

# THE HIGH COURT

[2022] IEHC 316

[2022 No. 20 EXT.]

BETWEEN

MINISTER FOR JUSTICE AND EQUALITY

APPLICANT

AND

BONCHO ASENOV

RESPONDENT

## **JUDGMENT of Ms. Justice Caroline Biggs delivered on the 1<sup>st</sup> day of April, 2022**

1. By this application, the applicant seeks an order for the surrender of the respondent to Federal Republic of Germany pursuant to a European Arrest Warrant dated 19<sup>th</sup> of May 2021 (“the EAW”). The EAW was issued by Judge Datsogiannis of the Kiel Local Court, as the issuing judicial authority.
2. The EAW seeks the surrender of the respondent in order to prosecute him in respect of alleged burglary-type offences.
3. The respondent was arrested on 31<sup>st</sup> of January 2022, on foot of a Schengen Information System II alert, and brought before the High Court on the 1<sup>st</sup> of February 2022. The EAW was produced to the High Court on the 7<sup>th</sup> of February 2022
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. 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. 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. Section 38(1)(b) of the Act of 2003 provides that it is not necessary for the applicant to establish correspondence between the offences to which the EAW relates and offences under the law of the State where the offences referred to in the EAW are offences to which Article 2.2 of the Framework Decision applies and carry a maximum penalty in the issuing state of at least three years' imprisonment. In this instance, the issuing judicial authority has certified that the offences referred to in the EAW are offences to which Article 2.2 of the Framework Decision applies, that same are punishable by a maximum penalty of at least three years' imprisonment and has indicated the appropriate box for "organised or armed robbery". There is no manifest error or ambiguity in respect of the aforesaid certification such as would justify this Court in looking beyond same, in any case the candidate offence is Section 12 of the Criminal Justice Theft and Fraud Offences Act 2001

8. As surrender is sought to prosecute the respondent, no issue arises under s. 45 of the Act of 2003.

9. The respondent objected to surrender on the following grounds:

- That the surrender of the respondent would be a breach of, or a disproportionate interference with, his rights pursuant to Article 8 of the European Convention on Human Rights and/or his and/or his family's rights under Article 8 of the European Convention on Human Rights and/or the Constitution and/or Articles 7 of the Charter of Fundamental Rights of the European Union and as a

consequence surrender of the Respondent would be in breach of Section 37 of the European Arrest Warrant Act, 2003.

10. The respondent swore an affidavit dated 25<sup>th</sup> February 2022 wherein he averred to the following:

- The respondent says that he has been living and working in Ireland since October 2020. He resides in rented accommodation in Cahir with his wife Beata and her father.
- His father-in-law has lived and worked in Ireland for the last twenty years. He was the reason they moved to Ireland in order to secure work in the same place he works – HSK Nursery Limited in Cahir, Co. Tipperary.
- He has a medical condition, suffering from neurosis and depression. His wife was diagnosed with schizophrenia on 14<sup>th</sup> April 2015 in Poland. Since then, his wife has been in and out of hospital. They both attend a Polish doctor (online now) Dr. Kryszkowski. Lastly, he takes care of his wife when she is sick.
- In relation to the offence, he has been to Kiel several times with his family and he used to work there. However, he was not in Kiel at the time of the offence as his wife was admitted to hospital in Poland at the time.
- He has lived in this jurisdiction since October 2020, he has not left the jurisdiction since then and very much considers Ireland to be his home.
- He has lived openly throughout his entire time in the State, is registered as a PAYE employee and is fully tax-compliant. For the avoidance of doubt, he says that he has always presented himself and conducted his business using his correct personal details, and he has never used an alias at any stage.
- In summary, he says that he has strong personal and family ties to this jurisdiction. His wife and father-in-law reside here and he has a number of close friends in Ireland.

In these circumstances, surrender would constitute a very significant interference with his private and family life.

11. In light of the aforementioned Affidavit and original points of objection, this Court sought further information by way of a Section 20 request dated the 28<sup>th</sup> of February 2022 where this court asked:

“1. The Respondent has maintained that his surrender to Germany should be refused on the grounds of an inordinate delay on the part of the authorities in issuing the European Arrest Warrant and in taking steps to enforce same. In those circumstances please provide a full chronology of all steps taken by the authorities in Germany from the date of the alleged commission of the offence (4 April 2015 - 5 April 2015) to the date of the issue of the European Arrest Warrant (19 May 2021) to proceed with [and] prosecute this matter.

