

**THE HIGH COURT  
AN ARD-CHÚIRT**

[2022] IEHC 485  
[2021 No. 180 EXT]

**IN THE MATTER OF AN APPLICATION UNDER S. 16 OF THE EUROPEAN ARREST  
WARRANT ACT 2003, AS AMENDED.**

**BETWEEN**

**THE MINISTER FOR JUSTICE**

**APPLICANT**

**AND**

**RAFAL LUKASZEWSKI**

**RESPONDENT**

**JUDGMENT of Mr Justice David Keane delivered on the 29th July 2022**

**Introduction**

1. The Minister for Justice ('the Minister') applies under s. 16(2) of the European Arrest Warrant Act 2003, as amended ('the Act of 2003'), for an order directing the surrender of Rafal Sebastian Lukaszewski to the Republic of Poland, pursuant to a European Arrest Warrant ('the EAW') issued by the District Court of Toruń, as the issuing judicial authority in that Member State, on 7 May 2021.

**Background**

2. The EAW seeks the surrender of Mr Lukaszewski to serve a sentence of imprisonment of 1 year and 10 months imposed upon him on 23 July 2013 for two offences of theft or fraud that are the subject of case file II K 339/13 ('file 339/13'), and a consecutive sentence of 2 years and 2 months imposed upon him on 6 September 2013 for ten further offences of theft or fraud that are the subject of case file II K 403/13 ('file 403/13'). The EAW recites that the entire duration of that aggregate four-year sentence remains to be served.
3. I am satisfied that the offences concerned meet the minimum gravity requirements of s. 38 of the Act of 2003 and that they each correspond to an offence under the law of the State, being either that of making a gain or causing a loss by deception, contrary to s. 6 of the Criminal Justice (Theft and Fraud) Offences Act 2001, or that of using a false instrument, contrary to s. 26 of that Act, as the case may be. Mr Lukaszewski raises no issue on either of those points.
4. Mr Lukaszewski was arrested on 21 June 2021 on foot of an alert ('the SIS II alert') issued under the second generation of the Schengen Information System, established by Council Decision 2007/JHA ('the Council Decision'), and was brought before the High

Court. The EAW was provided to the High Court when Mr Lukaszewski was brought before it again on 25 June 2021. I am satisfied that the person before the court is the person in respect of whom the EAW was issued. Mr Lukaszewski raises no issue in that regard.

5. In response to a request from the Minister as the Central Authority in the State, the issuing judicial authority provided additional information, by letter dated 2 July 2021, concerning documentation previously served on Mr Lukaszewski in connection with the offences for which his surrender is now sought and concerning sentences previously imposed on Mr Lukaszewski in Poland for other offences.
6. Points of Objection were filed on Mr Lukaszewski's behalf on 29 July 2021. Mr Lukaszewski's solicitor swore affidavits on 28 July 2021 and 10 January 2022 to ground Mr Lukaszewski's opposition to the application.
7. By letters dated 29 October, 1 November 2021, and 14 January 2022, the High Court requested the issuing judicial authority to provide it with certain specified additional information. The issuing authority provided additional information in response to those requests by letters dated 8 November 2021 and 19 January 2022.

#### **The issues**

8. While Mr Lukaszewski puts the Minister on strict proof of the matters that it is necessary to establish under s. 16(2) of the Act of 2003 and while a wide range of objections to surrender are raised in his points of objection, in both his written and oral submissions Mr Lukaszewski relies on two specific objections.
9. First, Mr Lukaszewski submits that his surrender must be refused under s. 22(2) of the Act of 2003 because the law of Poland does not provide that a person surrendered to it will not be proceeded against, sentenced or detained for an offence or offences committed prior to surrender that are not covered by the EAW, and he will be proceeded against, sentenced or detained for such an offence if surrendered ('the rule of specialty objection').
10. Second, Mr Lukaszewski submits that his surrender must be refused under s. 37 of the Act of 2003 because it would be incompatible with the State's obligations under the European Convention on Human Rights ('the ECHR') in that, in the determination of the criminal charges covered by the EAW, he was deprived of his minimum right under Article 6(3) of the ECHR to legal assistance in his defence ('the right to legal assistance objection').
11. I will deal with each of those arguments in turn.

