

THE HIGH COURT

RECORD NUMBER 2019/193 EXT

BETWEEN

MINISTER FOR JUSTICE AND EQUALITY

APPLICANT

AND

DARIUSZ FLORCZAK

RESPONDENT

Judgment of Mr. Justice Paul Burns delivered on the 7th day of October, 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 2nd April, 2019 ("the EAW") issued by Agnieszka Szeliga, Judge of the Circuit Court in Łódź, as the issuing judicial authority. The surrender of the respondent is sought to try him for offences of swindling and organised/armed robbery.
2. The EAW was endorsed by the High Court on 6th June, 2019 and the respondent was arrested and brought before this Court on 9th June, 2019.
3. I am satisfied that the person before the Court is the person in respect of whom the EAW 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 and 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. I am satisfied that the minimum gravity requirements of the Act of 2003 are met. The offences in respect of which surrender is sought carry a maximum penalty of 8 years' imprisonment in respect of the swindling offence and 15 years' imprisonment in respect of the robbery offence.
6. At part E of the EAW it is certified that the offences referred to therein fall within article 2(2) of the Council Framework Decision dated 13th June, 2002 on the European Arrest Warrant and the Surrender Procedures between Member States, as amended ("the Framework Decision"), and the relevant boxes are ticked for "swindling", and "organised or armed robbery". 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 EAW and an offence under Irish law, where the offence in the EAW is an offence to which article 2(2) of the Framework Decision applies and carries a maximum penalty of at least 3 years' imprisonment. In this instance, the issuing judicial authority has certified that the offences carry a penalty of at least 3 years' imprisonment and are offences to which article 2(2) of the Framework Decision applies and has indicated same by ticking the relevant boxes at part E of the EAW as aforesaid. There is nothing in the EAW that gives rise to any ambiguity or perceived manifest error, such as would justify this Court in looking behind the certification in the EAW. Nevertheless, for the sake of completeness I point out that I am satisfied on reading the EAW as a whole that correspondence clearly exists in respect of the offences in the EAW and offences under Irish law.

7. The details of the alleged offences are set out in the EAW as follows:-

"Offence I: In the period from 10 September to 2 October 2001 in Łódź, the suspect Dariusz Florczak, together and in contact with Jarosław Rakowiecki, Paweł Brocki, Sławomir Pisarek, and other unascertained individuals, with intent to obtain financial advantage caused Andrzej Pawelec to adversely dispose of his property being PLN 20,000 (twenty thousand zloty) worth of cash received from the victim for return of art pieces and other items previously stolen to his prejudice in effect of the offence of burglary committed on 10 September 2001.

Offence II: In the period from mid-October of 2003 to mid-November of 2003, on the route in the vicinities of the village of Teodorów, Łódzkie Region, the suspect Dariusz Florczak, together and in contact with Jarosław Rakowiecki, Krzysztof Jaszczyk, Jacek Lewandowski, and Adam Słociński, after having used violence on Włodzimierz Najder, i.e. after having beaten and kicked him all over the body and threatened to kill him with an unascertained type of firearm, stole from him PLN 100,000 (one hundred thousand zloty) worth of cash and Włodzimierz Najder's ID card."

8. The respondent filed points of objection to his surrender dated 16th October, 2019, which can be summarised as follows:-

- (a) that surrender was prohibited by 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 by virtue of:-
- (i) deficiencies in the Polish justice system, meaning that there was a real risk that the respondent's fair trial rights under article 6 of the ECHR would be violated, and/or
 - (ii) the delay between the date of the alleged offences and the execution of the EAW, which meant that the respondent's right to a family life under article 8 ECHR would be violated;
- (b) that surrender was prohibited by s. 38 of the Act of 2003 as there was no correspondence between the offences referred to in the EAW and offences under the law of the State.

9. At hearing, counsel for the respondent did not pursue any submission in respect of the lack of correspondence between the offences referred to in the EAW and offences under the law of the State.

