

THE HIGH COURT

RECORD NUMBER 2019/327 EXT

BETWEEN

MINISTER FOR JUSTICE AND EQUALITY

APPLICANT

AND

KATARZYNA ŻYŁKA

RESPONDENT

JUDGMENT of Mr. Justice Paul Burns delivered on the 17th day of July, 2020.

1. By this application the applicant seeks an order for the surrender of the respondent to the Republic of Poland ("Poland") pursuant to a European arrest warrant dated 26th February, 2018 ("the warrant") issued by Judge Soltysińska-Laszczyca of the District Court in Kraków as the issuing judicial authority.
2. The warrant was endorsed by the High Court on the 8th October, 2019 and the respondent was arrested and brought before the High Court on 18th November, 2019.
3. I am satisfied that the person before the Court is the person in respect of whom the warrant was issued. This was not put in issue by the respondent.
4. I am further satisfied that none of the matters referred to in ss. 21A, 22, 23 or 24 of the European Arrest Warrant Act 2003, as amended ("the Act of 2003"), arise and that the surrender of the respondent is not prohibited for the reasons set forth therein.
5. Poland seeks the surrender of the respondent for the purpose of serving a sentence of imprisonment imposed on 30th November, 2005, by the Kraków-Śródmieście Regional Court in Kraków Second Criminal Division and affirmed on appeal on 30th January, 2007 by the District Court in Kraków Fourth Division of Criminal Appeals. The sentence was an aggregate sentence of 2 years and 6 months imprisonment and was imposed in respect of three offences committed between 1998 and 2002. The respondent appears to have already served over a year in detention and, allowing for that, the remaining sentence to be served is 1 year, 4 months and 6 days.
6. The offences in question relate to fraudulently obtaining loans from various financial institutions between 1998 and 2002, using false identities and an offence concerning removing/hiding certain documents belonging to third parties. The respondent is a 46-year-old Polish national. She resides with her husband in Ireland and has six children ranging in age from 6 to 20 years, with five of the children under the age of 14 years. She is described as "a home-maker" and devotes her time to caring for her family. She and her family have resided in Ireland since October 2005. The circumstances which the respondent, her husband and their young children now find themselves in are unfortunate but are not relevant to the issues which this Court has to decide. It is now accepted that the family circumstances are not so truly exceptional as would engage the Court in a consideration of whether surrender would be incompatible with the State's obligations under the European Convention on Human Rights ("the Convention") or the Constitution.

7. Points of objection were delivered on 2nd December, 2019. These can be summarised as follows:-
- (I) that surrender would constitute a breach of the State's obligations under the Convention and/or the Constitution, due to delay and the impact upon her family circumstances;
 - (II) that surrender was prohibited by virtue of s. 38 of the Act of 2003 due to the absence of correspondence between the offences referred to in the warrant and offences in the State;
 - (III) that surrender was prohibited as the requirements of s. 45 of the Act of 2003 had not been complied with; and
 - (IV) that surrender should be refused due to lack of judicial independence/political interference with the judiciary in Poland.
8. The respondent swore two affidavits dated 17th January, 2020 and 9th March, 2020 respectively. Her solicitor, Mr. Tony Hughes, swore an affidavit dated 2nd December, 2019.
9. At trial, only points (II) and (III) were pressed by Counsel on behalf of the respondent. On the basis of additional information received from the Polish authorities and on the basis of the respondent's affidavit of 9th March, 2020, it was clear that regular deferments of the obligation to serve the sentence in question were obtained from the Polish courts at the request of the respondent due to her family circumstances until further deferral was refused in 2017.

Correspondence

10. The Court was informed that there was agreement between Counsel for the parties that the sentence imposed was an aggregate sentence in respect of all the offences referred to in the warrant and that it was not possible to attribute any particular term of imprisonment to any particular offence, so that unless correspondence was made out in respect of all the offences referred to in the warrant, then surrender should be refused in accordance with the reasoning of the Supreme Court in *Minister for Justice, Equality and Law Reform v. Ferenca* [2008] IESC 52.
11. At s. (e) of the warrant it is certified that offences I and II as set out in the warrant fall within article 2(2) of the Council Framework Decision of 13th June, 2002 on the European Arrest Warrant and the Surrender Procedures between Member States, as amended ("the Framework Decision"), and the relevant boxes were ticked for fraud and forgery. By virtue of s. 38 of the Act of 2003, it is not necessary for the applicant to show correspondence between an offence in the warrant and an offence under Irish law where the offence in the warrant is an offence to which article 2(2) of the Framework Decision applies. The respondent did not take issue with the certification as regards offences I and II. It was therefore only necessary for the applicant to establish correspondence as

between offence III and an offence at Irish law. The respondent vigorously contested any proposed correspondence.

