

THE HIGH COURT

[2021] IEHC 738
[2021 No. 2115 EXT.]

BETWEEN

MINISTER FOR JUSTICE

APPLICANT

AND

ROBERT PAWEL KOWALCZYK

DEFENDANT

JUDGMENT of Mr. Justice Paul Burns delivered on the 22nd day of November 2021

1. By this application, the applicant seeks an order for the surrender of the respondent to the Republic of Poland pursuant to a European arrest warrant dated the 20th May, 2019 (“the EAW”). The EAW was issued by Judge Maciej Romotowski, of the Suwalki Regional Court, 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 upon the respondent on 12th December, 2017, all of which remains to be served.
3. The respondent was arrested on 9th May, 2021 on foot of a Schengen Information System II alert and brought before the High Court on 10th May, 2021. The EAW was produced to the High Court on 13th May, 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.
7. It is clear from the EAW that the sentence of two years’ imprisonment imposed on 12th December, 2017 was an aggregated penalty imposed in respect of two previous convictions/sentences as follows:-
 - (i) a penalty of one-year imprisonment imposed on 23rd March, 2016, case reference number VII.K.492/15; and
 - (ii) a penalty of one year and six months’ imprisonment imposed on 22nd December, 2016, case reference number VII.K.434/16.
8. At part D of the EAW, it is indicated that the respondent did not appear at the hearing which resulted in the sentence imposed on 12th December, 2017, but that he was notified of the scheduled date and place of the hearing and that he gave a power of attorney to a legal

counsel to defend his interests and the appointed legal counsel defended his interests at the trial. Neither the respondent nor his legal counsel filed submission to have the matter reheard or appealed. It is further indicated at part D of the EAW that it was, in fact, the respondent through his legal counsel who applied to have a cumulative judgement imposed and the legal counsel represented the respondent at the hearing of 12th December, 2017. As regards the two underlying convictions/sentences, by way of additional information dated the 2nd June, 2021, it is indicated that as regards case reference number VII.K.492/15, the respondent appeared in person and as regards case reference number VII.K.434/16, he did not appear in person but was notified and mandated a lawyer to appear on his behalf and that lawyer in fact appeared on his behalf.

9. I am satisfied that the requirements of s. 45 of the Act of 2003 have been met. I am further satisfied that the respondent's defence rights were respected and were not breached both as regards the aggregate sentence of 12th December, 2017 and the underlying convictions/sentences incorporated within same.
10. At part E of the EAW it is stated that it refers to six offences in total. I am satisfied that correspondence can be established between each of the offences to which the EAW relates and an offence under the law of this State as follows:-
 - (i) theft contrary to s. 4 of the Criminal Justice (Theft and Fraud Offences) Act, 2001;
 - (ii) criminal damage contrary to s. 2 of the Criminal Damage Act, 1991;
 - (iii) theft contrary to s. 4 of the Criminal Justice (Theft and Fraud Offences) Act, 2001;
 - (iv) burglary contrary to s. 12 of the Criminal Justice (Theft and Fraud Offences) Act, 2001 and/or theft contrary to s. 4 of the Criminal Justice (Theft and Fraud Offences) Act, 2001;
 - (v) theft contrary to s. 4 of the Criminal Justice (Theft and Fraud Offences) Act, 2001;
and
 - (vi) the offence at common law of attempted theft contrary to s. 4 of the Criminal Justice (Theft and Fraud Offences) Act, 2001.

No issue was taken in respect of correspondence.

