

THE HIGH COURT

[2021] IEHC 405
[2020 No. 191 EXT]

BETWEEN

MINISTER FOR JUSTICE AND EQUALITY

APPLICANT

AND

PIOTR MARIAN MOCEK (NO. 2)

RESPONDENT

JUDGMENT of Mr. Justice Paul Burns delivered on the 8th 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 21st September, 2019 ("the EAW"). The EAW was issued by Judge Michał Ziemniewski, 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 one year and four months' imprisonment (case reference number II K 29/16), all of which remains to be served.
3. The EAW was endorsed on 18th August, 2020, the respondent was arrested on 21st December, 2020 and he was brought before the High Court on 22nd December, 2020 on foot of same.
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 prohibited 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. Section 38(1)(b) of the Act of 2003 provides that it is not necessary for the applicant to establish correspondence between offences to which the EAW relates and offences under the law of State, where the offences referred to in the EAW are offences 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 carry a maximum penalty in the issuing state of at least three years' imprisonment. In this instance, the issuing judicial authority has certified that the offences referred to in the EAW are offences to which article 2.2 of the Framework Decision applies, that same are punishable by a maximum penalty of at least three years' imprisonment and has ticked the appropriate box for "*swindling*". By way of additional information dated 17th February, 2021, the issuing judicial authority indicates that offence number one in the EAW carries a maximum penalty of five years'

imprisonment and offence number two carries a maximum penalty of eight years' imprisonment. There is no apparent mistake or ambiguity concerning the invocation of the tick-box procedure by the issuing judicial authority such as would justify this Court looking beyond same. In any event, I am satisfied that, if necessary, correspondence could be established between the two offences referred to in the EAW and the offence under the law of this State of deception contrary to s. 6 of the Criminal Justice (Theft and Fraud Offences) Act, 2001.

8. In part D of the EAW, it is indicated that the respondent did not appear in person at the hearing. It is also indicated that the respondent was summoned in person on 25th January, 2016 and thereby informed of the date and place of the court hearing which led to the decision and that he was informed that a decision may be rendered *in absentia*.
9. The solicitor for the respondent, Mr. Michael Halleron, swore an affidavit dated 7th January, 2021 exhibiting a draft affidavit of the respondent and explaining that it was not possible for the respondent to swear the affidavit due to Covid-19 restrictions. The solicitor avers that the contents of the draft affidavit were the respondent's instructions. In the draft affidavit, the respondent indicates that he had been surrendered to Poland in 2015 where he served the remainder of an 18-month sentence, which had been imposed on him as a suspended sentence in 2005 and activated in 2007. He indicates no attempt was made to execute the offences listed in the EAW which were allegedly committed in 2005. The respondent indicates that he came to Ireland in 2007.
10. In a further affidavit, the respondent refers to the fact that whilst he was in custody in Poland, he was told he was to be prosecuted for two other offences dating from 2007 but he did not give his consent to this prosecution and was not produced from custody at the hearing. He states a suspended sentence of 16 months' imprisonment was imposed on him. He states that he was later told that a condition of his suspended sentence was for him to pay an amount of money into court but he could not do so because he did not have a bank account.
11. By way of additional information dated 2nd February, 2021, the issuing judicial authority indicates that as regards case reference number II K 29/16, attendance at the session was not mandatory. The respondent was notified of the time of the court hearing by way of service upon him at Poznań Detention Centre where he was detained in respect of case reference number II Kp 216/18. It is indicated that he received the notification personally on 25th January, 2016 and was not produced for the court hearing as he did not file a request to that end. The additional information encloses a copy of the receipt of the notice.
12. By additional information dated 17th February, 2021, the issuing judicial authority indicates that the notification received by the respondent about the date of the hearing did not include an instruction about his right to request that he could be produced to the court hearing on 18th February, 2016.

