

THE HIGH COURT

[2021] IEHC 404
[2020 No. 190 EXT]

BETWEEN

MINISTER FOR JUSTICE AND EQUALITY

APPLICANT

AND

PIOTR MARIAN MOCEK (NO. 1)

RESPONDENT

JUDGMENT of Mr. Justice Paul Burns delivered on the 8th day of June, 2021

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 6th May, 2019 ("the EAW"). The EAW was issued by Judge Michał Ziemniewski, of the Regional Court in Poznań, as the issuing judicial authority.
2. The EAW seeks the surrender of the respondent in order to enforce two sentences of imprisonment imposed upon him. The first sentence was imposed by the District Court in Leszno on 6th May, 2005 (case reference no. II K 280/04) for a period of one year and six months' imprisonment, conditionally suspended for four years of probation. By a decision dated 12th January, 2007 (case reference no. II Ko 542/06), the District Court in Leszno ordered execution of the suspended sentence. The remaining period to be served in respect of that sentence is seven months and two days' imprisonment. The second sentence was imposed by the District Court in Leszno on 23rd October, 2006 (case reference no. II K 272/06) for a period of ten months' imprisonment conditionally suspended for five years. By a decision dated 20th July, 2007 (case reference no. II Ko 310/07), the District Court in Leszno ordered the execution of the sentence of ten months' imprisonment. All of the ten months' imprisonment imposed under the second sentence remains to be served.
3. The EAW was endorsed by the High Court on 18th August, 2020 and the respondent was arrested and brought before the High Court on 22nd December, 2020 on foot of same.
4. 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 that regard.
5. I am satisfied that none of the matters referred to in ss. 21A, 22, 23 and 24 of the European Arrest Warrant Act, 2003, as amended ("the Act of 2003"), arise for consideration in this application and that 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 sentences in respect of which surrender is sought is in excess of four 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 offences to which the EAW relates and offences under the law of State, where the offences referred to in the EAW are offences to which article

2.2 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"), 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 boxes for "*forgery of administrative documents and trafficking therein*" and "*fraud*". However, by additional information dated 28th January, 2021, it is indicated that one of the offences to which the second sentence relates, the offence of using false documents, carries a maximum sentence of two years' imprisonment and so s. 38(1)(b) of the Act of 2003 does not apply to same and correspondence must be established. As regards the other offences, I am satisfied that there is no manifest error or ambiguity in respect of the certification, such as would justify this Court in looking beyond same.

8. Part E of the EAW indicates that the first sentence relates to a single offence and the circumstances of same are set out therein. It is also indicated that the second sentence relates to two offences and the circumstances of each of those offences are set out therein. Counsel for the respondent initially contested whether correspondence could be established between one of those offences in the EAW and an offence under the law of the State. However, by way of additional information dated 19th March, 2021, the issuing judicial authority indicated as follows:-

"The offence in case II K 272/06 committed on 8th September 2005 consisted in Mr. Mocek acting jointly and in concert with other identified adult with the intention of making gain for another person. (On 8th September, 2005 in Leszno, for the purpose of obtaining a loan in the amount of PLN 5,000 from PEKAO S.A. bank in Leszno by another adult, acting jointly and in concert with another person he submitted a false certificate of employment and salary of Rafał Gorący at Prężsiębiorstwo Wielobranżowe Ewa Nowak, ul Nicpodleglosci 47 in Leszno, where he (Mr. Mocek) was not employed, i.e. an offence under Article 297(1)).

Mr. Mocek acted with the intention of causing loss to another entity - the bank.

The intention of Mr. Mocek was to induce the bank on foot of a false document to make a loan to the prejudice of the bank."

9. In light of the additional information, counsel on behalf of the respondent conceded that correspondence appeared to have been made out with an offence under ss. 6 and/or 7 of the Criminal Justice (Theft and Fraud Offences) Act, 2001 ("the Act of 2001").
10. In so far as it is necessary to do so, I am satisfied that correspondence can be established between the offences to which the EAW relates and offences under the law of the State. As regards the single offence to which the first sentence relates, this corresponds to an offence in this State contrary to s. 6 of the Act of 2001. As regards the offences to which

the second sentence relates, these correspond to offences in this State contrary to ss. 6 and/or 7 of the Act of 2001.