10. As regards the objection to surrender based upon alleged deficiencies in the Polish justice system, counsel on behalf of the respondent accepted that the applicable law is as set out in the judgment of the Court of Justice of the European Union ("the CJEU") in *LM Case C-216/18 PPU* (2018) and in the judgment of the Supreme Court in *Minister for Justice and Equality v. Celmer* [2019] IESC 80. In *LM*, the CJEU accepted that, in principle, a member state could refuse surrender on foot of a European arrest warrant in circumstances where

there was a real risk that the person, if surrendered, would suffer a breach of his fundamental right to an independent tribunal and, thus, a breach of the essence of his fundamental right to a fair trial. However, the CJEU emphasised that it was not sufficient for the requested person to point to systemic or generalised deficiencies regarding the independence of the issuing member state's courts, but rather that he or she would have to demonstrate that there were substantial grounds for believing that the individual requested would run a real risk of a breach of his/her right to a fair trial. In *Celmer*, O'Donnell J. set out the position as follows at para. 40:-

"However, the court pointed out that under the Framework Decision, surrender can only be suspended generally, if the European Council was to adopt a decision under Article 7(2) TEU that there was a serious and persistent breach in the issuing Member State of the principles set out in Article 2 TEU. So long as such a decision had not been adopted, then it was only in exceptional circumstances that a court could refuse to surrender, and that was where the authority found, after a specific and precise assessment of the particular case that there were substantial grounds for believing the person in respect of whom the European arrest warrant had been issued would, following a surrender to the issuing judicial authority, run a real risk of breach of his fundamental right to an independent tribunal and, therefore, of the essence of his fundamental right to a fair trial. This assessment required the executing authority to examine, in particular, to what extent the systemic or generalised deficiencies regarding independence of the issuing Member State's courts were liable to have an impact at the level of that state's courts with jurisdiction over the proceedings to which the requested person would be subject (para.74). If so, the assessment must consider, in light of any information supplied by the individual, and any concerns expressed by him or her, whether there are substantial grounds for believing that, having regard to his or her personal situation, and the nature of the offence charged, he or she will run a real risk of a breach of the fundamental right to a fair trial (para.75)."

11. In his affidavit, dated 5th June, 2020, the respondent expressed his concern regarding recent reforms in Poland and exhibited a report entitled "Justice under pressure – repressions as a means of attempting to take control over the judiciary and the prosecution in Poland Years 2015-2019", drawn up by judges from the "Lex Super Omnia" Polish Judges' Association and by a prosecutor from the Association of Prosecutors. However, counsel for the respondent had to concede that he was not in a position to adduce any evidence concerning any specific risk or prejudice which the respondent was likely to suffer in terms of any deficiency in the Polish justice system. In the absence of any such evidence, I dismiss the respondent's objection to surrender based upon alleged deficiencies in the court system of Poland.
12. The respondent swore two affidavits. The first affidavit, dated 18th September, 2019, dealt with bail matters. The second affidavit, dated 5th June, 2020, dealt with his objection based upon delay and article 8 ECHR family rights. The offences were alleged to have occurred between October 2001 and November 2003, approximately 16 to 18 years

previously. He is approximately 48 years old. He averred that he had never been questioned about the offences referred to in the EAW and that he had served a period of detention in Poland in 2006, in the course of which he had been treated at a psychiatric hospital. He was divorced in June 2006. He has a son from that relationship who was born in January 1998 and has a daughter from his current relationship who was born in 2002. He first came to Ireland in December 2007 to find employment and has returned to Poland on a number of occasions without ever being questioned about the alleged offences. He has been in employment in Ireland since 2007, has married since arriving in Ireland and lives with his wife and daughter in Ireland. His wife has a medical condition arising from an injury to her back. His daughter hoped to commence university in the autumn of 2020. His son was living with him in Ireland since 2010 until 2019 when he moved out following the birth of twins, the respondent's grandchildren. The respondent stated that he provided some financial support to his son and also assisted with childcare. He stated that he suffered from high blood pressure for which was on medication and which was exacerbated by stress from the proceedings herein. He expressed his concern regarding recent reforms in Poland and exhibited a report entitled "Justice under pressure – repressions as a means of attempting to take control over the judiciary and the prosecution in Poland. Years 2015-2019", drawn up by judges from the "Lex Super Omnia" Polish Judges' Association and by a prosecutor from the Association of Prosecutors. As regards delay, he stated that he was particularly concerned at the unusual and unexplained delay in these proceedings, as well as the effect that this will have on both his right to a fair trial and his ability to properly defend himself. He stated that he had engaged a defence counsel in Poland to access the case records in respect of the offences to which the EAW relates, but such access had been refused, apparently because of "... *fact that the suspect remained in hiding for a long time and due to the lack of his pleading in this case ... the release of records at this stage could result in significant impediment in the course of the proceedings*".

13. As regards the refusal of the Polish authorities to allow the respondent's Polish representative access to the case papers, the Polish Prosecutor's Office set out its reasoning as follows:-

"On 20th of September 2019 this Prosecutor's Office received an application lodged by the defence counsel of the suspect Dariusz Florczak – Michal Pietruszka, Barrister for access to case records in case X Ds. 48/14 and to serve the decision to prosecute.

