

THE HIGH COURT

[2022] IEHC 143
[2021 No. 363 EXT.]

BETWEEN

MINISTER FOR JUSTICE AND EQUALITY

APPLICANT

AND

ANDRZEK GOZDYRA

RESPONDENT

JUDGMENT of Ms. Justice Caroline Biggs delivered on the 10th day of February, 2022

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 1st of December 2010 ("the EAW"). The EAW was issued by Agnieszka Pawlowska, Judge of Radom Provincial Court as the issuing judicial authority.
2. The EAW seeks the surrender of the respondent in order to prosecute him in respect of alleged sexual offences.
3. The respondent was arrested on the 16th of December 2021, on foot of a Schengen Information System II alert, and brought before the High Court on that date. The EAW was produced before the High Court on the 21st of December 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 for surrender of the respondent.
6. I am satisfied that the minimum gravity requirements of the Act of 2003 have been met. Each of the offences in respect of which surrender of the respondent is sought carries a maximum penalty in excess of twelve months imprisonment.
7. I am satisfied that correspondence can be established between the offences referred to in the EAW and offences under the law of this State, viz. Rape contrary to Section 2 of the Criminal Law Rape Act 1981.
8. As surrender is sought to prosecute the respondent, no issue arises under s. 45 of the Act of 2003.
9. The respondent's Points of Objection are as follows:
 - (A) "Res Judicata/ Issue Estoppel/ Cause of Action Estoppel"
 - I. The issue of whether Mr. Gozdyra's surrender to Poland for the alleged rape on five occasions of three women; Anna Turek; Renata Prawda; Katarzyna Wojak; during a period of time spanning June – October 2006 in Bristol, the United Kingdom, is prohibited under section 44 of the European Arrest Warrant Act 2003. It is the

subject of a previous refusal to endorse a European Arrest Warrant Act in respect of these alleged offences, by The Honourable Mr. Justice John Edwards. A transcript of the decision of Mr. Justice Edwards has been directed by this Honourable Court and the respondent reserves the right to advance further points on this grounds when the said transcript is to hand.

II. The respondent maintains that the issue of his surrender is therefore subject to an issue estoppel and/or subject to a cause of action estoppel and/or the changes to statute do not interfere with his vested rights.

III. The applicant has not established the relevant statutory basis upon which the requesting Member State purports to prosecute the applicant, in Poland, for acts alleged to have been committed in the United Kingdom in 2006. It has not been established that any of the above named complainants are in fact Polish citizens, or indeed the basis upon which the requesting member state asserts that it has a right to prosecute the respondent for the alleged acts.

IV. Strictly without prejudice to the foregoing objections, it is pleaded that Section 44 of the Act of 2003, on its proper interpretation, prohibits the surrender of the respondent.

(B) Fair Trial Rights

V. The reasons hereinafter pleaded, the surrender of Mr. Gozdyra to Poland would, constitute a breach of his fundamental rights under the Constitution as protected under section 37 (1) (b) of the European Arrest Warrant Act, 2003 or further or in the alternative under 37 (1) (a) relating to his rights under the European Convention on Human Rights and its Protocols. In particular, surrender would cause a breach of his Fair Trial rights pursuant to, inter alia, the Convention and Article 6 of the European Convention on Human Rights.

VI. The trial of this aspect cannot take place in accordance with fundamental rights due to, inter alia, the lack of coercive powers over the witnesses which are located here in the United Kingdom, and over the Police authorities in that jurisdiction, that no longer forms part of the European Union. It is not clear what the status of the allegations were in England, and whether or not a decision had been made to prosecute the respondent in that jurisdiction. It is also unclear why the English authorities did not issue a European Arrest Warrant in respect of the respondent. It is not clear from the European Arrest Warrant what material the requesting Member State purports to base the prosecution of the respondent upon, and whether any assistance was provided by the English authorities in this regard.