#### **The rule of specialty objection**

12. In advancing the argument that Polish law does not provide for the rule of specialty and that, if returned to Poland, he will be proceeded against, sentenced or detained for an offence or offences not covered by the EAW, Mr Lukaszewski relies upon the assertion

that his prosecution and conviction for the offences that are the subject of the EAW occurred in clear breach of the rule.

13. The relevant sequence of events, as disclosed in the information provided by the issuing judicial authority, was as follows.
14. The same issuing judicial authority had issued an earlier EAW for Mr Lukaszewski in 2011 for the purpose of prosecuting him for other quite separate offences, the subject of case file Kop 22/10 ('file 22/10'). That warrant had been transmitted to the United Kingdom as the executing Member State. In February 2013, Mr Lukaszewski was surrendered to Poland where he pleaded guilty to those offences and was sentenced to a term of imprisonment that ended with his release from custody in January 2017. For clarity, I will refer to that earlier EAW as 'the UK EAW'.
15. After his surrender to Poland on foot of the UK EAW, Mr Lukaszewski was prosecuted and sentenced for the offences covered by the EAW on foot of which he is now before this court. As already described, a sentence of imprisonment of 1 year and 10 months was imposed upon Mr Lukaszewski on 23 July 2013 for the two offences of theft or fraud that are the subject of file 339/13, and a consecutive sentence of 2 years and 2 months was imposed upon him on 6 September 2013 for the ten further offences of theft or fraud that are the subject of case file 403/13, amounting to an aggregate sentence of four years imprisonment.
16. While serving the sentence imposed on him for the offences covered by the UK EAW, Mr Lukaszewski was invited to renounce his entitlement to the application of the specialty rule to the execution of the sentences imposed for the offences covered by the present EAW but formally declined to do so on 25 February 2014. Hence, he was released from custody in January 2017 at the expiration of the sentence imposed for the UK EAW offences. On 30 March 2017, Mr Lukaszewski's request to withhold the execution of the sentences imposed in respect of the offences covered by the present EAW was refused. On 3 April 2017, Mr Lukaszewski was summoned to prison to commence serving those sentences. In response, he requested a postponement or stay. On 10 May 2017, that request was refused. Despite that refusal, Mr Lukaszewski failed to comply with the summons and a warrant later issued for his arrest in or about the month of August 2017.
17. Mr Lukaszewski submits that, on those facts, there has been an accomplished breach of the rule of specialty as it applied to his earlier surrender from the United Kingdom to Poland from which an inference should be drawn that the law of Poland does not provide that a person surrendered to that Member State pursuant to an EAW will not be 'proceeded against, sentenced or detained for the purpose of executing a sentence or detention order, or otherwise restricted in his or her personal liberty, in respect of an offence' other than the offence or offences on which his surrender may be ordered, and that – notwithstanding the presumption to the contrary required under s. 22(3) of the Act of 2003 – Mr Lukaszewski will be proceeded against, sentenced or detained for the purposes of executing a sentence or detention order, or otherwise restricted in his

personal liberty in respect of another offence if surrendered to Poland, so that his surrender must be refused under s. 22(2) of that Act.

