

THE HIGH COURT

[2021] IEHC 38
[2019 No. 317 EXT.]

BETWEEN

MINISTER FOR JUSTICE AND EQUALITY

APPLICANT

AND

MICHAŁ STRYCZEK

RESPONDENT

JUDGMENT of Mr. Justice Paul Burns delivered on the 20th day of January, 2021

1. In 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 5th August, 2019 ("the EAW"). The EAW was issued by Judge Karin Kot, of the Regional Court in Jelenia Góra, as the issuing judicial authority. The EAW seeks the surrender of the respondent to serve two sentences of imprisonment, being:-
 - I. an aggregate sentence of 2 years' deprivation of liberty imposed upon him on 30th October, 2006 in respect of an offence of robbery and an offence of assault, case reference II K 160/06; and
 - II. a sentence of 12 months' deprivation of liberty imposed upon him on 2nd September, 2010 in respect of an offence of assault, case reference II K 506/10.
2. The EAW was endorsed by the High Court on 16th December, 2019 and the respondent was arrested and brought before the High Court on 20th February, 2020.
3. I am satisfied that the person before the Court is the person in respect of whom the EAW was issued. No issue was raised in this respect.
4. I am satisfied that the minimum gravity requirements of the European Arrest Warrant Act, 2003, as amended ("the Act of 2003"), have been met. The respondent is sought to serve two terms of imprisonment, each of which is in excess of 4 months.
5. I am satisfied that none of the matters referred to in ss. 21A, 22, 23 and 24 of the Act of 2003 arise and that the surrender of the respondent is not prohibited for the reasons set forth therein.
6. I am satisfied that correspondence exists between the offences which are the subject matter of the EAW and offences under the law of the State, viz. robbery contrary to s. 14 of the Criminal Justice (Theft and Fraud Offences) Act, 2001 and assault/assault causing harm contrary to s. 2/s. 3 of the Non-Fatal Offences Against the Person Act, 1997. No issue was taken in respect of correspondence.
7. The respondent delivered points of objection dated 6th March, 2020 and at hearing, counsel on behalf of the respondent submitted that objection to surrender was being maintained on the basis that the earlier suspended sentence of 30th October, 2006 (II K 160/06), was activated by the conviction for the offence in respect of which the later sentence of 2nd September, 2010 (II K 506/10) was imposed, and that the later

conviction/sentence failed to meet the requirements of s. 45 of the Act of 2003. It was submitted that if the later sentence failed to meet the requirements of s. 45 of the Act of 2003, then surrender was precluded not only in respect of that later sentence, but also in respect of the earlier sentence which was activated by the later conviction/sentence.

8. The earlier sentence (II K 160/06) was initially suspended for a 5-year period and the period of imprisonment was activated by order dated 16th December, 2010 on foot of the respondent's conviction in respect of the later conviction/sentence (II K 506/10).
9. The later sentence (II K 506/10) was initially suspended for a 5-year period and the period of imprisonment was activated by order dated 12th September, 2011 on foot of the respondent's failure to comply with the terms of suspension, including failure to pay compensation to the injured party.
10. Section 45 of the Act of 2003 is intended to incorporate the provisions of article 4a of the European Council Framework Decision dated 13th June, 2002 on the European Arrest Warrant and the Surrender Procedures Between Member States ("the Framework Decision") into Irish law, and provides:-

"A person shall not be surrendered under this Act if he or she did not appear in person at the proceedings resulting in the sentence or detention order in respect of which the European arrest warrant was issued, unless the European arrest warrant indicates the matters required by points 2, 3 and 4 of point (d) of the form of warrant in the Annex to the Framework Decision as amended by Council Framework Decision 2009/299/JHA, as set out in the table to this section.

TABLE

(d) *Indicate if the person appeared in person at the trial resulting in the decision:*

1. *Yes, the person appeared in person at the trial resulting in the decision.*
2. *No, the person did not appear in person at the trial resulting in the decision.*
3. *If you have ticked the box under point 2, please confirm the existence of one of the following:*

3.1a. the person was summoned in person on . . . (day/month/year) and thereby informed of the scheduled date and place of the trial which resulted in the decision and was informed that a decision may be handed down if he or she does not appear for the trial;

OR

3.1b. the person was not summoned in person but by other means actually received official information of the scheduled date and place of the trial which resulted in the decision, in such a manner that it was unequivocally established that he or she was aware of the scheduled

trial, and was informed that a decision may be handed down if he or she does not appear for the trial;

OR

3.2. *being aware of the scheduled trial, the person had given a mandate to a legal counsellor, who was either appointed by the person concerned or by the State, to defend him or her at the trial, and was indeed defended by that counsellor at the trial;*

