

**THE HIGH COURT**

[2021] IEHC 631  
[2019 No. 366 EXT.]

**BETWEEN**

**MINISTER FOR JUSTICE AND EQUALITY**

**APPLICANT**

**AND**

**GRZEGORZ LUKASZKA**

**RESPONDENT**

**Judgment of Mr. Justice Paul Burns delivered on the 7th 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 16th December, 2014 ("the EAW") issued by Judge Tomasz Krzemianowski, of the District Court in Koszalin, as the issuing judicial authority (case reference II Kop 90/14).
2. Part B of the EAW indicates that the surrender of the respondent is sought to enforce a judgment of the local court in Szczecinek dated 22nd December, 2009 (case reference II K 753/09) imposing a sentence of 150 days' imprisonment and part C indicates that 148 days remain to be served. Part F of the EAW indicates that a sentence of limitation of freedom was originally imposed but this was subsequently changed into a prison sentence by order dated 2nd December, 2011.
3. The EAW was endorsed by the High Court on 11th November, 2019 and the respondent was arrested and brought before the High Court on 26th February, 2020.
4. I am satisfied that the person before the Court, the respondent, is the person in respect of whom the EAW was issued. This was not put in issue by the respondent.
5. 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.
6. I am satisfied that the minimum gravity requirements of the Act of 2003 are met. The sentence in respect of which surrender is sought is in excess of four months' imprisonment.
7. The respondent objects to surrender on the following grounds:-
  - (i) surrender is precluded by reason of s. 38 of the Act of 2003, in that correspondence could not be established between the offences set out in the EAW and an offence under the law of the State, and
  - (ii) surrender is precluded by reason of s. 45 of the Act of 2003, in that the sentence had been imposed in absentia and the requirements of that section had not been met.

**Correspondence**

8. At part E of the EAW, it is stated that it relates to one offence, the circumstances of which are described as follows:-

*"On 4 November 2009 in Szczecinek at an apartment at no. 9/1 Zielona Street, against the law, he was in possession of 1 gram of intoxicant in the form of marihuana."*

9. The Court requested additional information from the issuing judicial authority in respect of the EAW including, *inter alia*:-

*"1. Please indicate the precise nature of the substance which Mr Grzegorz Lukaszka was found to have possessed.*

*2. Please indicate the chemical compound of the substance described as marihuana and/or provide a copy of the certificate of scientific analysis of the substance."*

10. The following response was received:-

*"With regard to the substance that was secured with Grzegorz Lukaszka, that according to the protocol of use of the drug tester Nark 2 Fast Blue B Salt reagent, the dried green plant was tested, secured on 04.11.2009 from Grzegorz Lukaszka, and that the test was positive for the presence of marijuana in the tested substance, however, the aforementioned test did not indicate the exact nature of the substance that Grzegorz Lukaszka possessed, only establishing that it was marijuana. Moreover, no scientific analysis of the substance was carried out in the conducted proceedings, which makes it impossible to indicate the chemical compound of the substance defined as marijuana, secured from Grzegorz Lukaszka."*

11. Counsel for the applicant submitted that the acts set out in the EAW would, if committed in this State, amount to the offence of unlawful possession of a controlled drug, namely cannabis, contrary to s. 3 of the Misuse of Drugs Act, 1977, as amended ("the Act of 1977"). Counsel for the respondent submits that "marijuana" was not a controlled drug under that Act and the legislation did not refer to same. He further submits that marijuana in some forms could be possessed without committing an offence and used the example of hemp made from the marijuana plant. He submitted that as no analysis of the substance was available, it was not possible to establish correspondence.

12. Counsel on behalf of the applicant referred the Court to *Minister for Justice v. Wicinski* [2011] IEHC 169 in which Poland sought the surrender of Mr. Wicinski to serve sentences in respect of, *inter alia*, possession of "marihuana". An argument similar to that submitted in this case was made on behalf of Mr. Wicinski and was dismissed by the Court. Edwards J. held at para. 40:-

*"40. The Court does not agree with the respondent's submission and considers it to be unfounded. As far as marihuana is concerned the Court is prepared to take judicial notice on the basis of having heard as a judge, or as counsel having*

