THE HIGH COURT

[2023] IEHC 323

[2022 NO. 122 EXT.]

BETWEEN

MINISTER FOR JUSTICE AND EQUALITY

APPLICANT

AND

SYLWESTER MIELCZAREK

RESPONDENT

Judgment of Mr. Justice Kerida Naidoo delivered on the 10th day of March, 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 21st February 2019 ("the EAW"). The EAW was issued by a Regional Court Judge, as the Issuing Judicial Authority ("IJA").

2. The EAW seeks the surrender of the respondent in respect of a sentence of 2 years' imprisonment imposed upon him on 6th December 2017. The judgment became effective on 14th December 2017. The respondent's surrender is sought to serve the remaining 1 year 11 months and 26 days of that sentence.

3. The IJA has certified the provisions of Polish law pursuant to which the offences were committed.

4. The respondent was arrested on 21st June 2022 on foot of a Schengen Information System II alert. He was brought before the High Court on the same date. The EAW was produced to the High Court on 28th June 2022.

5. 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.

6. I am satisfied that none of the matters referred to in sections 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.

7. 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 more than four months' imprisonment.

8. I am satisfied that no issue arises under section 11 of the Act of 2003.

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: possession of controlled drugs

contrary to section 3 of the Misuse of Drugs Act 1977, possession of controlled drugs for sale or supply contrary to section 15 of the Misuse of Drugs Act 1977 and cultivation contrary to section 17 of the Misuse of Drugs Act 1977. No issue was raised in that regard.

Section 45

10. The responded submits that his surrender is prohibited pursuant to section 45 of the Act of 2003.

11. Part D of the EAW indicates that the respondent did not appear in person at the hearing on 6th December 2017 resulting in the decision which is sought to be enforced. The Issuing Judicial Authority has indicated that it relies on Part D.1.b of the warrant, which states:

"*the person was not notified in person but actually received, by post, 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 was aware of the scheduled trial, and was informed that a decision may be handed down if he does not appear for the trial – the summons to a hearing date was not called for by the convict within the prescribed time-limit although the notice to collect it from the post office was left twice at his address – the summons was deemed duly delivered.*"

12. At Part F, the warrant states:

"*…The convict failed to attend to serve his sentence and attempts to arrest and bring him to prison failed. Therefore, with the order of 26 February 2018, case ref. no. II Ko 612/18, the District Court in Belchatów suspended the enforcement proceedings with respect to the convict and issued a national arrest warrant for him.*

The search carried out on the national scale was unsuccessful, whereas the police have found that the convict has left abroad and is probably in Ireland."

13. The case reference for the decision on 6th December 2017 is II K 779/17. That hearing resulted in a cumulative sentence of 2 years' imprisonment being imposed upon the respondent. The hearing dealt with the sentences imposed in case II K 694/13 and case II K 1168/13. The number of days the respondent had already served in custody was taken into account. The sentence that became effective on 14th December 2017 was therefore one of 1 year, 11 months and 26 days, which is what remains to be served. That sentence did not involve any additional offences over and above those to which cases II K 694/13 and II K 1168/13 related.

14. A request for further information dated 4th of July 2022 sought clarification as to whether the respondent was present for the hearing on 6th December 2017. A reply was received dated 11th July 2022. It was to the effect that the respondent was present in person when the sentences for case II K 694/13 and case II K 1168/13 were imposed. The reply also says that the respondent was not present on 6th December 2017.

15. The reply set out the penalties imposed in respect of each case and how they came about:

a. Case II K 694/13: 2 years' imprisonment and a fine. The respondent attended a meeting with the authorities about the case on 8th August 2013.

b. Case II K 1168/13: 1-year imprisonment and a fine. The respondent attended a meeting with the authorities about the case on 11th December 2013.

c. The respondent pleaded guilty in both matters and was present when the sentences were imposed.

d. The sentences in both matters were a result of a settlement between the respondent and the prosecutor, under supervision and formal approval of the court.

16. That reply also says, in effect, that:

a. The respondent gave an address for service when being dealt with in relation to cases II K 694/13 and II K 1168/13.

b. He had also been informed that he was under a duty to provide details of any change of address, but he did not provide any new address. Delivery of the notification about the hearing on 6th December 2017 was therefore forwarded to the address he had previously given.

c. Notification about the date of the hearing was delivered to the address given, but it was not collected. Under the legal regime in the requesting State notification was therefore deemed to have been duly served.

17. The respondent swore an affidavit dated 3rd October 2022. In it he acknowledges being present in the court in Poland and admitting guilt to charges in 2013. He says he was not aware of the hearing that took place on 6th December 2017. He says he has lived at his current address in Ireland for approximately two years. Before that he says he resided in the Netherlands for a period of three years. That means, on his account, he left Poland approximately five years ago, which would mean in or about 2017.

