

THE HIGH COURT

[2022] IEHC 570

[2018 Nos. 16, 17, 18, 218, 289, 290, 345, 354 EXT.]

[2019 Nos. 147, 148, 331, 356 EXT.]

[2020 No. 234 EXT.]

BETWEEN

MINISTER FOR JUSTICE AND EQUALITY

APPLICANT

AND

JAROSLAW SLIWA

RESPONDENT

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

1. By these applications the applicant seeks orders for the surrender of the respondent to the Republic of Poland ("Poland") pursuant to a large number of European arrest warrants ("the EAWs") issued by various judges in Poland, as the respective issuing judicial authorities. The respondent was initially admitted to bail but this was subsequently revoked. The determination of these matters has been delayed due to the number of EAWs and issues raised in respect thereof, as well as the need to seek additional information and to await determinations of other courts in respect of relevant issues.

2. It should be noted that the respondent was the subject of previous proceedings under the European Arrest Warrant Act, 2003, as amended ("the Act of 2003"), seeking his surrender on foot of four European arrest warrants, two of which were in respect of enforcement of sentences and two of which were in respect of prosecution for offences. The respondent was surrendered to Poland on foot of those warrants in October 2014 in respect of all matters save prosecution in respect of one offence.

3. I am satisfied that the person before the Court, the respondent, is the person in respect of whom the EAWs have been issued. This was not put in issue by the respondent.

4. In total there were initially 13 separate EAWs before the Court, of these six seeking surrender for the purpose of prosecuting the respondent and seven seeking surrender for the enforcement of sentences of imprisonment imposed upon the respondent. As regards the EAWs seeking surrender for the purpose of enforcement of sentences imposed upon the respondent, these have now been withdrawn following the imposition of a single aggregate sentence in respect of those matters. Presumably a fresh warrant will issue in due course as regards that aggregate sentence.

5. In addition to the respective EAWs, the Court has received various pieces of additional information from the issuing judicial authorities. As stated above, the respondent has been the subject of previous proceedings in which his surrender to Poland was ordered, except as regards prosecution for one of the alleged offences. Following his surrender, the Polish authorities sought permission to prosecute him in respect of other offences, but it appears that before such requests were processed the respondent left Poland and returned to Ireland, making such requests redundant and necessitating the issue of some of these EAWs instead.

6. The respondent swore three affidavits dated 22nd January, 2019, 9th December, 2019 and 9th October, 2020, respectively. In addition, he relied upon two affidavits sworn by Ms. Alicia Szturma, translator, dated 28th July, 2020 and 27th October, 2020, respectively.

7. The Court is obliged to consider each EAW on its own merits although there are a number of 'omnibus' issues common to all or many of the EAWs. I propose to deal with each application separately as regards its unique features and to then deal with the omnibus issues.

Application No. 2018/16 EXT. – EAW III Kop 4/17

8. This EAW is dated 10th February, 2017, was issued by Judge Dariusz Swiezynski, of the Circuit Court in Kalisz, and seeks the surrender of the respondent for prosecution in respect of three fraud-type offences allegedly committed in 2011. Additional information dated 7th November, 2018 confirmed that the respondent was sought for prosecution and that the date of issue of the EAW was 10th February, 2017, such issue being based upon a domestic arrest warrant dated 9th August, 2016.

9. This EAW was endorsed by the High Court on 15th January, 2018 and the respondent was arrested and brought before the High Court on 9th April, 2018.

10. I am satisfied that the minimum gravity requirements of the Act of 2003 are met. The maximum penalty in respect of each offence is stated at part C of the EAW to be 12 years' imprisonment. I am satisfied that it is not necessary to look beyond the EAW in this respect. I note that at part E of the EAW, setting out the circumstances in which the offences were committed, it is specifically stated that each alleged offence was committed "*within 5 years after serving not less than a six-month prison sentence for an offence of a similar nature*". It is clear, from information furnished in the course of dealing with these applications, that there is a basic maximum penalty of 8 years' imprisonment which can be increased by up to 50% for subsequent similar offences.

