THE HIGH COURT

[2023] IEHC 253

[2022 NO. 8 EXT.]

BETWEEN

MINISTER FOR JUSTICE AND EQUALITY

APPLICANT

AND

TOMASZ LESZEK NOWAKOWSKI

RESPONDENT

Judgment of Mr. Justice Kerida Naidoo delivered on the 17th day of February, 2023.

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 9th September 2013 and re-issued on 24th May 2021 ("the EAW"). The EAW was issued by a Judge of the Regional Court in Bydgoszcz, as the Issuing Judicial Authority.

2. The EAW seeks the surrender of the respondent in order to enforce a sentence of 1 year and 4 months' imprisonment imposed upon the respondent on 21st April 2006, of which 1 year, 1 month and 16 days remains to be served.

3. The EAW was endorsed by the High Court on 24th January 2022 and the respondent was arrested and brought before the High Court on 31st July 2022 on foot of same.

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 section 21A, 22, 23 and 24 of the European Arrest Warrant Act 2003, as amended ("the Act of 2003"), arise for consideration in the 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. I am satisfied that no issue arises under section 11 of the Act of 2003.

8. The Issuing State has certified that the two offences to which the EAW relates were committed contrary to the following provisions of Polish law:

I. An offence against freedom contrary to Article 190 section 1 of the Polish Penal Code and Article 217 section 1 of the Polish Penal Code in connection with Article 11 section 2 of the Polish Penal Code and;

II. An offence against the administration of justice contrary to Article 245 of the Polish Penal Code.

9. I am satisfied that correspondence can be established between the offences referred to in the EAW and offences under the law of this State, namely:

I. An offence of assault causing harm contrary to section 3 of the Non-Fatal Offences Against the Person Act, 1997 and;

II. An offence of intimidation of a witness contrary to section 41 of the Criminal Justice Act, 1999.

10. At Part D of the EAW, it is indicated that the respondent appeared at the hearing which resulted in the decision that is sought to be enforced. No issue therefore arises under section 45 of the Act of 2003.

Abuse of Process

11. The respondent's surrender was previously sought for the same offences on foot of a warrant dated 9th September 2013. The matter came before the High Court and surrender was refused by Hunt J. who gave a judgment dated 9th October 2015.

12. The respondent objects to surrender on the basis that he says the re-issuing of the warrant more than five years after surrender was refused by the High Court, without any explanation for the failure of the IJA to engage with previous assurances sought, taken together with the respondent's medical condition and personal circumstances amounts to an abuse of process.

13. The offences to which the warrant relates are an assault on the respondent's father on 21st November and 21st of December 2005. Under the law of the requesting State the two incidents are charged as a single assault. The second offence is interference with a witness on 7th February 2006. The interference offence relates to the respondent's father, who was a witness in the trial of the assault offence. The respondent was convicted of both offences.

14. The warrant now before me is all but identical to the one that was before Hunt J., including the date of issue of 9th September 2013, however the new warrant also has a "date of amendment" of 24th May 2021. In addition, the original warrant and the amended warrant were issued by different judges. For the purposes of the abuse of process argument I do not consider there to be a meaningful distinction to be drawn on the basis that the warrant before this Court could be said to be a re-issue of the original warrant not the issuing of a second warrant.

15. The respondent swore two affidavits: one in July 2014 and another in January 2015, the contents of which are not in dispute. In those affidavits he says, *inter alia*, that he has been living in Ireland since 2008 and he has made Ireland his home. He says he has two children, who were nine years old and five years old at the time of the swearing of the 2014 affidavit. He avers that he works on a local farm. The respondent states that the issues surrounding

the offences in the warrant relate to incidents with his father, but that his father and he are now on good terms with each other. The respondent further says that his surrender will only serve to disrupt his family and will impose great hardship on them.

16. The respondent avers that since coming to Ireland he has had a number of significant medical problems. He was diagnosed as suffering from congenital thrombophilia as a result of which he is on medication on a daily basis. He also underwent surgery to remove a portion of his large intestine. He says that he underwent the surgery on 1st November 2009. He says that he has also developed a chronic venous ulcer on his left leg. Reports from his treating consultant haematologist are exhibited. He says that his family are totally dependent on him for financial and emotional support and that if he is surrendered to Poland, they will likely have to return to Poland also. He avers that in view of his personal circumstances and medical condition his surrender would be a disproportionate interference with his rights, and his family rights.

17. The relevant dates in relation to the application are as follows:

(i) The events giving rise to the offences in respect of which surrender is sought occurred on 21st November 2005, 21st December 2005 and 7th February 2006.

