

THE HIGH COURT

[2021] IEHC 316
[2019 No. 260 EXT.]
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BETWEEN

MINISTER FOR JUSTICE AND EQUALITY

APPLICANT

AND

ZBIGNIEW BEDNARCZYK

RESPONDENT

JUDGMENT of Mr. Justice Paul Burns delivered on the 30th day of April, 2021

1. In this application the applicant seeks an order for the surrender of the respondent to the Republic of Poland ("Poland") pursuant to two European arrest warrants dated 15th June, 2007 ("EAW 1") and 27th November, 2009 ("EAW 2"), respectively.
2. EAW 1 was issued by Judge Jacek Żółć, of the Regional Court in Słupsk, as the issuing judicial authority. EAW 1 seeks the surrender of the respondent in order to prosecute him in respect of a single offence of multiple criminal acts carried out between June 1995 and March 1998, consisting of entering into contracts for supply of goods with no intention to pay for same.
3. EAW 2 was issued by Judge Marek Buczek, of the District Court in Jelenia Góra, as the issuing judicial authority. EAW 2 seeks the surrender of the respondent in order to prosecute him in respect of a single offence of obtaining goods by false pretences in August 1997.
4. Both EAW 1 and EAW 2 were endorsed by the High Court on 29th July, 2019, the respondent was arrested in respect of both and was brought before the High Court on 31st August, 2020.
5. I am satisfied that the person before the Court is the person in respect of whom both EAWs were issued. No issue was raised in this respect.
6. 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 and that the surrender of the respondent is not prohibited for the reasons set forth therein.
7. I am satisfied that the minimum gravity requirements of the Act of 2003 have been met. The offence in respect of which surrender is sought in EAW 1 carries a maximum penalty of 10 years' imprisonment and the offence in respect of which surrender is sought in EAW 2 carries a maximum penalty of 8 years' imprisonment.
8. I am satisfied that the offence referred to in EAW 1 corresponds to the offence under the law of the State of deception contrary to s. 6 of the Criminal Justice (Theft and Fraud Offences) Act, 2001. As regards the offence referred to in EAW 2, the issuing judicial authority has invoked the tick-box procedure provided for at s. 38(1)(b) of the Act of 2003 so that it is not necessary to establish such correspondence and has indicated the

box for "*frauds*". I am satisfied that the tick-box procedure has been properly invoked by the issuing judicial authority and there is no reason to look beyond same. In any event, I am satisfied that the offence referred to in EAW 2 also corresponds to the offence under the law of the State of deception contrary to s. 6 of the Criminal Justice (Theft and Fraud Offences) Act, 2001. No issue was taken in respect of correspondence.

9. In his points of objection, the respondent submitted that surrender is precluded by s. 37 of the Act of 2003 on the grounds that it would be a disproportionate interference with his right to a private and family life under article 8 of the European Convention on Human Rights ("the ECHR"). At hearing, this objection was expanded to include a plea that the proceedings and/or an order for surrender in respect of same would constitute an abuse of process. It was also submitted that surrender could not be ordered unless there had been a more recent consideration of proportionality by the issuing judicial authority.
10. The basis of the respondent's objection is the fact that the same EAWs were the subject matter of earlier proceedings under the Act of 2003, bearing record number 2011/82 EXT. as regards EAW 1 and record number 2010/150 EXT. as regards EAW 2. Together with those proceedings, a number of other European arrest warrants issued by Poland seeking the surrender of the respondent were also dealt with. Of significance to the current proceedings is the fact that surrender on foot of both EAWs was ordered by the High Court by Order dated 19th April, 2012. The respondent was remanded in custody of foot of the said Order to await surrender. On the making of an Order pursuant to s. 16(1) of the Act of 2003, surrender may not take place until 15 days thereafter and must take place within 10 days after that 15-day period. The respondent waived the normal 15-day period following the making of the Order for surrender so that his surrender could be effected earlier. However, no surrender took place. The matter was not brought before the High Court again to fix a new date for surrender as provided for by the Act of 2003. Upon the expiry of the period of detention contained within the Order of 19th April, 2012, the respondent was simply released from prison and heard no more about the matter until arrested on 31st August, 2019, in the context of the current proceedings.
11. Additional information from the issuing judicial authorities established that the lead prosecutor considered there was still reason to seek the surrender of the respondent by way of a European arrest warrant, that the Polish courts could not reconsider the issue of proportionality prior to re-transmission unless the circumstances upon which it had issued had changed and that it was not possible to apply for a new European arrest warrant in Poland. The respondent, if surrendered, could not challenge his surrender in the Polish courts.
12. The following timeline is of assistance in establishing what occurred after the making of the Order for surrender in 2012:-
 - on 19th April, 2012, a fax was sent to the Polish authorities notifying them that an Order for surrender had been made;

