

**THE HIGH COURT**

[2022] IEHC 569

**[2021 No. 67 EXT.]**

**BETWEEN**

**MINISTER FOR JUSTICE**

**APPLICANT**

**AND**

**TOMASZ BARTLOMIEJ BEBENEK**

**RESPONDENT**

**JUDGMENT of Mr. Justice Paul Burns delivered on the 10th day of October, 2022**

**1.** By this application, the applicant seeks an order for the surrender of the respondent to the Republic of Poland ("Poland") pursuant to a European arrest warrant dated 17th November, 2020 ("the EAW"). The EAW was issued by Judge Jerzy Kosiela of the Circuit Court in Radom as the issuing judicial authority.

**2.** The EAW seeks the surrender of the respondent in order to prosecute him in respect of nine offences.

**3.** The respondent was arrested on 27th March, 2021 on foot of a Schengen Information System II alert and brought before the High Court on the same day. The EAW was produced to the High Court on 31st March, 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 this 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 prohibited 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 is sought carry a maximum penalty in excess of 12 months' imprisonment. No issue was taken in respect of minimum gravity.

**7.** The respondent's solicitor, Ms. Mary Malarkey, swore an affidavit herein dated 8th April, 2021 in which she exhibited a draft affidavit of the respondent for the purposes of bail dated 29th March, 2021 and averred that same had been prepared on foot of his instructions but, due to the Covid-19 pandemic, was unable to have him swear same. In the draft affidavit the respondent indicates that he originally came to Ireland in 2005 and has been in a long-term relationship with his partner since 2014. They have an 18-month-old son. He indicates that on 17th September, 2014, in Ireland, he was sentenced to serve an 18-month term of imprisonment imposed for a number of offences including offences under the Criminal Justice (Theft and Fraud Offences) Act, 2001 and the Misuse of Drugs Acts. He indicates that he was served with a Removal Order dated 10th June, 2015 and issued judicial review proceedings in respect of same. He indicates that in or around July 2016, he and his partner moved to England and then returned to Ireland in December 2020. He indicates that he suffers from Type 1 Diabetes.

**8.** The respondent swore an affidavit in which he takes issue with the allegation that he was banned or disqualified from driving motor vehicles in January 2011 and/or April 2011 as alleged in

the EAW. He avers that in or around August 2010, he was arrested on foot of a European arrest warrant, remanded to Cloverhill Prison and that an Order was made for his extradition to Poland on 4th November, 2010. He avers that he was later extradited to Poland to serve a sentence there, was initially in custody in Warsaw, then transferred to Radom Prison and was released on or about 2nd December, 2011. He avers that he returned to Ireland on or about 3rd January, 2012 and that he has not returned to Poland since that time. He avers that the reason he has not travelled back to Poland is because there are threats to his life as a result of a criminal organisation with which he was involved while in custody in Poland from 2010 to 2011. He avers that he was requested to carry out certain criminal acts upon his release which he did not do and instead left Poland. He says that, as a result thereof, he is in fear of his safety and life if returned to a prison in Poland. He sets out his family circumstances as already referred to in the earlier draft affidavit.

9. The respondent objects to surrender on the following grounds:-

- (i) surrender is precluded by reason of s. 38 of the Act of 2003; and
- (ii) surrender is precluded by reason of s. 37 of the Act of 2003.

### **Section 38 of the Act of 2003 – Correspondence**

10. Out of the nine offences to which the EAW relates, counsel on behalf of the respondent disputes that correspondence can be established in relation to offence number five in relation to damage to a motor vehicle and offence number six relating to insulting police officers.

11. By way of additional information dated 19th May, 2021, the Provincial Prosecutor's Office in Radom set out in more detail the circumstances of the said offences. It is clear from the description of offence number five set out therein that the respondent, along with another, set fire to a motor vehicle belonging to a third party using a container of gasoline from the respondent's house and did so intentionally. In light of such additional evidence, counsel for the respondent did not vigorously pursue his submission in respect of lack of correspondence as regards that offence. I am satisfied that offence number five of the main offences to which the EAW relates corresponds with an offence under the law of this State, *viz.* criminal damage contrary to s. 2 of the Criminal Damage Act, 1991.

