

THE HIGH COURT

RECORD NUMBER 2015/13 EXT

BETWEEN

MINISTER FOR JUSTICE AND EQUALITY

APPLICANT

AND

ADAM JANUSZ OLEJKIEWICZ

RESPONDENT

JUDGMENT of Mr. Justice Paul Burns delivered on the 24th 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 11th December, 2006 ("the EAW"). The EAW was issued by Judge Wiesław Pędziwiatr of the Circuit Law Court at Świdnica as the issuing judicial authority. The EAW seeks the surrender of the Respondent to serve two sentences of (i) one year, eight months and eight days', and (ii) one year, 11 months and 21 days' imprisonment, respectively. The first sentence was a suspended sentence which was subsequently activated.
2. The EAW was endorsed by the High Court on 20th January, 2015, was executed by An Garda Síochána and the respondent was brought before the High Court on 15th April, 2015.
3. I am satisfied that the person before the Court is the person in respect of whom the EAW was issued. No issue was raised in this respect.
4. I am satisfied that the minimum gravity requirements of the European Arrest Warrant Act 2003, as amended ("the Act of 2003"), have been met. The respondent is sought to serve the terms of imprisonment as set out earlier.
5. I am satisfied that none of the matters referred to in ss. 21A, 22, 23 and 24 of the Act of 2003 arise and that the surrender of the Respondent is not prohibited for the reasons set forth therein.
6. The respondent delivered points of objection dated 17th June, 2015. At hearing, Counsel on behalf of the respondent indicated that she was pursuing two grounds of objection, viz:-
 - (a) surrender as regards sentence (ii) was prohibited under s. 38 of the Act of 2003 due to a lack of correspondence with one of the offences, in respect of which sentence (ii) had been imposed, and
 - (b) that surrender as regards both sentences was prohibited by reason of s. 37 of the Act of 2003 as it would be incompatible with the State's obligations under the European Convention on Human Rights ("the ECHR") and/ or the Constitution.

I will consider each of these objections in turn.

Correspondence

7. The surrender of the respondent is sought in order that he should serve two sentences of imprisonment, each of which was imposed in respect of two offences, so there are a total of four offences. Under Polish law, a number of similar offences may be treated as a single offence.
8. The first sentence is a two-year sentence imposed in respect of offences of robbery and attempted robbery on 17th March, 2003. This two-year sentence was imposed on 9th July, 2003 and suspended. It was activated on 7th October, 2005, and there is a period of one year, eight months and eight days remaining to be served in respect of same. The respondent takes no issue with correspondence as regards the offences which are the subject matter of this sentence.
9. The second sentence is a two-year, six-month sentence imposed in respect of an assault and attempted robbery on 8th November, 2003, and the offences are described as an offence against the institution of family and guardianship and an offence against life and health over two periods, viz. 15th November, 2002 to 18th March, 2003 and 18th June, 2003 to 20th October, 2003. There is a period of one year, 11 months and 21 days remaining to be served in respect of that sentence. The respondent takes no issue with correspondence as regards the offences of assault and attempted robbery, or the offence against life and health, but submits that there is no correspondence between an offence against the institution of family and guardianship and any offence under Irish law.
10. It is helpful to consider the details of the relevant offending as set out at part E. 2 of the EAW:-

"II. From November 15th 2002 to March 18th 2003 and from June 18th 2003 to October 20th 2003, in Wałbrzych, in the province of Dolny Śląsk, he displayed psychological and physical cruelty to his mother Lucyna Olejkiewicz, to his sister Marta Olejkiewicz and to his grandmother Albina Onyszczyk in the following ways: he raised rows and provoked fights at home during which he hurled insults at them, he demolished the flat by breaking the windows and destroying the furniture, he beat his mother by punching her, kicking her and strangling her with his bare hands. On 28.10.2003 he knocked his mother over on the floor and then he beat her on the head, he kicked her all over her body and he was strangling her. He inflicted on her the injuries such as the reddening of the skin on the neck, a bruise and swelling in the region of the left temple, a bruise on the left eyelid, bruises on the breasts and a bruise on the right thigh, which impaired the functioning of her bodily organs for a period of time not exceeding 7 days; this is an act from art.207 §1 of C. Pen. and art.157 § 2 of C.Pen. cum art.11 § 2 of C.Pen."
11. The nature and legal classification of the offences is set out at Part E. 3 of the EAW as:-
 - (a) art.280 § 1 of C. Pen. – an offence against property;

