintiff's claim and refused to grant declaratory relief against the State for failing to transpose into national law the same framework decision which is the subject matter of these proceedings. Similarly, in *Minister for Justice and Equality v. Teelin* [2015] IEHC 310, Hunt J. held that a failure to transpose a framework decision on probation measures could not bar surrender on foot of a European arrest warrant. Hunt J. stated at para. 76:-

*"76. However, in the absence of a legislative instrument creating directly effective rights, these matters are beyond the province of the judicial branch. Presumably the potential remedy against State default lies in an enforcement action against the states concerned by the EU authorities for failure to implement the provisions of the Decision by the date specified in that regard. Furthermore, the absence of a facility for the transfer of probation supervision is not an exceptional feature, in that it applies currently to all Irish residents who choose to commit criminal offences in the United Kingdom and who receive a 'half and half' type sentence, and not exclusively or primarily to the respondent."*

14. In TR (Case C-416/20 PPU), the Court of Justice of the European Union ("the CJEU") was asked for a preliminary ruling under Article 267 of the Treaty on the Functioning of the European Union on the interpretation of Articles 8 and 9 of EU Directive 2016/343, dealing with certain aspects of the presumption of innocence and the right to be present at trial in criminal proceedings. The request was made in the context of European arrest warrant proceedings. The CJEU held at para. 47:-

*"47. Reliance on the provisions of a directive in order to prevent the execution of a European arrest warrant would make it possible to circumvent the system established by Framework Decision 2002/584, which provides an exhaustive list of the grounds for non-execution."*

15. If this Court were to order refusal on the grounds that the Irish State had failed to transpose European Council Framework Decision 2008/909/JHA into national law, that would, in effect, amount to introducing a new ground for non-execution of a European arrest warrant and thereby circumventing the system put in place by the Framework Decision on surrender procedures, as amended, which exhaustively provides the grounds for non-execution.
16. Presumably taking the above into consideration, counsel for the respondent nuanced his objection to surrender in terms which might bring it within s. 37 of the Act of 2003, which

provides that surrender is precluded if it would be inconsistent with the State's obligations under the ECHR, the protocols thereto, or contravene the Constitution. Counsel for the respondent submitted that the respondent had a right to a private and family life as recognised by article 8 ECHR. He accepted, on the basis of the reasoning of the Supreme Court in *Minister for Justice and Equality v. Vestartas* [2020] IESC 12, that only in truly exceptional cases could article 8 ECHR rights justify a refusal of surrender. He submitted that, taking the respondent's personal family circumstances into account and adding thereto the failure of the State to transpose European Council Framework Decision 2008/909/JHA into national law, this amounted to truly exceptional circumstances, particularly as the Polish state had indicated a positive response to any application for the respondent to serve the remainder of his sentence in Ireland.

17. In a draft affidavit dated February 2021, (sworn copy not filed until after judgment delivered) the respondent indicates that he has been living in Ireland for 15 years. He is married and has three children, aged between three and eight years old. He emphasises the passage of time since the offence in September 2003 and the sentence in June 2016, as well as the further lapse in time until the issue of the EAW in 2020. He exhibits the decision of the Polish court as referred to earlier herein. He indicates that, up until recently, his wife was working and that he was the main carer for their children. He expresses his concern that if he has to serve the remainder of the sentence in Poland, this will cause irreparable damage to the family and, in particular, emphasises the difficulty of having family visits if imprisoned in Poland. He also emphasises that the measures put in place in Irish prisons as regards education, work training and rehabilitation are better than those in Poland. He expresses the view that the logic behind European Council Framework Decision 2008/909/JHA is to give recognition and effect to the family rights set out at article 8 ECHR as regards persons who had established a family life in a Member State other than that where they were obliged to serve a sentence.
18. Leaving aside the issue of the non-transposition of European Council Framework Decision 2008/909/JHA into Irish law, the respondent's personal and family circumstances could not in any way be regarded as exceptional. It is an unfortunate and, in most cases, inevitable consequence of surrender or imprisonment that personal and family circumstances will be significantly disrupted. There is nothing in the respondent's personal or family circumstances to justify a finding that such a disruption in this case would be so truly exceptional as to justify refusal of surrender. I am not satisfied that taking into account the failure of the State to transpose European Council Framework Decision 2008/909/JHA into national law, along with the respondent's circumstances, renders this matter so truly exceptional as to justify surrender.
19. I dismiss the respondent's objection to surrender.
20. 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 Poland.