13. On foot of a request for further information from this Court, the issuing judicial authority replied by letter dated 19th March, 2021 indicating:-

"It cannot be proved that Mr. Piotr Mocek unequivocally waived his right to be present at the trial in case II K 29/16 on 18 February 2016."

A copy of the letter of notification is enclosed and it is clear that notification did no more than simply inform the respondent that a hearing was to be held on 18th February, 2016 to examine the motion of the District Prosecutor's Office in Leszno to convict the respondent without conducting a trial. The notification states that a copy of the motion was attached. The issuing judicial authority also indicates:-

"There is no document showing that Piotr Mocek did not wish to attend the hearing on 18 February 2016."

The letter goes on to explain that the judgment was passed in case reference number II K 29/16 on the basis of a motion of the District Prosecutor's Office to convict and impose sentence without a trial which had previously been agreed with the respondent.

14. It is clear that the hearing on 18th February, 2016, which led to the sentence imposed on the respondent, was a hearing at which the respondent was not present and in such circumstances, surrender in respect of same is precluded unless the requirements of s. 45 of the Act of 2003 are met. Section 45 of the Act of 2003 transposes article 4a of the Framework Decision into Irish law. Article 4a of the Framework Decision and s. 45 of the Act of 2003 set out a number of circumstances in which surrender may be effected despite the fact that the respondent was not personally present at the relevant hearing. In the EAW, the issuing judicial authority indicated that it was relying on the equivalent of point 3.1.a of the table set out at s. 45 of the Act of 2003 to the effect that the respondent had been summoned in person on 25th January, 2016 and informed of the date and place of the court hearing and was informed that a decision may be rendered *in absentia*. Normally such notice would be sufficient to establish that the respondent could be taken to have unequivocally waived his right to attend the hearing if he did not attend same. In this case, however, the respondent was being detained in prison in Poland. This was known to the relevant authorities as they served the notice upon the respondent at the prison. The respondent had no way of appearing at the hearing unless he was to be brought there by the relevant Polish authorities. The relevant notice did not inform him of any right to request to be brought to the hearing. Particular care should be taken when determining whether a person in custody has waived his or her rights, in particular the right to attend court hearings.
15. In light of the additional information referred to above, and in particular the statement of the issuing judicial authority that it cannot be proved that the respondent unequivocally waived his right to be present at the trial on 18th February, 2016, counsel on behalf of the applicant conceded that it could not be established that the respondent had unequivocally waived his right to be present at the hearing and that it was not suggested that there was any lack of diligence on his part in failing to attend at the hearing. In the

absence of such an express concession on the part of the issuing state the issue of waiver might well have been open to considerable argument.

16. Section 45 of the Act of 2003 is not to be given an absolute literal interpretation but rather should be given a purposive interpretation. That this is so is reflected in the decision of the Supreme Court in *Minister for Justice v. Zarnescu* [2020] IESC 59, which confirmed that in certain circumstances, surrender could take place even though on a literal interpretation, the requirements of s. 45 had not been met. The Supreme Court acknowledged that in certain circumstances, surrender could be affected where it could be proved that the respondent had unequivocally waived the right to be present or had been guilty of such a lack of diligence which could amount to the equivalent of a waiver.

17. As set out in *Zarnescu* at paras. 61-65:-

"61. *Recital 1 of the 2009 Framework Decision provides that the right of an accused person to appear in person at trial is not absolute and that 'under certain conditions the accused person may, of his or her own free will, expressly or tacitly but unequivocally, waive that right'.*

62. *That recital finds expression in article 4a of the Framework Decision, quoted at para. 17 supra. The waiver must be unequivocal, but it can be implied from conduct. This flows from the decision of the Court of Justice in Melloni (Case C-399/11), EU:C:2013:107, where, at para. 49, it said that:*

'The accused may waive that right of his own free will, either expressly or tacitly, provided that the waiver is established in an unequivocal manner, is attended by minimum safeguards commensurate to its importance and does not run counter to any important public interest. In particular, violation of the right to a fair trial has not been established, even where the accused did not appear in person, if he was informed of the date and place of the trial or was defended by a legal counsellor to whom he had given a mandate to do so'.