11. In part D of the EAW, it is indicated that the respondent appeared in person at the respective trials resulting in each of the sentences.
12. At part F of the EAW, further details are provided concerning the sentences to be enforced. It appears that by a decision dated 12th January, 2007 (case reference no. II Ko 542/06), the District Court in Leszno ordered that the respondent should serve the custodial sentence imposed on 6th May, 2005 (case reference no. II K 280/04). He personally appeared for the hearing. However, he did not appear at the prison facility to serve the sentence and a European arrest warrant was issued. The respondent was arrested in Ireland on foot of that European arrest warrant, was surrendered to Poland and detained to serve that sentence. By a decision dated 4th October, 2016 (case reference no. V Kow 3805/16wz), the Regional Court in Poznań conditionally released the respondent from serving the balance of the sentence and placed him on probation. However, by a decision dated 5th July, 2018, the Court revoked the conditional release and ordered the serving of the balance of the penalty. The respondent did not appear at the prison facility to serve the balance of the penalty.
13. It is also indicated at part F of the EAW that as regards the second sentence, the respondent did not appear at the court hearing which revoked the suspension of same although he had been notified of the date of the hearing by twice leaving a notice at the address provided by him.
14. At part F of the EAW, it is indicated that the execution of the first sentence will become statute-barred no later than 14th May, 2030 and as regards the second sentence, no later than 2nd November, 2031.
15. The respondent objects to surrender on the following grounds:-
 - (i) surrender is precluded by virtue of s. 38 of the Act of 2003;
 - (ii) the sentences in respect of which surrender was sought are not immediately enforceable as against the respondent; and
 - (iii) surrender is precluded by virtue of s. 37 of the Act of 2003 due to prison conditions in Poland, the respondent's personal and family circumstances and the failure to provide the respondent with information upon arrest along the lines provided for by Directive 2013/48/EU of the European Parliament and of the Council ("Directive 2013/48").
16. Due to difficulties encountered in having the respondent swear an affidavit as a result of the Covid-19 pandemic, the solicitor for the respondent, Mr. Michael Halleron, swore an affidavit dated 7th January, 2021, exhibiting an unsworn affidavit of the respondent and averring that this unsworn affidavit reflected the instructions which he had received from the respondent. In the unsworn affidavit, the respondent indicates that he came to

Ireland on 17th March, 2007 and that in 2015, he had been arrested on foot of a European arrest warrant in respect of the first sentence of one year and six months' imprisonment. He disputes that he had any time left to serve in respect of that sentence and contends that the sentence is spent. He indicates that while he was in custody in Poland in 2015 - 2016, no attempt was made to execute the domestic warrant which had issued in respect of the second sentence of ten months' imprisonment. He complains of the delay on the part of the Polish authorities in seeking to have him surrendered by this State in respect of that sentence. The respondent also indicates that his wife suffers badly from depression.

17. The respondent subsequently swore an affidavit dated 26th February, 2021, broadly repeating the contents of the earlier unsworn affidavit. He avers that he was not present at the hearing on 12th January, 2007 which activated the first sentence. He avers that he was released from prison on 4th October, 2016 on conditional release and that the conditional release was revoked because he had failed to pay compensation as directed. He avers that he did in fact pay the compensation and exhibited a receipt in that regard. He avers that he was not present when the second sentence was activated and that the sentence was covered by the conditional release on 4th October, 2016 which was revoked due to failure to pay compensation which he had in fact paid. He exhibits a medical report in relation to his wife's medical condition. He sets out the conditions in the Polish prison system as experienced by him when in custody in 2015 - 2016. He avers that conditions were very crowded and that he was confined to his cell for 23 hours a day for the initial period of his detention. He exhibits a large number of materials relating to prison conditions in Poland. Finally, he avers that he was not informed of his rights pursuant to article 10(4) of Directive 2013/48 on the right of access to a lawyer, the right to have a third party informed upon deprivation of liberty and to communicate with third persons and consular authorities when deprived of liberty.
18. On foot of the affidavit sworn by the respondent, the Court sought additional information from the issuing judicial authority and by reply dated 28th January, 2021, it is confirmed that in respect of the first sentence, the respondent has seven months and two days' imprisonment left to serve. It is confirmed that the conditional early release was revoked "*due to violation of law*" by the respondent. As regards the second sentence, this was not enforced following his earlier surrender as it was not included in the earlier warrant and at a hearing on 15th February, 2016, the respondent did not waive the specialty rule or consent to enforcement of that sentence. Confirmation is given that the maximum penalty for the fraud offence in the first sentence is eight years' imprisonment, as regards the second sentence the maximum sentence for gaining credit by false pretences is five years' imprisonment and for the use of false documents the maximum sentence is two years' imprisonment. Following hearing further submissions from the parties, the Court sought additional information and by reply dated 19th March, 2021, it is indicated that the reason for the revocation of the conditional early release granted on 4th October, 2016 was due to the violation of the conditions of the conditional early release by the respondent. The respondent is said to have evaded probation supervision, failed to stay at the designated address and left the country without permission to change his place of residence. As

regards the second sentence, this was revoked due to his evasion of probation supervision and changing his whereabouts and also failing to meet an obligation to pay a fine. The fine was eventually paid but not within the period required and, as indicated, this was not the only reason for the revocation of the suspension of sentence.