18. The respondent's solicitor swore an affidavit in which he exhibits a report received by him from a solicitor in Poland, Mr. Piotr Leder. He seems to have been commissioned to carry out an examination in respect of the respondent's fitness to plead. The content of the report is to the effect that the respondent was of a fit mental state. Mr. Leder was later discharged from representing the respondent.

19. A further request for information was sent dated 10th of October 2022 asking whether the court that fixed the cumulative sentence on 6th of December 2017 had any discretion in

respect of the sentence to be imposed. A reply was received dated 3rd November 2022, to the following effect:

a. When passing judgment on 6th December 2017 in case II K 779/17, the District Court in Belchatów followed the relevant provisions of the Criminal Code.

b. Article 85 of the Criminal Code says that: "*if the perpetrator has committed two or more offences, before the first sentence was rendered with regard to any of these offences, even though not effective yet, and for which penalties of the same type or any other penalties subject to accumulation were imposed, the court shall impose a cumulative sentence, taking as a basis the individual sentences imposed for the concurrent offences.*"

c. Article 86 § 1 of the Criminal Code states that: "*the court shall impose a cumulative sentence falling within the limit between the highest of the sentences imposed for individual offences and the sum thereof, however without exceeding 810 daily fine units, restriction of liberty for 2 years, or imprisonment of 15 years.*"

d. When imposing the cumulative sentence "*the court considers a number of factors, i.e., individual sentences imposed for individual offences, a number and the nature of the offences committed by the convicted person, the time over which they were being committed, as well as the convicted person's attitude, age, personal circumstances. The above affect the severity of the cumulative sentence imposed on the convicted person, which must fall within the limits specified in Article 86 of the Criminal Code.*"

e. The Criminal Code also says: "*As regards the obligation to notify of any address change, it is regulated by Article 75 § 1 of the Criminal Procedure Code which states that the accused person shall have an obligation to notify the authority in charge of the proceedings of each change of their place of residence or stay which exceeds 7 days, including also due to any custodial sentence in a different matter, as well as of each change of contact details, which they know are known to the authority in charge of the proceedings; also, the accused person shall have an obligation to present himself whenever summoned in the course of the criminal proceedings. The accused person is informed of the above obligation already when being interviewed for the first time. Additionally, the accused person receives from the court a relevant information sheet showing his rights and obligations (including the obligation to notify of any address change) the moment he is served a copy of the indictment.*"

20. I am satisfied that the material before me is not sufficient to establish that the respondent was personally served with notification of the hearing that took place on 6th December 2017. Service at his last known address is not sufficient to establish actual knowledge on his

part. However, in the particular circumstances of this case that is not necessarily determinative of the issue.

21. I have considered the content of the warrant, the replies to the requests for further information and the respondent's affidavit. I am satisfied that the respondent was present when the sentences in cases II K 694/13 and II K 1168/13 were imposed and that he may have left Poland before the hearing on 6th December 2017. It is noteworthy that in his affidavit the respondent makes no mention of being aware that he was obliged to inform the relevant authorities in Poland if he changed the address that he had given when being dealt with in respect of cases II K 694/13 and II K 1168/13.

22. It is apparent from the additional information provided dated 3rd November 2022 that on the hearing on 6th December 2017 the District Court was obliged to impose a cumulative sentence calculated on the basis of a number of clearly defined factors. The decision that was made on 6th December 2017 resulted in a cumulative sentence that was one third less than the sum of the two individual sentences. The cumulative sentence was then varied to give credit for time served.

23. The additional information sets out the procedure that was engaged in when the cumulative sentence was being calculated. The sentence imposed had to fall "*within the limit between the highest of the sentences imposed for individual offences and the sum thereof, however without exceeding 810 daily fine units, restriction of liberty for 2 years, or imprisonment of 15 years.*" Therefore, the sentence imposed had to be between 2 years' imprisonment (being the sentence imposed in case II K 694/13) and 3 years' imprisonment (being the sum of the sentences of cases II K 694/13 and II K 1168/13). The sentence imposed was therefore the lowest sentence that could have been imposed. It also gave credit for time already served.

24. The discretion provided for by the law of the requesting State allowed the court to impose a sentence up to a certain maximum taking into account a number of different factors, outlined above. It was, however, a qualified discretion.

25. In the instant case the decision of 6th December 2017 did involve varying the level of the sentence originally imposed, but the judge dealing with the case could not have exercised that discretion to give a lower sentence than what was in fact arrived at. Therefore, in the particular circumstances of this case, the calculation of the cumulative sentence resulted in the shortest sentence that could have been imposed within the parameters fixed by the law of the requesting State.