Despite the fact that the European arrest warrant was issued on the 2nd of April 2019 and despite the lengthy search conducted by the law enforcement authorities, the suspect Dariusz Florczak was not apprehended until the 9th of September 2019 in the Republic of Ireland and has not yet been surrendered to the Republic of Poland. Due to the above, the suspect has not yet heard the charges in case number X Ds. 48/14.

Due to the fact that the suspect remained in hiding for a long time and due to the lack of his pleading in this case, the release of records at this stage could result in significant impediment in the course of the proceedings. As far as the serving to the Defence of the decision to prosecute one should keep in mind that the action of prosecuting consists of three elements: the issuing of the decision to prosecute, the immediate presenting of same to the suspect and the interrogation of the suspect. Given this, in order for the preparatory proceedings to go from in rem to in personam it will not suffice only to issue the decision to prosecute but it is also necessary to present it to the suspect (Supreme Court decision dated 16 January 2009, IV Criminal Code 256/08, Supreme Court Jurisdiction, Law and Prosecution 2009, issue no. 6, rule 26, with an approving gloss by R. A. Stefanski, Law and Prosecution 2009, issue no. 9, pp. 152 – 158).

Due to the above the sending to the Defence of the decision to prosecute before it is presented to the suspect would have adverse effects on the preparatory proceedings already in motion.

In order to protect the correct running of the investigation it is hereby decided to refuse the Applicant access to case records and to refuse to serve the decision to prosecute as stated hereinabove."

14. Counsel on behalf of the respondent submitted that, given the long delay in the matter, the refusal of the prosecutor to make the case papers available and the fact that the respondent had established a family life in Ireland as set out in his affidavit, the Court should refuse surrender, or conduct an enquiry into the reasons for the delay, and if not satisfied with same, then refuse to surrender.
15. Counsel on behalf of the applicant referred the Court to part F of the EAW which stated: -

"The Prokuratura Okręgowa w Łodzi (Circuit Prosecution Service in Łódź) is investigating in the case number X Ds 48/14 (previous case number Ap V Ds 48/14). The investigation is based on the evidence severed from the case number Ap V Ds 47/14 of the former Prokuratura Apelacyjna w Łodzi (Appellate Prosecution Service in Łódź) (previous case number Ap V Ds 35/11). In the course of the said investigation it was decided to bring charges against Darius Florczak for the offence within Article 286 section 2 of the Criminal Code and the offence within Article 280 section 2 of the Criminal Code read together with Article 275 section 1 of the Criminal Code read together with Article 11 section 2 of the Criminal Code. On 20 October 2014 the case number Ap V Ds. 48/14 was suspended, since the suspect was not linked to his registered place of residence, and the attempts to arrest him were inconclusive, as were the local searches for him. On 16 October 2017 the Prosecutor of the Prokuratura Okręgowa w Łodzi (Circuit Prosecution Service) requested the Sąd Rejonowy dla Łodzi-Śródmieścia w Łodzi (District Court for Łódź-Śródmieście in Łódź) to order the suspect Darius Florczak to be provisionally detained for 30 (thirty) days after the date of his apprehension. On 31 October 2017 the Sąd Rejonowy dla Łodzi-Śródmieścia w Łodzi (District Court for Łódź-

Śródmieście in Łódź) ordered the suspect Darius Florczak to be provisionally arrested in the case number IV1 Kp 458/17 for 30 (thirty) days after the date of his apprehension. On 17 November 2017 the Prosecutor ordered the suspect wanted on an arrest warrant in the case number X Ds. 48/14. The searches for the suspect in Poland have been inconclusive.

The latest diffusion from the Police suggests that the suspect is residing at Old Kilcullen Road – Hotel Kilashee House, Naas, Ireland.

Also, Darius Florczak is wanted internationally on the request of the Sąd Okręgowy w Łodzi (Circuit Court in Łódź) in the case number IV Kop 36/13.”

