

THE HIGH COURT

[2021] IEHC 426
[2019 No. 396 EXT.]

BETWEEN

MINISTER FOR JUSTICE AND EQUALITY

APPLICANT

AND

ANDRZEJ WAJZIK

RESPONDENT

JUDGMENT of Mr. Justice Paul Burns delivered on the 21st day of June, 2021

1. In 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 4th July, 2019 ("the EAW"). The EAW was issued by Robert Mietelski, Judge of the Regional Court in Opole, as the issuing judicial authority. The EAW seeks the surrender of the respondent to enforce two sentences of two years' imprisonment, all of which remains to be served.
2. The EAW was endorsed by the High Court on 16th December, 2019 and the respondent was arrested and brought before the High Court on 6th November, 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 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.
5. I am satisfied that the minimum gravity requirements of the Act of 2003 have been met. Each of the sentences in respect of which surrender is sought is in excess of four months' imprisonment. No issue was taken in respect of minimum gravity.
6. At part D of the EAW, it is indicated that the respondent was present for each of the hearings resulting in the respective sentences. I am satisfied that no issue arises in respect of s. 45 of the Act of 2003.
7. The first sentence of 2 years' imprisonment was imposed on 22nd February, 2006 (case reference II K 563/02), in respect of two offences, committed in 1999 and 2000, respectively.
8. The second sentence of 2 years' imprisonment was imposed on 13th June, 2006 (case reference II K 94/06), in respect of 38 offences committed over the period from 2002 to 2004, inclusive.
9. The respondent pursues two objections to surrender as follows:-
 - (i) surrender is precluded by s. 38 of the Act of 2003 as there is no correspondence between the offences referred to in the EAW and any offence under the law of this State as required by s. 38(1)(a); and

- (ii) surrender is precluded as the sentences are not enforceable due to the expiration of the statutory limitation period in Poland.

Correspondence

10. Section 38(1) of the Act of 2003 provides:-

"38. – (1) Subject to subsection (2), a person shall not be surrendered to an issuing state under this Act in respect of an offence unless—

(a) the offence corresponds to an offence under the law of the State, and—

(i) under the law of the issuing state the offence is punishable by imprisonment or detention for a maximum period of not less than 12 months, or

(ii) a term of imprisonment or detention of not less than 4 months has been imposed on the person in respect of the offence in the issuing state, and the person is required under the law of the issuing state to serve all or part of that term of imprisonment,

or

(b) in the case of a European arrest warrant, the offence is an offence to which paragraph 2 of Article 2 of the Framework Decision applies and under the law of the issuing state the offence is punishable by imprisonment for a maximum period of not less than three years..."

11. In respect of the concept of correspondence, s. 5 of the Act of 2003 provides:-

"5. – For the purposes of this Act, an offence specified in a European arrest warrant corresponds to an offence under the law of the State, where the act or omission that constitutes the offence so specified would, if committed in the State on the date on which the relevant arrest warrant is issued, constitute an offence under the law of the State."

12. As can be seen from the above, s. 38(1)(b) of the Act of 2003 provides for a procedure whereby it is not necessary for the applicant to establish correspondence under s. 38(1)(a), or double criminality as it is sometimes referred to, where the offence is an offence to which article 2(2) of the 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 which carries a maximum penalty of at least three years' imprisonment under the law of the issuing state.

13. At part E.1. of the EAW, the issuing judicial authority has invoked the procedure provided for at s. 38(1)(b) of the Act of 2003 by certifying that the offences carry a maximum penalty of at least three years' imprisonment and indicating the box for "fraud" as the relevant offence to which article 2(2) of the Framework Decision applies. However, under part E.2. of the EAW which requests "Full description of the offence or offences not covered by section E.1" (emphasis added), the issuing judicial authority has gone on to

set out particulars of all 40 offences. This obviously gave rise to a lack of clarity as to whether the issuing judicial authority is in fact relying upon the tick-box procedure in respect of all or any of the offences. The Court sought additional information from the issuing judicial authority in order to clarify the matter.

14. The issuing judicial authority replied by way of additional information dated 12th February, 2021, but this reply did not clarify matters. The Court made a final attempt to clarify the matter. By way of additional information dated 5th March, 2021, it is indicated that part E.2. of the EAW was incorrectly filled in and that the ticked box "fraud" relates to all offences. On foot of that information, I am satisfied that there is no longer any manifest error or ambiguity about such certification so as to warrant this Court refusing to accept same.
15. In any event, I am satisfied that, if necessary, correspondence could be established between all of the offences in the EAW and the offence in this State of deception contrary to s. 6 of the Criminal Justice (Theft and Fraud Offences) Act, 2001. In essence, it is alleged that for his own gain and/or to the detriment of another, the respondent misled others into entering into contractual arrangements on false pretences, in that he had no intention of fulfilling his obligation to pay under same. The descriptions of the various offences are replete with phrases such as "*premeditated intention*", "*for the purpose of gaining material benefit*", "*misleading*", "*no intention of complying with the financial terms*", "*misled*", "*while he had no intention of performing this agreement*" and "*while he had no financial means or intention of paying for the purchase*". In addition, I am satisfied that the wording in the description of the offences is sufficient to indicate the necessary element of dishonesty required for an offence under s. 6 of the Criminal Justice (Theft and Fraud Offences) Act, 2001 (see *Minister for Justice, Equality and Law Reform v. Tomella* [2008] IEHC 443).
16. I dismiss the respondent's objection in respect of correspondence.