11. At hearing, counsel on behalf of the respondent indicated that there was a single objection to surrender grounded in s. 37 of the Act of 2003. It was submitted that due to the personal circumstances and ill health of the respondent, his surrender to the issuing state would constitute a breach of his right to a family and/or private life as recognised by Article 8 of the European Convention on Human Rights ("the ECHR") and/or would amount to inhuman and degrading treatment contrary to Article 3 of the ECHR.
12. The respondent swore an affidavit dated 10th June, 2021 in which he avers that on 17th August, 2017, whilst working at a construction site in Dublin, he was struck by a teleporter

and caused to fall from a considerable height. He avers that as a result of that accident he suffered multiple bodily injuries, including damage to his optic nerve. He avers that in October 2017 he lost consciousness while driving and has developed severe headaches, hypertension and experienced seizure-like episodes. He lists a number of hospitals where he has attended. He sets out his current symptoms including blackouts and seizures accompanied by elevated blood pressure. He avers that he was imprisoned in Castlerea Prison, County Roscommon for three months but does not give dates for same. He states that during his imprisonment in Castlerea he experienced three blackouts and was hospitalised for 19 days. He avers he was released early. He avers that he is able to live a relatively stable life save for the blackouts, which condition has not been fully diagnosed.

13. The respondent's wife, Paulina Kowalczyk, swore an affidavit dated 10th June, 2021 in which she avers that they have seven children aged between three months and eight years old. She avers that officers from Tusla have interviewed their children and that if the respondent was surrendered, she would not be capable of taking care of the children who would be placed in foster care.
14. The solicitor for the respondent, Mr. Morgan F. Coleman, swore an affidavit dated 16th June, 2021 in which he avers that he had written to Tusla and to a number of medical practitioners in an attempt to obtain a clearer picture of the respondent's circumstances. Tusla replied that an initial assessment was ongoing. There was no reply exhibited from the medical consultants although a medical report from a GP dated January 2019 was exhibited.
15. In a further affidavit dated 1st July, 2021, the respondent avers that his medical condition has worsened over the last year and refers to blood clots, headaches, blurred vision and numbness in his face and limbs. He also referred to a tremor in his left hand. He exhibits a referral letter from his GP to Sligo University Hospital. He avers that he attended the Acute Assessment Unit at Sligo University Hospital in June 2021 and underwent a number of examinations and tests. Reviews by hospital consultants have been arranged. In the referral letter of Dr. Ó Ceallaigh, the respondent's GP, dated 25th June, 2021, the active condition referred to is epilepsy together with severe headaches. Reference is made to flexion difficulties with his left middle finger. In a discharge letter from Sligo University Hospital dated 28th June, 2021, the respondent's medical history since the accidents and his various complaints are recorded. He is noted to be on medication for epilepsy. On examination it was noted that there was blurring of monocular right side of his vision and pain with extraocular movement to the left upper quadrant and that his left hand third and fourth phalanges rested in slight deflection at DIP joints. A future appointment was made for the respondent to be seen by a consultant neurologist.
16. The Court was furnished with a medical report dated 16th June, 2021 from the respondent's GP, Dr. Ó Ceallaigh. This indicates that he is taking anti-epileptic medication and also Zoton and Aspirin. A concise relevant medical history is set out which refers to the accident at work and the road traffic incident. It notes that the respondent failed to attend an appointment with a consultant neurologist in University Hospital Galway in January 2019. It notes that he was referred from Castlerea Prison to Galway University Hospital in March

2019 (it should be noted that the respondent's detention in Castlrea Prison at that time was not in connection with European arrest warrant proceedings). An MRI brain scan is reported as having indicated no evidence of acute stroke and the only abnormality noted was a single small focus of altered signal intensity on the left centrum semiovale adjacent to the diagonal of the left lower lateral ventricle of the ventricle on the flair sequences. No acute abnormality was seen on the CT brain scan. He had a normal CT Angio cerebral artery. EEG was reported as normal and a follow-up was planned for video investigations for his seizure-like activity. On 9th April, 2019, he was seen at the Ballina Medical Clinic by a consultant physician who felt that his presentation to Mayo University Hospital in August 2018 was possibly a seizure-type episode and his admission to University Hospital Galway was possibly a stroke, but the doctor felt it was more functional. On 27th November, 2019, the respondent was seen at Sligo University Hospital and a CT brain scan was reported as normal. On 2nd October, 2020, he was reviewed at Sligo University Hospital complaining of chronic headaches, a migraine and uncontrolled seizures. He declined hospital admission and thus was not seen by the neurology team. It was noted that out-patient's department appointments had been cancelled on several occasions due to the Covid-19 pandemic. Dr. Ó Ceallaigh stated that in his opinion, if the respondent was extradited and placed in an overcrowded prison, it may increase his seizure frequency and he may not have the same access to neurological services as he does in Ireland. He noted his extradition would have a major psychological impact on the family.