16. Counsel on behalf of the applicant submitted that it was clear from the above that the investigations into the offences in question have been ongoing for a number of years and that since 2014, the Polish authorities had been unable to apprehend the respondent as he had left the country. It would seem that on receiving information, the respondent was residing at an address in Ireland and the Polish authorities issued the EAW to have him surrendered. It was further submitted that there is nothing contained within the documents or information before the Court to suggest that there was any improper or sinister element to the lapse of time in this matter. The respondent was sought for prosecution, and therefore can argue any points in respect of delay and/or unfairness before the Polish courts. The Court was referred to *Minister for Justice v. Schoppik* [2018] IEHC 584, where a delay of over 21 years was not regarded as a reason to refuse surrender in respect of tax offences. The Court notes that Schoppik was a situation where the requested person was sought to serve a sentence and where a previous European arrest warrant had been issued.
17. In *Minister for Justice and Equality v. Vestartas* [2020] IESC 12, the Supreme Court considered at length the extent to which delay and/or article 8 ECHR rights could impact upon the issue of surrender in the context of a European arrest warrant. The Supreme Court emphasised that pursuant to s. 4A of the Act of 2003:-

“It shall be presumed that an issuing state will comply with the requirements of the Framework Decision, unless the contrary is shown.”

18. The Supreme Court explained how that provision concerns the duties and obligations of an issuing state concerning the manner in which it will deal with the person, if surrendered, and after surrender has taken place. If there is cogent evidence of non-compliance, then issues may arise which an Irish court might have to address. However, a mere assertion of non-compliance, or the possibility of non-compliance, will not be sufficient to dislodge the presumption. The presumption applies to all applications, whether the form of defence arises under the Constitution or the ECHR, as per para. 31. At para. 86, the Supreme Court also pointed out that the question of the passage of time from the commission of an offence no longer forms an express part of the Act of 2003. Lapse of time was not to be viewed in isolation. At para. 89 of the judgment, MacMenamin J. stated:-

"Though a matter of legitimate concern, in this case the delay is to be viewed against the respondent's private and family circumstances. Unless truly exceptional or egregious, delay will not alter the public interest, although there may come a point where the delay is so lengthy and unexplained as to constitute an abuse of process, or to raise other constitutional or ECHR issues."

19. While there has been a considerable lapse of time since the alleged commission of the offences, I do not regard this in itself as being truly exceptional or egregious so as to be so lengthy and unexplained as to constitute an abuse of process, or to raise other constitutional or ECHR issues. The respondent left Poland in 2007. The decision to prosecute him appears to have been taken in 2014. Despite efforts to locate the respondent, his whereabouts appear to have been unknown to the Polish authorities until shortly before the issuing of the EAW. The surrender of the respondent is sought to face trial. Any issues he has in relation to delay and/or a fair trial can be raised in the course of those proceedings in Poland. No cogent evidence pertinent to the respondent's circumstances has been adduced to dislodge the presumption contained in s. 4A of the Act of 2003 that the issuing state will comply with the Framework Decision, including respect for fundamental rights and fundamental legal principles as enshrined in article 6 of the Treaty on the European Union.

20. In *Vestartas*, MacMenamin J. stated at para. 94:-

"The contrast with the exceptional facts in J.A.T. is plain. For an Article 8 defence to succeed, it can only be on clear facts based on cogent evidence. The evidence must be sufficient to rebut the presumption contained in s. 4A of the Act (see, para. 41 above). The circumstances must be shown to be well outside the norm; that is, truly exceptional. In the words of s. 37(1), they must be such as would render an order for surrender 'incompatible' with the State's obligations under Article 8 of the ECHR. This would necessitate that the incursion into the private and family rights referred to in Article 8(1) was such as to supervene the limitations on the right contained in Article 8(2), and over the significant public interest thresholds set by the 2003 Act itself."

21. I find that the family circumstances of the respondent, as set out in his affidavit dated 5th June, 2020, fall far short of being exceptional or so well outside the norm so as to be truly exceptional, such as would justify this Court in refusing surrender on the grounds that surrender would be incompatible with the State's obligations under the ECHR or the Constitution. The family circumstances of the respondent appear to me to be relatively normal. It is an unfortunate fact of life that being accused of and tried for an offence will be disruptive of family life and stressful for both the accused and family members. There is nothing contained within the affidavit of the respondent as regards his family circumstances, looked at alone or in conjunction with the lapse of time, to take this matter out of the norm.

22. I have considered whether the documentation or information provided to the Court is not sufficient to enable the Court to perform its functions under the Act of 2003, so as to

require me to seek additional information or documentation in accordance with s. 20 of the Act of 2003. I do not regard the documentation or information as insufficient in that regard. While the information provided in relation to the course of the proceedings is limited as regards the lapse of time, I do not find the limited nature of same insufficient for the purposes of determining the issues raised herein.

23. I dismiss the respondent's objections to surrender based on delay and/or his family rights.
24. I am satisfied that the respondent's surrender is not prohibited by part 3 of the Act of 2003.
25. It follows that this Court will make an order pursuant to s. 16(1) of the Act of 2003 for the surrender of the respondent to Poland.