THE HIGH COURT

[2023] IEHC 294

[2021 No. 202 EXT]

BETWEEN

MINISTER FOR JUSTICE

APPLICANT

AND

RYSZARD SZLACHIKOWSKI

RESPONDENT

JUDGMENT of Ms. Justice Stack delivered on 24 May, 2023.

1. This is a Request pursuant to Article 27.4 of Council Framework Decision of 13 June, 2002 on the European Arrest Warrant and the surrender procedures between member states ("the Framework Decision"), implemented in Irish law by s. 22 (7) of the European Arrest Warrant Act, 2003, as amended, for the consent of this court to proceedings being brought against the respondent for the purpose of executing two sentences of imprisonment which were imposed on him in Poland in 2009.

2. The two sentences in question are judgements of the District Court in Sosnowiec, Poland of 21 January, 2009 (File reference XI K 596/08) and 20 November, 2009 (File reference XI K 21/09), which imposed sentences of six months and one year, respectively.

3. The respondent has already consented to his surrender to Poland in respect of 77 fraud offences and that surrender took place on 27 October, 2021.

4. The respondent originally objected on four bases to the granting of consent to the enforcement of these two sentences: first, that the matters to which the request relates did not correspond to offences in this jurisdiction, secondly, that compliance with s. 45 of the Act could not be shown, and thirdly that the delay involved in seeking surrender to serve sentences imposed in 2009 was such as to amount to an abuse of process. The fourth objection was based on the issue of law which was rejected by the Supreme Court in *Minister for Justice v. Kairys* [2022] IESC 531, in a judgment delivered on 22 December, 2022, and therefore after the initial hearing of the application for consent.

5. In an *ex tempore* judgment delivered on 27 January, 2023, I indicated that I was satisfied that correspondence could be shown, that there was no evidence of abuse of process and, of course, that the *Kairys* point had been rejected by the Supreme Court. However, I sought further information pursuant to s. 20 of the Act for the purposes of considering compliance with s. 45 of the Act.

6. As already stated in my *ex tempore* judgment, the Article 27 Request is in a form similar to the prescribed form of a European Arrest Warrant as originally set out in the Annex to the Framework Decision, but with some differences, most significantly omitting point (d) of the prescribed form of European Arrest Warrant which deals with decisions rendered *in absentia.*

7. While it is not necessary that a request pursuant to Article 27.4 be in any particular form (*Minister for Justice v. Fassih* [2021] IECA 159), in circumstances where the issuing judicial authority chose to draft the Request more or less in the form prescribed in the Annex to the Framework Decision for European Arrest Warrants, the removal of point (d) of that form was a significant omission. The substance of what must be considered on an application of this kind is not materially different from the matters which must be considered on an application for surrender.

8. It follows perhaps as a matter of logic and common sense that if a court would not have approved surrender in respect of particular offences, then neither would it grant consent to the subsequent prosecution or enforcement of a sentence imposed for those offences. Otherwise, the safeguards in the Framework Decision could easily be evaded by the simple expedient of withholding any reference in the European Arrest Warrant to those further criminal proceedings, and then simply prosecuting for that offence or requiring the service of a sentence for such an offence after the surrender had taken place.

9. Article 27.4 of the Framework Decision makes this clear. It provides:

> *"A request for consent shall be submitted to the executing judicial authority, accompanied by the information mentioned in Article 8(1) and a translation as referred to in Article 8(2). Consent shall be given when the offence for which it is requested is itself subject to surrender in accordance with the provisions of this Framework Decision. Consent shall be refused on the grounds referred to in Article 3 and otherwise may be refused only on the grounds referred to in Article 4. …. For the situations mentioned in Article 5 the issuing Member State must give the guarantees provided for therein."* [Emphasis added.]

10. As initially adopted, Article 5 of the Framework Decision required the giving of give additional guarantees in three circumstances, one of which related to situations of the imposition of sentences after trials *in absentia*. The guarantees required in the event of a decision rendered *in absentia* were set out in Article 5.1. However, Article 5.1 was removed by Council Framework Decision, 2009/JHA of 26 February, 2009, ("the 2009 Framework Decision") and was replaced by a new Article 4a.