19. As regards prison conditions, the additional information dated 19th March, 2021 indicates that the respondent will serve his sentence in the penitentiary in Rawicz in which living space for prisoners is no less than three square metres excluding sanitary facilities. It is indicated that a prison director may place a prisoner in a cell with a personal living space of less than three square metres but a special decision is issued in such a case. The additional information sets out the general conditions as regards the living quarters in the prison, sanitary/hygiene facilities, windows, lighting, bedding, physical exercise, education and food. It is also confirmed that the respondent will undergo a medical examination prior to transfer to the penitentiary, that any suspected threat to the personal safety of the respondent will be assessed and steps taken to provide for his safety while in detention.

Correspondence

20. This has already been dealt with herein. In so far as it may be necessary, I am satisfied that correspondence can be established between each of the offences referred to in the EAW and offences under the law of the State.

Enforceability of Sentence

21. Counsel on behalf of the respondent submitted that the sentences in respect of which surrender is sought had originally been suspended and were activated by reason of the failure on the part of the respondent to pay a fine/compensation. He submitted that the respondent had paid the fine as evidenced by the receipt exhibited in the respondent's affidavit. However, the additional information dated 28th January, 2021 indicates that while the respondent did indeed pay the fine/compensation, he did so after the period provided for doing so and that failure to pay such fine/compensation was not the only reason for the activation of the suspended sentence. By additional information dated 19th March, 2021, the issuing judicial authority expressly states that the sentence of the District Court in Leszno, case reference no. II K 280/04 remains enforceable and surrender is sought to serve the sentence of one year and six months' imprisonment. It also indicates that in case reference no. II K 272/06, the late payment of the fine/compensation has no bearing on the request for surrender as it does not change the fact that there are still other grounds for the sentence to be executed. It is clear from all the documentation before the Court that the sentences are not regarded as spent under the law of the issuing state and that surrender in respect of same is still sought by the issuing state. I dismiss the respondent's objection to surrender based upon his submission that the sentences are spent and unenforceable.

Section 37 of the Act of 2003 – Prison Conditions

22. It is submitted on behalf of the respondent that surrender is precluded by reason of s. 37 of the Act of 2003 which provides that surrender shall be refused where it is incompatible with the State's obligations under the European Convention on Human Rights ("the

ECHR”), the Protocols thereto and/or would be in breach of the Constitution. It is submitted on behalf of the respondent that due to prison conditions in the issuing state, there is a real risk that, if surrendered, the respondent would be subjected to inhuman and degrading treatment in breach of article 3 ECHR. The respondent relied upon a number of reports from various international organisations including the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. Having considered the said documentation, the Court sought additional information in relation to the conditions in which the respondent will be detained if surrendered.

23. By additional evidence dated 19th March, 2021 the issuing judicial authority indicates that after surrender, the respondent will be detained to serve his sentence in the penitentiary in Rawicz. It is indicated that the space per prisoner there is no less than three square metres. On foot of a special decision, the prisoner may be placed in a cell with less than three square metres of floor space, but it would appear that this is exceptional. Counsel for the respondent accepted that the High Court, in *Minister for Justice and Equality v. Mroz* (Unreported, High Court, Coffey J., 9th March, 2021), has already ruled that the existence of such an exception does not of itself give rise to a substantial reason to believe that the requested person will be subjected to inhuman or degrading treatment. The additional information sets out the prison conditions. Having evaluated all of the information before the Court, I am not satisfied that there are substantial reasons for believing that there exists a real risk that, if surrendered, the respondent will be subjected to inhuman and/or degrading treatment while detained in the issuing state.
24. It should be noted that s. 4A of the Act of 2003 provides for a presumption that Member States will comply with the requirements of the Framework Decision unless the contrary is shown. The Framework Decision incorporates respect for fundamental rights. On considering all of the evidence before the Court, I am satisfied that the presumption in s. 4A of the Act of 2003 has not been rebutted.
25. Ultimately, bearing in mind the wording of s. 37 of the Act of 2003, this Court must determine whether surrender of the respondent to the issuing state is incompatible with the State’s obligations under the ECHR, the protocols thereto and/or the Constitution. I am satisfied that surrender of the respondent to Poland is not incompatible with the State’s obligations in that regard. I therefore dismiss the respondent’s objection to surrender grounded upon prison conditions in Poland.