11. The circumstances of each offence, including the extent of the respondent's involvement in same, and the relevant statutory provisions are set out at part E of the EAW. It is certified that the offences each carry a maximum penalty of at least three years' imprisonment and fall within 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"), and the relevant box is ticked for "*swindling*".

12. By virtue of s. 38(1)(b) of the Act of 2003, it is not necessary for the applicant to show correspondence between an offence in the EAW and an offence under Irish law, where the offence in the EAW is an offence to which Article 2.2. of the Framework Decision applies and carries a maximum penalty of at least three years' imprisonment. I am satisfied that there is no manifest error as regards the invocation of the said tick-box procedure and it is not necessary for the Court to look beyond same. However, for the sake of completeness I point out that I am satisfied that, if required, correspondence could be made out between the offences in the EAW and an offence under the law of the State, being an offence of deception contrary to s. 6 of the Criminal Justice (Theft and Fraud Offences) Act, 2001.

13. I am satisfied, subject to the omnibus issues, surrender on foot of this EAW may be ordered pursuant to the Act of 2003.

Application No. 2018/17 EXT. – EAW III Kop 108/17

14. This EAW is dated 30th June, 2017, was issued by Judge Alexandra Soltysinska- Laszczyca of the District Court in Krakow and seeks the surrender of the respondent for prosecution in respect of 18 fraud-type offences (contrary to Articles 287.1 and 286.1 of the Polish Criminal Code) allegedly committed between February 2011 and August 2012. Additional information dated 21st November, 2018 confirmed that the respondent was sought for prosecution and that the EAW was based upon a domestic arrest warrant dated 21st December, 2016.

15. This EAW was endorsed by the High Court on 15th January, 2018 and the respondent was arrested and brought before the High Court on 9th April, 2018.

16. I am satisfied that the minimum gravity requirements of the Act of 2003 are met. From the EAW, read as a whole, it is clear that the maximum penalty is stated to be five years' imprisonment for an offence under Article 287.1 of the Polish Criminal Code and 8 years' imprisonment, for an offence under Article 286.1 of the Polish Criminal Code. As pointed out in respect of application 2018/16 EXT. above, these penalties may be increased by up to 50% in the case of a subsequent similar offence.

17. The circumstances of each offence, including the extent of the respondent's involvement in same, and the relevant statutory provisions are set out at part E of the EAW. It is certified that the offences each carry a maximum penalty of at least three years' imprisonment and fall within Article 2.2. of the Framework Decision and the relevant box is ticked for "fraud".

18. I am satisfied that there is no manifest error or ambiguity as regards the invocation of the said tick-box procedure and that it is not necessary for the Court to look beyond same. However, for the sake of completeness I point out that I am satisfied that, if required, correspondence could be made out between the offences in the EAW and an offence under the law of the State, being an offence of deception contrary to s. 6 of the Criminal Justice (Theft and Fraud Offences) Act, 2001 as regards offences II–XVIII in the EAW and the offence of unlawful use of a computer contrary to s. 9 of the Act of 2001 as regards offence I in the EAW.

19. I am satisfied that all the offences referred to in the EAW are alleged to have been committed in Poland. The EAW states at part E that offences XI and XV were committed in an unknown place, but by way of additional information dated 21st November, 2018, it has been clarified that the said offences "*were committed via an ICT network and for this reason it is not possible to state the exact location, yet they were perpetrated in the territory of the Republic of Poland*".