2. Please note the following sections from the European Arrest Warrant Act 2003 which governs the extradition process in this jurisdiction

10. — Where a judicial authority in an issuing state issues a relevant arrest warrant in respect of a person —

( a ) against whom that state intends to bring proceedings for an offence to which the relevant arrest warrant relates,

( b ) who is the subject of proceedings in that state for an offence in that state to which the relevant arrest warrant relates,

( c ) who has been convicted of, but not yet sentenced in respect of, an offence in that state to which the relevant arrest warrant relates, or

( d ) on whom a sentence of imprisonment or detention has been imposed in that state in respect of an offence to which the relevant arrest warrant relates, that person shall,

subject to and in accordance with the provisions of this Act, be arrested and surrendered to the issuing state.

Similarly, please note that Section 21A of the European Arrest Warrant Act, 2003, as amended, states as follows:

21A. — (1) Where a European arrest warrant is issued in the issuing state in respect of a person who has not been convicted of an offence specified therein, the High Court shall refuse to surrender the person if it is satisfied that a decision has not been made to charge the person with, and try him or her for, that offence in the issuing state.

(2) Where a European arrest warrant is issued in respect of a person who has not been convicted of an offence specified therein, it shall be presumed that a decision has been made to charge the person with, and try him or her for, that offence in the issuing state, unless the contrary is proved.

Having regard to the above, please confirm whether a decision has been made to charge and try the Respondent for the offence set out in the European Arrest Warrant and if so, please provide full details of same including;

- a) the date upon which the decision was made and
- b) the identity of the relevant authority or person who made the decision.

3. Where the Respondent has maintained that he was not in Kiel, Germany at the time of the alleged offence, please furnish additional information in respect of the connection made by the relevant prosecuting authority between the Respondent and the commission of the alleged offence.”

**12.** The issuing judicial state responded by way of letter dated the 4<sup>th</sup> of March 2022 wherein they confirmed:

“1. The long period that has elapsed since the crime in 2015 is explained by the fact that the accused Asenov was absconding immediately after the crime and the whereabouts in Ireland only became known with the arrest on 31.01.2022. The accused Asenov was initially only advertised within Germany for search. Since the search for the accused in Germany was unsuccessful, the EAW was issued on 19 May 2021.

2. Because of the offence, the District Court of Kiel on 4.8.2015 issue (*sic*) a national arrest warrant. After transfer to Germany, charges will be brought against the accused by the public prosecutor's office in Kiel to the District Court of Kiel. However, under German law, the accused must be granted a right to be heard before charges are brought.

3. With regard to the defendant's argument that he was not in Kiel at the time of the crime, the following must be stated: In the apartment of witness Wolter, which was broken into, the fingerprints of the accused Asenov could be determined beyond doubt on a lamp. This results in the suspicion against the accused. The accused also had no previously entitled access to the home of witness Wolter.”

**13.** In considering Section 21 (a) of the 2003 Act, this Court must have regard to the following -

- a. s. 21A(2) of the Act of 2003, as inserted by s. 25 of the Act of 2005, contains a presumption that a decision has been made to charge the person and try him or her for the offence.
- b. The opening lines of the European arrest warrant itself, request that the person mentioned below “be arrested and surrendered for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order”

- c. Recital 10 of the Framework Decision which describes “[t]he mechanism of the European arrest warrant [as being] based on a high level of confidence between Member States”.
- d. A court is only to refuse to surrender a requested person when it is satisfied that no decision has been made to charge or try that person. This would be so where there is no intention to try the requested person on the charges at the time the warrant is issued. In such circumstances, the warrant could not be for the purposes of conducting a criminal prosecution.
- e. There must be strong and cogent evidence to rebut the presumption in s. 21A of the Act of 2003, and in this case there is none.
- f. The issuing judicial authority has confirmed by way of additional information that after transfer to Germany, a charge will be brought against the accused by the public prosecutor’s office in Kiel to the District Court in Kiel. However, under German Law, the accused must be granted a right to be heard before the charges are brought.

14. In light of the foregoing and in all of the circumstances I am satisfied that surrender of the respondent is not precluded by reason of Section 21A of the Act of 2003.

15. **Is surrender prohibited by section 37 of the Act of 2003**

The respondent provided the court with a number of reports that were relevant to both the respondent and his wife.