26. The respondent submits that the court should seek additional information from the IJA as to whether or not it was theoretically possible for a lower sentence to have been imposed. I am satisfied that the information before me sets out the relevant criteria that had to be taken into account by the judge who imposed the sentence on 6th December 2017. Based on the length of each of the individual sentences a custodial sentence had to be imposed, which

could have been no less than that which was in fact handed down. I am therefore satisfied that no further additional information is required.

27. That being so, regardless of whether or not the respondent was present or represented at it, the hearing on 6th December 2017 could not have resulted in a more favourable outcome because the sentence actually arrived at was one that could not have been any shorter. I am therefore satisfied that no submission by or on behalf of the respondent could have altered the outcome of the hearing or resulted in a lesser sentence being imposed.

28. The parties agree the hearing on 6th December 2017 was a "trial" within the meaning of *Ardic* and that the case falls to be considered on the basis of *Minister for Justice v. Zarnescu* [2020] IESC 59. In *Zarnescu*, the Supreme Court said that section 45 of the Act of 2003 is to be given a purposive interpretation and that even though a particular set of circumstances may not fit neatly into one of the scenarios set out in Table D of an EAW, it may nevertheless be permissible for the court to order surrender if it is satisfied that the requirements of section 45 have been substantially met. However, as Baker J. pointed out in *Zarnescu*, before making an order for surrender in such circumstances, the court must take a step back and satisfy itself that the defence rights of the respondent have not been breached and will not be breached.

29. The respondent submits that the court's role under *Zarnescu* is as set out at paragraph 90(l) of the decision: "*The purpose of the exercise is to ascertain whether the requested person who did not attend at trial has waived his or her right of defence*". In the circumstance of this case, the respondent submits that it cannot be established unequivocally, either by personal service or extrinsic evidence, that the respondent had actual knowledge of the scheduled hearing of 6th December 2017 and therefore it cannot be inferred that he had waived his right of defence.

30. The respondent refers the court to *Minister for Justice and Equality v. Fafrowicz* [2020] IEHC 680. In *Fafrowicz* the respondent did not appear in person at the hearing when a cumulative sentence was imposed. Burns J. refused surrender and in his judgment said the following:

"*30. … It appears that as a result of a change in Polish law, it was necessary to revisit two previous sentences imposed a number of years earlier upon the respondent. Such re-visitation was outside the reasonable contemplation of the respondent, and most likely the prosecution also, at the time of the original sentences. At such hearing, the court had a discretion as to what substituted penalty to impose. While it imposed a lesser penalty than the two earlier sentences, it is possible that if the respondent had been in attendance and participated, either personally or through legal representative, a greater reduction may have been imposed. The respondent was not notified of the hearing, was not legally represented at same and was not informed of the outcome of same so that he could appeal within time. Upon surrender, he will have no automatic right to a retrial or to appeal the decision but merely a right to submit a request for a retrial or appeal. In such circumstances, I am not satisfied that the rights of the defence were or are adequately protected.*"

31. In *Fafrowicz*, the respondent did not appear in person at the hearing when a cumulative sentence was imposed. However, unlike the instant case, he had also not appeared in person at either of the hearings when the original sentences were fixed, although he appears to have known about those sentences. Furthermore, in that case, an earlier EAW had been issued that the High Court had declined to endorse. Importantly, it was also a case in which the possibility could not be excluded that a lower sentence might have been imposed if the respondent had been present and participated in the hearing. In the instant case, for the reasons set out above, I am satisfied that the presence of the respondent at the hearing on 6th December 2017 could not have resulted in a greater reduction in the sentence imposed.

32. The respondent also refers to *Minister for Justice and Equality v Szefer* [2021] IEHC 441 in support of the proposition that a failure to notify the prosecuting authorities as to a change of address does not necessarily amount to an unequivocal waiver of the right to be notified of, or attend, the trial. I accept that general proposition, but in *Szefer* the respondent did not appear in person for the hearing at which the original sentence was imposed. *Szefer* was also a case in which the relevant notification was served at an address provided by the respondent but at that time the respondent was in custody in respect of another matter. It was therefore obvious that the respondent was not residing at the address at which the notice had been served. There had also been a four year period during which the matter was not progressed and, in the circumstances, Burns J. concluded that it was not unreasonable for the respondent to have assumed that the matter was no longer being pursued.

33. The respondent further relies on *Minister for Justice and Equality v Szadkowski* [2022] IEHC 59. But, like *Szefer*, that was a case in which an accused was convicted by a court of first instance *in absentia* and did not know he had been charged. In my view, the factual circumstances in *Szefer* and *Szadkowski* are materially different to those in this case. In particular because this is not a case in which an accused was convicted by a court of first instance *in absentia*.

34. In the instant case a delay point is not being made, but the respondent says that the lapse of time from December 2013, when the individual sentences were fixed, to December 2017, when the cumulative sentence was imposed, must be considered. The respondent also places particular emphasis on the fact that he was not legally represented in the earlier proceedings in cases II K 694/13 and II K 1168/13. He also highlights his relative youth in 2013, when he was 19 years old.