11. Article 27.4 must therefore now be read as referring to Article 4a, as well as Articles 3, 4 and the remaining provisions of Article 5. In other words, consent pursuant to Article 27.4 may be refused in the case of a decision rendered *in absentia* unless the information

required by Article 4a is given. Any other reading of the Framework Decision would be inconsistent with its purposes which are, not only to provide for a mutual system of surrender but that such a system should be operated in conformity with the right of an accused to a fair trial: see recitals (1), (9) and (15) to the 2009 Framework Decision.

12. In addition to deleting Article 5.1 and replacing it with Article 4a, the 2009 Framework Decision also amended the Annex to the Framework Decision so as to replace the old point (d), which provided for the guarantees to be given where the decision on which the Warrant was based was one which had been made *in absentia*, with a much more elaborate Table. This Table was designed to oblige issuing judicial authorities to indicate which of the circumstances identified by Article 4a was relied upon for the purpose of enforcing a decision rendered *in absentia* and the basis on which it was claimed such circumstances existed.

13. In this case, there was nothing on the face of the Request which gave any hint that the two sentences in respect of which it issued had been imposed after a trial *in absentia.* It is of course the case that there is no prescribed form for a request pursuant to Article 27.4 and, in particular, it need not be in the form prescribed in the Annex to the Framework Decision for European Arrest Warrants. However, having chosen to use that form, a conscious decision to remove point (d) of that form was, in the circumstances of this case where both of the relevant decisions were rendered *in absentia*, inappropriate.

14. By letter dated 6 October, 2022, the Minister, on behalf of this court, asked the issuing judicial authority to complete a Table in the form set out at point (d) of the prescribed form European Arrest Warrant.

15. The information received in response to that request was not, as had been requested, in the form of the Table at point (d) of the prescribed form European Arrest Warrant. This does not, in itself, pose a difficulty. As already stated, no prescribed form applies to a request and the matter must be considered from the point of view of substance, not form. But neither,

might I add, was there anything improper in the request sent by the Minister: in fact, the Table attached to point (d) of the Warrant provides a convenient method of eliciting the information which would be necessary to permit this Court to review the Request in accordance with the requirements of Article 4a of the Framework Decision.

16. The information sought in the Table at point (d) of a European Arrest Warrant is designed to ensure that the executing judicial authority can be satisfied that the recognition of the decision made in the course of the criminal proceedings conducted in the issuing respect the fundamental rights of a person who has been convicted *in absentia*. While those rights are protected as a matter of Union law by Article 5 of the Charter of Fundamental Rights, that provision is of course based on Article 6 of the European Convention on Human Rights which guarantees the right to a fair trial and on which there is extensive jurisprudence of the European Court of Human Rights.

17. The question of what information is required before surrender will be ordered in respect of a decision rendered *in absentia* was considered in *Minister for Justice v. Palonka* [2015] IECA 69, where it was submitted that it was not fatal to an application for surrender under s. 16 that para. 4 of the Table in point (d) of the European Arrest Warrant had not been completed. In that case, the box had been ticked to invoke the condition at para. 3.2, but no factual information to demonstrate satisfaction with the necessary condition had been given.

18. It was held that s. 45 of the 2003 Act explicitly required the giving of information within the meaning of paragraph 4 of point (d) in the standard form European arrest Warrant whenever paragraph 3.1b, 3.2 or 3.3 of point (d) was relied upon, and surrender was therefore prohibited by Part 3 of the Warrant and had to be refused.

19. In my view, the same requirement applies to a request for consent pursuant to Article 27.4. Where the request is based on a decision rendered *in absentia* and the person was not personally informed of the date and time of trial (which corresponds to para 3.1a), or is not

guaranteed a full rehearing (which corresponds to para. 3.4), then the issuing judicial authority must indicate the basis on which it is said it is entitled to enforce the decision rendered *in absentia*, and the information which establishes that entitlement. That is the case here where, in substance, the issuing judicial authority has indicated that reliance is placed on the condition at in Article 4a.1.(a) of the Framework decision (which equates to para. 3.1b of a European Arrest Warrant).