Limitation Period

17. At part F of the EAW under the sub-heading "*Extinguishment of a sentence by limitation*", the issuing judicial authority cites article 103 of the Polish Penal Code and goes on to state "*The extinguishment of the sentence adjudged in the case II K 563/02 by limitation shall take place on 31 August 2022*" and "*The extinguishment of the sentence adjudged in the case II K 94/06 by limitation shall take place on 20 June 2021*".
18. The respondent swore an affidavit dated 13th January, 2021, in which he avers that he previously appeared before the High Court on foot of a European arrest warrant issued by Poland on 3rd April, 2016. In respect of that earlier warrant, he had contested that he was evading justice and showed that he had engaged with the Polish authorities via the Irish Revenue Commissioners in respect of a tax liability which he had settled in full. He attended at the Polish embassy to assist with enquiries and the warrant was withdrawn. He avers that he came to Ireland in October 2006 and is a self-employed electrician. He has two adult sons and a number of grandchildren living in Ireland. He avers that he has contacted his "*long-standing Defence Counsel in Poland*" to assist him in respect of this

EAW and exhibits a number of e-mails from his Polish lawyer in which it is submitted that the matters which are the subject matter of this EAW are statute-barred and that the time limits indicated in the EAW appear to be incorrect. Due to Covid pandemic-related factors, it had not been possible to check the court files. I note that reference is made to article 101 of the Polish Penal Code as opposed to article 103 as set out in the EAW.

19. The Court sought additional information from the issuing judicial authority in respect of the time limits for enforcement of the sentences and by reply dated 12th February, 2021, it is confirmed that the limitation period would expire on 31st August, 2022 as regards case reference II K 563/02, and on 20th June, 2021 as regards case reference II K 94/04. As regards each case, the issuing judicial authority sets out how these dates are arrived at. By additional information dated 10th June, 2021, the issuing judicial authority indicates that the statute of limitations in respect of case reference II K 94/04 will expire on 4th August, 2021 and not 20th June, 2021 as a result of a suspension in the running of time due to the Covid pandemic as provided for in Polish law. By further additional information dated 15th June, 2021, it is indicated that the suspension in respect of limitation periods was further extended. In so far as there is any dispute concerning the date of extinguishment of the sentences, I accept the confirmation of the issuing judicial authority on the basis of the mutual trust and confidence which underpins the European arrest warrant system, but also on the basis that the method of how those extinguishment dates has been set out by the issuing judicial authority. I am satisfied that each of the orders imposing a sentence remains an enforceable judgment/order and I dismiss the respondent's objection in that regard.

Lapse of Time

20. It is noted that the respondent's affidavit referred to the fact that the Polish authorities were aware that the respondent was living in Ireland from at least 2016 or 2017, when the earlier proceedings seeking surrender were brought in Ireland and, thus, there had been a delay in issuing the current EAW. This was not pursued at hearing as an independent objection to surrender. In any event, I am satisfied that there has been no culpable delay or lapse of time in this matter, taken individually or together with the other matters raised, such as could justify refusal of surrender.

Application in Poland

21. The respondent swore a further affidavit dated 15th March, 2021, in which he averred that a lawyer in Poland had applied on his behalf to the Polish courts for a revocation of the EAW and exhibited a copy of the said application as well as what appeared to be an application by the lawyer in Poland to this Court to suspend these proceedings pending the outcome of the application in Poland. The application to the Polish courts appears to have been lodged on 15th January, 2021. By additional information dated 10th June, 2021, the issuing judicial authority indicates that the application seeking withdrawal of the EAW was rejected.
22. Counsel on behalf of the respondent submitted that the decision of the Polish court to dismiss his application for withdrawal of the EAW was being appealed but he was unable to indicate when such appeal would be determined. I am not satisfied that such appeal in

itself is a ground for refusal of surrender or can justify further delay in determining the issues before this Court. The time taken to clarify relevant matters with the issuing judicial authority has coincidentally afforded the respondent the opportunity to bring a domestic challenge to the EAW in Poland. That challenge has been unsuccessful to date. This Court is in a position to determine the issues before it and is obliged to do so in a timely manner. I reject the respondent's request for a further adjournment of this matter pending the final outcome of appeal proceedings in Poland.

Covid Vaccination

23. Counsel on behalf of the respondent also sought an adjournment on the basis that the respondent is awaiting his second dose of the vaccination against the Covid virus. I do not consider that to be a valid reason for refusing surrender. However, it is open to the respondent to apply for a postponement of surrender on humanitarian grounds after an order for surrender has been made and the Court can separately consider such application.

Conclusion

24. I am satisfied that surrender is not precluded under part 3 of the Act of 2003 or any provision of the said Act.

25. 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 Poland.