- (b) art.207 § 1 of C. Pen. – an offence against the institution of family and guardianship; and
- (c) art.157 § 1 of C. Pen. – an offence against life and health [maximum penalty two years' imprisonment, as per additional information 14th June, 2016].

Additional information received from the Polish authority dated 14th June, 2016 set out the relevant statutory provision as follows:-

"Art.207. §1. Anyone that physically or psychologically mistreats a person close to him/her, or another person in a permanent or temporary state of dependence to the offender, a minor or a person that is vulnerable because of his/her mental or physical condition shall be liable to imprisonment for a term between 3 months and 5 years."

- 12. Counsel on behalf of the respondent submits that in respect of the 'offence against the institution of family and guardianship', that there is no equivalent offence under Irish law and that the acts described would not be an offence under Irish law.
- 13. Counsel for the applicant submits that in accordance with the Supreme Court decision in *Minister for Justice Equality and Law Reform v. Dolny* [2009] IESC 48, the Court is not required to examine the particular words used in describing or naming the offence, but rather the Court must look at the conduct as set out in the warrant and determine whether such conduct would amount to an offence in this jurisdiction. She submitted that the relevant corresponding offences at Irish law were:-
 - (a) assault contrary to s. 2 of the Non-Fatal Offences against the Person Act, 1997 ("the Act of 1997");
 - (b) assault causing harm contrary to s. 3 of the Act of 1997; and
 - (c) criminal damage contrary to s. 2 of the Criminal Damage Act, 1991 ("the Act of 1991").

It should be noted that in the additional information dated 14th June, 2015, it was indicated that the premises which was damaged belong to the respondent's mother.

- 14. In *Dolny*, 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 if committed in this jurisdiction.”

15. On carrying out the exercise as directed in *Dolny* above, I am satisfied that the acts set out in the EAW and additional information would constitute offences if committed in this jurisdiction. The behaviour of the respondent towards his mother and grandmother amounts to assault contrary to s. 2 of the Act of 1997. As regards the provocation of fights and the hurling of insults in circumstances where windows were broken and furniture destroyed, the Court can reasonably conclude and/or infer that such behaviour would cause another to believe on reasonable grounds that she was likely to be immediately subjected to force or impact to her body without her consent. The physical beating of his mother clearly amounts to assault causing harm contrary to s. 3 of the Act of 1997. The damage to windows and furniture clearly amounts to criminal damage contrary to s. 2 of the 1991 Act.
16. I dismiss the respondent’s objection on grounds of lack of correspondence.

Section 37 of the Act of 2003

17. On behalf of the respondent it is submitted that surrender is prohibited by s. 37 of the Act of 2003, as such surrender would be incompatible with the State’s obligations under the ECHR and/or the Constitution. Emphasis is placed upon the following facts: -
- (a) the offences occurred between 2002 and 2003;
 - (b) the sentences were imposed between 2003 and 2005;
 - (c) the EAW was issued on 11th December, 2006;
 - (d) the respondent has been living in Ireland since 2007, having initially moved from Germany in 2004;
 - (e) the respondent has been in employment for most of his time in Ireland; and
 - (f) the respondent is the father of a daughter born in Ireland in 2009.

The respondent swore three affidavits herein dated 30th July, 2015, 31st July, 2015 and 13th June, 2016 respectively. The solicitor for the respondent, Caroline Butler, swore an affidavit herein on 18th June, 2020.