20. I note that offence X in the EAW matches an offence in respect of which the Polish authorities, on 15th January, 2015, had petitioned for consent to prosecute the respondent following his surrender in 2014. Donnelly J. had granted consent for such prosecution. By way of additional information dated 21st November, 2018, the issuing judicial authority has confirmed that the proceedings are still ongoing. In such circumstances no question of double jeopardy as envisaged by s. 41 of the Act of 2003 arises. While there are some discrepancies between the offence as outlined in the said petition and in the EAW, by way of additional information dated 23rd September, 2020 the issuing judicial authority has stated that the offence is alleged to have occurred on 22nd April, 2011 and the amount in question was 2,316 PLN.

21. I am satisfied that there are no outstanding details, discrepancies or ambiguities such as would justify this Court in refusing surrender.

22. I am satisfied that, subject to the omnibus issues, surrender on foot of this EAW may be ordered pursuant to the Act of 2003.

Application No. 2018/18 EXT. – EAW II Kop 22/17 (Withdrawn)

Application No. 2018/218 EXT. – EAW II Kop 22/18 (Withdrawn)

Application No. 2018/289 EXT. – EAW II Kop 1/18 (Withdrawn)

Application No. 2018/290 EXT. – EAW IV Kop 140/18 (Withdrawn)

Application No. 2018/345 EXT. – EAW II Kop 92/18 (Withdrawn)

Application No. 2018/354 EXT. – EAW III Kop 140/18 (Withdrawn)

Application 2019/147 EXT. – EAW II Kop 4/19

23. This EAW is dated 31st January, 2019, was issued by Judge Agnieszka Sadecka of the Regional Court in Tarnow and seeks the surrender of the respondent in order to prosecute him in respect of a single fraud-related offence (contrary to Article 286 of the Polish Criminal Code) allegedly committed on 1st October, 2013.

24. This EAW was endorsed by the High Court on 29th April, 2019 and the respondent was arrested and brought before the High Court on the same day.

25. I am satisfied that the minimum gravity requirements of the Act of 2003 are met. The maximum penalty is stated in the EAW to be 8 years' imprisonment and it is explained at part E of the EAW that this may in certain circumstances be increased by up to 50% if the offence is of a similar nature to previous offending.

26. The circumstances of the alleged offence, including the extent of the respondent's involvement in same, and the relevant statutory provisions are set out in part E of the EAW. It is certified that the offence carries a maximum penalty of at least 3 years' imprisonment and falls within Article 2.2. of the Framework Decision and the relevant box is marked for "*fraud*".

27. I am satisfied that there is no manifest error or ambiguity as regards the invocation of the tick-box procedure and that it is not necessary for the Court to look beyond same. However, for the sake of completeness I point out that I am satisfied that, if required, correspondence could be made out between that offence in the EAW and an offence under the law of the State, being an offence of deception contrary to s. 6 of the Criminal Justice (Theft and Fraud Offences) Act, 2001.

28. As regards the alleged offence, no location was specified in the EAW. However, in additional information dated 27th February, 2019, the issuing judicial authority confirmed and explained that the victim of the offence was in Poland and his relevant bank account was maintained in Poland. I am satisfied that the offence was committed in Poland. I am satisfied that sufficient details of the alleged offence have been furnished.

Application 2019/148 EXT. – EAW IV Kop 15/19 (Withdrawn)

Application 2019/331 EXT. – EAW IV Kop 211/18

29. This EAW is dated 23rd October, 2018, was issued by Judge Andrej Wach of the Circuit Court in Lublin and seeks the surrender of the respondent in order to prosecute him in respect of a single fraud-related offence (contrary to Article 286 of the Polish Criminal Code) allegedly committed on 30th September, 2014.

30. This EAW was endorsed by the High Court on 8th October, 2019 and the respondent was arrested and brought before the High Court on 14th October, 2019.

31. I am satisfied that the minimum gravity requirements of the Act of 2003 are met. The alleged offence in respect of which surrender is sought is stated at part C of the EAW to carry a maximum penalty of "*2 (two) years of detention with the possibility of strengthening the penalty to 3 years of imprisonment*".