(ii) The sentence of 1 year, 1 month and 16 days is what remains of a 1 year and 4 month sentence imposed on 21st April 2006.

(iii) The respondent says he has been living in Ireland since 2008.

(iv) The first EAW issued was dated 9th September 2013.

(v) Surrender was refused by Hunt J. on 9th October 2015.

(vi) The amended warrant now before this Court is dated 24th May 2021.

18. As is apparent from the above, the respondent left Poland knowing that he had been convicted and sentenced for certain offences. There is nothing to suggest that the Polish authorities knew where he was prior to issuing the first warrant in 2013. The period between his conviction and the issuing of the first warrant could not be considered excessive in the circumstances. Approximately five years then passed between the refusal to surrender in 2015 and the issue of the second warrant in 2021. The total time that elapsed since the events giving rise to the offences and issue of the second warrant is therefore approximately fifteen years.

19. It is worth setting out the history of the earlier proceedings in some detail. During the course of the original hearing before Hunt J. no substantive issue was taken on the necessary proofs under the Act of 2003. The only argument related to the respondent's medical condition. Appropriate medical evidence was put before Hunt J., and he summarised the respondent's medical condition as follows:

"[The respondent's consultant haematologist] *makes it perfectly clear that any deficiency or inadequacy in the respondent's treatment regime could have very serious consequences. In this respect, she stated that he was referred to her because of a significant history of thrombosis. Thrombophilia testing confirmed that he has congenital anti-thrombin deficiency, which is a rare but serious thrombotic disorder requiring life-long anticoagulation. He also has a history of portal vein thrombosis and previous deep vein thrombosis in the right leg. His congenital condition significantly increases his risk of spontaneous thrombosis, and he has already had at least one life threatening event with a portal vein thrombosis which resulted in bowel resection.* [The respondent's consultant haematologist] *further confirms that "if his Warfarin is discontinued or his INR is sub-therapeutic, he is at risk of a further thrombosis which could be life-threatening"*."

20. Hunt J. therefore found as follows in respect of the respondent's medical condition:

"*I am satisfied by the information emanating from* [The respondent's consultant haematologist] *that the respondent now suffers from the serious medical conditions outlined by her, and that he is in need of constant supervision and treatment is also outlined in her reports.*"

21. A number of requests for additional information were made by Hunt J.. In a request dated 23rd January 2015, which refers back to an earlier request and reply of 19th November 2014 (a copy of which I do not have), Hunt J. sought confirmation that the respondent would "*have the required access to the specific treatment outlined in the correspondence of* [The respondent's consultant haematologist] *dated 30 September, 2014, if he is surrendered to the Polish Authorities*". A medical report prepared by the respondent's consultant haematologist dated 30th September 2014 appears to have accompanied that request.

22. A reply was received dated 4th February 2015, which addressed the request about the respondent's medical condition as follows:

"*In the answer to the letter dated January 23, 2015 we hereby kindly inform, that the convict shall in the penal institution be covered by the specialist care just as it has been mentioned in the letter dated November 19, 2014, and in case of his surrender of the instructions included in the letter of* [The respondent's consultant haematologist] *concerning continuation of specialist treatment (Warfarin therapy) shall immediately be passed on to the prison service of the competent Penal Institution.*"

23. Hunt J. was of the view that:

"*The response that particulars concerning the respondent will be furnished to the prison medical officer on surrender is a very limited assurance, and does not go beyond the normal procedures that might be expected when a prisoner is admitted to any prison system. In this case, it adds nothing in that a diagnosis and medical prescription is already to hand, and it*

would hardly be open to a prison doctor to come to a different conclusion to that of [The respondent's consultant haematologist]*. It fails utterly to address the specific request as to the treatment that would be made available in the light of the respondent's established diagnosis and current medical care plan.*"

24. Hunt J., therefore, concluded as follows:

"*I am satisfied that the objection to surrender based on treatment of the respondent's medical condition has been made out. It should be stressed that this is not based on any general assertions about the harshness of Polish prison conditions or on the overall adequacy of the scheme of medical treatment available to prisoners in that jurisdiction. The decision in this case centres solely on the individual circumstances of the respondent and the specific response of the requesting State to notification of those circumstances. His condition is not trivial or transient, and the consequences of the absence of proper treatment and supervision are established and serious. If the Polish authorities had furnished a simple declaration that they were prepared to provide for the respondent the specific treatment regime prescribed by his Irish consultant, I would have been quite happy to act upon that assurance and to operate upon the presumption that the respondent's rights would then be respected by the Polish authorities in the event of his surrender, by the provision of promised and necessary treatment and care. Instead of simple clarification, there is still no clear assurance that the scheme of general medical provision in Polish prisons would extend to that which is clearly necessary to maintain the respondent's health.*"