(C) Surrender a breach of the fundamental rights of the respondent pursuant to the Charter of Fundamental Rights of the European Union/Rule of Law

VII. The applicant asserts that on account of the recent changes in the landscape of the Law of Poland, and the Judgments of the CJEU in joined cases C-345/29PPU and C-412/20 PPU the judgments of 19th November 2019, A.K. and Others (Independence of the Disciplinary Chamber of the Supreme Court) (C-585/18, C-624/18 and C-625/18, EU:C:2019:982) and of 26 March 202, *Miasto Łowicz and Prokurator Generalny* (C-558/18 and C-563/18, EU:C:2020:234); the judgment of *Sąd Najwyższy (Izba Pracy i Ubezpieczeń Społecznych)* (Supreme Court, Chamber of Labour and Social Insurance) of 5 December 2019, in which that court, ruling in the dispute which gave rise to the request for a preliminary ruling in Case C-585/18, held that the Krajowa Rada Sądownictwa (National Council of the Judiciary, Poland) was not, in its current composition, an impartial body independent of the legislature and the executive.

VIII. In light of the action for failure to fulfil obligations brought by the European Commission against the Republic of Poland (Case C-791/19), and the order of 8th April 2020, *Commission v Poland* (C-791/19 R, EU:C:2020:277).

IX. The adoption on 20th December 2019 by the Republic of Poland of a new law on the system of justice, which entered into force on 14th February 2020. That led the Commission to initiate infringement proceedings on 29th April 2020 and to send a letter of formal notice concerning that new law to the Member State and; The holding of a hearing on 9th June 2020 before the *Sąd Najwyższy (Izba Dyscyplinarna)* (Supreme Court, Disciplinary Chamber) concerning the lifting of the criminal immunity of a Polish judge and the delivery of a judgment on the same date, according to official information received by the referring court.

X. The respondent asserts that the lack of an independent judiciary in Poland and other changes, eroding the rule of law in the requesting member state, that he cannot receive a fair trial in that jurisdiction. The respondent relies upon the joint cases of *Jakub Lyszkiewicz v MJE*, and *Orolowski v MJE* [2021] IESC 46 which are now the subject of a reference by the Irish Supreme Court to the CJEU.

10. Is Surrender Prohibited by Section 44 of the Act of 2003

The respondent submits that surrender is prohibited by Section 44 of the Act of 2003. Section 44 of the Act of 2003 states:

"44.—A person shall not be surrendered under this Act if the offence specified in the [relevant arrest warrant] issued in respect of him or her was committed or is alleged to have been committed in a place other than the issuing state and the act or omission of which the offence consists does not, by virtue of having been committed in a place other than the State, constitute an offence under the law of the State."

11. In this regard, Part E.2. of the EAW provides a full description of the offences, as follows:

- I. 'At an unidentified date in February 2006 in Bristol, UK, he raped Anna Turek by first using violence that involved pressing her head against a pillow and pressing all her body down to a bed with the weight of his own body, putting his member inside her vagina and forcing her to have sexual intercourse, where the offence was committed within 5 years of serving at least 6 months of detention sentence for a similar premeditated offence, i.e. an offence under Article 197§1 penal code in conjunction with Article 64 §1 penal code;
 - II. At an unidentified date in June 2006 in Bristol, UI he raped Renata Prawda by first using violence that involved pushing her down to a bathroom floor, holding her and threatening to do something to her were she to put up a fight, putting his member inside her vagina and forcing her to have a sexual intercourse, where the offence was committed within 5 years of serving at least 6 months of detention sentence for a similar premeditated offence, i.e an offence under Article 197§1 penal code in conjunction with Article 64 §1 penal code;
 - III. At an unidentified date between late June 2006 and early July 2006 in Bristol, UK, he raped Renata Prawda by first using violence that involved pushing her down onto a bed and strangling her by covering her nose and mouth with his hand, put his member inside her vagina and forced her to have a sexual intercourse, where the offence was committed within 5 years of serving at least 6 months of detention sentence for a similar premeditated offence, i.e. an offence under Article 197§1 penal code in conjunction with Article 64 §1 penal code;
 - IV. At an unidentified date between August 2006 and early October 2006 in Bristol, UK, he raped Renata Prawda by first using violence that involved pushing her down onto a bed and strangling her by covering her nose and mouth with his hand, put his member inside her vagina and forced her to have a sexual intercourse, where the offence was committed within 5 years of serving at least 6 months of detention sentence for a similar premeditated offence, i.e. an offence under Article 197§ 1 penal code in conjunction with Article 64 §1 penal code;
 - V. On the night of 14/15 October 2006 in Bristol, UK, he raped Katerzyna Wojcik by first using violence that involved pushing her down onto a bed, pressing her down with his own body and strangling her by covering her nose and mouth with his hand, put his member inside her vagina and had a sexual intercourse, then proceeded to force her to have approximately ten sexual intercourses with him, i.e. an offence under Article 197§ 1 penal code in conjunction with Article 12 penal code."
12. In light of the fact that the alleged offences were committed outside of the territory of the issuing state, a s.20 request for additional information dated the 22nd of December 2021, was sent in the following terms:

