

**THE HIGH COURT**

[2021] IEHC 508  
[2021 No. 051 EXT]

**BETWEEN**

**THE MINISTER FOR JUSTICE**

**APPLICANT**

**AND**

**DANIEL TOMASZ MARKIEWICZ**

**RESPONDENT**

**JUDGMENT of Mr. Justice Paul Burns delivered on the 14th day of July, 2021**

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 25th August, 2020 ("the EAW"). The EAW was issued by Judge Dariusz Lubowski of the Regional Court in Warsaw as the issuing judicial authority.
2. The EAW seeks the surrender of the respondent in order to enforce a sentence of two years' imprisonment imposed on 13th December, 2016 of which one year, 11 months and 16 days remains to be served.
3. The respondent was arrested on foot of a Schengen Information System II alert and brought before the High Court on the 16th March, 2021. The EAW was produced to the High Court on the 25th March, 2021.
4. 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.
5. I am 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 for consideration in this application and surrender of the respondent is not precluded for any of the reasons set forth in any of those sections.
6. 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 in excess of four months' imprisonment. The two-year sentence imposed upon the respondent on 13th December, 2016 was initially suspended but subsequently activated by order dated 6th February, 2018, due to the failure on the part of the respondent to fulfil the conditions of his probation.
7. Part E of the EAW indicates that it relates to 18 offences in total. Sixteen of these offences relate to the theft of bicycles. Offences 17 and 18 are described as follows:-

*"17. In Warsaw, on 16.07.2013, in a flat no 34 at 29 Łomżyńska Street, he was hiding documents such as: driving licence with the name of Damian Poplawski, driving licence for the name of Kazimierz Chojnacki, identity card for the name of Kazimierz Chojnacki, identity card for the name Sylwia Dąbrowska, identity card with the cut-off corner for the name of Krystyna Chojnacka;*

18. *Not earlier than on 04.07.2013 and up to 16.07.2013, in the flat no 34 at 29 Łomżyńska Street in Warsaw, there he made preparation to forge 130 pieces of prescriptions to be used as authentic."*

8. Part D of the EAW indicates that the respondent was not present at the trial when the judgment was issued but that he had been notified about the trial date and was represented by a counsel of his own choice in the course of the proceedings. The judgment was not appealed. Initially, an issue was raised in respect of s. 45 of the Act of 2003. However, the respondent's Polish solicitor confirmed that he was present on 13th December, 2016 and the issue in relation to s. 45 of the Act of 2003 was not pursued. I am satisfied that the requirements of s. 45 of the Act of 2003 have been complied with.
9. The respondent objects to surrender on the following grounds:-
- (i) surrender is precluded by reason of s. 38 of the Act of 2003; and
  - (ii) surrender is precluded by reason of s. 37 of the Act of 2003.
10. The respondent swore an affidavit dated 28th April, 2021 in which he avers that he was previously surrendered from the United Kingdom ("the UK") to Poland on foot of a European arrest warrant for the same offences, the subject matter of this EAW. He avers that he was arrested in Kent, England on 3rd August, 2015 and detained in custody on remand until a date in June 2016. He avers that he believes that he was arrested in the UK in or around March 2015, whilst on remand serving a sentence for offences committed in England, and that he stayed in custody until May 2015 on foot of both the earlier European arrest warrant and the English offences. He believes he may have been released as a result of inadvertence on the part of the UK authorities. In any event, he was re-arrested on 3rd August, 2015. He avers that his Polish solicitor has confirmed that he was surrendered to Poland in June 2016 and spent approximately two weeks in pre-trial custody until released subject to suspended sentence. He avers that the principal requirement of his suspended sentence was to address addiction issues and undergo psychiatric assessment. He avers that he met with the psychiatrist prior to leaving to go to Ireland and was informed that there was no bar to him moving to Ireland. He avers that he presented himself for questioning at the Polish Embassy in Dublin in December 2016 in respect of an unrelated bicycle theft investigation.

### **Section 38 of the Act of 2003 – Correspondence**

11. Counsel on behalf of the respondent submits that correspondence, or 'double criminality' as it is sometimes referred to, cannot be established between offences 17 and 18 in the EAW and offences under the law of this State. He submits that offence 17, as described in the EAW, consists of hiding documents and that this would not constitute an offence if carried out in this jurisdiction. He referred the court to *Minister for Justice and Equality v. Witek* [2021] IEHC 196, where the court found a lack of correspondence between the circumstances between the acts stated to have constituted the same offence of hiding documents as in the present case, and any offence under Irish law.