25. Hunt J. continued:

"*Having regard to the medical evidence concerning the respondent's individual situation, in the absence of a specific assurance that the respondent will be provided with the necessary supervision and treatment to obviate life-threatening complications, I am satisfied that the respondent has established by inference from the failure of the Polish authorities on two occasions to confirm that he will receive the treatment and care deemed necessary by his Irish doctor that there is a probable and real risk that he will not receive this treatment if returned to Poland. It must follow from this that there is a real risk to him of the inhuman and degrading consequences which would inevitably follow from the absence of appropriate care. Accordingly, I refuse the application for the surrender of the respondent on this basis*"

26. The above decision of Hunt J. was not appealed by the applicant.

27. The matter was listed before this Court on a number of occasions and submissions were made on different issues that resulted in a number of section 20 requests being made. A section 20 request was issued dated 26th of January 2022, seeking clarification about the number of offences in respect of which surrender is sought. A reply was provided, dated 2nd February 2022, clarifying the issue.

28. A further request for additional information was issued dated 7th November 2022. The questions were agreed between the parties and approved by the Court. It set out the history of the hearing before Hunt J. that led to his refusal of surrender and attached his judgment, together with a copy of the correspondence between Hunt J. and the IJA. A copy of the request for assurances in respect of the respondent's medical treatment if surrendered and the reply to that request were also attached. The request then raised the following queries:

> *(i)* "*Why were the specific assurances sought on 23rd January 2015 by Judge Hunt in relation to the medical care that would be made available to Mr. Nowakowski in prison not provided?*
>
> *(ii) Why has a period of approximately 5 and a half years been permitted to elapse between the decision of Judge Hunt refusing Mr. Nowakowski's surrender and the amendment of the European Arrest Warrant on 24th May 2021?*
>
> *(iii) If surrendered, will Mr. Nowakowski have access to the specific treatment that the medical reports that have been furnished indicate that he requires, namely*
>
> > *(a) Access to a standard anticoagulant such as Warfarin, and*
> >
> > *(b) Regular monitoring i.e. monthly access to a standard anticoagulant management clinic and a consultant haematologist?*
>
> (iv) *If the assurances sought in (iii) can now be provided, why were they not provided in 2015?*"

29. The question at (ii) above was asked because where abuse of process is raised, having regard to the principle of mutual trust and confidence, I considered it appropriate to give the IJA an opportunity to explain the period that elapsed between the refusal of surrender by Hunt J. and the issuing of the amended warrant. The question at (i) above was raised because there may have been a practical or logistical reason why the specific assurances sought by Hunt J. in 2015 were not given to him.

30. A response was received by letter dated 15th November 2022 in the following terms:

> "*1) The European Arrest Warrant after Tomasz Nowakowski was only altered in point F, in such a way that the current expiration date of the act was included "April 29, 2031". This happened because the District Court in Naklo nad Notecią provided information on April 21, 2022 and on May 13, 2022 that the enforcement proceedings in the case with reference number II K 67/06 were suspended due to the evasion by Tomasz Nowakowski from the execution of the penalty and that the current limitation date was April 29, 2031.*
>
> *2) At the time of serving the sentence in Poland Tomasz Nowakowski will be provided with medical care appropriate to his health condition, which was described in your documents.*

3) Warfarin is a medicine that is generally available on the pharmaceutical market in Poland and is used according to medical indication.

4) Monitoring of coagulation parameters, which is necessary during Warfarin pharmacotherapy, is generally available and performed as prescribed by the physician."

31. The response under point 1) above does not explain the reason for the five and a half year period that elapsed between the decision of Hunt J. in 2015 and the issuing of the amended warrant in 2021. It merely says that the warrant was amended so as to reflect a new limitation period for the offences. That is not an explanation for the delay, in fact the necessity to extend the limitation period is a consequence of it.

