THE HIGH COURT

[2022] IEHC 734

[2022 No. 6 EXT.]

BETWEEN

MINISTER FOR JUSTICE

APPLICANT

AND

JACEK GERARD JĘDRYSIAK

RESPONDENT

JUDGMENT of Ms. Justice Caroline Biggs delivered on the 23rd day of June, 2022

1. By this application, the applicant seeks an order for the surrender of the respondent to The Republic of Poland pursuant to a European Arrest Warrant dated the 6th of December 2021 ("the EAW"). The EAW was issued by Edyta Markowics, as the issuing judicial authority.

2. The EAW seeks the surrender of the respondent in order to enforce a sentence of one year and 6 months imprisonment imposed upon the respondent on the 22nd of December 2009 of which one year and six months remains to be served.

3. The EAW was endorsed by the High Court on the 24th of January 2022 the respondent was arrested on 10th of May 2022 brought before the High Court on that date.

4. I am satisfied that the person before the Court, the respondent, is the person in respect of whom the EAW was issued. No issue was raised in that 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. 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 the offences to which the EAW relates and offences under the law of the State in circumstances where the offences referred to in the EAW are offences to which Article 2.2 of 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. The issuing judicial authority has also indicated the appropriate box for "Swindling" and for "Forgery of Administrative Documents". There is no manifest error or ambiguity in respect of the aforesaid certification such as would justify this Court in looking beyond same.

8. Part D of the EAW indicates that the respondent did not appear in person at the hearing which resulted in the decision which is sought to be enforced. The issuing judicial authority has indicated that it relies on the point D.1 (c) on the Table as outlined in Article 4A of the Framework Decision and Section 45 of the Act of 2003 which incorporates same, namely:

> "*Being aware of the scheduled trial, the person had given a mandate to a legal counsellor, who was either appointed by the person concerned or by the State, to defend him or her at the trial, and was indeed defended by that counsellor at the trial*."

9. Part D.2 of the EAW states:

"In the course of the proceedings Jacek Jędrysiak benefitted from the assistance of a defence counsel in the person of barrister Bartosz Tiutiunik. The afore-named barrister represented him at the hearing on 22 December 2009 aiming to consider the prosecutor's application for a plea bargain in terms of Article 335 of the Criminal Procedures Code (conviction without trial).

The said application requested that Jacek Jędrysiak be given the sentence previously arranged with the prosecutor. The court granted this application and delivered the judgement on 22 December 2009. The convict was not present at the sitting when the judgement was delivered, but had been given notice of the sitting date and was aware that the sitting aimed to deliver his conviction judgement.

Neither the convict nor his defence counsel challenged the verdict. On 12 July 2010 Jacek Jędrysiak testified as a witness in case number IV K 235/09 against the persons with whom he had operated upon committing the offences of which he had been convicted. When interviewed in court, he said he was aware that he had been validly convicted and confirmed everything to what he had testified before."

10. Part F of the warrant states:

"*The limitation period to enforce the sentence expires on 29 December 2034. By virtue of the judgement delivered on 22 December 2009 in case number IV K 286/09 Jacek Jędrysiak was given a custodial sentence of 1 year and 6 months, suspended for a S-year probation, a fine of 60 daily rates of PLN 20 each, and was obliged to compensate for the loss of PLN 19,800.00 caused to the Towarzystwo Ubezpieczeh "Generali" S.A. (Insurance Jointstock Company) and the loss of PLN 34,546.10 caused to the Towarzystwo Ubezpieczeti i ! Reasekuracji "Cigna Stu" S.A (Insurance and Reinsurance Joint-stock Company) within 2 : years after the effective date of the*

judgement. Given that Jacek Jędrysiak failed to compensate for the losses he had caused within the time frame set forth in the judgement of 22 December 2009, on 18 September 2012 the Sąd Okręgowy w todzi (Circuit Court in Lodz) activated the convict's custodial sentence. The convict did not surrender to custody in order to serve his prison term when summoned to do so. He was ordered to be conveyed to prison by Police. On 21 February 2013 he was ordered wanted on an arrest warrant. Given that the domestic searches were inconclusive, on 22 November 2017 the enforcement proceedings were suspended. On 12 March 2020 the do Sąd Okręgowy w Łodzi (Circuit Court in Lodz) received a diffusion from the Komisariat Policji Poznań - Nowe Miasto (Poznań - Nowe Miasto Police Station) that they had established the convict's whereabouts in Ireland. Therefore, Jacek Jędrysiak was resummoned to surrender to custody in order to serve his prison term - to no avail. The summons was sent to his address in Ireland. Jacek Jędrysiak again failed to surrender to custody on the appointed date."