- (i) Reports from Dr Kryszkowski dated the 24<sup>th</sup> January 2022, 26<sup>th</sup> February 2022 and 7<sup>th</sup> March 2022. The findings of Dr. Kryszkowski are conveniently summarised in his final report wherein he states:

**“Physical Examination**

**Mental State:**

The patient is well-oriented allo- and autopsychologically. Clear awareness. Situationally depressed mood, as is the psychomotor drive. Without psychosis symptoms (negates all productive symptoms, does not appear hallucinating, does not express delusions). It contradicts suicidal thoughts and tendencies. Sleep is not very good. Fluctuating appetite. Fear and anxiety confirm situational. Focused on himself and his ailments - features of a personality disorder. Tendency to put oneself in the role of a sick person, to exaggerate symptoms. The main influence of external factors on the mental state of the patient. Reports problems with memory» for further observation It functions properly in everyday life. Stable mental state. He has not undertaken and is not planning to take any action on the basis of the presented symptoms. He ensured that he would cooperate in therapy and report any disturbing psychological symptoms" therapeutic and informative conversation. He claims to take the drugs as prescribed.No side effects after medication. Cardiovascular and respiratory efficient. He agreed to the proposed therapeutic procedure. Further care in PZP Pharmacotherapy as prescribed. Psychological care recommended. The time from modification and pharmacotherapy is too short to assess its effectiveness He has other drugs. Doctor's certificate - at the patient's request

**Main diagnoses:****Main:**

- F43 - adaptive disorders
- FGO - specific personality disorders

**Recommendations, treatments, medicinal products and medical devices****Anxieties:**



Rp. Chlorprothixen Zentiva (0.015 g) (SO tablets (5 blisters of 10 tablets)) 2 packs Dosage Ox 0 tablets

Prescription printout number:

0205040000001321838786

Description: DS.1-1-1 table.

Recommendations: Further care in PZP Pharmacotherapy as prescribed Psychological care recommended.

Information about limitations after taking medications were provided.

It was informed about the management if the patient's mental condition deteriorating Complete abstinence from alcohol and other psychoactive substances was recommended.

Informed about the prohibition of drinking alcohol and driving vehicles until the individual sensitivity to the drug is established.

The maximum dose of Hydroxyzine = 100 mg/day.”

(ii) Report from Dr Patrick Lynch dated the 21<sup>st</sup> March 2022 wherein he states:

“Mr. Boncho Asenov attended me today in my surgery for the first time.

He showed me documentation which confirmed that he had been under psychiatric care in Poland since 24 January 2022, where he had been treated for adjustment disorder and personality disorder.

He showed me a prescription and pharmacist's receipt confirming that he had been prescribed, and dispensed, the following medication:

Epilim Chrono 300mg, two to be taken daily – a mood stabilising medication  
 Atarax 25mg (Hydroxyzine), one or two to be taken as needed (an antihistamine sedative)  
 Chlorprothixen 15mg – an antipsychotic medication.

From the information available to me and my limited contact with the patient, it is difficult to pronounce on the severity of the disorder, but it was certainly considered significant to judge by the medication prescribed. It seems more likely that he would have intended to take medication of this nature long-term, especially mood stabilising medication like Epilim.”

(iii) Prison medical records from February 2022 of significance is an entry dated 1<sup>st</sup> February 2022 from nurse Miriam Dunne & the 2<sup>nd</sup> February 2022 from Dr Elkerany:

New Committal:

Hx anxiety/panic attacks. Was medicating through doctor in Bulgaria. He didn't attend any GP clinic although he is living in Ireland 15 years, works as gardener. Speech normal with basic English.

Depressed mood. Anxious and angry. No sleep.

Plan: Psychiatry review. Chat with his family if possible to get information about medications he is on as he claimed.

(iv) A Hospital Information sheet in relation to the respondent's wife from 2013-2018 the relevant portions states:

“Basic Diagnosis: Paranoid schizophrenia (F20.0).”

16. Whilst lapse of time is not, on its own, a recognised a ground for refusal of surrender, delay is a recognised factor weighing into a court’s cumulative Section 37 analysis as to whether Article 8 ECHR or other alleged breaches of rights might ground a refusal to surrender. As set out by O’Donnell J. in *Minister for Justice and Equality v J.A.T. No. 2* [2016] IESC 17 at paras 9 to 11;-

*“Delay and Lapse of Time*

*9. The fact that the crimes alleged here date back to 1997 is more properly to be considered in the context of lapse of time rather than delay. There is, as I understand it, no suggestion that the United Kingdom authorities ought to have detected the alleged crime any earlier. In any event, such an allegation is one which a court should be extremely slow to entertain. The relative antiquity of the offences, however, is relevant in considering those elements of delay in the issuance of the first warrant, and more importantly, the second warrant, and its execution in this jurisdiction. I do think that these delays are factors in the Court’s assessment, but, regrettable and worthy of criticism as they are, in my view they fall far short, by themselves, of establishing any abuse of process or grounds for refusal of surrender. Nor do they do so when taken in conjunction with the fact that a second warrant was issued.*