"It seems from the European Arrest Warrant that all of the offences are alleged to have been committed in Bristol, England (i.e. outside of the territory of Poland).

Please specify the statutory basis on which Poland intends to exercise jurisdiction over each of the alleged offences, and the practical means that Poland intends to use.”

13. The issuing judicial authority replied by way of a letter dated the 23rd of December 2021 stating, as follows:

“(i) The District Prosecutor’s Office in Zwolen, after having received the materials from the Crown Prosecution Service of the United Kingdom of Great Britain and Northern Ireland of 10 November 2008 ref. No. 52/BP/1907/07, on these offenses of rape of three Polish citizens: Katarzyna Wojcik, Renata Prawda and Anna Turek in Bristol, on 29 January 2009 initiated an investigation proceedings into the cases of Ds. 22/09 under the Article 197 paragraph 1 of the Penal Code.

(ii) It is indisputable that the offenses against which Andrzej Gozdyra was charged took place in Bristol, on the territory of England, which does not prevent proceedings against a Polish citizen who committed a crime abroad. The provisions of the Act of 06 June 1997 – the Penal Code (the Journal of Laws of 2020, item 1444, the consolidated text of 25 August 2020) state that:

I. Article 109 (the principle of subjective nationality): “The Polish penal law shall be applied to Polish citizens who have committed an offence abroad.”

II. Article 111 (condition of a double offence):

(a) Para. 1: “The liability for an act committed abroad is, however, subject to the condition that the liability for such an act is likewise recognised as an offence, by a law in force in the place of its commission.”

(b) Para. 2: “If there are differences between the Polish penal law and the law in force in the place of commission [of] the offence, the court may take these differences into account in favour of the perpetrator.”

14. The reciprocity that is required in construing Section 44 is a factual reciprocity concerning the circumstances of the offences. Offences that take place outside the territory of a state require specification of the circumstances when that state will exercise jurisdiction. The reciprocity in this case requires Ireland to examine its law as if the circumstances of the offence were reversed. The question that Ireland must ask therefore, is whether the Irish state would be in a position to exercise its jurisdiction if an Irish citizen is alleged to have raped three Irish citizens in the United Kingdom.

15. As this case does not involve a minor, the provisions of Section 2 of the Criminal Law Offences Act 2006 do not apply. The applicant confirms that the only possible avenue available to the State on this issue is the Criminal Law Extraterritorial Jurisdiction Act 2019. The relevant sections of same are set out hereunder:

“1. Definitions

In this Act –

"Act of 1976" means the Criminal Law (Jurisdiction) Act 1976;

"Act of 1990" means the Criminal Law (Rape) (Amendment) Act 1990;

"Convention state" means a state, other than the State, that is a party to the Council of Europe Convention on preventing and combating violence against women and domestic violence done at Istanbul on 11 May 2011;

"Irish ship" means an Irish ship within the meaning of section 9 of the Mercantile Marine Act 1955";

"Minister" means the Minister for Justice and Equality;

"relevant offence" means –

- (a.) An offence under section 3, 4, 5, 9 or 10 of the Non-Fatal Offences against the Person Act 1997,*
- (b.) Sexual assault within the meaning of section 2 of the Act of 1990,*
- (c.) Aggravated sexual assault within the meaning of section 3 of the Act of 1990,*
- (d.) Rape under section 4 of the Act of 1990.*

3. Conduct Engaged in Outside State

(1) Where a person engages in conduct in a place outside the State that would, if it occurred in the State, constitute a relevant offence and the conduct occurs—

- (a.) on board an Irish ship, or*
- (b.) on an aircraft registered in the State,*

the person shall be guilty of an offence and shall be liable to be proceeded against and punished as if he or she were guilty of the relevant offence concerned.