- a reminder fax was sent to Poland on 25th April, 2012 reminding them to collect the respondent by 28th April, 2012;
- a replying fax dated 26th April, 2012, was received on 27th April, 2012 at 10:25 hours, noting that the Polish authorities were unable to complete surrender by 28th April, 2012 and requested a new date to effect the surrender;
- also on 27th April, 2012 at 10:45 hours, a response was received from Poland dated 26th April, 2012, requesting an extension with the new proposed date of 7th May, 2012;
- a replying fax was sent to Poland at 11:37 hours on 27th April, 2012, indicating that the High Court will only consider extension for *force majeure* and issuing another reminder for them to complete the surrender by 28th April, 2012;
- this fax prompted a further request from Poland at 14:07 hours on 27th April, 2012 for an extension of time to surrender;
- a replying fax was sent at 15:14 hours on 27th April, 2012, notifying the Polish authorities of the impending release of the respondent if not collected by midnight on 28th April, 2012;
- no further response was received and the respondent was released from custody, not having been collected for surrender within the statutory time frame provided for his surrender;
- the next correspondence was sent by Poland on 15th May, 2012, seeking an update on surrender. This was not responded to;
- thereafter, the next correspondence was again a request for an update on the surrender of the respondent by the Polish authorities by letter dated 8th April, 2013;
- this was responded to on 10th April, 2013, advising the Polish authorities that the respondent had been released from custody on 28th April, 2012;
- the next correspondence was not until 17th April, 2015, when the Polish authorities raised a query as to whether the surrender Order was still in effect and whether the respondent had been re-arrested;
- a response was sent by fax dated 25th May, 2015, indicating that the surrender Order was not in effect. This correspondence indicated that the High Court ordered his release (this was not accurate as the High Court had made no such Order. The prison released the respondent when he was not collected by midnight on 28th April, 2012);