*Article 8*

*10. It seems clear that the respondent is in a very difficult health situation, although the Court might expect a more detailed expert report. Again, however, this matter must not be tested against some generalised consideration of personal sympathy, but rather as to whether the circumstances are such which render it unjust to surrender the respondent. It will almost always be the case that considerations such as these, which undoubtedly evoke some sympathy, would never, in themselves, be remotely a ground*

*for refusing surrender any more than they would be a ground for prohibiting a trial in this jurisdiction. The respondent, however, is also the primary, and effectively the sole caregiver for his son, who in turn is in a situation where that care is particularly important. For the reasons set out in the judgment of the Chief Justice, it seems clear that he will undoubtedly suffer very severely if the appellant is surrendered for trial. He is not a person against whom there is any accusation of wrongdoing. The impact on the appellant's son is, for me, an important consideration. While the appellant's son is not a child, he is, in my view, a member of the appellant's family for the purposes both of Article 8 of the ECHR and the Constitution. Nevertheless, I agree with the learned trial judge in this case that these considerations would, themselves, not be enough to establish a ground for refusing surrender if the first warrant had been in a proper form and these matters, which were present at that time, had been the sole ground for resisting surrender. I do not, however, agree that the fact that neither the respondent's health issues nor his son's condition has deteriorated in the intervening time means that this consideration is now irrelevant. It seems to me to be relevant that this is a second application, and moreover, that there has been avoidable delay on the part of the authorities in both jurisdictions in the preparation, submission, and execution of the second warrant, even though the evidence of the respondent's circumstances, and those of his son, had been adduced in the first European Arrest Warrant proceedings. These factors - repeat application, lapse of time, delay, impact on the appellant's son, and knowledge on the part of the requesting and executing authorities of those factors - when weighed cumulatively, are powerful. Even then, and without undervaluing the offences alleged here, it is open to doubt that these matters would be sufficient to prevent surrender for very serious crimes of violence. This illustrates that the decision in this case is exceptional, and even then close to the margin.*

*11. In any future case, where all or any of the above factors may be relied on, it would not, in my view, be necessary to carry out any elaborate factual analysis or weighing of matters unless it is clear that the facts come at least close to a case which can be said to be truly exceptional in its features. Even in such cases, which must be rare, it is important that the considerations raised are scrutinised rigorously.”*

**17.** The Supreme Court set out the test which must be applied where an application for surrender is opposed on the grounds of Article 8 of the ECHR. In *Minister for Justice and Equality v Vestartas* [2020] IESC 12 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.”*

MacMenamin J. went on to state at para 94:

*“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 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.”*

**18.** In *The Minister for Justice and Equality v Smits* [2021] IESC 27, the Supreme Court noted at para. 62;-

*“62. Dealing with the issue of the elapse of time, McMenamin J. noted indications that the trial judge might have thought this could in itself suffice to defeat an EAW application, by reference to the decision of this Court in Finnegan. However, the decision in Finnegan had clearly been limited to the unusual facts of that case. Delay could not alter the public interest considerations unless it reached a point where it was so lengthy and unexplained as to amount to an abuse of process, or to raise other constitutional or ECHR issues. On the facts in Vestartas, delay was a matter of legitimate concern but was to be viewed against the background of private and family circumstances that fell very far short of those in J.A.T. (No.2).”*

**19.** In *Minister for Justice and Equality v D.E.* [2021] IECA 188, the Court of Appeal stated at para. 67;-

*“67. The questions certified by the High Court were as follows: “In the context of proceedings under the European Arrest Warrant Act 2003 as amended, where a respondent objects to surrender on the basis that same is precluded by s. 37 of the said Act as it would be in breach of the respondent’s rights under art. 8 ECHR and having particular regard to the provisions of art. 8(2) ECHR:*

*1. Can personal or family circumstances, in and of themselves, provide a basis upon which surrender might be precluded by s. 37 of the Act of 2003?*

2. *What is the appropriate test to be applied by the Court in determining whether such an objection is sustained and that surrender should be refused?*

3. *In so far as exceptionality may be a relevant factor in determining such an objection, what is the appropriate test to be applied by the Court in determining whether the circumstances found to exist are so exceptional as to justify refusal of surrender”*

*For the reasons set out in this judgment, it is appropriate to answer all three questions by repeating the principles set out at para 59 above:*