*participated in, many drugs cases over the years that "marihuana" is a popular and alternative name for the drug cannabis, or the cannabis plant from which it is made. The drug cannabis is listed as a controlled drug in the schedule to the Misuse of Drugs Act, . In so far as LSD is concerned, the Court is again prepared to take judicial notice on the basis of having heard as a judge, or as counsel having participated in, many drugs cases over the years that LSD is a popular name for, and also an acronym for, the drug Lysergide. Lysergide is also listed as a controlled drug in the schedule to the Misuse of Drugs Act. In the circumstances the Court is completely satisfied as to correspondence."*

13. Counsel on behalf of the applicant further submits that simply giving the words in the EAW their ordinary meaning, the Court could regard the reference to marijuana as a reference to cannabis. She also submits that under the Act of 1977, cannabis is defined as follows in s. 1 of the Act:-

*"1. - (1) In this Act-*

*...*

*'cannabis' (except in 'cannabis resin') means any plant of the genus Cannabis or any part of any such plant (by whatever name designated) but includes neither cannabis resin nor any of the following products after separation from the rest of any such plant, namely –*

- (a) mature stalk of any such plant,*
- (b) fibre produced from such mature stalk, or*
- (c) seed of any such plant."*

She emphasised that the responses from the issuing judicial authority referred to "*the dried green plant*".

14. On behalf of the respondent it is submitted that *Wicinski* was wrongly decided and that Edwards J. was not entitled to take judicial notice of such matters as he did. In McGrath, Evidence, 3rd Ed. (Dublin, 2020), the concept of judicial notice is considered in some depth. The author defines the concept in the following terms at para. 13-09:-

*"13-10 The truth or existence of certain matters may be accepted by a court without the necessity for proof pursuant to the doctrine of judicial notice. A succinct explanation of the operation of this doctrine is to be found in the judgment of Lavan J in Greene v Minister for Defence:*

*'Judicial notice refers to facts which a Judge can be called upon to receive, and to act upon, either from his general knowledge of them, or from enquiries to be made by himself for his own information from sources to which it is proper for him to refer. ... Judicial notice is therefore a means of*

*establishing rather than providing a fact. ... The Court is entitled to act upon such facts as if they were given in evidence before the Court by a competent witness in the ordinary way. That does not, of course, mean that the Court is bound to accept that evidence any more than it is bound to accept any other evidence which may be put before it. The doctrine of judicial notice concerns itself with the method of establishing facts rather than the weighing of conflicting evidence.”*

The categories of matters in respect of which judicial notice may be taken are set out by the author as follows at para. 13-11:-

*“13-11 Matters of which judicial notice may be taken are traditionally regarded as falling into two categories: (1) facts which are so notorious or well-known that they are not reasonably disputable; and (2) facts which are capable of immediate and accurate demonstration by having resort to readily accessible sources of indisputable accuracy. In addition, judicial notice is required to be taken of certain matters specified by statute....”*

Examples of the first category are set out as follows at para. 13-14:-

*“13-14 Facts that have been considered to be sufficiently notorious or well-known that judicial notice could be taken of them are diverse and include: the administrative counties which comprise the State and the cities and towns that are in the State, economic conditions, commercial practices, customary legal provisions and practices, the prices of goods and services, that a postcard is an open document, the writing on which is visible to every person through whose hand it passes, nomenclature and characteristics of controlled substances, the adverse impact of illicit drug use on society, proscribed terrorist organisations, that concepts of acting towards other persons fairly and in a spirit of honesty and good faith are intrinsic to the Christian message, the context and purpose of the insertion of Art.40.3.3 protecting the right to life of the unborn into the Constitution, the essentials of the Islamic marriage ceremony and well established medical or social matters.”*  
*(Emphasis added)*

The authority cited for the section underlined above is *Wicinski* and it is noted that the learned author of that textbook did not regard that decision as having been given in error or open to question as regards the application of judicial notice.

15. I am not convinced that Edwards J. fell into error in *Wicinski* by taking judicial notice of the fact that “marijuana” is a popular alternative term for the drug “cannabis” or the plant from which it is derived. I am therefore prepared to follow the reasoning in *Wicinski* and to hold that correspondence has been established between the offence in the EAW and an offence contrary to s. 3 of the Act of 1977.

16. Regardless of the decision in *Wicinski*, I am satisfied that giving the words in the EAW their ordinary meaning, the term "marijuana" is, in ordinary usage, synonymous with "cannabis".
17. I am satisfied that correspondence has been made out and I dismiss the respondent's objection in that regard.