32. The circumstances of the alleged offence, including the extent of the respondent's involvement in same, and the relevant statutory provisions are set out at part E of the EAW. At part E.1. of the EAW it is certified that the offence carries a maximum penalty of at least three years' imprisonment and falls within Article 2.2. of the Framework Decision and the relevant box is marked for "*swindling*". However, as the maximum penalty is stated at part C of the EAW to be "*2 (two) years of detention with the possibility of strengthening the penalty to 3 years of imprisonment*", the Court required the applicant to establish correspondence in accordance with s. 38(1)(a) of the Act of 2003. I am satisfied that correspondence has been made out between the offence in the EAW and an offence under the law of the State, being an offence of deception contrary to s. 6 of the Criminal Justice (Theft and Fraud Offences) Act, 2001. I am satisfied that the offence in the EAW carries a maximum penalty of not less than 12 months' imprisonment or detention. Accordingly, I am satisfied that the requirements of s. 38(1)(a) of the Act of 2003 are met.

33. Counsel on behalf of the respondent submits that surrender on foot of this EAW was precluded by s. 44 of the Act of 2003 as the offence is alleged to have been committed outside of Poland. This submission is based on the fact that at the time of the offence, the respondent was awaiting finalisation of separate EAW proceedings in this jurisdiction. It is submitted that the respondent can be taken to have been in Ireland at the time, although he was on bail, and if he was in Ireland the acts alleged to constitute the offence must have occurred in Ireland.

34. It is a well established principle of criminal law that a person may be in one state and yet commit an offence in another state. For instance, where person A in state 1 discharges a firearm in order to kill or injure person B in state 2 on the other side of the frontier and succeeds in doing so, person A will be regarded as having committed an offence in both states. The crime had constituent elements in each jurisdiction. The completion of the crime occurred in state 2.

35. Section 44 of the Act of 2003 provides as follows:-

"44. –A person shall not be surrendered under this Act if the offence specified in the European arrest warrant issued in respect of him or her was committed or is alleged to have been committed in a place other than the issuing state and the act or omission of which the offence consists does not, by virtue of having been committed in a place other than the State, constitute an offence under the law of the State."

36. Section 44 of the Act of 2003 thus sets out a two-part test for determining whether surrender is prohibited by virtue of that section. Firstly, it must be established that the offence specified in the

European arrest warrant was committed or is alleged to have been committed in a place other than the issuing state. Secondly, it must be established that the act or omission of which the offence consists does not, by virtue of having been committed in a place other than the State, constitute an offence under the law of the State. In *Minister for Justice and Equality v. Trust Egharevba* [2015] IESC 55, Denham C.J. stated at para. 15 of her judgment:-

"15. The requirements set out in section 44 of the Act of 2003, as amended, are conjunctive. Thus, both conditions are required to be met for the appellant to succeed."

37. It is noteworthy that the wording of s. 44 contains the wording "*was committed or is alleged to have been committed*". This appears to envisage two separate concepts, viz. that of "was committed" and that of "is alleged to have been committed". It appears to me that the reference to "*was committed or is alleged to have been committed*" reflects the fact that a European arrest warrant may be issued in respect of a person whose surrender is being sought in order to serve a sentence for an offence in respect of which he has already been convicted or alternatively may be issued in respect of a person whose surrender is being sought in order to prosecute such person for an alleged offence. Where the surrender is sought in order for the person to serve a sentence, the fact of the commission of an offence has already been judicially determined and therefore the location of the offence will have been established. Where a person is being sought in order to stand trial in respect of an alleged offence it has not yet been judicially determined whether an offence was actually committed, including where the offence was committed, and so the relevant criteria is where the offence is "alleged to have been committed". If that is so, then in considering s. 44 of the Act of 2003 in relation to a prosecution warrant, the executing judicial authority has to determine where it is alleged the offence was committed and in particular whether it is alleged that the offence was committed in a place other than the issuing state.