12. As regards offence number six in the EAW concerning insulting police officers, the circumstances of same are set out in the EAW at part E as follows:-

*"On 2 March 2012 in Szydłowiec, province of mazowieckie, using words commonly considered offensive, the above insulted police officers from the District Police Station in Szydłowiec – Ssgt Rafał Węgierek and Msgt Radosław Dujka while and in relation to them performing their official duties,  
i.e. an offence under art.226 § 1 of the Penal Code."*

13. Counsel on behalf of the respondent submits that insulting a police officer in itself is not an offence under Irish law. He relied on the decisions of the High Court in *Minister for Justice v. Makuch* [2013] IEHC 254 and *The Minister for Justice and Equality v. Zielinski* [2020] IEHC 398. He submits that, while it is alleged that in the course of the same incident the respondent assaulted one of the police officers and threatened to injure and kill the officers, those matters were the subject of separate offences in the EAW, namely offence numbers seven and eight referred to therein.

**14.** Counsel on behalf of the applicant submits that the corresponding offence under Irish law is an offence contrary to s. 6(1) of the Criminal Justice (Public Order) Act, 1994 which provides as follows:-

*"6.- (1) It shall be an offence for any person in a public place to use or engage in any threatening, abusive or insulting words or behaviour with intent to provoke a breach of the peace or being reckless as to whether a breach of the peace may be occasioned."*

**15.** In additional information dated 19th May, 2021, further details of the alleged offence are set out as follows:-

*"The place of committing the act was the area of public use, that is Kamienna Street in Szydłowiec. The perpetrators: Tomasz Bębenek, [P.S.], [J.S.] and [L.W.] were walking in the middle of the street. At the same time, the police officers [R.W.] and [R.D.] were on a motorized patrol, in an unmarked police car. They were both wearing police uniforms. Having had noticed this they called the men moving in the middle of the street to leave the roadway. Tomasz Bębenek and the others started to insult the police officers with words commonly considered offensive, that is 'whores' and 'dicks'. They refused to submit their personal data to the policemen. Tomasz Bębenek inflicted blows on the policeman who tried to detain him. A second police car was called for help. The incident took place at 20:55. There were no other bystanders (outsiders) at this place at that moment. Currently, no other proceedings are pending against Tomasz Bębenek."*

**16.** In *Clifford v. DPP (Garda McLoughlin)* [2013] 2 I.R. 396, the Supreme Court held that, contrary to English authority, it is possible to commit an offence contrary to s. 6 of the Criminal Justice (Public Order) Act, 1994 in circumstances where the threatening, abusive or insulting words or behaviour was directed at members of An Garda Síochána who were the only persons present other than the accused. Clarke J., as he then was, held at para. 23:-

*"[23] In any event, I am not satisfied that the somewhat absolutist view that is inherent in those English authorities represents the law in this jurisdiction. It must, of course, be hoped that, by virtue of their training and character, members of An Garda Síochána would only act in a legitimate and proportionate manner when provoked. It must, therefore, be hoped that the use of even outrageous behaviour to An Garda Síochána would not, in fact, provoke a breach of the peace involving the gardaí themselves. However, as pointed out earlier, the real question is not as to whether it is likely that a breach of the peace would in fact be provoked but rather whether such was the intention of the alleged offending party or whether the alleged offending party was reckless as to the consequences of his behaviour in relation to provoking a breach of the peace. The fact that all responsible citizens might hope that the gardaí would not respond to such behaviour by becoming themselves involved in a breach of the peace does not mean that there may not be circumstances where it is appropriate, having regard to all of the facts, to infer the appropriate intention or recklessness on the part of the accused."*

**17.** Clarke J. quoted Geoghegan J. in *People (DPP) v. Cagney; People (DPP) v. McGrath* [2008] 2 I.R. 111 at paras. 89-90 of that judgment:-

*"89. Where 'recklessness' is a constituent of a criminal offence in Ireland, the leading authority on its meaning is *The People v. Murray* [1977] I.R. 360. The judgments of Henchy,*