35. Even a very substantial delay is not, in and of itself, a bar to surrender. The fact that a period of time passed between when the respondent was convicted of the second offence and when the applicant initiated the process to activate the sentence cannot avail the respondent if the court finds that his non-attendance was because he put himself beyond the reach of the requesting State. Likewise, his age at the time is no bar to surrender.

36. The respondent points out that he was not represented when the individual sentences were imposed. He says in his affidavit that he was not represented when he pleaded guilty, but it is not submitted that he could not have legal representation if he had wanted or requested it. It is also apparent that before the respondent pleaded guilty a legal representative was appointed to ensure, it appears, that he was fit to do so. Ultimately it was a matter for the respondent to decide whether or not he wanted to avail of legal representation. That being so, if the court finds that by his own actions the respondent had waived his right to attend and participate in the hearing on 6th December 2017, the fact he was not represented cannot in my view be a bar to surrender.

37. The applicant submits that the respondent knew about the two sentences that were imposed and made a decision not to serve them when called upon to do so. It is further pointed out that all reasonable attempts were made by the authorities in the requesting State to serve the respondent notice of the cumulative sentence hearing. The applicant also says that the respondent was aware that he would be served notification of any further proceedings at the address previously provided.

38. The applicant further argues that the particular facts of the present case allow the court to be satisfied that the respondent's rights were protected. The applicant says that his failure to notify the authorities of a change of address coupled with the outcome of the cumulative sentencing hearing are sufficient for the court to be satisfied that his fair trial rights have not been breached.

39. The relevant factual circumstances that emerge from the totality of the material before the court, upon which the applicant relies, are as follows:

a. The respondent was present and pleaded guilty to the original offences in cases II K 694/13 and II K 1168/13.

b. The sentences imposed resulted from an agreement between the respondent and the prosecution. The respondent personally engaged in that process.

c. The offences in respect of which he was convicted could not be said to be minor offences.

d. During the course of the process, he provided an address for service on him of any material relevant to those convictions and sentences.

e. He was fully aware that he was obliged to provide details of any change of address for the purpose of service.

f. He had been provided with a document setting out those obligations.

g. The respondent had been informed that if he failed to provide change of address details, then the service of documents would be at the address he had already provided.

h. The respondent left Poland knowing that he was not only the subject of a criminal process but had been convicted of certain offences in person and engaged in the process that resulted in the relevant sentences being imposed on him.

i. The respondent left Poland without providing any change of address or other information to the relevant authorities that would have permitted service on him.

40. The position, therefore, is that the respondent was present when convicted and was fully aware of his obligation to keep the relevant authorities appraised of his whereabouts but left the jurisdiction without doing so. At the time the respondent left Poland he knew that he had pleaded guilty to two separate offences, each of which related to a significant number of individual incidents and had received sentences of 2 years' imprisonment and 1-year imprisonment in relation to those offences. Likewise, accepting he knew he had sentences totalling 3 years' imprisonment hanging over him, the respondent left Poland fully aware of his obligation to inform the relevant authorities of a change of address.

41. I am satisfied that the sentence imposed at the conclusion of the hearing on 6th December 2017 was the lowest sentence that could possibly have been imposed and that no submission made by or on behalf of the respondent at that hearing could have resulted in a shorter sentence. Therefore, regardless of whether or not the respondent was present or represented, the sentence could not have been less than what was in fact imposed. I am therefore satisfied that the respondent's fair trial rights were not breached.

42. Having carefully considered all of the materials before me, bearing in mind the Supreme Court decision in *Zarnescu* and the authorities referred to, I am satisfied that this case falls within the category of cases set out at paragraph 90(o) of the judgment:

"(o) In a suitable case a manifest absence of diligence may lead a requested authority to the view that the accused person made an informed decision not to be present at trial, or where it can be shown that there was an informed choice made by the person to avoid service."

43. In the circumstances, I find that the respondent made an informed decision to bring about a state of affairs in which it was not possible for the authorities in the requesting State to affect personal service upon him of the date when the cumulative sentence was imposed. The respondent made a decision not to provide details of any change of address in circumstances where he knew a failure to do so would result in service at the address he had given. I also find that the respondent made an informed decision not to take any further part in the process and thereby unequivocally waived his right to attend the hearing.

44. In arriving at the above conclusions, I am fully aware of the central importance in any fair criminal procedure that an accused person has the opportunity to be present at any hearing

that will affect his fundamental rights. I have carefully considered whether, in the circumstances, I can be satisfied that the fundamental rights to defence have not been breached and were adequately protected. I am so satisfied.

45. I therefore dismiss the respondent's objection to surrender based on section 45 of the Act of 2003.

46. 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.

47. 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.