38. The executing judicial authority is not normally required to conduct its own fact-finding inquiry to determine where the alleged offence took place but rather is to take cognisance of where the offence is alleged to have taken place on the basis of the information set out in the warrant, or in any additional information furnished by the issuing state. Only where there is obvious ambiguity or a manifest error or where cogent evidence has been adduced to the contrary should the Court consider looking beyond what is alleged in the warrant or any additional information furnished by the issuing state. I find no such ambiguity or manifest error in the EAW before me. The alleged fraud was conducted using access to a website whereby the respondent is alleged to have misled the victim in a named location in Poland into transferring funds to the respondent's benefit for a concert ticket which she did not receive. In such circumstances, at least some if not all of the acts alleged to constitute the offence occurred within Poland.

39. I am not satisfied that the offence in the EAW is alleged to have been committed in a place other than the issuing state. Indeed, I am satisfied that the offence is alleged to have been committed within the issuing state. Furthermore, I am satisfied that if proven at trial the acts alleged would amount to an offence committed within the issuing state. In such circumstances, the respondent has failed to satisfy the first limb of the test set out at s. 44 of the Act of 2003, and therefore it is not necessary to consider the second limb of the test. I dismiss the objection of the respondent based on s. 44 of the Act of 2003.

40. I am satisfied, subject to the omnibus issues, that surrender on foot of this EAW may be ordered pursuant to the Act of 2003.

41. Counsel on behalf of the respondent objects to surrender on the basis that it is not clear that a decision had been made to charge and try the respondent for the alleged offence and that s. 21A of the Act of 2003 precludes surrender. He referred to part F of the EAW which contained the following:-

"The District Prosecutors Office in Bochnia supervises preparatory proceedings against Jaroslaw Sliwa, suspected of committing an offence specified in box (e) of this form. By the decision of the District Court in Bochnia dated 24th August 2017 a preventative measure of remand in custody was imposed on Jaroslaw Sliwa."

Counsel placed particular reliance on the reference to "*preparatory proceedings*" and the reference to "*suspected of committing*". I dismiss this objection of the respondent. Section 21A(2) of the Act of 2003 provides:-

"21A.-(2) ... it shall be presumed that a decision has been made to charge the person with, and try him or her for, that offence in the issuing state, unless the contrary is proved."

No cogent evidence has been adduced to establish that no decision has been made to charge and try the respondent with the offence. The use of the words "*preparatory proceedings*" and/or "*suspected of committing*" do not in any way dislodge the presumption in s. 21A(2) of the Act of 2003.

42. I am satisfied, subject to the omnibus issues, that surrender on foot of this EAW may be ordered pursuant to the Act of 2003.

Application 2019/356 EXT. – EAW III Kop 87/19

43. This EAW is dated 26th September, 2018, was issued by Judge Teresa Jedrzejak of the Regional Court in Bielsko-Biala and seeks the surrender of the respondent in order to prosecute him in respect of a single fraud-related offence (contrary to Article 286 of the Polish Criminal Code) allegedly committed on 7th February, 2013.

44. This EAW was endorsed by the High Court on 4th November, 2018 and the respondent was arrested and brought before the High Court on the same day.

45. I am satisfied that the minimum gravity requirements of the Act of 2003 are met. The alleged offence is stated at part C of the EAW to carry a maximum penalty of 12 years' imprisonment, and at part E of the EAW it is clarified that the maximum penalty for the offence is 8 years' imprisonment under Article 286.1 of the Polish Penal Code but that under Article 64.1 of the Polish Penal Code this can be increased by up to a further half of that maximum penalty in respect of second or subsequent offences of a similar nature in certain circumstances.

46. The circumstances of the offences, including the extent of the respondent's involvement in same and the relevant statutory provisions are set out at part E of the EAW. It is certified that the offence carries a maximum penalty of at least three years' imprisonment and falls within Article 2.2. of the Framework Decision and the relevant box is marked for "*fraud*".