12. As this issue is peculiar to the circumstances of this particular case and turns upon the information furnished by the Polish authority, it is helpful to note that at s. (e)2 of the warrant a description of offence III is given as follows:-

"Beginning at a time unknown in 1998 and continuing thereafter until 22 Feb. 2002, in Krakow, she kept hidden a number of documents issued to the name of Barbara Madej, which she was not authorised to keep at her sole disposal, namely: an Employee Sanitary Inspection Logbook; a catechism course certificate; a decision of the Regional Government in Busko Zdrój dated 28 Sept. 1992; a Temporary Six Year Development Review Record; two employment contracts between Firma Handlowa LUX and Barbara Madej; a Pupil Medical Record; a Pupil Development Review Record; a subpoena from the Internal Revenue Service in Busko Zdrój dated 4 July 1994; a notification from the Regional Job Centre in Busko Zdrój dated 21 May 1993; a vaccination record; an agreement of 19th March 1996 between the temporary work agency Biuro Pośrednictwa Prac Zleconych and Barbara Madej; a Decision of the Regional Job Centre in Busko Zdrój dated 21 May 1993 disentitling her of unemployment benefit; a certification from the State children's home in Winiary dated 15 September 1992; consent to starting professional training, given by the State Children's Home in Winiary on 20 Aug. 1990; proof of payment of seventy-eight thousand zlotys (PLN 78,000) PLN; a diploma of a church marriage prep course; a PIT-11 tax return for 1994; a book of Original Minutes of the law office of Krzysztof Seweryn; and four inventorying cards stamped with a company stamp of the law office above and A name stamp of lawyer Krzysztof Seweryn."

13. At s. (e)3 of the warrant, the nature and legal classification of the offence and applicable statutory provision/code as regards offence III was stated to be "Art. 276 of the Criminal Code". Further on in s. (e), article 276 of the Criminal Code is set out as follows:-

"A person who damages, destroys, makes useless, withholds or removes a document which the person is not authorised to keep at his sole disposal, shall be liable to a fine or restriction of personal liberty or imprisonment for a term not exceeding 2 years."

14. I note in respect of offences I and II that article 275.1 of the Criminal Code was cited, *inter alia*, as the applicable statutory/code provision as regards those offences. Article 275.1 was not cited as an applicable statutory/code provision as regards offence III. Article 275.1 provides as follows:-

"a person who uses, steals or appropriates a document that confirms another person's identity or property title shall be liable to a fine, restriction of personal liberty or imprisonment for a term not exceeding 2 years."

15. Of particular note is the fact that an essential part of the offence under article 275.1 is "uses, steals or appropriates". As regards article 276.1, there is no reference therein to "uses, steals or appropriates". This suggests that stealing is not part of an offence under article 276.

16. A request for additional information was made on 25th June, 2018 as follows:-

"In relation to Offence III involving having documents she was not authorised to have, please advise whether it was established that the documents in question were stolen and the respondent knew that the documents were stolen or was it established that the respondent had the document for the purpose of committing fraud."

A reply to that request was received dated 6th July, 2018 and stated as follows:-

"In reply to your enquiry regarding case III Kop 4/18... that the documents described at count III of the charges were taken by Katarzyna ŻYŁKA from the authorised holders. Katarzyna ŻYŁKA and Barbara Madej were flatmates, and the documents in the name of Barbara Madej described at count III of the charges were taken by Katarzyna ŻYŁKA as she moved out from the flat they shared in January 1998. In 1997 – 1998, Katarzyna ŻYŁKA worked for the Law Office of Krzysztof Seweryn, from which she took documents that belong to the Law Office, and which are described at count III of the charges."

17. Further additional information was requested by letter on 20th January, 2020 as regards compliance with article 15(2) of the Framework Decision and other matters raised by the respondent but no further information was requested or furnished in respect of the correspondence issue.

18. Counsel for the applicant submitted that the corresponding offence under Irish law was theft contrary to s. 4 of the Criminal Justice (Theft and Fraud Offences) Act, 2001, as amended ("the Act of 2001"), which provides as follows:-

"(1) Subject to section 5, a person is guilty of theft if he or she dishonestly appropriates property without the consent of its owner and with the intention of depriving its owner of it.

(2) For the purposes of this section a person does not appropriate the consent of its owner if-

(a) the person believes that he or she has the owner's consent, or would have the owner's consent if the owner knew of the appropriation of the property and the circumstances in which it was appropriated, or

(b) (except where the property came to the person as trustee or personal representative) he or she appropriates the property in the belief that the owner cannot be discovered by taking reasonable steps,

but consent obtained by deception or intimidation is not consent for those purposes.

(3)(a) This subsection applies to a person who in the course of business holds property in trust for, or on behalf of, more than one owner.