*Walsh and Griffin JJ. make it clear that the required mens rea for the purposes of recklessness as to consequences is subjective and not objective. In particular, Henchy J. endorsed the American Law Institute definition in the Model Penal Code ....*

*90. It seems clear therefore that for the purpose of a count under s. 13 based on recklessness as was the case here the accused would have had to consciously disregard a risk not of just causing harm but of causing serious injury or death."*

**18.** Clarke J. went on to state at paras. 33-35:-

*"[33] It, therefore, follows that the question that a decider of fact, such as the District Judge in this case, had to address is as to whether it was appropriate, on all the evidence, to infer that, from Mr. Clifford's perspective, there was a substantial risk that a breach of the peace would be occasioned by his behaviour and that he went ahead anyway reckless as to the consequence.*

*[34] The fact remains that Mr. Clifford, on the evidence, attended in the public office of a police station and engaged in highly abusive and significantly threatening behaviour directed, in particular, to a female member of An Garda Síochána. He did so in the presence of a number of members of the public. The question that must be asked is as to whether it was open to the District Judge to conclude that, by so doing, Mr. Clifford acted recklessly as to whether there might be a breach of the peace by undertaking activity which, it might be inferred, from his perspective, gave rise to a substantial risk that such a breach of the peace might be occasioned. In reaching a conclusion on that question the District Judge was, of course, required to have regard to the fact that the persons against whom the abuse and threatening behaviour was directed were members of An Garda Síochána. The District Judge was also obliged to take into account all of the circumstances surrounding the presence of members of the general public in the public office of the police station at Kilmainham on the occasion in question. However, it seems to me that Charleton J. was correct in concluding that it was open to the District Judge, in assessing all of the evidence, to come to the conclusion that Mr. Clifford was reckless as to occasioning a breach of the peace on the basis of concluding that there was, in accordance with the authorities, from his perspective, a substantial risk that his activities would occasion such a breach of the peace but that he went ahead nonetheless.*

*[35] It does not seem to me that it is necessary to consider whether the District Judge could have come to any other conclusion. It was for the District Judge to assess the evidence and reach such conclusions as were open to him on that evidence. The only issue for the High Court and the only issue for this court on appeal is as to whether an inference of recklessness in accordance with the authorities was open to the District Judge on that evidence."*

**19.** On the basis of the circumstances surrounding the alleged offence in question, as set out in the EAW and in the additional information dated 19th May, 2021, I am satisfied that correspondence can be established between the alleged offence number six in the EAW and an offence under the law of this State, viz. an offence contrary to s. 6 of the Criminal Justice (Public Order) Act, 1994. It is alleged that the respondent and his associates were walking in the middle of the street/roadway. When asked to leave the roadway by police officers, the respondent and the others started to insult the police officers with words commonly considered offensive. I am satisfied that the facts alleged

against the respondent can be regarded as deliberately provocative behaviour on his part, which he must have known carried a substantial risk of provoking a breach of the peace. In such circumstances, it is possible to infer that the respondent intended to provoke a breach of the peace or was at least reckless as to whether a breach of the peace might be occasioned. Such acts, if carried out in this jurisdiction, would amount to an offence contrary to s. 6 of the Criminal Justice (Public Order) Act, 1994.

**20.** I am satisfied that correspondence can be established between the offences referred to in the EAW and offences under the law of this State.

### **Section 37 of the Act of 2003- Prison Conditions and Threat to Life**

**21.** Counsel on behalf of the respondent submits that, as set out in the affidavit of the respondent, if surrendered to Poland, and detained, the respondent's life would be at risk from an organised criminal group. The respondent has not put forward any independent or supporting evidence in respect of this submission other than his own bare allegation.

**22.** Counsel on behalf of the respondent also submits that prison conditions in Poland are such that if detained, there is a real risk that the respondent's right not to be subjected to inhuman or degrading treatment or punishment would be breached by virtue of the prison conditions. Counsel for the respondent opened to the Court a number of reports concerning prison conditions in Poland including reports from the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the Helsinki Committee for Human Rights as well as a report from the Ombudsman and other reports. The Court sought additional information as to the prison conditions which the respondent was likely to face if detained in Poland.