20. It is true that *Palonka* was not a case involving a request for consent pursuant to s. 22(7) and that case turned on the wording of s. 45 of the Act of 2003, with some consideration of ss. 15 and 16 of the Act. Nevertheless, the logic of the judgments in that case is, in my view, clearly applicable to requests pursuant to section 22 (7), as this must be interpreted to give effect to Article 27.4, which in turn equates the grounds for granting or refusing consent with those applicable to the grant or refusal of an order for surrender.

21. It is settled law that the 2003 Act, including s. 22 (7), must be given a conforming interpretation, that is, it must be interpreted *"so far as possible in light of the wording and purpose of the Framework Decision"*: *Pupino* (Case C-105/03) [2005] E.C.R. I-05333.

22. While the obligation of the court to apply a conforming interpretation to national legislation is subject to the limitation that the interpretation cannot be *contra legem* (see *Minister for Justice v. Altaravicius* [2006] 3 I.R. 148, [2006] IESC 23 at 156), that *caveat* does not affect the interpretation of s. 22(7) as the subsection is very general in its terms, and there is nothing in it which would affect the obligation of this court to interpret in a manner conforming with Article 27.4 of the Framework Decision. This court must, therefore, in an application for consent pursuant to s. 22 (7), consider all of the matters which would have been material had the application been one for surrender, and this includes whether the information provided by the issuing judicial authority is sufficient to satisfy Article 4a of the Framework Decision.

23. It was suggested in submissions in *Palonka* that Article 4a did not require the giving of the information at point 4 of point (d) of the Table. This submission appears to have been based on the fact that the text of Article 4a used the language of the various options in paras. 3.1a, 3.1b, 3.2, 3.3 and 3.4 without indicating that any further information need be given.

24. It was not necessary for the Court of Appeal to determine that point as the wording of s. 45 was so clear, though Finlay-Geoghegan J. at paras. 23 to 25 of her judgment appears to have rejected it, but in any event I am very doubtful that any such submission would be correct as it appears to be based on an excessively technical reading of Article 4a. Simply because the text of that Article does not go on to say in explicit terms that the underlying information on which reliance on the various options is based must be given, does not mean that the issuing judicial authority need not do so.

25. Any such submission seems to be based on an interpretation of the Table as going beyond what was required by Article 4a of the Framework Decision. However, the purpose of the Table is to provide a convenient form for eliciting the information required by the text of Article 4a itself and is, in my view, an expression of what is necessarily implicit in Article 4a: if an issuing judicial authority is to rely on one of the conditions in Article 4a which required further elaboration, that is, those which equate to paras. 3.1b, 3.2 and 3.3 of the Table, then it must give the information as to the particular circumstances which entitle it to so rely in the case in question. If this information was not required in order to satisfy Article 4a, then the Table would not provide that it was to be given.

26. The inclusion of para. 4 in the Table is not an accidental or superfluous matter, but one that appears to have been carefully included to ensure proper respect for the fair trial rights of an accused. If the essential information on which the issuing judicial authority claims to be in a position to satisfy Article 4a in the particular case were not given, this would reduce compliance with Article 4a, and consequently with Article 5 of the Charter, to a *"box*

ticking exercise". It might be convenient to provide a form in which the relevant box is ticked, but enforcement of an *in absentia* judgment or sentence requires more than that if the fundamental right of an accused to a fair trial is to be respected.

27. As Peart J. stressed at para. 37 of his judgment in *Palonka*, there is a potential for injustice if some basic information as to how it is said that points 3.1b, 3.2 or 3.3 of point (d) of the Table are said to apply is not given, so as to allow this court as executing judicial authority to satisfy itself that the requirements of the Framework Decision are satisfied. In cases where the accused was not personally summoned and is not entitled to an appeal or review which entitles the accused to a re-examination of the decision on the merits, including the possibility of fresh evidence, the risk of the enforcement of a conviction in circumstances where an accused did not unequivocally waive their right to attend is higher. Therefore, the essential facts and circumstances sufficient to allow this court to discharge its functions under the Framework Decision and to allow the respondent to challenge the accuracy of the information, must be given.