**Section 45 of the Act of 2003**

18. Section 45 of the Act of 2003 transposes Article 4A of the European Council Framework Decision dated 13th June, 2002 on the European Arrest Warrant and the Surrender Procedures Between Member States, as amended, into Irish law and provides as follows:-

*"45. — A person shall not be surrendered under this Act if he or she did not appear in person at the proceedings resulting in the sentence or detention order in respect of which the European arrest warrant ... was issued, unless... the warrant indicates the matters required by points 2, 3 and 4 of point (d) of the form of warrant in the Annex to the Framework Decision as amended by Council Framework Decision 2009/299/JHA ... as set out in the table to this section."* [Table set out thereafter]

19. By additional information dated 7th September, 2020, it is indicated that the original order of 22nd December, 2009, had sentenced the respondent to restriction of liberty consisting of the performance of unpaid controlled work for social purposes of 20 hours per month for ten months. At a hearing on 2nd December, 2011, this had subsequently been replaced with a sentence of 150 days' imprisonment, assuming that one day replacement imprisonment is the equivalent of two days' restriction of liberty.
20. The respondent swore an affidavit dated 16th December, 2020, in which he avers that he had been present for the original hearings in each matter but he had not been notified of the hearing on 2nd December, 2011, and thus had not appeared and had not arranged legal representation at same. He also avers that he had been unaware that he was not permitted to leave Poland at the time. I am somewhat sceptical of this latter averment given that the respondent was present when the sentences were imposed and must therefore have known of the requirement to carry out the unpaid work.
21. As a result of the aforesaid affidavit and further submissions on behalf of the respondent, the Court sought additional information from the issuing judicial authority. By reply dated 11th January, 2021, it is indicated that, under Article 34.3 of the Polish Penal Code, if a convicted person evades serving a sentence of deprivation of liberty, the court may order the execution of a substitute sentence of imprisonment. If the convicted person has served part of the sentence of restriction of liberty then the court shall order enforcement of the substitute sentence of imprisonment proportionate to the restriction of liberty remaining to be served, on the understanding that one day substitute imprisonment shall be equivalent of two days' restriction of liberty. The reply further states that the respondent was informed of this by letter dated 16th March, 2010, summoning him to commence the restriction of liberty, in which he was informed that in the case of evasion of the sentence of restriction of liberty:-

*"the court will impose a substitute fine, on the understanding that one day of the penalty of restriction of liberty will be equivalent to one daily fine or one day of alternative imprisonment shall be equivalent to two days of restriction of liberty."*

The issuing judicial authority indicates that the original order dated 22nd December, 2009 did not specify the default provisions as that is not required by Polish Law. Of importance, it is stated that the court, in its ruling of 2nd December, 2010, had a discretionary power of assessment as to the extent of alternative imprisonment and based its decision on particular provisions of Polish law, the content of the motion of the probation officer for the pronouncement of substitute imprisonment and the analysis of enforcement records. It is stated that the respondent did not appear at the hearing on 2nd December, 2011, when appropriately summoned. Reference is made to Article 139.1 of the Polish Code of Criminal Procedure whereby service at an address is deemed sufficient if the party has failed to notify a change of address.

22. By additional information dated 6th May, 2021, it is indicated that as regards the decision of 2nd December, 2011 *"It is not possible to establish whether the presence of the convicted person would have influenced the court."* In such circumstances, counsel for the applicant conceded that the decision of 2nd December 2011 was a hearing for the purposes of Article 4a of the Framework Decision and s. 45 of the Act of 2003 and she further conceded that the requirements of those provisions could not be established. In such circumstances, surrender is precluded by reason of s. 45 of the Act of 2003.
23. A hearing which merely revokes the suspension of a penalty previously imposed but suspended, is not to be regarded as a hearing for the purposes of Article 4a of the Framework Decision or s.45 of the Act of 2003, provided the nature and length of the initial penalty is not varied (see *Ardic* (Case C-571/17 PPU) (2017) and *Minister for Justice and Equality v. Lipinski* [2017] IESC 26). I am satisfied on the basis of the specific documentation before the Court in in this particular matter, that the hearing on 2nd December, 2011 involved the variation of the nature of a sentence by the exercise of a discretionary power and so falls outside the ambit of the Court of Justice of the European Union decision in *Ardic* and the Supreme Court decision in *Lipinski*. In such circumstances, the hearing 2nd December, 2011, imposing the sentence of imprisonment, was a hearing in absentia and must meet the requirements of Article 4a of the Framework Decision and s. 45 of the Act of 2003. Such compliance has not been established and so I must refuse surrender.