- the next correspondence was dated 17th May, 2019 following the re-transmission of the EAWs the subject matter of the instant proceedings. The Polish authorities were requested to furnish additional information explaining the delay in re-transmission of the EAWs in 2019, in circumstances where the respondent's surrender was ordered in 2012 and he was not collected in time to be surrendered; and
 - the Polish authorities replied by letter dated 22nd May, 2019 setting out the sequence of events between April 2012 and May 2019.
13. The failure to effect surrender in 2012 appears to have been due to a lack of effective communication and co-ordination between the relevant authorities in Poland and Ireland. It is difficult to ascertain precisely where the responsibility for this should lie, and attempting to apportion blame as between the two authorities is probably not a worthwhile exercise at this stage. However, it is important to note that no blame or responsibility for the failure to effect surrender in 2012 or thereafter can be laid at the door of the respondent. Since his release from prison in 2012, the respondent has simply carried on with his life, living openly within the State. He was given no explanation for the failure to surrender him and he was not informed by the Polish or Irish authorities that a further attempt to surrender him might or would be made in the future.
 14. The respondent's adult son swore an affidavit, dated 25th September, 2020, in which he outlines that he suffers from severe bipolar disorder and relies on the respondent as his sole support and carer. He resides with the respondent, although in the latter half of 2019 he was admitted as an in-patient to the psychiatric unit of Kilkenny Hospital for a period of six weeks. A GP's letter, exhibited in the affidavit, confirms that the respondent's son requires supervision and that the respondent acts as his son's guardian.
 15. Counsel on behalf of the respondent submitted that the Court had to consider all of the surrounding circumstances. He pointed out that the alleged offences date back to a period between 1995 to 1998 (approximately 21 to 24 years prior to re-transmission of the EAWs in 2019). He emphasised that the alleged offences do not involve violence or physical injury to others and that the respondent had made himself amenable to the proceedings resulting in the Order for surrender on 19th April, 2012. He explained that those proceedings had run from 2010 to 2012, with the reason for the delay in same due to the requests of the Irish authorities for further information from the Polish authorities. He emphasised that the respondent was not responsible in any way for the failure to effect surrender in 2012 and that the approach of the Polish and Irish authorities to this matter has been extremely casual with intermittent communication and long periods of inertia. It was submitted that surrender would have profoundly negative consequences for the respondent's son who relies on the respondent's care and supervision.
 16. Counsel for the applicant submitted that the respondent was aware that his surrender had been ordered in 2012 and so ought to have known or expected that a further attempt to surrender him would be made. She submitted that this case was simply a re-transmission of valid EAWs as opposed to fresh EAWs. She relied upon the decision of the Court of

Justice of the European Union ("the CJEU") in *Vilkas* (Case C-640/15) to the effect that Member States should persevere with attempts to surrender where the surrender was not effected due to circumstances beyond the control of the State, even if the requested person had been released from custody. She submitted that there had been an overview of the EAWs in Poland, albeit not by a judge or court, prior to re-transmission, with a third warrant not being re-transmitted as time in respect of same had expired. She submitted that such an overview was a sufficient, up to date reconsideration of the issue of proportionality, as matters had not changed in so far as the respondent was still wanted for prosecution in circumstances which met the minimum thresholds under 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"). She submitted there was no requirement for a formal reconsideration of proportionality by the issuing judicial authority.

17. It should be borne in mind that article 8 ECHR does not guarantee a person a private and family life, but rather guarantees "*respect for his private and family life*". Private and family life are expressly stated to be subject to interference by public authorities where necessary in a democratic society. Article 8 ECHR provides:-

- "1. *Everyone has the right to respect for his private and family life, his home and his correspondence.*
2. *There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being 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."*

18. In *Minister for Justice & Equality v. Vestartas* [2020] IESC 12, MacMenamin J. stated as follows at para. 68:-

- "68. *In carrying out an assessment in our law for the purposes of s.16 of the Act, therefore, it is not accurate to speak of the task as one which is not governed by any predetermined approach, or pre-set formula, balancing competing public and private interests. In fact, the constant and weighty public interest in ordering surrender is not only underlined by Article 8(2) considerations such as necessity under law, freedom and security, but the words of ss.4A and 10 of the Act. The test must be seen in light of the clear exposition in the judgments in *Ostrowski*. A court may often have to take private and family rights considerations into account. But it can only do so having regard to the limitation contained in Article 8(2) of the ECHR, and the public interest considerations inherent in the Act and the Framework Decision. To surmount these, in any case, would necessitate that the evidence requirement be high. The assessment does not involve a balance between the rights of the public and those of the individual. It is one, rather, where, as the Act provides, a court shall presume that an issuing state will comply with the*

requirements of the Framework Decision - unless the contrary is shown on the basis of cogent evidence."

19. As regards delay, in *Vestartas*, MacMenamin J. stated at para. 89 that:-

"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."

20. It is clear that there is a significant public interest in surrender where the requirements of the Framework Decision are met. How s. 37 of the Act of 2003 is to be approached in light of this significant public interest, particularly as regards article 8 ECHR, is set out by MacMenamin J. in *Vestartas* at para. 94:-

"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."