18. On behalf of the respondent, it is submitted that he has established a private and family life here in Ireland and that his surrender to Poland at such a far removed time from the offences and sentences in question would constitute an unjustified interference with his right to a private and family life pursuant to article 8 of the ECHR.
19. Counsel on behalf of the respondent further submitted in unequivocal terms that in *Minister for Justice and Equality v. Vestartas* [2020] IESC 12, the Supreme Court recognised a new and stand-alone prohibition on the surrender of a requested person where the issuing member state did not provide a mechanism whereby the proportionality

of the serving of the sentence could be adjudicated upon in judicial proceedings. It was submitted that the issuing member state had given no indication that such a mechanism would be available to the respondent and that, in such circumstances, surrender had to be refused.

20. Counsel on behalf of the applicant submitted that no such principle had been enunciated in *Vestartas*. It was submitted, moreover, that the circumstances put forward by the respondent were in no way sufficient to raise any likelihood that surrender would amount to a breach of his rights under article 8 of the ECHR. It was pointed out that the respondent did not reside with his daughter. It was emphasised that the respondent was to a large extent responsible for any lapse of time in so far as he had left Poland in circumstances where he had to serve a term of imprisonment and made no effort to address this over the years. Indeed, he had contributed significantly to the lapse of time in respect of the European arrest warrant proceedings in this jurisdiction as he had broken the terms of his bail, had failed to appear in court and a bench warrant had to be issued.
21. In *Vestartas*, the surrender of Mr. Vestartas was requested by the Republic of Lithuania to serve the remainder of a prison sentence due to a breach of his parole conditions. Mr. Vestartas was born in 1989. The offences were committed between 2003 and 2006. He had been released on parole in 2009 and his parole was revoked in 2011. Mr. Vestartas came to Ireland in late 2011 or 2012. The European arrest warrant was issued in 2013 and a replacement warrant was issued in 2016. Mr. Vestartas and his partner had made a life in Ireland for themselves and their two children who were Irish citizens. Both he and his partner were in employment and the children were well settled. The High Court had refused surrender following a form of proportionality analysis of the offences, the sentence, delay and family circumstances. The Supreme Court overturned the High Court decision emphasising that only in the most exceptional or egregious cases would delay alter the public interest in surrender. The Supreme Court emphasised that the High Court is not to engage in a balancing exercise where public and private interests are placed equally on the scales. The Supreme Court found no exceptional article eight factors such as would bring the case within the parameters of exceptionality where the public interest in surrender would be outweighed by article eight rights.
22. It should be noted that it was a feature of *Vestartas* that the issuing member state had indicated that Mr. Vestartas had not been served personally with the decision of the Lithuanian court revoking his parole in 2011, but that he would be served with a copy of same upon surrender and would have seven days within which to request a retrial or appeal which would allow the merits of the activation of sentence to be re-examined and could lead to the original decision being reversed. The Supreme Court appeared to take a certain degree of comfort from the existence of such a mechanism and at para. 96, MacMenamin J. stated:-

"Were it to be the situation that, on surrender, the respondent would be entirely shut out from raising these circumstances, this might be a different case. Arguably, such a preclusion would be a denial of fundamental rights."

Referring to the availability of an appeal, MacMenamin J. further stated at paras. 98-100:-

"These are important considerations regarding future compliance with fundamental rights in the event of the respondent's surrender. There is no evidence that the respondent would be precluded from raising any or all of the features of the case in the courts of the Republic of Lithuania.

On the basis of s. 4A of the 2003 Act, recited at para. 30 earlier, and in the absence of any contrary evidence, this Court must presume compliance with the Framework Decision and the protections it contains. It must presume that any determination in Lithuania of what part, if any, of the balance of the sentence the respondent will now have to serve after a substantial lapse of time will be a judicial decision, following a proceeding where the respondent will be able to fully exercise his rights of defence, or mitigation, in an effective manner and thereby influence any final decision which could potentially lead to loss of freedom.