OR

3.3. *the person was served with the decision on . . . (day/month/year) and was expressly informed about the right to a retrial or appeal, in which he or she has the right to participate and which allows the merits of the case, including fresh evidence, to be re-examined, and which may lead to the original decision being reversed, and*
the person expressly stated that he or she does not contest this decision,

OR

the person did not request a retrial or appeal within the applicable time frame;

OR

3.4. *the person was not personally served with the decision, but*
— *the person will be personally served with this decision without delay after the surrender, and*
— *when served with the decision, the person will be expressly informed of his or her right to a retrial or appeal, in which he or she has the right to participate and which allows the merits of the case, including fresh evidence, to be re-examined, and which may lead to the original decision being reversed, and*
— *the person will be informed of the time frame within which he or she has to request a retrial or appeal, which will be . . . days.*

4. *If you have ticked the box under points 3.1b, 3.2 or 3.3 above, please provide information about how the relevant condition has been met."*

11. As regards the earlier sentence (II K 160/06), the respondent appeared at the hearing which resulted in the suspended sentence, and thus no issue arises under s. 45 of the Act of 2003 in respect of that earlier suspended sentence.

12. As regards the later sentence (II K 506/10), the EAW indicates that:-

(a) the respondent did not appear at the hearing which led to the sentence;

- (b) in the course of pre-trial proceedings, he was instructed by the public prosecutor about his rights and obligations;
 - (c) notification of the hearing was collected by the respondent's sister at the address provided by the respondent;
 - (d) notification of the judgment and right of appeal was subsequently collected by the respondent's sister at the address provided by the respondent.
13. By additional information dated 14th October, 2019, the issuing judicial authority indicated that the later sentence (II K 506/10), had been "*completed in a consensual manner (the accused agreed to a conviction under conditions agreed with the prosecutor without conducting a trial)*".
14. By further additional information dated 27th November, 2019, the issuing judicial authority indicated that on 10th June, 2010, the respondent received an instruction concerning the rights and obligations vested in the suspect which he confirmed with his personal signature. He had chosen not to apply for defence counsel. He had admitted the act imputed to him and filed an application for voluntary submission to penalty of a 12-month custodial sentence suspended for 5 years, supervision by a court-appointed curator and payment of 1,000 PLN to the aggrieved party. He had personally signed the report to that effect. As per the respondent's application, the prosecutor filed a motion to the Court for imposing the proposed penalty.
15. On foot of a further request for additional information, the issuing judicial authority, by letter dated 12th June, 2020, provided copies of the instructions on rights and obligations provided to the respondent, the report of interview including request to voluntarily submit to penalty and a postal receipt showing the respondent's sister received the notification addressed to him of the date and place of the court sitting, together with instructions.
16. The copy of the written instructions provided to the respondent at interview is signed by the respondent and advised the respondent of his rights, including the right to the legal aid services of a defence counsel and to apply for permission to voluntarily submit to penalty. It also advised the respondent of his obligations, including to notify the authority of any change of residence and if staying abroad, to indicate an address for service in Poland, and on failure to do so, service to the address attached to the case file would be sufficient service.
17. The copy of the report of interview indicated the respondent's registered residence to be 59-600 Niwnice 665 949 833, with the service address in Poland stated to be the same. By his signature at relevant parts of the report, the respondent indicated, *inter alia*, that he did not demand defence counsel and that he wished to voluntarily submit to punishment of 12 months' deprivation of liberty suspended for a probation period of 5 years, probation supervision of court appointed administrator and PLN 1,000 damages for the benefit of the wronged party.