21. The issue of abuse of process in the context of the Act of 2003 came before the Supreme Court in *Minister for Justice and Equality v. J.A.T. No. 2* [2016] ISEC 17. That case concerned an application on behalf of the United Kingdom ("the UK") for the surrender of the respondent to face prosecution in respect of what were referred to in the European arrest warrant as 'tax fraud offences', which were alleged to have occurred between 1997 and 2005. A European arrest warrant seeking the respondent's surrender was issued on 7th March, 2008. The respondent was arrested on foot of same and his surrender was refused by the Supreme Court on 21st December, 2010. A second European arrest warrant was issued and the respondent was arrested on foot of same on 24th July, 2012. The UK authorities stated that the second warrant had taken into account the judgment of the Supreme Court in the first set of proceedings. His surrender was ordered by the High Court despite a finding of abuse of process. On appeal, the Supreme Court refused surrender, with no dissenting judgments.

22. Denham C.J. was satisfied that there was an evidential basis upon which the High Court could, and did, find that there was an abuse of process. She was satisfied not to interfere with that finding. She regarded the issue which the Supreme Court had to determine as whether, in light of the findings of the High Court, it was sufficient or appropriate for the High Court to simply admonish the parties responsible while surrendering the appellant.

23. As regards delay, Denham C.J. was of the opinion at para. 65 that:-

"65. The time which has passed since the alleged offences, the first arrest on the first EAW, the second EAW, and the hearing of this appeal, is not of itself a factor upon which a request for surrender would be refused. However, this time period has to be considered in light of all the circumstances of the case."

24. In terms of how a court should normally deal with an abuse of process, she further stated at paras. 72-77:-

"72. In general, if there is an abuse of process by authorities they should not benefit. The rule of law, and the right to fair procedures, requires that such a general principle be applied.

73. Of course, there may be circumstances where a court considers that there has been an abuse of process, but to a limited degree, and applying the principle of proportionality, a surrender procedure could proceed. However, such a finding would arise only in a situation where a process was found to be an abuse, but in a limited manner, and with limited effect.

74. In this case there is an accumulation of factors.

75. It is clear, and remains the law, that simply because a second European arrest warrant is issued that does not of itself indicate any abuse of process. See Bolger v. O'Toole, unreported Supreme Court, 2nd December, 2002, and Gibson v. Gibson, ex tempore, Supreme Court, 10th June, 2004, Keane C.J..

76. In analysing a case where there has been a finding of an abuse of process, the circumstances of each case are relevant and critical to the ultimate decision.

77. I have reviewed the circumstances of this appeal, which include the following factors:-

- (a) this is the second EAW issued in relation to the offences alleged;*
- (b) failings in the first EAW could have been addressed in the first application;*
- (c) a considerable time has passed since the alleged offences and a considerable time has passed since the arrest of the appellant on the first EAW;*
- (d) the medical condition of the appellant, who is a vulnerable person;*
- (e) the medical condition of the appellant's son, for whom the appellant is a significant carer;*
- (f) the family circumstances;*

- (g) *the oppressive effect which the two sets of EAWs have had on the appellant; on his son; and on his family;*
- (h) *no explanation has been given for delays;*
- (i) *there has been no engagement by the authorities with the issues as to the first EAW or the delays;*
- (j) *the Central Authority has a duty to bring to the attention of the issuing State authorities defects or internal contradictions in a warrant, and to consider whether all the documentation is complete and clear, before being relied upon for the purpose of seeking to endorse an EAW;*
- (k) *the duty of the Court to protect fair procedures; and*
- (l) *the principle that a party in litigation should not benefit from proceedings which were de facto abusive of the Court's process."*

25. Having taken such factors into account, Denham C.J. concluded at para. 85:-

"85. While no single factor, as set out above, governs this appeal, in circumstances where the High Court has found, correctly in my view, that there has been an abuse of process, I am satisfied that the factors, referred to in this judgment, taken cumulatively, are such that there should not be an order for the surrender of the appellant."