32. The respondent argues that there is an accumulation of factors that together amount to abuse of process. The central issue is the making of the second request for surrender more than five years after surrender had been refused on substantial grounds by Hunt J., together with the failure to explain the delay. The closely related issue is the failure to give reasons why the assurances about the respondent's medical condition sought by Hunt J. were not given in 2015. The respondent says those factors should be viewed in the context of the other circumstances of the case, including the total length of time that has passed since the events giving rise to the offences and the respondent's family and medical condition. He also submits that the Court must first adjudicate on the abuse of process issue and refuse surrender if I find it is made out. He further says that the assurances now given by the IJA are still inadequate in the circumstances.

33. In relation to the assurances now given to this Court about the treatment the respondent will receive if surrendered, I accept the respondent's submission that if I find there has been an abuse of process, surrender should be refused regardless of whether or not I consider the assurances now given are sufficient. I am, however, also of the view that the assurances now given to this Court do not represent a meaningful advance over those that were given to Hunt J., which he considered inadequate. In the circumstances I would expect greater engagement with the specific treatment regime the respondent requires to address what is a life-threatening condition.

34. In his written submissions, the respondent sets out the law on abuse of process in the context of EAW proceedings. He refers to the decision of *Minister for Justice and Equality v. J.A.T. No.2* [2016] IESC 17, a case that involved the issuing of two EAWs, in which Denham C.J. addressed abuse of process as follows:

"*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 should 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 of 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 EAW's 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."

35. Denham C.J. continued,

"*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 surrender of the appellant.*"

36. The respondent also relies on the case of *Minister for Justice v. Tobin (No. 2)* [2012] 4 IR 147 in which Hardiman J. addressed the concept of an abuse of process and concluded:

"[340] In my view, all the considerations mentioned above are relevant to the present case. I refer particularly to the proposition that there should be finality in litigation and that a party should not be vexed twice in the same matter; that it is an abuse to subject a party to unjust harassment; that the appellant must therefore be protected from oppression; that it is important in the public interest, as well as that of the parties, that litigation should not drag on for ever; and that a defendant should not be oppressed by successive suits where one would do. Similarly, I agree that these rules are rules of justice."

37. The respondent quotes Hunt J. in *Minister for Justice v. Bailey* [2017] IEHC 482:

"*Abuse of process can arise without any institution acting in bad faith. It may be caused, as it was in this case, by the cumulative effect of the circumstances of the case rendering an abuse of process on the individual concerned. These principles are all expressed in the judgment of Denham C.J. in Tobin (No. 2). 'Abuse of process' is described in the same case by Hardiman J. in characteristically vivid and eloquent terms. I can do no better than borrow his words. He described it at para. [313] as:- "a many headed concept whose manifestations range from the deliberate maintenance of legal proceeding without probable cause… to a ham fisted or unthought out conduct of litigation, particularly by making two or more actions where one would do, which tends to oppress the other party and to cause him expense and/or distress.*"

38. The respondent also draws the Court's attention to *Minister for Justice v. Lach* [2021] IEHC 632, in which Burns J. commented as follows:

"[41.] It is undoubtedly the case that the issuing of a second warrant, where the initial warrant had 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. Indeed, the Court of Justice of the European Union in Vilkas (Case C-640/15) has made it clear that Member States should persevere with attempts to surrender where the surrender was not effected due to circumstances beyond control of the states, even if the requested person has been released from custody. This is undoubtedly so. However, the issue of the second EAW and the application for surrender on foot of same must be considered along with, and in light of, all

relevant surrounding circumstances, and must be assessed on a cumulative basis with such circumstances."

39. In reply the applicant refers to *Minister for Justice v Downey* [2019] IECA 182 in which Peart J. states as follows:

"[19.] It is clear from J.A.T (No. 2) that there can be circumstances which justify the High Court refusing an application for surrender on the basis of abuse of process. But it is equally clear firstly that such cases require some exceptional circumstance to justify such refusal, but, and critically, that the abuse asserted to exist must be of the processes of the High Court here dealing with the application for surrender, and therefore must relate to the application for surrender itself, and not to the prosecution of the offences which the respondent will face if he/she is surrendered. The different question whether there might be an abuse of process were the respondent put on trial for the offences for which surrender is sought is not a matter for determination in this jurisdiction on an application for surrender. Absent any suggestion that there is no possibility of a fair hearing of any application to have his trial on these offences stayed, and there has been no such suggestion made by the appellant, it is in my view clear that any such question of abuse of process will be a matter to be pursued by the appellant before the courts in the requesting jurisdiction."