17. By letter from the Court dated 13th July, 2021, the discharge letter from Sligo University Hospital dated 28th June, 2021 was furnished to the issuing judicial authority which was asked to indicate whether the Polish prison system could deal with and treat the respondent. By reply dated 22nd July, 2021, the issuing judicial authority confirmed that if surrendered, the respondent will be provided with medical care in a penitentiary unit appropriate for his current state of health, and if his condition worsened he would be able to apply for a break in the execution of his prison sentence.
18. Section 37 of the Act of 2003 provides, *inter alia*, that a person shall not be surrendered if his surrender would be incompatible with the State's obligations under the ECHR, the protocols thereto or would constitute a contravention of any provision of the Constitution. It is submitted on behalf of the respondent that the respondent's right to a family life under Article 8 ECHR would be breached if his surrender is ordered.
19. In *Minister for Justice and Equality v. Vestartas* [2020] IESC 12, the Supreme Court considered Article 8 ECHR in the context of European arrest warrant proceedings. MacMenamin J., delivering the judgment of the Court, stated at para. 23:-

"[23] Article 8(1) ECHR guarantees the right to respect for an individual's private and family life, home and correspondence. But that guarantee is subject to the proviso that public authorities shall not interfere with the exercise of that right, except such as in accordance with law, and is necessary in a democratic society in the interests of national security, public safety, the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the

protection of the rights and freedoms of others (Article 8(2)). The terms of Article 8(2) are, therefore, sufficiently broad to encompass orders for extradition, or in this case, surrender. But as will be seen, these Article 8 considerations arise within a statutory framework which it is now necessary to consider."

20. As regards delay or lapse of time, MacMenamin J. stated at para. 89:-

"89. 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. The High Court judgment holds that there had been a significant dilution of the public interest which would ordinarily apply (para. 37). It posed what was characterised there as a modified and weakened public interest in surrender, evidenced by the elapses of time and other factors. Against this, it posed the private and family factors in the case (para. 38). But for the reasons set out above, there was a misapprehension as to the nature of the assessment. This is not a balancing exercise where public and private interests are placed equally on the scales. It is nonetheless necessary to have regard to the circumstances."

21. The threshold to meet in order to avoid surrender due to Article 8 ECHR considerations is a high one. No evidence has been produced to the Court from Tusla or any other source indicating that the respondent's children would have to be taken into care if his surrender is ordered. I note that the respondent has spent at least one period of incarceration in this jurisdiction in recent years.

22. In *Vestartas*, Mac Menamin J. stated at para 94:-

"94. For an Article 8 defence to succeed, it can only be on clear facts based and 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."

23. While the surrender of the respondent will have an adverse impact upon the respondent and the respondent's family, such adverse impacts are, unfortunately, inherent in any system of extradition. In *The Minister for Justice and Equality v. N.M.* [2013] IEHC 322, the respondent was the sole carer of her two children aged 15 and 17 years old, one of whom suffered from autism. Despite the fact that alternative care arrangements would have to be put in place in respect of the child, the Court held that the private rights of the respondent and dependent children did not justify a refusal of surrender.