26. From the foregoing, it is clear that Denham C.J. accepted that there had been an abuse of process and regarded the listed factors as relevant matters in determining that the appropriate judicial response to same was to refuse surrender.

27. O'Donnell J., with whom MacMenamin and Laffoy JJ. concurred, reluctantly agreed that the appropriate judicial response was to refuse surrender at para. 1 of his judgment:-

"1. I was myself doubtful, however, that even cumulatively, the matters relied on by the appellant were sufficient to justify a refusal of surrender in this case. But in the light of the views of my colleagues, and the judgment of the Chief Justice, I do not dissent from the Order proposed. I would, however, emphasise that this is a rare, and indeed exceptional case. While exceptionality is not in itself a test, it can be a useful description, and it is, in my view, only cases which can truly be so described that will be those rare cases in which it may be said that surrender would offend due process and interfere with the rights of the appellant to such an extent that it must be refused."

28. O'Donnell J. sought to identify the principles involved, to identify the factors grounding a refusal and to determine the weight to be accorded to them. He doubted whether it was appropriate or useful to introduce the concept of a 'duty of care' on the part of requesting authorities or the Irish authorities. He emphasised that the law of European arrest

warrants was intended to provide a new and streamlined process for surrender between Member States and represented a significant departure from the earlier approach. In his view, the starting point was that considerable weight is to be given to the public interest in ensuring that persons charged with offences face trial. As a decision to refuse surrender will often provide a form of limited immunity to a person so long as they remain in this jurisdiction, he stressed it is only if some quite compelling feature, or combination of features, is present that it would be appropriate to refuse surrender on grounds of due process or interference with rights. At para. 4, he emphasised it was important that the court should rigorously scrutinise the factual basis for any such claims against that background.

29. As regards the case before him, O'Donnell J. identified three factors as having been asserted as cumulatively leading to an order refusing surrender, namely the fact that it was a repeat application, delay/lapse of time and article 8 ECHR/personal and family rights aspects. He emphasised that a repeat application based on a fresh warrant could not in itself be regarded as an abuse of process. Dealing with delay/lapse of time, he was not satisfied that, taken alone or in conjunction with the repeat application, delay/lapse of time in the circumstances constituted an abuse of process or justified refusal of surrender, as outlined at para. 9. Turning to the remaining factor of rights pursuant to article 8 ECHR, O'Donnell J. noted that the respondent was in a very difficult health situation but emphasised that the matter was not to be tested against some generalised consideration of personal sympathy, but rather as to whether the circumstances were such that it rendered it unjust to surrender the respondent. He noted that the respondent was the primary and, effectively, the sole caregiver for his son, in circumstances where that care was particularly important, and that his son would undoubtedly suffer very severely if the appellant was surrendered for trial. He stated that, on their own, such matters would not justify refusal of surrender.

30. He then set out what he considered to be the relevant factors to be weighed cumulatively at para. 10:-

"10. It seems to me to be relevant that this is a second application, and moreover, that there has been avoidable delay on the part of the authorities in both jurisdictions in the preparation, submission, and execution of a second warrant, even though the evidence of the respondent's circumstances, and those of his son, had been adduced in the first European Arrest Warrant proceedings. 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."

31. As regards matters that could be properly addressed by admonishment, O'Donnell J. doubted whether same would amount to an abuse of process at all.

32. From the foregoing, it appears that O'Donnell J. ultimately agreed that the facts in *J.A.T. No. 2* constituted an abuse of process, as he refused surrender. While he disagreed with the separate judgment of Denham C.J. on some of the issues which she had included in her estimation of relevant factors, he expressly prefaced his judgment by indicating that, in light of the views of his colleagues and the judgment of the Chief Justice, he did not dissent from the decision to refuse surrender. He was clear that each of the factors said to constitute an abuse of process would not in itself justify a refusal to surrender and, even taken cumulatively, the matter was close to the margin.
33. Having regard to the public interest in ensuring that persons charged with offences face trial, O'Donnell J. expressed doubt as to whether such factors would be sufficient to prevent surrender for very serious crimes of violence. However, he fell short of saying that such factors could never be sufficient to prevent surrender. He stated at para. 3, "*something is either an abuse of process, or it is not*", while he went on to indicate at para. 12:-

"12. But the normal and logical remedy for an abuse of process is the striking out or staying of the proceedings constituting abuse."