40. The appellant also relies on the *Minister for Justice and Equality v. Campbell* [2020] IEHC 344 in which Donnelly J. reviewed the law governing abuse of process. In the *Minister for Justice and Equality v. Angel* [2020] IEHC 699 Burns J. summarised Donnelly J.'s statement of the principles that apply in abuse of process cases, stating:

"(a) there is no bar to bring a fresh application to the Court for surrender;

(b) there can be circumstances which justify or require the High Court refusing an application for surrender on the basis of abuse of process;

(c) a finding of an abuse of process should not be made lightly;

(d) it is only where the case has exceptional circumstances that an abuse of process will be found (although exceptionality is not the test) and that the abuse of process is that of the High Court in this jurisdiction rather than concern about an abuse of process to put the requested person on trial;

(e) there is a broad public interest in bringing things to finality in one set of proceedings;

(f) there is a strong public interest in Ireland complying with its international obligations and surrendering individuals in accordance with the relevant extradition provisions;

(g) a repeat application for surrender is not per se abusive of process. It would only be abusive of the process where to do so is unconscionable in all the circumstances;

(h) mala fides or an improper motive is not a necessary precondition for an abuse of process; and

(i) the Court should look to the cumulative factors which may make the application for surrender oppressive or unconscionable."

41. The fact that fifteen years have passed since the events giving rise to the request for surrender does not, in and of itself, amount to an abuse of process. The respondent left the requesting State in or around 2008 having had a sentence imposed upon him for what are, in my view, not minor offences. The time that elapsed between then and the issuing of the first warrant in 2013 is therefore attributable to his own conduct.

42. The circumstances of the instant case do, however, include some of the factors that were present in the authorities referred to above: two European arrest warrants were issued, surrender was refused in respect of the first warrant and there was a notable lapse of time between that refusal to surrender in 2015 and the issuing of the second warrant in 2021. Refusal to surrender was not because of a technical defect in the formal content of the warrant, or due to some logistical difficulty transferring the respondent to the requesting State, it was because of a legitimate concern on the part of the court hearing the application about the respondent's medical condition, which the requesting State did not address to the satisfaction of Hunt J.. No further request having been issued within a reasonable period after the refusal to surrender, the respondent was, in my view, justified in thinking that the matter had reached finality. The issuing of a second warrant is not, of course, impermissible and, depending on the circumstances, five and a half years might not, in and of itself, amount to an egregious delay. However, the fact that it occurred after refusal of surrender on substantial grounds means the delay did require an explanation.

43. Unfortunately, explanations sought by this Court from the IJA to explain, in particular, the delay in issuing the second warrant, have not been addressed. The issuing of the second warrant does not *prima facie* amount to an abuse of process, indeed it occurs routinely. However, where, as in this case, the amended warrant was issued more than five years after the IJA had failed to give adequate assurances to a different composition of this Court, it was, in my view, appropriate to seek an explanation for the delay so as to ensure that the respondent was not, to adopt the language of the Supreme Court in *Tobin (No. 2)*, being "*vexed twice in the same matter*" in circumstances that might be seen as oppressive absent an explanation from the requesting State.

44. The abuse of process contended for in this case does not involve any suggestion of bad faith or a deliberate intention to disrupt or interfere with the proper administration of justice and the conclusion of abuse of process is not to be made lightly in any circumstances. It is a vital feature of the administration of justice throughout the EU that Member States comply with international obligations and surrender individuals in accordance with the relevant extradition provisions. The offences in this case are not minor. However, in what I consider to be exceptional circumstances, I am satisfied that the issuing of the second warrant five

and a half years after surrender had been refused by Hunt J., taken together with the total time that has elapsed since the offences were committed, the respondent's medical condition and the failure of the IJA to engage adequately with this Court's request for an explanation for the delay does amount to an abuse of process.

45. Having decided that there has been an abuse of process, I must then ask whether it was of such a limited degree that, applying the principle of proportionality, surrender should nonetheless be ordered. As highlighted above, I do not consider the offences in respect of which extradition is sought to be minor. However, the penalty imposed suggests that the conduct involved did not lie at the upper end of the spectrum of seriousness for offences of this kind. Furthermore, I accept the respondent's averment that since the commission of the offences he and his father are now on good terms with each other. I accept that averment because it is quite likely that after more than a decade family members have reconciled, but also because the respondent's affidavits contain other details that might be said to be declarations against interest, which in my view adds to the credibility of his averment about the current state of his relations with his father. I also take into account the respondent's ongoing and potentially life-threatening medical condition and the impact that his surrender would have on his family. I do not consider the abuse of process to be insignificant and in all the circumstances, I am not satisfied that surrender should be ordered.

46. It, therefore, follows that this Court will make an order refusing the application for surrender.