11. In light of the above, this Court sought to clarify a number of issues by sending a Section 20 request dated the 1st of February 2022:

"*In considering the European Arrest Warrant for the purposes of execution, the High Court noted the information at part F of the Warrant, where it states that the sentence imposed and suspended by the Circuit Court in Łodz on the 22nd December 2009 was activated by the same court on the 18th September 2012. The High Court notes from the decision of the Court of Justice in Ardic (Case C-571/17 PPU) that Article 4a(1) of Council Framework Decision 2002/584/JHA does not apply to proceedings in which a suspended sentence of imprisonment is activated on grounds of infringement of the conditions of suspension, provided that the activation decision adopted at the end of those proceedings does not change the nature or the level of the sentence*

initially imposed. In these circumstances, and if it is the case that Mr. Jędrysiak was not present for the activation hearing on the 18th December 2012, you are respectfully requested to address the following queries:

1. Did the Court which activated the sentence have discretion to modify the nature or the quantum of the sentence initially imposed, or did its decision simply involve a choice between activating the sentence and not activating it?

2. If the Court which activated the sentence did have discretion to modify the nature or the quantum of the sentence initially imposed, please complete the table at part (d) of the standard form European Arrest Warrant (as inserted by Article 2(3) of Council Framework Decision 2009/299/JHA) in respect of the activation hearing of the 18th September 2012."

12. By way of additional information dated the 25th of February 2022, the issuing judicial authority stated:

"*In reply to the letter from Mr. Phillip J. Donohue, the Sąd Okręgowy w Łodzi – IV Wydział Karny (Circuit Court in Łódź – 4th Criminal Division) kindly provides that the decision passed by the Sąd Okręgowy w Łodzi (Circuit Court in Lódź) on 18th September 2012 consisted in* [sic] *resolving the matter of activating the conditionally suspended custodial sentence handed down to Jacek Gerard Jędrysiak by the Sąd Okręgowy w Lodzi (Circuit Court in Lódź) on 22nd December 2009 in case number IV K 268/09.*

The Court did not have any discretion to modify the nature or the quantum of the sentence initially imposed. The Court's decision simply involved a choice between activating or not activating the sentence handed down to Jacek Gerard Jędrysiak.

The basis for the decision of 18th September 2012 was Article 75(2) of the Polish Criminal Code in terms of which the court may activate the sentence if the convict,

while on probation, grossly violates the law, in particular when the convict commits another offence, or evades paying a fine, evades supervision, or defaults on the obligations, penal measures, compensatory measures or the forfeiture order imposed. In this case Jacek Gerard Jędrysiak evaded supervision [sic] *of his probation officer and failed to pay PLN 19, 800.00 worth of compensation in favour of the Towarzstowo Ubsezpieczen "Generali" Spólka Akeyjna (Insurance Joint-stock Company and PLN 15, 228.00 worth of compensation in favour of the Towarzystwo Ubezpieczen "Cign Stu" S.A. (Insurance Joint-stock Company)*."

13. In light of the foregoing, this Court is satisfied that the respondent's rights pursuant to Section 45 of the Act of 2003 have been adhered to and no issue is raised in this regard.

14. The respondent objected to surrender on the following ground:

The respondent asserts that his surrender should be refused on grounds of delay. The offence to which this European Arrest Warrant relates occurred in 2001; His conviction and the imposition of a suspended sentence occurred in 2009; therefore it would be disproportionate to return him to the requesting member state to serve a sentence at a remove of some 21 years since the offence date and some 13 years since the purported activation of this sentence. The respondent asserts that this would involve a breach of his rights pursuant to Article 8 of the ECHR and of the Charter of Fundamental Freedoms.

15. The respondent swore an affidavit dated 30th May 2022 wherein he averred to the following:

- He was born in Poznań, Poland on the 10th day of April 1972. His parents are from Poznań and still reside there. He says that he has one brother living in Germany. He says that in 2008, he moved to Ireland for the purposes of building a better life. He says that he worked in a clothing warehouse in Blanchardstown for 5 years and then began

working for Pallas Foods.

- He says that during periods where he could not find work he claimed social welfare, he says that he has a good employment record in Ireland and has worked for BWG, AVIS; and is currently working for Sherwin Williams (a paint company on Robin Hood Industrial Estate) for the past 18 months. He says that for a period of time he has lived at 7 Cherrywood Villas, Bawnogue, Clondalkin, Dublin 22.