18. The Minister submits, and I accept, that this argument is misconceived in light of the judgment of the European Court of Justice in Case C-388/08 PPU *Criminal proceedings against Leyman and Pustovarov* ECLI:EU:C:2008:669 ('*Leyman*'). In material part, that judgment addressed the scope of the exception in Article 27(3)(c) of the Council Framework Decision on the European arrest warrant and the surrender procedures between Member States [2002] O.J. L 190/1 ('the Framework Decision'), to the rule of specialty enshrined in Article 27(2) of that instrument.
19. Article 27(2) of the Framework Decision provides in material part:

'Except in the cases referred to in [paragraph 3], a person surrendered may not be prosecuted, sentenced or otherwise deprived of his liberty for an offence committed prior to his surrender other than that for which he was surrendered.'
20. Article 27(3) states in material part that:

'Paragraph 2 does not apply in the following cases:  
...  
(c) the criminal proceedings do not give rise to the application of a measure restricting personal liberty....'
21. In *Leyman*, one of the questions raised by the referring court, as identified by the Court of Justice (at para 64) was how the exception to the specialty rule in Article 27(3)(c) must be interpreted and, in particular, whether that provision permits a person to be prosecuted and sentenced for an offence other than that for which he was surrendered, requiring the consent of that Member State, before that consent has been received, in so far as his liberty is not restricted. The Court of Justice answered that question in the following way (at paras 72 and 73):

'72 The exception in Article 27(3)(c) of the Framework Decision concerns a situation in which the criminal proceedings do not give rise to the application of a measure restricting personal liberty.

73 It follows that, in the case of that exception, a person can be prosecuted and sentenced for an offence 'other than' that for which he was surrendered, which gives rise to a penalty or measure involving the deprivation of liberty, without recourse being necessary to the consent procedure, provided that no measure restricting liberty is applied during the criminal proceedings. If however, after judgment has been given, that person is sentenced to a penalty or measure restricting liberty, consent is required in order to enable that penalty to be executed.'
22. Applying that analysis to the facts of the present case, while keeping in mind the Article 27(3)(a) exception to the specialty rule that applies when the surrendered person has been afforded a defined opportunity to leave the territory of the Member State to which

he has been surrendered after his discharge from detention there, Mr Lukaszewski has failed to satisfy me that there was any breach of the specialty rule in connection with his surrender to Poland under the UK EAW. That is because, while it is common case that Mr Lukaszewski was prosecuted and sentenced in Poland for the offences the subject of the present EAW, as offences committed prior to his surrender on foot of the UK EAW, it is also common case that no measure restricting Mr Lukaszewski's liberty was applied, nor was any penalty of imprisonment executed, at any material time prior to his departure from Poland, once he had served the sentence imposed for the offences the subject of the UK EAW. It is thus apparent that Mr Lukaszewski's decision not to renounce his entitlement to the application of the specialty rule to the offences that are the subject of the EAW was fully respected by Poland in accordance with the terms of Article 27(2) of the Framework Decision as interpreted by the Court of Justice in *Leyman*.

23. It follows that Mr Lukaszewski has failed to satisfy me that the law of Poland does not provide that a person who is surrendered to it pursuant to an EAW shall not be proceeded against, sentenced or detained for the purpose of executing a sentence or detention order, or otherwise restricted in his or her personal liberty, in respect of an offence other than the offence or offences in respect of which surrender has been ordered under the Act of 2003.
24. It also follows that, on the basis of the evidence and information before me, there is nothing to suggest, still less establish, that, if surrendered to Poland, Mr Lukaszewski will be proceeded against, sentenced or detained for the purposes of executing a sentence or detention order, or otherwise restricted in his liberty, in respect of an offence other than those in respect of which his surrender is now sought. The presumption under s. 4A of the Act of 2003 that Poland, as the issuing state in this case, will comply with the relevant requirement of the Framework Decision remains entirely undisturbed, as does the presumption under s. 22(3) of that Act that Poland does not intend to: (a) proceed against Mr Lukaszewski; (b) sentence or detain him for the purpose of executing a sentence or detention order; or (c) otherwise restrict him in his personal liberty, in respect of any offence other than those for which his surrender is now sought.
25. For those reasons, Mr Lukaszewski's objection that his surrender is prohibited under s. 22(2) of the Act of 2003 fails.