18. The respondent swore an affidavit dated 6th March, 2020, in which he averred that he had come to Ireland in June or July of 2010 and that he had never been made personally aware by the Polish authorities that proceedings were in being. He denied signing a report in 2010 and denied engaging in any agreement as to conviction. He denied signing anything confirming notification of rights and obligations. In light of the additional documentation furnished by the issuing judicial authority, the respondent, through counsel and without swearing any further affidavit, accepted that he had in fact signed the documents as stated by the issuing judicial authority.
19. In so far as the respondent has denied being aware of any proceedings in being or of engaging in any agreement as to sentence prior to coming to Ireland, I find his denials entirely lacking in credibility in light of the documentation copied to the Court by the issuing judicial authority. It is clear from all the materials before the Court that the respondent had been interviewed in respect of the offence to which the later sentence (II K 506/10) relates, had been informed of his rights and obligations, had indicated his wish to apply for an agreed penalty to be imposed in terms of the actual penalty imposed and that he was obliged to inform the relevant authority of any change of address or of an address for service in Poland if he had left the country. I find he was aware of these matters when he came to Ireland. I further note the carefully worded denial at para. 6 of his affidavit that "*I was never made personally aware by the Polish authorities that proceedings were in being...*". (emphasis added) He has not denied being informed by his sister of receipt of the documents collected by her or of the contents of such documents, although it cannot be established that she did inform him. The respondent's lack of precision as to the date on which he left Poland means that it is not possible to say with certainty whether he was or was not still residing at the address given when notification was delivered to that address and collected by his sister.
20. I am satisfied that the respondent, in full knowledge that proceedings were in being against him in Poland, decided to leave Poland and come to Ireland, notwithstanding the existence of such proceedings. I am satisfied that in full knowledge of his obligation to provide details of a change of address within Poland or an address in Poland for service if he left Poland, the respondent did not provide any such details. I am further satisfied that the respondent had been informed and understood that in the absence of providing such details, then service at the address on the case file would be sufficient service. The issue for this Court is whether in such circumstances, s. 45 of the Act of 2003 precludes surrender in respect of the later sentence (II K 506/10).
21. It is accepted by both parties to these proceedings that none of the options set out in the table at s. 45 of the Act of 2003 are directly applicable to the factual situation as regards the later sentence (II K 506/10). If s. 45 is to be interpreted on a strictly literal basis, then in the absence of being able to rely upon one of the options set out therein, the application for surrender would fail as regards the later sentence (II K 506/10). However, in light of the Supreme Court decision in *Minister for Justice v. Zarnescu* [2020] IESC 59, it is now clear that such a literal interpretation is not the correct approach to be taken by the Court, but rather a purposive interpretation is to be adopted in respect of s. 45 of the

Act of 2003. In *Zarnescu*, Baker J. analysed the relevant authorities as regards surrender of persons convicted or sentenced *in absentia* and the proper application of s. 45 of the Act of 2003, and held, *inter alia*, at para. 90:-

"[90] *From this analysis the following emerges:*

- (a) *The return of a person tried in absentia is permitted;*
- (b) *Article 4(6) of the 2002 Framework Decision permits the refusal to return where the requested state has a legitimate reason to refuse the EAW;*
- (c) *A person tried in absentia will not be returned if that person's rights of defence were breached:*
- (d) *Section 45 of the Act expressly identifies circumstances in which a person tried in absentia may be returned, primarily where there is evidence of service or where the person was legally represented or where it is shown that a right of retrial in the requesting state is available as of right:*
- (e) *The examples outlined in section 45 as forming the basis of the analysis are not exhaustive, and the requested authority may look to the circumstances giving rise to the non-attendance of the accused person at the hearing;*
- (f) *The requested state has a margin of discretion in how it approaches the facts, and whether to refuse return;*
- (g) *In so doing the requested authority must be satisfied that it has been established unequivocally that the accused person was aware of the date and place of trial and of the consequences of not attending;*
- (h) *Actual proof of service is not always required, and an assessment may be made from extrinsic evidence that the requested person was aware but nonetheless chose not to attend;*
- (i) *Proof of service on a family member is not sufficient extrinsic evidence of that knowledge;*
- (j) *The assessment is made on the individual facts but there must be actual knowledge by the requested person;*
- (k) *Whether actual knowledge existed is a matter of fact and can be shown from extrinsic evidence;*
- (l) *The purpose of the exercise is to ascertain whether the requested person who did not attend at trial has waived his or her right of defence;*
- (m) *A waiver may be express or implicit from the circumstances, but an implication that a requested person has waived his or her rights to be present*

at trial is not to be lightly made and will not be made if it has not been unequivocally established that the person was aware of the date and place of trial;

- (n) The degree of diligence exercised by a requested person in receiving notification of the date and place of trial may be a factor in the assessment of his or her knowledge of the date of trial:*
- (o) In a suitable case a manifest absence of diligence may lead a requested authority to the view that the accused person made an informed decision not to be present at trial, or where it can be shown that there was an informed choice made by the person to avoid service;*
- (p) The mere absence of enquiry as to the date or place of hearing in itself may not be sufficient, as it must be unequivocally shown that the requested person made an informed decision and, so informed, either expressly or by conduct waived a right to be present:*
- (q) It may in a suitable case be appropriate to weigh the degree of responsibility of the requesting state to notify an accused person of the date of trial against the accused's responsibility for the receipt of his or her mail:*
- (r) The enquiry has as its aim the assessment of whether rights of defence have been breached. It is not therefore a wide ranging or free-standing enquiry into the behaviour or lack of diligence of the requested person, and the purpose is to ascertain if rights of defence were adequately protected."*

22. In the present case, the applicant accepts that it cannot be established unequivocally, either by personal service or extrinsic evidence, that the respondent had actual knowledge of the scheduled hearing. At sub-para. (m) as quoted above, the Supreme Court has expressly stated:-

"[90] ...