(3) Where a person who is an Irish citizen or who is ordinarily resident in the State engages in conduct in a Convention state that—

- (a.) constitutes an offence in the Convention state, and*
- (b.) would, if it occurred in the State, constitute a relevant offence,*

the person shall be guilty of an offence and shall be liable to be proceeded against and punished as if he or she were guilty of the relevant offence concerned.

(7) Proceedings for an offence under this section may be taken in any place in the State and the offence may, for all incidental purposes, be treated as having been committed in that place."

16. In order to come within Section 3(3) of the Criminal Law Extraterritorial Jurisdiction Act 2019, a number of requirements must be met:

- (i) The respondent must be an Irish citizen or a person who is ordinarily resident in the State.
- (ii) The respondent must engage in conduct in a convention state
- (iii) That conduct must constitute an offence in the convention state, and
- (iv) would if it occurred in Ireland, constitute a relevant offence.

17. For the purposes of proving that the conduct was engaged in a convention state the applicant must be able to show that The United Kingdom is a party to the Council of Europe Convention on preventing and combating violence against women and domestic violence. The applicant can show that the United Kingdom signed the said convention on the 8th of June 2012, but it would seem that no further steps have been taken by the United Kingdom. In order to determine if a signature is enough to be a party to the convention the applicant drew the courts attention to two matters:

- (i) Article 75 of the Council of Europe Convention on preventing and combating violence against women and domestic violence done at Istanbul on 11 May 2011, Article 75 is a schedule to the 2019 Act.

Article 75 states:

'1. This Convention shall be open for signature by the member States of the Council of Europe, the non-member States which have participated in its elaboration and the European Union.

2. This Convention is subject to ratification, acceptance or approval. Instruments of ratification, acceptance or approval shall be deposited with the Secretary General of the Council of Europe.

3. This Convention shall enter into force on the first day of the month following the expiration of a period of three months after the date on which 10 signatories, including at least eight member States of the Council of Europe, have expressed their consent to be bound by the Convention in accordance with the provisions of paragraph 2.

4. In respect of any State referred to in paragraph 1 or the European Union, which subsequently expresses its consent to be bound by it, the Convention shall enter into force on the first day of the month following the expiration of a period of three months after the date of the deposit of its instrument of ratification, acceptance or approval.'

18. The United Kingdom has not expressed its consent by means of ratification, acceptance or approval.
19. The applicant also draws the courts attention to the Vienna Convention on the Law of Treaties 1969, this came into force in Ireland on 8 September 2006. This Convention sets out the applicable law in relation to the interpretation of treaties:

Article 1 (a) states:-

“treaty” means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.”

Article 1(g) states:- “party” means a State which has consented to be bound by the treaty and for which the treaty is in force; (h) “third State” means a State not a party to the treaty; (i) “international organization” means an intergovernmental organization.

Article 14 states:-

1. The consent of a State to be bound by a treaty is expressed by ratification when:

(a) the treaty provides for such consent to be expressed by means of ratification;

(b) it is otherwise established that the negotiating States were agreed that ratification should be required;

(c) the representative of the State has signed the treaty subject to ratification; or

(d) the intention of the State to sign the treaty subject to ratification appears from the full powers of its representative or was expressed during the negotiation.

2. The consent of a State to be bound by a treaty is expressed by acceptance or approval under conditions similar to those which apply to ratification.

20. In light of full consideration of the above, the applicant fairly concedes that it cannot be suggested that the United Kingdom is a convention state. It follows therefore that if the United Kingdom is not a convention state the requirements of Section 3 (3) of the Criminal Law Extraterritorial Jurisdiction Act 2019 cannot be satisfied. As a consequence surrender is prohibited by Section 44 of the Act of 2003. It follows that this Court will make an order refusing the application for surrender. The court has not adjudicated on any of the other points of objection raised by the respondent.