**The right to legal assistance objection**

26. Mr Lukaszewski's second objection to his surrender is that it would be incompatible with the State's obligations under the ECHR in that, in the determination of the criminal charges covered by the EAW, he was deprived of his minimum right under Article 6(3) of the ECHR to legal assistance in his defence, so that his surrender must be refused under s. 37(1)(a) of the Act of 2003.
27. In advancing this objection, Mr Lukaszewski asserts - both in the affidavits sworn by his solicitor on his behalf and in his written submissions - that he was not legally represented at various hearings during the prosecution of those offences because his right to legal representation was withdrawn by the court. However, Mr Lukaszewski fails to engage

with the fundamental question of how that lack – or withdrawal – of legal representation came about. Was it at his own election or upon the arbitrary insistence of the court? Mr Lukaszewski does not say but, rather, invites the court to assume the latter and, thus, to infer a breach of his minimum right to legal assistance in his defence under Article 6(3)(c) of the ECHR.

28. The additional information provided by the issuing judicial authority on 19 January 2022, includes the following recital:

'By the order of 18th March 2013 in case file reference number II K 339/13 the defence counsel ex officio in the person of the attorney Anna Kurek was appointed for Rafal Lukaszewski. However, by the order of 25th April 2013 the appointment of the defence counsel was withdrawn as it was established that the sanity of the accused had not given rise to any doubts. During the appeal trial on 5th December 2013 Rafal Lukaszewski did not avail himself from the assistance of defence counsel.'

29. It seems that Mr Lukaszewski is inviting me to conclude that the court concerned denies the minimum right to legal assistance to every person charged with a criminal offence before it whose sanity is not in doubt, whereas it seems just as likely that the court concerned properly upholds that right, while permitting such a person to dispense with the legal representation available to him or her, once it is established that there are no doubts about the person's mental competence to make that decision.

30. Through his solicitor, Mr Lukaszewski has exhibited a copy of the decision made by the District Court in Grudziadz, Poland, on 6 September 2013 in file 403/13. Among the orders it contains is the following:

'7. Orders to pay from the State Treasury of the District Court in Grudziadz in favour of the office of the legal counsel Anna Graczy-Schulz, the amount of 504 Polish Zlotys (five hundred and four) & 23% VAT as legal aid provided to the defendant ex officio, which has not been paid.'

31. As Burns J explained in *Minister for Justice v Purse* [2020] IEHC 515 (at paras 26 and 27):

'26. In the cases of *Minister for Justice, Equality and Law Reform v. Marjasz* [2012] IEHC 233 and *Minister for Justice and Equality v. Rostas* [2014] IEHC 391, Edwards J. stressed that in cases where surrender is sought to enforce a sentence imposed following a criminal trial, the Court will in general be most reluctant to engage in any review of the trial process leading to the conviction upon which the European arrest warrant is based to determine whether it was fair and lawful. The default and starting position in all cases is that the Court must proceed upon a presumption that the trial leading to the conviction in question was fair in respect of the respondent's fundamental rights, and that in the event of him having some complaint in regard to the fairness of the trial that led to his conviction, that it was incumbent upon

him, at the material time, to seek an effective remedy in regard to that before the courts of the issuing state.

27. Similarly, in *Minister for Justice v. Stapleton* [2008] 1 IR 699, the Supreme Court emphasised the principles of mutual trust and mutual recognition which lie at the heart of the European arrest warrant system. Fennelly J. pointed out that mutual confidence encompasses the system of trial in the issuing state, and it follows therefore that the courts of the executing member state, when deciding whether to make an order for surrender, must proceed on the assumption that the court of the issuing member state will, as required by article 61 of the Treaty on the European Union, respect human rights and fundamental freedoms. In *Minister for Justice, Equality and Law Reform v. Koncis* [2006] IEHC 379, Peart J. stated at para. 9:-

“[a] respondent seeking to unsettle such a presumption and understanding has a heavy onus to discharge and a high hurdle to overcome before his/her surrender will be refused.”