28. In this case, the Additional Information sent in response to the Minister's request for a completed Table is contained in a the translation dated 11 October, 2022. This indicates that the respondent was notified of all of the relevant hearing dates for both sentences by *"sending a notification to the address he indicated in the preparatory proceeding"*, which equates to the circumstances at para. 3.1b of the Table.

29. As regards File Ref No. XI K 596/08, it is confirmed that there were three hearing dates and that the respondent was *"notified about all three dates by sending a notification to the address he indicated in the preparatory proceedings. All three notices were upon the issuance of advice notes and were not collected. The accused did not appear at any of the dates, and the proceedings therefore proceeded in his absence. At the third hearing date, in the absence of the accused, a default judgment was passed. The judgment was sent to the*

address indicated by the accused, it was notified by the issuance of advice note and it was not collected. No appeal proceedings were pending."

30. The information relating to File Ref. No. XI K 21/09 is very similar, save that on the third hearing date, the announcement of the judgment was postponed for a period of 3 days. However, the respondent was not notified in writing about the postponement of the pronouncement of the judgment as Polish law did not provide for any obligation to notify him in writing of such a situation. The judgment was pronounced in his absence, and again it was a default judgment. All three hearing dates and the judgment itself were all served on the respondent by sending them to the address which he indicated. Again it is stated that the notices of the three hearings and the service of the judgment were *"notified by the issuance of advice note and were not collected."* It is again confirmed that no appeal proceedings were pending.

31. It was clear, therefore, that the Polish authorities were purporting to rely on the second part of Article 4a.1.(a) which permits surrender where the person was not summoned in person *"but by other means actually received official information of the scheduled date and place of the trial which resulted in the decision, in such a manner that it was unequivocally established that he or she was aware of the scheduled trial"*. Where this is relied on, there must also be information that sub-para. (ii), which requires that the requested person *"was informed that a decision may be handed down if he or she does not appear for trial"*, is also satisfied. I return to this below.

32. The first concern arising out of the response was that no details were given which would allow the respondent to challenge the accuracy of the assertion that he had been notified of the relevant hearing dates. The judgments in *Palonka* make it clear that the purpose of the information is to permit a respondent to challenge it: see the judgment of Peart

J. at para. 8 and, in particular, para. 9 where examples of the level of detail required where reliance on point 3.2 were given.

33. By analogy, I think the issuing judicial authority would have to identify the address to which the notifications were sent and perhaps the dates (or at least approximate dates) on which they were sent. Otherwise, it is difficult to see how a requested person could challenge the accuracy of what was asserted as demonstrated by his or her unequivocal waiver of the right to attend the hearing.

34. A further request for additional information was therefore sent by letter from the Minister dated 30 January, 2023, and in the response subsequently received, it was indicated in relation to both sentences the subject of the Request that, while there were no facts indicating that the accused was actually aware of the date for hearing, he was personally instructed in the preparatory proceedings, i.e., during questioning as a suspect, that letters sent to the address indicated by him would be deemed delivered if he changed his place of residence without providing a new address or if he did not stay at the address indicated. The information states that the respondent gave his address as Sosnowiec, ul. Lubelska 22/1 street and never provided any information that that address had changed. The hearing dates are also given.

35. I am satisfied that the respondent has had, in these proceedings, an adequate opportunity to challenge the correctness of the information. Although he is currently serving a prison sentence in the issuing State, there has been more than adequate time for arrangements to be made to take instructions from him and to swear an affidavit in these proceedings. There has not even been an affidavit of his solicitor, sworn on the basis of instructions.