O'Donnell J. therefore appears to have left open the possibility that if the factors constituting abuse of process were sufficiently exceptional, the appropriate remedy would be to strike out or stay the proceedings.

34. In the current matter, there had been a significant lapse of time between the date of the alleged offending and the initial issuing of the EAWs of between 9 and 11 years. The lapse of time between the alleged offences and the re-transmission of the EAWs is between 21 and 24 years. If the matters were coming before this Court for the first time, then bearing in mind the reasoning of the Supreme Court in *Vestartas*, I would not regard the said lapse as so egregious in itself as to justify refusal of surrender. Also, bearing in mind the reasoning of the Supreme Court in *Vestartas*, I would not regard the personal or family circumstances of the respondent as so exceptional in themselves as to justify a refusal of surrender.
35. However, unlike *Vestartas*, in the current case there has also been very significant delay in the actual prosecution of the EAW proceedings. In effect, the current proceedings are an extension of the proceedings commenced in 2010 in respect of which surrender was ordered in 2012. It is difficult to see how a delay of 7 years in effecting surrender could be justified in this case and I do not believe it has been justified or even adequately explained. It may well be that even in such circumstances, the significant public interest in surrender could justify surrender as regards alleged offending of a particularly serious nature. In the present case it was conceded by the applicant that the alleged offending is not at the most serious level of offending (written submissions, para. 39). I am satisfied that the request for surrender was effectively allowed to go into abeyance for a prolonged period. There has been an abject failure on the part of both the issuing and executing authorities to follow up on the Order for surrender with any degree of alacrity or expedition.

36. It is undoubtedly the case that the issuing of a second warrant, where the initial warrant has been unsuccessful due to some technical defect, does not of itself amount to an abuse of process. Similarly, the re-transmission of a warrant where surrender has failed to take place is not in and of itself an abuse of process. However, the re-transmission of the EAWs in the present instance must be considered along with, and in the light of, all relevant surrounding circumstances and must be assessed on a cumulative basis with such circumstances. Bearing in mind the reasoning of the Supreme Court in *JAT No. 2*, I consider that the facts of the present case, taken cumulatively, are exceptional and constitute a rare case where surrender should be refused on grounds of abuse of process. In that regard, the following matters are of significance: inordinate and inexplicable delay/lapse of time; the personal and family circumstances of the respondent, especially the apparent deterioration in his son's bipolar disorder necessitating a prolonged admission to a psychiatric unit and the manner in which the issue of surrender has been handled by the both the Irish and Polish authorities. The use of the phrase 'abuse of process' is not intended to convey any *mala fides* on the part of the authorities or any conduct intended to oppress the respondent. To permit a lapse of 7 years to occur between the making of an Order for surrender and the giving effect to same, without any extenuating circumstances, is simply unjustifiable and amounts to an abuse of the process of this Court.
37. I acknowledge that in *Vilkas*, the CJEU indicated that the expiry of the time provided for effecting a surrender did not relieve the executing Member State of its obligation to surrender the requested person, but I do not believe that *Vilkas* is authority for the proposition that the issuing state and/or the executing state may permit a prolonged and inexcusable delay in effecting surrender to occur so that some 7 years later, the executing judicial authority is obliged in all circumstances to order surrender.
38. In light of the above, I refuse the application for an Order of surrender in respect of each EAW.
39. For the sake of completeness, I should point out that I do not accept the respondent's submission that the failure of a judicial authority in Poland to reconsider proportionality prior to transmission is a fundamental flaw in the bringing of this application obliging this Court to refuse surrender.