- (m) A waiver may be express or implicit from the circumstances, but an implication that a requested person has waived his or her rights to be present at trial is not to be lightly made and will not be made if it has not been unequivocally established that the person was aware of the date and place of trial." (emphasis added)*

This appears to be an absolute prohibition on implying a waiver where the fact of knowledge of the date and place of trial cannot be established by personal service or extrinsic evidence. However, the Supreme Court went on to consider the issue of lack of diligence on the part of a requested person in terms of that being a factor in assessing the requested person's knowledge of the date of trial. It pointed out that manifest absence of diligence could support a view that the requested person had made an informed decision not to be present at trial or to avoid service, so as to unequivocally establish that an

informed decision had been made by the requested person to waive the right to be present at the hearing, as per sub-paras. (n)-(q) of the judgment. It is necessary in conducting an enquiry into the alleged lack of diligence on the part of a requested person to always bear in mind that the aim is to assess whether rights of defence have been breached or were adequately protected, as opposed to a general enquiry into the behaviour of the requested person, as per sub-para. (r).

23. At first glance, it may seem difficult to reconcile the seemingly absolute requirement of actual knowledge for a waiver to be found as set out at sub-para. (m) with the enquiry as to diligence referred to in the later sub-paragraphs, as clearly any lack of diligence is only relevant where actual knowledge cannot be established. On closer perusal, while the lack of diligence issue may feed into an assessment of knowledge, it may also be relevant as to whether the requested person has brought about a situation of deliberate or wilful ignorance of the date and place of trial. However, even where the Court finds such deliberate or wilful ignorance has been brought about by the requested person, it should not simply find a waiver of the right to be present, but should still consider whether the rights of defence were adequately protected or breached.
24. Having carefully considered all the materials before the Court and bearing in mind the Supreme Court decision in *Zarnescu* and the authorities referred to therein, I am satisfied that this case falls within the category of cases set out at sub-para. (o) of para. 90 of Baker J.'s judgment:-

"[90] ...

(o) In a suitable case a manifest absence of diligence may lead a requested authority to the view that the accused person made an informed decision not to be present at trial, or where it can be shown that there was an informed choice made by the person to avoid service."

25. I am satisfied that this is such a suitable case as regards the later sentence (II K 506/10), in circumstances where I find:-
- (i) the respondent left Poland in the knowledge that he had applied to court for an agreed penalty to be imposed and knew that application was pending;
 - (ii) in full knowledge of his obligation to provide details of a change of address within Poland or an address in Poland for service if he left Poland, the respondent did not provide any such details;
 - (iii) the respondent had been informed and understood that in the absence of providing such details, then service at the address on the case file would be sufficient service;
 - (iv) in such circumstances, it can be inferred that the respondent had made an informed decision to bring about a state of affairs in which it was not possible for the Polish authorities to effect personal service upon him;

- (v) in such circumstances, it can be inferred that the respondent had made an informed decision to deliberately and effectively avoid service; and
 - (vi) in such circumstances, it can be also inferred that, having applied for an agreed penalty to be imposed and having left Poland in the circumstances outlined herein, the respondent made an informed decision not to take any further part in the process, including attending any hearing in respect thereof.
26. I have not come to the above conclusions lightly and I have taken a step back to consider whether, in the circumstances, I can be satisfied that the rights of defence have not been breached and were adequately protected. The respondent made an informed decision not to avail of defence counsel, to apply for an agreed penalty to be imposed, not to take any further part in the process and not to provide details of any change of address in circumstances where he knew a failure to do so would result in service at the address on the case file. That agreed penalty of a suspended sentence and payment of compensation was imposed as requested by the respondent. I am satisfied that the respondent's defence rights were adequately protected and were not breached.
27. I am satisfied that the surrender of the respondent in respect of the later sentence (II K 506/10) is not precluded under s. 45 of the Act of 2003 and I dismiss the respondent's objection to surrender based on s. 45 of the Act of 2003.
28. Counsel for the respondent fairly and properly conceded that if this Court concluded that s. 45 of the Act of 2003 did not preclude surrender in respect of the later sentence (II K 506/10), then there was no bar to the surrender of the respondent in respect of the earlier sentence (II K 160/06).
29. I am satisfied that surrender as regards each sentence is not precluded by part 3 of the Act of 2003 or any other provision in the said Act.
30. Having dismissed the respondent's objections, it follows that this Court will make an order pursuant to s. 16(1) of the Act of 2003 for the surrender of the respondent to Poland in respect of both sentences referred to in the EAW.