**23.** By additional information dated 19th May, 2021, the Provincial Prosecutor's Office in Radom indicated that the manner of serving a sentence in pre-trial detention, in Poland, is specified in the provisions of the Executive Penal Code. It is indicated that persons serve their sentence in humane conditions with respect for the rights of prisoners and their dignity, under the supervision of the penitentiary court. Prisoners are provided with suitable medical care, adequate food, sanitary and hygiene conditions. An excerpt from the relevant provisions of the Polish Criminal Code was enclosed therewith.

**24.** By further additional information dated 2nd June, 2021, the Provincial Prosecutor Deputy in Radom indicated that the respondent will most probably be temporarily detained or serve his imprisonment penalty in detention on remand in Radom. It was confirmed that pursuant to the Executive Penal Code, the area of living space for a prisoner is not less than three square metres, including furniture but excluding sanitary equipment, and this would be guaranteed for the respondent. It was confirmed that the respondent would be medically assessed upon arrival in Poland and given proper access to medical care if it was required. It was also confirmed that if prison authorities are notified of a suspected threat to the respondent's personal security, a threat assessment will be carried out and if warranted, reasonable steps will be taken to ensure his safety while in custody.

**25.** I note that the additional information is furnished by the Provincial Prosecutor's Office as opposed to the issuing judicial authority. As such, the additional information does not automatically

carry the same weight as information furnished by the issuing judicial authority. However, I am satisfied that the additional information furnished by the Provincial Prosecutor's Office can be given significant weight as it is provided in response to specific questions raised by this Court and comes from a source which is likely to have in-depth knowledge of the conditions and operation of detention regimes in Radom where the respondent is likely to be detained. The additional information must be read and considered alongside all of the other evidence before the Court.

**26.** Taking into account all of the documentation before the Court, I am not satisfied that there are substantial reasons for believing that, if surrendered, the respondent would face a real risk of a breach of his fundamental rights and in particular his right to life and his right not to be subjected to inhuman or degrading treatment or punishment.

**27.** Section 4A of the Act of 2003 provides that it shall be presumed 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"), unless the contrary is shown. The Framework Decision incorporates respect for fundamental rights. I am satisfied that the presumption provided for by s. 4A of the Act of 2003 has not been rebutted in this instance.

**28.** Ultimately, bearing in mind the wording of s. 37 of the Act of 2003, this Court must determine whether surrender of the respondent is incompatible with the State's obligations under the European Convention on Human Rights ("the ECHR"), the protocols thereto, or would be in contravention of the Constitution. I am satisfied that surrender of the respondent would not be incompatible with the State's obligations under the ECHR, the protocols thereto and nor would it contravene the Constitution.

**29.** I dismiss the respondent's objections to surrender based upon prison conditions in the issuing state and/or an alleged threat to his life, if surrendered.

### **Section 37 of the Act of 2003 – Family Rights**

**30.** I am satisfied that the respondent's personal and family circumstances are not so exceptional as could justify refusal of surrender. It is an inherent aspect of criminal prosecutions and/or extraditions that the private and family life of the accused or requested person is likely to be disrupted, and often significantly so. The private and family circumstances of the respondent as set out before the Court come nowhere near meeting the threshold of being "truly exceptional" so as to justify a refusal of surrender (see *Minister for Justice and Equality v. Vestartas* [2020] IESC 12).

### **Section 37 of the Act of 2003 – Rule of Law**

**31.** An earlier ruling was delivered on the above-mentioned points of objection, rejecting such objections. That ruling is incorporated into this judgment. This matter was further adjourned to await decisions from the Supreme Court and/or the Court of Justice of the European Union as regards the rule of law objection and on foot of those decisions the line of objection based on rule of law was not pursued.

### **Conclusion**

**32.** I am satisfied that the surrender of the respondent is not precluded by reason of Part 3 of the Act of 2003 or any other provision of that Act.

**33.** Having rejected the respondent's objections to surrender, it follows that this Court will make an Order for the surrender of the respondent to Poland.