- (i) *In an application for surrender, the court is not carrying out a general proportionality test on the merits of the application. The court should apply the specific terms of the 2003 Act, albeit subject to a careful consideration of whether, if necessary, applying a proportionality test to Article 8 Convention rights, to order surrender would involve a violation of that ECHR right to the extent of being incompatible with the State’s obligations under the Convention. (Vestartas).*
- (ii) *Surrender (or extradition) presupposes an impact on the personal or family life of a requested person. Having regard to Article 8(2), surrender (or extradition) carried out pursuant to legislation is in principle an acceptable interference with the right to respect for those rights. (Ostrowski, JAT (No. 2), Vestartas).*
- (iii) *When faced with an Article 8 objection to surrender, the function of the Court is to decide if the surrender is incompatible with the State’s obligation under the European Convention on Human Rights. That requires a very high threshold. Any inquiry must bear in mind that s. 10 requires a court to surrender in accordance with the provisions of the 2003 Act and s. 4A of that Act obliges the court to presume that the issuing state has complied and will comply with its fundamental rights obligations. (Vestartas).*

- (iv) *The evidential burden of proving incompatibility lies on the requested person. (Rettinger and Vestartas).*
- (v) *The assessment of the claimed impact of surrender on personal and family rights must be a rigorous one. (Rettinger and JAT (No. 2)).*
- (vi) *The evidence must be cogent and must reach the level of incompatibility (Vestartas).*
- (vii) *Exceptionality is not the test for incompatibility, but it will only be in a truly exceptional case that surrender will be found to be incompatible with the State's obligations under Article 8 of the Convention. (JAT No. 2 and Vestartas).*
- (viii) *For an Article 8 objection to succeed, there must be clear cogent evidence sufficient to rebut the presumption in s. 4A of the 2003 Act. (Vestartas).*
- (ix) *No elaborate factual analysis or weighing of matters is necessary unless it is clear that the facts come close to a case which would be truly exceptional in nature thereby engaging the possibility that surrender may be incompatible with the State's obligations under the Convention. (JAT (No.2)).*
- (x) *The requirement that the circumstances must be shown to render the order for surrender incompatible with the State's obligations under Article 8 necessitates that the incursion into the private and family rights referred to in Article 8(1) is 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. (Vestartas).*
- (xi) *Where the facts, assessed as set out above, come close to being truly exceptional in nature thereby engaging the possibility that surrender might be incompatible with the State's obligations, the Court will engage in a proportionality test of whether the high public interest in the prevention of disorder and crime (and the*



*protection of the rights of others) is overridden by the personal and family circumstances (taken where appropriate with all the cumulative circumstances) of the requested person. That is a case-specific analysis which will be required in very few cases.”*

**20.** In this case, the delay is not so egregious so as to amount to an abuse of process. The delay in the issuing of the warrant is of 6 years from the date of the domestic warrant to the date of the EAW. This delay is caused by the respondent. He absconded immediately after the crime was committed and his whereabouts were not known. Initially, the German authorities sought the respondent in Germany and when the search for the respondent was unsuccessful in Germany the EAW was issued.

**21.** In relation to his family and personal circumstances, the respondent avers to the fact that he has depression and neuroses and provides documentation in support of same, and avers to the fact that his wife has schizophrenia and again provides documentation in support of same. The documentation that relates to the respondent confirms:

- (i) That he has a diagnosis of adaptive disorders and specific personality disorders.
- (ii) That he receives medication for these conditions.
- (iii) That if he is compliant with his medication intake, he can continue and live a normal life notwithstanding these conditions, i.e. work and have a normal family life.
- (iv) That he has not sought or required any psychiatric or indeed medical assistance in this country for his conditions since he arrived here 1.5 years ago, that he receives medicine and communicates with his doctor.
- (v) That his wife was diagnosed with schizophrenia in 2013, had three psychotic episodes as a consequence and has been prescribed medication. Her medical report is of some antiquity now some 4 years old. There is no medical evidence

before the Court that she requires daily care/management or supervision. In fact, she works on a full time basis. There is nothing to suggest that the respondent's surrender will prevent the respondent's wife receiving the treatment that she requires.

The Court does not have any evidence before it as to why surrender should be prohibited because of those mental health conditions.

**22.** In applying the test set out in *D.E.* and in giving effect to the judgments of Supreme Court in *Vestartas* this Court finds that although the respondent's personal and family circumstances are difficult, they are not beyond the norm. There is no cogent evidence before this Court to rebut the presumption in Section 4A of the 2003 Act. I am satisfied that surrender of the respondent is not precluded by reason of Part 3 of the Act of 2003 or another provision of that Act.

**23.** As conceded by counsel for the respondent, the suggestion by the respondent that he was not in Germany at the time if the commission of the offence is without any merit.

**24.** It, therefore, 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 Federal Republic of Germany.