(b) Where a person to whom this subsection applies appropriates some of the property so held to his or her own use or benefit, the person shall, for the purposes of subsection (1) but subject to subsection (2), be deemed to have appropriated the property or, as the case may be, a sum representing it without the consent of its owner or owners.

(c) If in any proceedings against a person to whom this subsection applies for theft of some or all of the property so held by him or her it is proved that—

(i) there is a deficiency in the property or the sum representing it, and

(ii) the person has failed to provide a satisfactory explanation for the whole or any part of the deficiency,

it shall be presumed, until the contrary is proved, for the purposes of subsection (1) but subject to subsection (2), that the person appropriated, without the consent of its owner or owners, the whole or that part of the deficiency.

(4) If at the trial of a person for theft the court or jury, as the case may be has to consider whether the person believed—

(a) that he or she had not acted dishonestly, or

(b) that the owner of the property concerned had consented or would have consented to its appropriation, or

(c) that the owner could not be discovered by taking reasonable steps,

the presence or absence of reasonable grounds of such a belief is a matter to which the court or jury shall have regard, in conjunction with any other relevant matters, in considering whether the person so believed.

(5) In this section—

"appropriates", in relation to property, means usurps or adversely interferes with the proprietary rights of the owner of the property;

"depriving" means temporarily or permanently depriving.

(6) A person guilty of theft is liable on conviction on indictment to a fine or imprisonment for a term not exceeding 10 years or both."

19. It was submitted on behalf of the applicant that while the warrant and the additional information did not expressly refer to a person dishonestly appropriating property without

the consent of its owner and with the intention of depriving its owner of it, the Court could infer that such matters were inherent in the acts as set out in the warrant and additional information of 6th July, 2018. It was submitted that the Court could draw such inferences from the information furnished.

20. Counsel for the applicant submitted that the Court should look at the warrant in its totality and consider the acts said to constitute offence III in the context of the description given in the warrant of the acts said to constitute offences I and II. Emphasis was placed on the additional information of 6th July, 2018 to the effect that the documents were taken by the respondent from the authorised holders and thus the Court could infer that the respondent was not an authorised holder or otherwise entitled to possession of the documents. It was submitted that the Court could also infer that the documents had been dishonestly taken without the owner's consent and with an intent to deprive the owner thereof.
21. Section 2 of the Act of 2001 defines "dishonestly" as "*without a claim of right made in good faith*". It was submitted that the Court could infer dishonesty in respect of the appropriation of the documents when the matter was viewed in the context of the other two offences which involved the fraudulent use of another person's documents.
22. On behalf of the respondent, it was submitted that correspondence had not been established. Emphasis was placed upon the fact that the request for additional information dated 25th June, 2018 had specifically asked whether the documents in question were stolen, whether the respondent knew that the documents were stolen and whether it had been established that the respondent had the documents for the purpose of committing fraud. The reply from the issuing state had failed to confirm any of those matters. It was submitted that this was not an oversight on the part of the issuing state but rather indicated that the offence in question did not entail any of the concepts, facts or ingredients referred to in the request for additional information. It was submitted that on the basis of the acts said to constitute offence III in the warrant, such acts would not amount to an offence of theft under s. 4 of the 2001 Act or any other offence at Irish law.
23. In *Minister for Justice, Equality and Law Reform v. Dolny* [2009] IESC 48 Denham J., as she then was, stated at para. 38:-

"In addressing the issue of correspondence it is necessary to consider the particulars on the warrant, the acts, to decide if they would constitute an offence in the State. In considering the issue it is appropriate to read the warrant as a whole. In so reading the particulars it is a question of determining whether there is a corresponding offence. It is a question of determining if the acts alleged were such that if committed in this jurisdiction they would constitute an offence. It is not a helpful analogy to consider whether the words would equate with the terms of an indictment in this jurisdiction. Rather it is a matter of considering the acts described and deciding whether they would constitute an offence committed in this jurisdiction."

Denham J. referred to the well-established jurisprudence on the approach to be taken to the words and warrants under the Extradition Act, 1965 as amended, at para. 41:-

"Thus in Wilson v. Sheehan [1979] IR 423, at p. 429 Henchy J. stated:-

'When it comes to the words in the warrant by which the factual content of the specified offence is identified, the correct rule is that those words should prima facie be given their ordinary or popular meaning unless they are used in a context which suggests that they have a special signification.'"

Denham J. held that a similar approach may be taken to the words on a warrant issued under the Act of 2003 and that the Court may look at all the information provided, the facts and acts described, and give the words their ordinary and popular meaning. I approach the issue on that basis.