*No case has been made out that, on surrender, a new hearing as to sentence or penalty in the Lithuanian courts will have any predetermined outcome; rather, it will be decided on the basis of the facts then adduced (see, *Tupikas* (Case C-270/17; 10th August 2017) at paras. 78-80, and *Ardic* (Case C-571/17 PPU; 22nd December, 2017 at para. 76)."*

23. I am not convinced that the judgment in *Vestartas* goes as far as is submitted on behalf of the respondent. While it was a factor in that case that the issuing member state had indicated that Mr. Vestartas would have an entitlement to an appeal, I do not read the judgment as holding that in the absence of such an appeal mechanism, surrender would necessarily have been refused. Nor do I take the judgment as holding that it is a prerequisite to surrender for the purposes of serving a sentence, or part thereof, that the issuing member state must provide such an appeal or review mechanism by a court. For instance, a member state may provide for an application to a parole board or periodic review by such board, which while not a judicial entity, may nevertheless provide sufficient protection of a requested person's rights. However, before such considerations could arise in a particular case which would warrant the Court embarking on an enquiry in respect of same, the respondent would have to adduce cogent evidence that there was a real risk that his article eight rights would be breached if surrendered.
24. As regards the activation of a suspended sentence, it is worth noting that the Supreme Court in *Minister for Justice and Equality v. Lipinski* [2018] IESC 8, (based on the decision of the Court of Justice of the European Union in *Ardic*, Case C-571/17 PPU), confirmed at para. 3.7:-

" It is clear, therefore, that a hearing at which a suspension of sentence is revoked on grounds of infringement of conditions attaching to that suspension is not considered to be part of a 'trial resulting in the decision' for the purposes of the Framework Decision unless the revocation decision changes 'the nature or the level of the sentence initially imposed'. If the consequence of the revocation is to alter the sentence originally imposed then different considerations may apply."

Thus, if a requested person had been present at the hearing at which the sentence had been initially imposed, there was no requirement that the warrant set out the various matters as indicated in article 4A of the Council Framework Decision dated 13th June, 2002 on the European Arrest Warrant and the Surrender Procedures Between Member States ("the Framework Decision") or s. 45 of the Act of 2003, including matters relating to retrial or appeal.

25. It is also worth noting that article 4A of the Framework Decision and s. 45 of the Act of 2003 only require an issuing member state to inform a requested person of his right to a retrial or appeal, following surrender in circumstances where he did not appear at the trial resulting in the decision and he was not personally served with the decision, i.e. the initial decision imposing the sentence of imprisonment as opposed to the activation of a suspended sentence, as per *Lipinski*. It appears therefore, that when surrender is sought to serve an activated sentence in circumstances such as in *Lipinski*, article 4A of the Framework Decision does not envisage a requirement to inform of a right of appeal or re-hearing because there is no such automatic right. I do not consider the decision in *Vestartas* as seeking to establish a right of appeal in such cases. Nor do I consider the decision as seeking to establish a right of appeal in all cases where surrender is sought to serve a sentence.
26. I read the judgment in *Vestartas*, not as setting a prerequisite that, in all cases where surrender is sought to serve a sentence, the issuing member state must provide for a right to have some form of judicial appeal or review as regards the proportionality of being required to serve the sentence, but rather as leaving open the possibility that in certain limited cases, where cogent evidence has been adduced to support the contention that there is a real risk of a breach of a requested person's article 8 ECHR rights, the absence of a judicial appeal or review mechanism might possibly lead to a refusal to surrender.
27. In the present case, the respondent has failed to adduce any cogent evidence of a risk that his rights under article 8 of the ECHR will be breached by surrender to the issuing member state. It is an unfortunate reality that a sentence of imprisonment will undoubtedly disrupt the family life of the offender and members of his family. The sentences in question meet the minimum gravity requirements under the Framework Decision. The lapse of time in this case and the circumstances outlined by the respondent in his affidavits and that of his solicitor come nowhere near establishing the truly exceptional or egregious circumstances envisaged by the Supreme Court in *Vestartas* as

constituting a real risk that the respondent's article 8 ECHR rights will be breached, such as would justify this Court in refusing surrender.

28. I dismiss the respondent's objection pursuant to s. 37 of the Act of 2003.
29. I am satisfied that the surrender of the respondent is not prohibited by any of the provisions of part three of the Act of 2003.
30. It follows from the foregoing that this Court will make an order pursuant to s. 16 of the Act of 2003 for the surrender of the respondent to Poland.