12. By additional information dated 2nd June, 2021, it is indicated that on 16th July, 2013, police officers went to the respondent's flat to detain him and, in the course of same, called upon him to surrender anything that had been acquired illegally or the possession of which was unlawful. The respondent stated he had no such things and a search was carried out. As a result of the search, they found the documents referred to at offence 17 in the EAW as well as a black clutch bag containing four doctor's certificate forms stamped with a name stamp of Andrzej Kaczorowski and two prescription forms with the same name stamp, 15 prescription forms stamped with CM LIM, which is a medical centre, 25 prescription forms stamped with a CM LIM stamp and 84 unstamped prescription forms. In the course of an examination, the respondent stated that Sylwia Dabrowska had left her ID card at his place, Damien Poplawski had left his driving licence, and the ID cards under the names of Krystyna Chojnacka, Kazimierz Chojnacki and the driving licence under the name of Kazimierz Chojnacki had been found by the respondent. He stated that he had found the clutch bag containing the prescription forms on a bus. In the course of another examination, the respondent admitted to having committed all of the acts imputed to him and voluntarily submitted to a penalty. Andrezej Kaczorowski was examined in the course of the proceedings and he testified that he was a doctor with the Lux-Med Group and he recognised the prescriptions and doctored certificates and stated that they were no longer valid because they were using a different stamp now and that the prescriptions ceased to be valid by the end of 2012. He further testified that the room where he had kept the prescriptions had been burgled.
13. The additional information dated 2nd June, 2021 explains that under Article 276 of the Polish Penal Code, it is an offence, among other things, to hide a document to which the offender has no exclusive right of possession. Hiding should be interpreted as a perpetrator's action who intentionally makes it unavailable to the people who have the right to possess and want to use it. While the respondent has said that he found the documents, he did not forward the documents to the appropriate institution and there was no indication that he contacted Krystyna Chojnacka and Kazimierz Chojnacki, who did not know where their documents were. The respondent admitted to having committed the act he was charged with, namely hiding those documents and agreed to a custodial penalty for that act.
14. The additional evidence also refers to offence number 18, in relation to the prescriptions, and explains that anyone who forges, counterfeits or alters a document with the intention of using it as authentic, or who uses such a document as authentic, commits an offence and anyone who makes preparations for that offence also commits an offence. Acquisition of forms and official stamps is regarded as preparations for committing the offence.
15. The additional information also confirms that while the court imposed individual penalties for offences, it combined those penalties and an aggregate penalty of two years' imprisonment was imposed. It is no longer possible to indicate what penalty of imprisonment would have to be served if either of offence 17 or 18 were to be excluded.

16. The additional information also confirms that the time spent in custody by the respondent in the UK from 9th September, 2015 to 16th June, 2016 will be credited against the penalty. The time spent in custody in the UK from 2nd August, 2015 to 16th June, 2016 was to be credited but 38 days of that period was time served in respect of a penalty for an offence committed in the UK.
17. In relation to offence number 17 in the EAW, the additional information dated 2nd June, 2021 provides further information regarding the commission of offence number 17. It is clear that the essence of the offence, and indeed the conduct in question, was the hiding of a document to which the respondent had no exclusive right to possession. While the respondent's explanations as to how the documents came to be at his place of residence may be lacking in credibility, the fact is that there was no evidence before the court in Poland that he had stolen same or that he knew same were stolen. Similarly, there is no direct evidence of that in the description of the offence set out in the EAW or the additional information. Counsel on behalf of the applicant accepted that there is insufficient material before the Court which would allow the Court to infer that the respondent had in fact stolen the documents or that the actions alleged against him would constitute handling stolen property under the law of this State. The fact of the matter was that he was charged with hiding the documents, he admitted hiding the documents and it was unnecessary for any further circumstances surrounding same to be established.
18. I am not satisfied that correspondence has been established between offence number 17 in the EAW and an offence under the law of the state.
19. It is been agreed between the parties that the sentence in question is an aggregate sentence which, as the additional information confirms, cannot be disentangled in respect of each or any particular offence to which it relates. It is also agreed that unless correspondence can be established in respect of all the offences, then surrender must be refused in line with the decision of the Supreme Court in *Minister for Justice, Equality and Law Reform v. Ferenca* [2008] IESC 52,.
20. Accordingly, as I am not satisfied that correspondence can be established between offence number 17 to which the EAW relates and an offence under the law of the State, I must refuse surrender.
21. It should be noted that in light of the additional information, it was accepted on behalf of the respondent that correspondence could be established in respect of offence number 18 in the EAW and an offence under the law of the State.