

THE HIGH COURT

RECORD NUMBER 2019/340 EXT

BETWEEN

MINISTER FOR JUSTICE AND EQUALITY

APPLICANT

AND

GNIEWOMIR ZARAS

RESPONDENT

JUDGMENT of Mr. Justice Paul Burns delivered on the 25th day of June, 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 8th February, 2019 ("the EAW"). The EAW was issued by Judge Michal Ziemniewski of the Region Court in Poznan, as issuing judicial authority. The EAW seeks the surrender of the respondent to serve a sentence of 1 year and 6 months imprisonment.
2. The EAW was endorsed by the High Court on 18th November, 2019, was executed by An Garda Síochána and the respondent was brought before the High Court on 3rd June, 2020. The Respondent was admitted to bail on 18th June, 2020.
3. 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 respect.
4. I am satisfied that the minimum gravity requirements of the European Arrest Warrant Act 2003, as amended ("the Act of 2003"), have been met. The respondent is sought to serve the term of imprisonment of 1 year and 6 months. The offences in respect of which the respondent was convicted carry a maximum penalty of between 5 and 8 years imprisonment.
5. I am satisfied that correspondence has been made out between the offences referred to in the warrant and offences under the law of the State. The respondent was convicted of stealing amounts of telecommunication cable over a number of dates. I am satisfied that the acts in question correspond with the offence of theft contrary to s. of the Criminal Justice (Theft and Fraud Offences) Act, 2001. Correspondence was not contested.
6. I am satisfied that none of the matters referred to in ss. 21A, 22, 23 and 24 of the Act of 2003, arise and that the surrender of the Respondent is not prohibited for the reasons set forth therein.
7. Counsel on behalf of the respondent objected to surrender on the ground that the requirements of s. 45 of the Act of 2003, which concerns trials in absentia, had not been complied with.
8. Section (b) sets out that the EAW is based on the final:-

"Judgement of the District Court in Miedzyrzecz of 19 November 2013, reference number II K 255/13, sentencing Gniewomir Zaras to 1 year and 6 months imprisonment, conditionally suspended for five years probation.

Pursuant to the decision of the District Court in Szamotuly of 10 November 2016, reference number II Ko 1627/16, the execution of the above mentioned custodial sentence of Gniewomir Zaras was activated."

At section (d) of the EAW it is indicated that the respondent appeared in person at the trial resulting in the imposition of the suspended or conditional term of imprisonment.

9. The respondent swore an affidavit dated 22nd June, 2020 in which he stated that his probation officer was aware that he came to Ireland. The respondent did not take issue with any of the facts as set out in the EAW. He averred:-

"I am advised on the basis of the European arrest warrant that the suspension was lifted and that the sentence was activated by the district court in Szamotuly on 10th November 2016. However the warrant does not indicate why the sentence was activated. I am advised that this information is important. I would like to ascertain that information and I respectfully ask the court to seek it. I am also hoping to ascertain if the suspension can be re-imposed."

10. Counsel on behalf of the respondent submitted that the Court needed to know the reason why the suspended sentence had been activated, and in the absence of such information the Court could not make an order for surrender but rather had to make a request for additional information concerning the reasons and circumstances in which the sentence was activated.
11. Counsel on behalf of the applicant submitted that it was not necessary for the Court to revert to the police authorities seeking any further information as the warrant was properly completed, no issue was taken as to the facts set out therein, s. 45 of the Act of 2003 was not applicable to the decision which imposed the original sentence as the respondent had been present, and on foot of the decision of the Supreme Court in *Minister for Justice and Equality v. Lipinski* [2018] IESC 8, the Court was not required to carry out an inquiry into the circumstances in which the sentence was activated when the original sentence had not been changed.
12. In *Lipinski*, the Supreme Court had to consider whether the absence of the respondent at a hearing which led to the revocation of suspension of a sentence of imprisonment engaged the *in absentia* requirements of the Council Framework Decision of 13th June, 2002 on the European Arrest Warrant and the Surrender Procedures between Member States, as amended ("the Framework Decisions"). While the Supreme Court initially made a reference to the Court of Justice of the European Union (CJEU) on the point, it transpired that such reference was unnecessary by virtue of a previous decision of the CJEU in *Samet Ardic* (Case C – 571/17P PU). The ruling of the CJEU in *Samet Ardic* was in the following terms:-

"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 4 a (1) of Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant on 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 such 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."

Clarke C.J. at para. 3.7 of the Supreme Court decision held:-

"It is clear, therefore, that a hearing at which a suspension of sentence is revoked on grounds of infringement of conditions attaching to that suspension is not considered to be part of a "trial resulting in the decision" for the purposes of the framework decision unless the revocation decision changes "the nature of the level of the sentence initially imposed". If the consequence of the revocation is to alter the sentence originally imposed then different considerations may apply."

13. In the present case, the EAW sets out at section (b) that the sentence of 1 year and 6 months imprisonment was conditionally suspended for five years probation. Therefore, the only condition upon which the sentence was suspended was that of probation. It is clear from the EAW that the sole consequence of the revocation order made by the Polish courts in this case was to activate the original sentence without variation. There is nothing before the Court to suggest that the revocation was for any reason other than a breach of the probation. The respondent has not proposed that it was for any other or improper reason. Thus it can be reasonably concluded that the revocation was on grounds of infringement of the probation. The respondent in his affidavit indicates that he hopes to have the suspension re-imposed. That is a matter he can take up with the Polish court system, it is outside the jurisdiction of this Court. In the circumstances, s. 45 of the Act of 2003 is not relevant to the decision to revoke the suspension of the sentence. As the respondent was present at the original trial in which the sentence was imposed, the requirements of s. 45 of the Act of 2003 do not arise.
14. I am satisfied that the details required by s. 11 of the Act of 2003 are contained in the EAW and the additional information furnished.
15. I am satisfied that the surrender of the respondent is not prohibited by any of the provisions of part 3 of the Act of 2003, as amended.
16. It follows from the foregoing that this Court will make an order pursuant to s. 16 of the Act of 2003 for the surrender of the respondent to Poland.