36. The result is that the additional information received since the *ex tempore* judgment of 27 January, 2023, demonstrates that, in respect of both sentences, the respondent was advised

during questioning as a suspect that he should give his address and that anything sent to that address would be deemed delivered. He was told that, if he changed address, he should notify the authorities of that. No such notification was received and the respondent has not disputed that he gave that address or indeed that he was in fact resident at that address at the relevant times. Although the date of notifications themselves are not given, it is necessarily implicit in the additional information that the notifications were sent in advance of the stated hearing dates and the respondent has not asserted that he was not resident in the address at the material time.

37. In those circumstances, it can be inferred from the fact that the respondent gave his address and was notified of the need to update it if it changed, and of the fact that post sent there would be deemed delivered, that the respondent was aware of the likelihood of correspondence relating to criminal charges and consciously and deliberately either did not respond to the advice notes sent to the given address or did not update the authorities as to his whereabouts.

38. This meets the requirements of Article 4a.1(a)(i) of the Framework Decision, in my view. In *Dworzecki* (Case C-108/16 PPU) EU: C:2016:346, the Court of Justice gave significant guidance on the requirements of Article 4a. In that case, the Court refused to approve a mode of service which was recognised as valid under national law, whereby service on an adult in the requested person's household had been effected but it could not be ascertained from the Warrant whether that adult had in fact given it to the respondent. The Court did, however, at para. 51, indicate that *"manifest lack of diligence"* by a requested person, notably where *"it transpires that he sought to avoid service of the information addressed to him"* would justify a finding that Article 4a was satisfied even though it could not be established that the requested person was in fact aware of the date and time of hearing.

39. This case is one involving a common scenario of a requested person being served by way of a notification to the address given by him or her for service of documents in circumstances where he or she is, or must have been, aware that the address would be used to serve documents relating to a criminal prosecution. Where that is so, and where the notification of the date and time of criminal proceedings is sent to the correct address but has not been not collected, then it would appear that the requirements of Article 4a.1(1)(i) are satisfied.

40. This is notwithstanding that the express words of Article 4a suggest that the person must become actually aware of the date and time of trial. The Court of Justice has adopted the approach of the European Court of Human Rights where Article 6 ECHR is not regarded as being breached even where the accused was not in fact aware of the date and time of trial, but where it has been established that there is an *"unequivocal waiver"* of the right to be present at trial.

41. The information now received is sufficient to establish the circumstances in which the address was given, notably that the requested person was under questioning as a subject, such that it must have been obvious that the address was being furnished for service of criminal proceedings, including notification of the trial itself. Where the respondent, despite being furnished with adequate information, does not dispute that the address was given, that it was given in the stated circumstances, and that it was the correct address, then, subject to compliance with A.4a.1.(a)(ii), this court can be satisfied that the requested person consciously and deliberately waived his right to be present at his trial.

42. The only information which is not given is that in sub-paragraph (ii) of Article 4a.1.(a) namely, that the respondent was informed that a decision might be handed down *in absentia*. All that is said is that the respondent was informed that the that letters would be *"deemed delivered"*.

43. It is a pity that the issuing judicial authority did not, as originally requested by the Minister on 6 October. 2022, simply refer to the requirements of the Table at point (d) of a European Arrest Warrant as setting out what was required. The requirement to confirm that the requested person was informed that a decision might be handed down *in absentia* is clearly stated at para. 3.1b of the Table and had the additional information stated that the notification had included this information also, then that would have satisfied Article 4a and consent could well have been granted pursuant to Article 27.4.

44. In addition, in the request for further information dated 30 January, 2023, an open ended question asking the Polish authority to *"state any other facts which establish that the requested person waived his right to attend"*. Knowledge that a decision may be rendered *in absentia* if an accused does not ensure to give the correct address, to update it as required, and to collect notifications once an advice note is sent to the correct address is knowledge required for the type of waiver required to comply with the fair trial rights which Article 4a seeks to protect. If an accused is not informed of the consequences of a failure go give and, if necessary, to update his address, or of failing to respond to advice notices sent to that address, it cannot be established that, by failing to collect the advice notices sent to the address given, he was waiving his right to be present at his criminal trial.

45. In the circumstances, it is the case that, notwithstanding two requests for additional information, the information required by Article 4a has not been given. I must therefore refuse the application for consent.