24. Having considered all of the materials placed before the Court, I am not satisfied that the respondent's personal and/or family circumstances are so exceptional as to justify this Court in refusing surrender.
25. The respondent also objects to surrender on the basis that his imprisonment in the issuing state would amount to inhuman or degrading treatment contrary to Article 3 ECHR.
26. The respondent's solicitor, Morgan F. Coleman, swore two affidavits dated 2nd November, 2021 and 9th November, 2021 respectively, in identical terms exhibiting a medical report from Mr. Michael Hennessy, consultant neurologist dated 7th October, 2021. This report confirms the respondent suffered injuries in an accident at work in August 2017 and that since then has suffered from poor concentration, short term memory and severe insomnia as well as severe headaches. The report also refers to the fact that the respondent developed recurrent seizures at a frequency of one per month at this stage. He has been started on anti-convulsant medication but despite this the attacks are still occurring. It is noted that there have been a number of road traffic offences and brief incarcerations in Castlereagh Prison which have been associated with seizures necessitating hospital admission. Neurological examination was within normal limits. In the opinion of Mr. Hennessy, the respondent sustained a concussive injury following the fall in 2017. He opines that the respondent's seizures probably relate to a post-traumatic stress disorder and situational anxiety such as prison incarceration is likely to aggravate the situation. Mr. Hennessy opines that the respondent requires intensive intervention such as cognitive behavioural therapy and a withdrawal of the epilepsy medication which is clearly not working. He states: -
- "I would have thought that prison incarceration would be deleterious both for aggravating the current attacks and in devising a proper treatment strategy to aid their remission."*
27. A report from the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment placed before the Court appears to be more concerned with conditions in police custody than conditions in prisons.
28. The respondent has not adduced any cogent evidence to support his contention that the Polish prison system would not be able to provide him with adequate medical care. On the other hand, the issuing judicial authority has confirmed that the respondent will be provided with appropriate medical care and that he has a right to apply for a break in the execution of his prison sentence if his condition worsens.
29. I am not satisfied that there are substantial grounds for believing that, if surrendered, there is a real risk that the respondent will be subjected to inhuman and degrading treatment in breach of Article 3 ECHR. The issuing judicial authority has confirmed that he will receive the appropriate treatment and if his condition deteriorates he can apply for a suspension of the execution of his penalty. I accept this assurance on the basis of the mutual trust and confidence which underpins the European arrest warrant system.

30. Having considered all of the materials placed before the Court and notwithstanding the contents of the report from Mr. Hennessy, I accept the assurances provided by the issuing state that the respondent will be provided with medical care in a penitentiary unit appropriate to his current state of health and that if his condition worsens he will be able to apply for a break in the execution of his prison sentence.
31. Ultimately, bearing in mind the wording of s. 37 of the Act of 2003, I have to determine whether surrender of the respondent would be incompatible with the State's obligations under the ECHR, the protocols thereto or would be in breach of a provision of the Constitution. Having considered all of the evidence and submissions, individually and collectively, as regards the respondent's family and personal circumstances, I am satisfied that surrender of the respondent would not be incompatible with those obligations and nor would it amount to a breach of any provision of the Constitution.
32. Section 4A of the Act of 2003 provides for a presumption that an issuing state will comply with the requirements of the European Council Framework Decision dated 13th June, 2002 on the European Arrest Warrant and the Surrender Procedures Between Member States, as amended ("the Framework Decision"). The Framework Decision incorporates respect for fundamental human rights. On the basis of the materials before me, I am satisfied that such presumption has not been rebutted in the present case.
33. I dismiss the respondent's objection to surrender based upon his family and personal circumstances, including his health, and his objection based upon prison conditions in Poland, including the alleged inability of the Polish prison system to meet the respondent's health needs.
34. I dismiss the respondent's objections to surrender based on s. 37 of the Act of 2003.
35. I am satisfied that surrender of the respondent is not precluded by reason of Part 3 of the Act of 2003 or any other provision of that Act.
36. Having dismissed the respondent's objections, it follows that this Court will make an order pursuant to s. 16 of the Act of 2003 for the surrender of the respondent to the Republic of Poland.
37. It was of course open to the respondent to apply to the court for a postponement of his surrender on humanitarian grounds, such as the facilitation of imminent medical treatment. However, it appears that the respondent is facing serious charges in this jurisdiction and postponement of surrender is ordered to allow for the prosecution of same.