Section 37 of the Act of 2003 – Right to Private and Family Life

26. Counsel for the respondent submitted that surrender of the respondent would be disproportionate, oppressive and unfair and would constitute an unjustified interference with the respondent’s right to a private and family life as protected by article 8 ECHR. He emphasised that the offences and sentences were of some antiquity. He pointed out that the respondent had previously been surrendered in respect of sentence number one and yet no effort was made to execute sentence number two while the respondent was in Poland on foot of the earlier surrender. However, as is made clear in the additional

information, the respondent declined to give consent to the second sentence being dealt with on foot of his earlier surrender in respect of the first sentence.

27. The respondent relied upon medical reports from his partner's GP, Dr. Beirne, to the effect that she suffers from multiple medical problems including gastritis, duodenitis, panic attacks, depressive disorder and hypothyroidism. Dr. Beirne opines that if the respondent was not there to care for his partner, her health would deteriorate drastically. I accept that the respondent provides a level of care for his partner. However, I am not satisfied that the impact the respondent's surrender may have upon the care needs of his partner is such as would justify a refusal of surrender in this case. The report of Dr. Beirne does not indicate precisely how the respondent's absence will lead to a deterioration in his partner's health and does not indicate precisely what is meant by "drastic deterioration". Without wishing to make light of the respondent's partner's health difficulties, they are not of an uncommon nature and in general are capable of being medically monitored and treated. In an email from Dr. Beirne to the respondent's solicitors dated 12th March, 2021, Dr. Beirne sets out the respondent's partner's medical conditions but states:-

"She is on a lot of medication for the above conditions. While she is fully mobile and independent in daily activities she is emotionally dependant on her partner Piotr. So it is all to do with her psychological health and wellbeing. I do believe that she would suffer a relapse in her Depressive illness and Panic attacks if he was removed from the scene."

28. It is inherent in the criminal process and extradition system that the personal and family life of an accused or surrendered person and his immediate family will be disrupted and often significantly so. As pointed out in *Minister for Justice and Equality v. Vestartas* [2020] IESC 12, it is only where the personal and family circumstances of the requested person are truly exceptional that same could be regarded as possibly justifying refusal of surrender. In *Vestartas*, MacMenamin J., delivering the judgment of the Supreme Court, stated at para. 23:-

"23. Article 8(1) ECHR guarantees the right to respect for an individual's private and family life, home and correspondence. But that guarantee is subject to the proviso that public authorities shall not interfere with the exercise of that right, except such as in accordance with law, and is necessary in a democratic society in the interests of national security, public safety, the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others (Article 8(2)). The terms of Article 8(2) are, therefore, sufficiently broad to encompass orders for extradition, or in this case, surrender. But as will be seen, these Article 8 considerations arise within a statutory framework which it is now necessary to consider."

29. At para. 94, MacMenamin J. went on to state:-

"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.*"

30. Again, as regards the respondent's private and family life, 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 ECHR, the Protocols thereto and/or the Constitution. I am satisfied that surrender is not incompatible with the State's obligations in that regard. I therefore dismiss the respondent's objection to surrender grounded upon his private and family life.

Directive 2013/48

31. Counsel for the respondent did not pursue this objection as he accepted that this Court was bound to follow the decision in *Mroz*, in which Coffey J. held that as Ireland is not obliged to transpose Directive 2013/48 (which counsel for the respondent accepted), Irish law is not required to be interpreted in a way that conforms with that Directive.

Other matters

32. Insofar as the respondent sought to rely upon any other grounds for refusal of surrender contained within the written submissions but not argued at hearing before the Court, I am satisfied that there are no other grounds contained within the written submissions which would justify this Court in refusing surrender.

Conclusion

33. I am satisfied that surrender of the respondent is not precluded by part 3 of the Act of 2003 or any other provision of that Act.
34. Having dismissed the respondent's objections to surrender, it follows that this Court will make an order pursuant to s. 16 for the surrender of the respondent to Poland.
35. Following the Court having dealt with this matter over a number of months, including receiving written submissions and conducting oral hearings, and upon the Court indicating that it would deliver judgment on today's date, counsel for the respondent indicated that he wished to raise a new ground of objection to surrender based upon rule of law issues in Poland. I declined to hear this further objection in such circumstances. The respondent had ample opportunity to raise any such objection in the normal course of the proceedings and had not done so. No explanation for leaving the issue to such a late stage in the proceedings was given.