24. It is clear that a distinction exists between an offence under article 276 and an offence under article 275.1 or there would not be two separate and distinct offences. Article 275.1 concerns using, stealing or appropriating a document that confirms another person's identity or property title. Article 276 is not limited to documents confirming identity or property title, but neither does it involve stealing or appropriation. It is concerned with damaging, destroying, making useless, withholding, or removing a document which one is not entitled to keep at one's sole disposal. In the present instance, there is no suggestion of damaging, destroying or making useless. At s. (e) of the warrant it is stated that the respondent "kept hidden" a number of documents which she was not authorised to keep at her sole disposal. How these were hidden is not stated. In the additional information, it is stated that she took the documents from her former flatmate and former employer.
25. It should be noted that the documents referred to as regards offence III are different documents from those referred to in offences I and II. I am not convinced that the Court should necessarily infer from the description of offences I and II that dishonesty is necessary to establish offence III or that in fact there was a dishonest intention in removing the documents referred to in offence III.
26. It is not an offence in Irish law simply to remove or even hide documents belonging to another unless there is dishonesty (as defined in the Act of 2001) in the appropriation and an intention to deprive the owner thereof.
27. Despite being specifically asked whether the documents were stolen and whether the respondent knew that the documents were stolen or whether she had them for the purpose of committing fraud (presumably frauds similar to offences I and II), the issuing member state has not confirmed that any of those elements were present. The absence of such confirmation despite the request suggests that those elements were not present or at least tends against the Court drawing an inference that they were present. The fact that the offence under article 275.1 specifically refers to "*a person who uses, steals or appropriates a document...*" and the offence under article 276 makes no such reference to 'stealing' suggests that the features which one would normally associate with 'stealing' or

theft, and in particular dishonesty and an intention to deprive the owner thereof, may not be a requisite feature of an offence under article 276. In the warrant, offence III was expressly not included in the ambit of fraud or forgery unlike the other two offences, and the documents used in those offences were not the documents with which offence III was concerned. It must be borne in mind that in line with the reasoning of the Supreme Court in *Dolny*, this Court is not concerned with an analysis of the Polish offence but rather is required to look at the facts as set out by the issuing member state to see if the acts on the part of the respondent would constitute an offence under Irish law. However, in light of the differences between the various offences set out in the warrant, the Court is careful of drawing inferences from the facts concerning offences I and II in order to hold the necessary correspondence of offence III with the Irish offence of theft.

28. Counsel for the applicant has invited the Court to draw from the facts as set out in the warrant and additional information an inference of dishonestly appropriating the documents with an intention to deprive the owner so as to bring the acts as set out within the ambit of the offence of theft as defined in s. 4 of the Act of 2001. I am not satisfied that the drawing of such an inference in this matter is fair or reasonable. In particular, such an approach requires the Court to give little or no regard or weight to the declining of the issuing member state to confirm that the documents were stolen, that the respondent knew they were stolen or that she had them for the purposes of committing fraud. In all of the circumstances, I am not satisfied that the correspondence contended for by the applicant exists.
29. In general terms, with a limited exception in respect of revenue offences, s. 38 of the Act of 2003 prohibits the surrender of a person to an issuing state in respect of an offence unless the offence corresponds to an offence under the law of the State. I am not satisfied that such correspondence exists between offence III in the warrant and an offence at Irish law. I am advised by Counsel for both parties that it is agreed that unless correspondence can be made out in respect of all three offences referred to in the warrant an order for surrender should not be made.
30. It follows therefore that this Court must refuse to surrender the respondent.

Section 45 of the Act of 2003

31. Given the decision of the Court on the issue of correspondence, it is not necessary for the Court to determine the issue in respect of s. 45 of the Act of 2003. However, for the sake of completeness I will briefly set out the Court's view in respect of that issue.
32. In the present case, the respondent participated in the trial process until shortly before judgment was given, an appeal was taken at which she was not present but the outcome of which she was fully aware of and she subsequently engaged with the court process through her lawyer to obtain repeated deferrals of the sentence, including an appeal of the ultimate decision to refuse any further deferral. At no stage has the respondent sought to challenge before the Polish courts the validity of the decision of the appellate court to confirm her conviction and sentence, despite her lengthy engagement with the courts over the years since the sentence was affirmed on appeal. In such circumstances it

does not appear that any defence rights have in any way been breached or interfered with. Taking into consideration the totality of the information provided by the issuing member state in the warrant and in the additional information, I am satisfied that one could regard the requirements of s. 45 of the Act of 2003 as having been correctly indicated by the issuing Member state. Moreover on the basis of the reasoning of the High Court and Court of Appeal in *Minister for Justice and Equality v. Skwierczynski* [2018] IECA 204, I do not regard s. 45 of the Act of 2003 as prohibiting surrender in this case. Even if the facts do not fit neatly within the section D schedule as set out in s. 45 of the Act of 2003, there has been no unfairness as regards the respondent's fair trial rights and in such circumstances s. 45 of the Act of 2003 does not prohibit surrender.

33. In light of my findings on the correspondence issue I refuse the application for surrender.