32. In attempting to displace the presumption, Mr Lukaszewski cites the decisions of the European Court of Human Rights ('the ECtHR') in the cases of *Salduz v Turkey* (2009) 49 E.H.R.R. 19 (denial of right of access to a lawyer to a minor in police custody under a law that denied that right to persons accused of offences falling within the jurisdiction of the state security courts) and *Pakelli v Germany* (1984) 6 E.H.R.R. 1 (refusal to appoint an official defence counsel to represent a person in an appeal on a point of law). The legal principles that those decisions identify on the proper scope and interpretation of the minimum right to legal assistance under Article 6(3)(c) of the ECHR are well-settled and are not in dispute between the parties in this case. The matter in dispute is whether Mr Lukaszewski has displaced the presumption that his trial was fair and, more particularly, whether he has established that his legal representation on the offences the subject of file 339/13 was withdrawn in circumstances amounting to a denial of his minimum right to legal assistance, rather than simply at his own election. After all, the Article 6(3)(c) minimum fair trial right of a person charged with a criminal offence is 'to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require' (emphasis supplied). Given Mr Lukaszewski's failure to engage with that issue on the basis of his own direct knowledge or on the basis of any other evidence beyond what is contained in the court documentation, the relevant contents of which I have already described, I conclude that, on the evidence presented, Mr Lukaszewski has failed to displace the presumption that his trial was fair.
33. For that reason, Mr Lukaszewski's objection that his surrender is prohibited under s. 37(1)(a) of the Act of 2003 also fails.

#### **Withdrawal of the rule of law objection**

34. In the points of objection served on his behalf, Mr Lukaszewski had also claimed that, due to recent legislative changes in Poland, his surrender would be in breach of Article 2 of

the Treaty on European Union; Articles 6 and 13 of the ECHR; and Article 47 of the Charter of Fundamental Rights of the European Union, in that it would run contrary to the values of respect for democracy and the rule of law common to the Member States, and would deprive him of the rights to a fair trial and an effective remedy.

35. Those arguments had been placed to one side to await the decision of the Court of Justice of the European Union ('CJEU') on the three questions referred to it by the Supreme Court in *Orlowski v. Minister for Justice and Equality* [2021] IESC 46, although why that should have been so is not immediately apparent, as this is a 'conviction' case and the questions raised in *Orlowski* are more obviously pertinent to 'prosecution' cases.
36. Be that as it may, after I had reserved judgment on the other issues in the application but before I could deliver judgment, the CJEU delivered its preliminary ruling in Case C-480/21 *WO and JL v Minister for Justice and Equality* ECLI:EU:C:2022:592 by order made on 12 July 2022. In those circumstances and to promote efficiency in the administration of justice, I indicated to the parties that I would hear argument on the rule of law issue at the first available opportunity to enable the delivery of a single unitary judgment on the application as a whole. In response to that indication, counsel for Mr Lukaszewski informed me that his objections to surrender based on the rule of law issue were being withdrawn. Thus, it is unnecessary to consider the rule of law issue any further in deciding whether to make an order for the surrender of Mr Lukaszewski under s. 16(2) of the Act of 2003.

### **Conclusion**

37. For the reasons I have given, I am satisfied that I am not required to refuse to order the surrender Mr Lukaszewski under s. 22 of the Act of 2003. Nor am I required to refuse to order his surrender under ss. 21A, 23 or 24 of that Act, as no issue arises under any of those provisions.
38. Further, for the reasons I have given, I am satisfied that I am not required to refuse to order the surrender of Mr Lukaszewski under s. 37(1)(a) of the Act of 2003. Nor is the surrender of Mr Lukaszewski otherwise prohibited under any of the other provisions of Part 3 of that Act.
39. It follows that, having due regard to the obligation to surrender under s. 10 of the Act of 2003, I will make an order under s. 16(2) of that Act, directing the surrender of Mr Lukaszewski to such person as is duly authorised by Poland to receive him.