63. *In the light of the decision of the Court of Justice in Dworzecki and the language of the Frameworks Decisions, the requested court may examine the behaviour of a requested person with a view to ascertaining whether it has been unequivocally established that he or she was aware of a trial date and the consequence of non-attendance, with a view to ascertaining if an informed choice was made not to attend. This in practical terms means ascertaining whether the person has knowingly waived his or her rights to be present at trial.*

64. *The primary debate between the sides then comes down to the correct approach to the circumstances when none of the specific opt out provisions can be met. Again, there is broad agreement between the parties that when the court comes to engage this more general jurisdiction to order surrender notwithstanding that the identified exemptions cannot be shown, it must have regard to the overriding principle that a person may not be so rendered if his or her rights of defence have been breached.*

65. *This means that if the person sought to be returned under an EAW appears in person at the relevant hearing, that person is to be returned. If that person has not appeared in person or through nominated lawyers at the relevant hearing, but the circumstances meet those expressly identified in s. 45, equally no impediment exists to return. This case concerns the third possible scenario, where the circumstances of the trial giving rise to the request for return do not fit within those expressed in the exceptions contained in s. 45. Return may still be ordered, but only if the court is satisfied having made an appropriate inquiry that the rights of defence of the requested person have been met. As will be apparent then, the analysis of the facts must have as its aim the objective of ascertaining whether the rights of defence are sufficiently protected."*

18. On the approach taken by the Supreme Court in Zarnescu to interpreting s. 45 of the Act of 2003, there may be exceptional circumstances in which, on a literal interpretation, the requirements of s. 45 of the Act of 2003 have not been met but, on a purposive interpretation, such requirements have in fact been met. The converse should also follow. There may be exceptional circumstances in which, on a literal interpretation, the requirements of s. 45 of the Act of 2003 have been met but, on a purposive interpretation, such requirements have in fact not been met. This would appear to be one of those instances. At para. 90 of her judgment, Baker J. stated:-

"90.

...

- (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.”

19. The respondent was indeed served with notice of the hearing, but it was impossible for him to attend same as he was being detained in custody by the Polish authorities. This was known to the authorities. He was not informed of a right to request attendance at the hearing. The right of an accused person to attend at his or her trial is of so fundamental a nature that a court should be slow to give effect to any decision rendered in absentia unless satisfied that the defence rights of the respondent, including the right to attend, were probably respected and given effect to. It is expressly acknowledged by the issuing judicial authority that an unequivocal waiver of the right to attend the hearing cannot be established. No attempt was made to rely upon a lack of diligence on the part of the respondent. In light of the additional information furnished by the issuing judicial authority, I cannot be satisfied that the defence rights of the respondent were adequately respected or given effect to. To all intents and purposes, this was effectively conceded by the applicant.
20. It appears to me that the application for surrender in this case should be refused on the grounds that I cannot be satisfied that the requirements of article 4a of the Framework Decision and s. 45 of the Act of 2003 have been substantively complied with in order to allow effect to be given to the *in absentia* conviction and sentence. Nor can I be satisfied that the fair trial rights of the respondent, as protected by article 6 of the European Convention on Human Rights (“the ECHR”), in particular his right to attend and participate in the trial resulting in his conviction and sentence, have been adequately protected or given effect to. In the absence of an unequivocal waiver or a lack of diligence on the part of the respondent, the sentence to which the EAW relates was in effect imposed in breach of the respondent’s fair trial rights under article 6 ECHR and in such circumstances, the surrender of the respondent is incompatible with the State’s obligations under the ECHR and, thus, is precluded by s. 37 of the Act of 2003.
21. For the reasons stated I refuse the application for surrender.