16. The Supreme Court set out the test which must be applied where an application for surrender is opposed on the grounds of Article 8 of the ECHR. In *Minister for Justice and Equality v. Vestartas* [2020] IESC 12, MacMenamin J. stated at para 89; -

> *"[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. The High Court judgment holds that there had been a significant dilution of the public interest which would ordinarily apply (para. 37). It posed what was characterised there as a modified and weakened public interest in surrender, evidenced by the elapses of time and other factors. Against this, it posed the private and family factors in the case (para. 38). But for the reasons set out above, there was a misapprehension as to the nature of the assessment. This is not a balancing exercise where public and private interests are placed equally on the scales. It is nonetheless necessary to have regard to the circumstances."*

MacMenamin J. went on to state 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."

17. In *The Minister for Justice and Equality v. Smits* [2021] IESC 27, the Supreme Court noted at para. 62; -

"[62] Dealing with the issue of the elapse of time, McMenamin J. noted indications that the trial judge might have thought this could in itself suffice to defeat an EAW application, by reference to the decision of this Court in Finnegan. However, the decision in Finnegan had clearly been limited to the unusual facts of that case. Delay could not alter the public interest considerations unless it reached a point where it was so lengthy and unexplained as to amount to an abuse of process, or to raise other constitutional or ECHR issues. On the facts in Vestartas, delay was a matter of legitimate concern but was to be viewed against the background of private and family circumstances that fell very far short of those in J.A.T. (No.2)."

18. It was further stated by O'Malley J. at para. 80; -

"[80] […] It is not obvious that a person who absconds in the knowledge that he or she is subject to a final order of imprisonment should thereby become entitled to a level of court protection not available to those who commence their sentences but might wish to have it reduced after some passage of time. In this jurisdiction, when an appeal has been disposed of, and the final order made, the criminal justice process is complete so far as the criminal courts are concerned. If there is an issue as to the lawfulness of a person's imprisonment, that issue will be dealt with by courts

exercising a different jurisdiction. The procedures affecting the rights of the sentenced prisoner in relation to his or her detention will be the responsibility of the executive in the first instance, subject of course to the possibility of invoking court protection against any breach of rights."

19. In *Minister for Justice and Equality v. D.E.* [2021] IECA 188, the Court of Appeal stated at para. 67; -

"[67] The questions certified by the High Court were as follows: "In the context of proceedings under the European Arrest Warrant Act 2003 as amended, where a respondent objects to surrender on the basis that same is precluded by s. 37 of the said Act as it would be in breach of the respondent's rights under art. 8 ECHR and having particular regard to the provisions of art. 8(2) ECHR:

1. Can personal or family circumstances, in and of themselves, provide a basis upon which surrender might be precluded by s. 37 of the Act of 2003?

2. What is the appropriate test to be applied by the Court in determining whether such an objection is sustained and that surrender should be refused?

3. In so far as exceptionality may be a relevant factor in determining such an objection, what is the appropriate test to be applied by the Court in determining whether the circumstances found to exist are so exceptional as to justify refusal of surrender"

For the reasons set out in this judgment, it is appropriate to answer all three questions by repeating the principles set out at para 59 above:

(i) In an application for surrender, the court is not carrying out a general proportionality test on the merits of the application. The court should apply the specific terms of the 2003 Act, albeit subject to a careful consideration of whether, if necessary, applying a proportionality test to Article 8 Convention rights, to order surrender would involve a violation of that ECHR right to the

extent of being incompatible with the State's obligations under the Convention. (Vestartas).

(ii) *Surrender (or extradition) presupposes an impact on the personal or family life of a requested person. Having regard to Article 8(2), surrender (or extradition) carried out pursuant to legislation is in principle an acceptable interference with the right to respect for those rights. (Ostrowski, JAT (No. 2), Vestartas).*

(iii) *When faced with an Article 8 objection to surrender, the function of the Court is to decide if the surrender is incompatible with the State's obligation under the European Convention on Human Rights. That requires a very high threshold. Any inquiry must bear in mind that s. 10 requires a court to surrender in accordance with the provisions of the 2003 Act and s. 4A of that Act obliges the court to presume that the issuing state has complied and will comply with its fundamental rights obligations. (Vestartas).*

(iv) *The evidential burden of proving incompatibility lies on the requested person. (Rettinger and Vestartas).*

(v) *The assessment of the claimed impact of surrender on personal and family rights must be a rigorous one. (Rettinger and JAT (No. 2)).*

(vi) *The evidence must be cogent and must reach the level of incompatibility (Vestartas).*

(vii) *Exceptionality is not the test for incompatibility, but it will only be in a truly exceptional case that surrender will be found to be incompatible with the State's obligations under Article 8 of the Convention. (JAT No. 2 and Vestartas).*

(viii) *For an Article 8 objection to succeed, there must be clear cogent evidence sufficient to rebut the presumption in s. 4A of the 2003 Act. (Vestartas).*

(ix) No elaborate factual analysis or weighing of matters is necessary unless it is clear that the facts come close to a case which would be truly exceptional in nature thereby engaging the possibility that surrender may be incompatible with the State's obligations under the Convention. (JAT (No.2)).

(x) The requirement that the circumstances must be shown to render the order for surrender incompatible with the State's obligations under Article 8 necessitates that the incursion into the private and family rights referred to in Article 8(1) is 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. (Vestartas).

(xi) Where the facts, assessed as set out above, come close to being truly exceptional in nature thereby engaging the possibility that surrender might be incompatible with the State's obligations, the Court will engage in a proportionality test of whether the high public interest in the prevention of disorder and crime (and the protection of the rights of others) is overridden by the personal and family circumstances (taken where appropriate with all the cumulative circumstances) of the requested person. That is a case-specific analysis which will be required in very few cases."

20. The respondent acknowledges that the test for refusal on the basis of proportionality is a difficult one to achieve and acknowledges the principles set out by the Supreme Court in Vestartas. Nevertheless, the respondent respectfully submits that the Court is dealing with a sentence of one year and six months, at a remove of some 21 years after the commission of the offence and 13 years after the suspended sentence that was imposed had been activated.

21. The respondent moved to Ireland in 2008, and has been in gainful employment since his arrival here, with only brief periods in which he claimed social welfare. He now works for

Sherwin Williams and has established a life for himself in Ireland. While he has not established a family here, as such, he does have a network of friends. It is submitted that these are matters that must be set against the long delay since this offending occurred and since the sentence to be served was imposed upon the respondent.

22. This Court reiterates the views expressed by Ms. Justice O'Malley in Smits wherein she stated at para. 74; -

> *"[74] I think it necessary to observe that a lawfully issued EAW in respect of a sentence does not somehow become legally invalidated by subsequent delay. The presumption that guides the courts of the executing State is that a sentenced person has enjoyed all necessary guarantees in the process leading to the imposition of the sentence and that the decision to issue the warrant involved an assessment of proportionality, with appropriate judicial protection. If that presumption is not rebutted, the decision to issue the warrant must be seen as valid. A valid order does not, by passage of time, "become" either incorrect, unlawful or void. Use of the word "stale" does not assist with the legal analysis. It is well established that delay is not, in itself, a ground for refusal of surrender unless it is so egregious that the application for surrender amounts to an abuse of process."*

23. This Court notes the following chronology of relevant domestic events:

a. The offences date back to 2001.

b. The original court order imposing the suspended sentence was on the 22nd December 2009.

c. In any case, the facts establish that the respondent left Poland in the full knowledge that he was subject to a suspended sentence, with conditions attached and he did not comply with those conditions. In addition, he failed

to pay the compensation that he was lawfully ordered to pay on foot of a court order.

d. The sentence was activated in those circumstances on the 18th September 2012.

e. The respondent was ordered "wanted" on a domestic arrest warrant on the 21st of February 2013.

f. The Polish authorities established that the respondent was in Ireland on the 12th of March 2020, and therefore a summons was sent to the respondent in Ireland requiring him to surrender to custody in order to serve his prison term, to no avail.

g. The EAW was issued on the 10th of December 2021.

24. In light of the foregoing, it cannot be said that there is so significant a delay as to meet the threshold of a truly exceptional or egregious delay, as set out in Vestartas. Whilst this Court has sympathy for the respondent, it cannot be said that he has family in this jurisdiction and his personal circumstances do not go beyond the norm.

25. In these circumstances, in this Court's view Article 4A of the Act of 2003 has not been rebutted and this ground of objection fails.

26. I am satisfied that surrender of the respondent is not precluded by reason of Part 3 of the Act of 2003 or another provision of that Act.

27. It, therefore, follows that this Court will make an order pursuant to Section 16 of the Act of 2003 for the surrender of the respondent to the Republic of Poland.