47. I am satisfied that there is no manifest error as regards the invocation of the tick-box procedure and it is not necessary for the Court to look beyond same. However, for the sake of completeness I point out that I am satisfied that, if required, correspondence could be made out

between that offence in the EAW and an offence under the law of the State, being an offence of deception contrary to s. 6 of the Criminal Justice (Theft and Fraud Offences) Act, 2001.

48. Counsel on behalf of the respondent submits that surrender on foot of this EAW is precluded by s. 44 of the Act of 2003. The relevant issues in respect of this submission are essentially the same as in Application 2019/331 EXT. – EAW IV Kop 211/18 and for the reasons set out earlier in respect of that application I dismiss the respondent's similar objection in respect of this EAW.

49. I am satisfied, subject to the omnibus issues, that surrender on foot of this EAW may be ordered pursuant to the Act of 2003.

Application 2020/234 EXT. – EAW III Kop 151/20

50. This EAW is dated 22nd July, 2020, was issued by Judge Joanna Wieczorkiewicz-Kita of the Regional Court in Szczecin and seeks the surrender of the respondent in order to prosecute him in respect of a single fraud-related offence (contrary to Article 286 of the Polish Criminal Code) allegedly committed on 5th May, 2011.

51. This EAW was endorsed by the High Court on 29th September, 2020 and the respondent was arrested and brought before the High Court on 9th October, 2020.

52. I am satisfied that the minimum gravity requirements of the Act of 2003 are met. The alleged offence is stated at part C of the EAW to carry a maximum penalty of 8 years' imprisonment.

53. The circumstances of the offence, including the extent of the respondent's involvement in same and the relevant statutory provisions are set out at part E of the EAW. It is certified that the offence carries a maximum penalty of at least three years' imprisonment and is the type of offence which falls within Article 2.2. of the Framework Decision and the relevant type of offence is stated to be "*fraud*".

54. I am satisfied that there is no manifest error as regards the invocation of this procedure and it is not necessary for the Court to look beyond same. However, for the sake of completeness I point out that I am satisfied that, if required, correspondence could be made out between that offence in the EAW and an offence under the law of the State, being an offence of deception contrary to s. 6 of the Criminal Justice (Theft and Fraud Offences) Act, 2001.

55. I am satisfied, subject to the omnibus issues, that surrender on foot of this EAW may be ordered pursuant to the Act of 2003.

Omnibus Objections

56. I turn now to consider what the parties have termed 'omnibus objections' being objections that are not specific to a particular warrant but rather apply to all or the majority of the EAWs before the Court.

The Rule of Specialty

57. It appears that following his previous surrender to Poland in 2014 proceedings were initiated against the respondent for matters other than those in respect of which he was surrendered. In particular, it would appear that he was subjected to pre-trial detention in respect of one or more such matters. Counsel on behalf of the respondent submits that this was in breach of the rule of specialty in so far as that rule is incorporated into Article 27 of the Framework Decision and s. 22 of

the Act of 2003. He further submits that, given such previous conduct on the part of Poland, this Court could not be satisfied that, if surrendered, the respondent would not be prosecuted and/or detained in breach of the relevant provisions of the Framework Decision and/or the Act of 2003.

58. Article 27 of the Framework Decision provides as follows:-

"1. Each Member State may notify the General Secretariat of the Council that, in its relations with other Member States that have given the same notification, consent is presumed to have been given for the prosecution, sentencing or detention with a view to the carrying out of a custodial sentence or detention order for an offence committed prior to his or her surrender, other than that for which he or she was surrendered, unless in a particular case the executing judicial authority states otherwise in its decision on surrender.

2. Except in the cases referred to in paragraphs 1 and 3, a person surrendered may not be prosecuted, sentenced or otherwise deprived of his or her liberty for an offence committed prior to his or her surrender other than that for which he or she was surrendered."

59. Section 22 of the Act of 2003 incorporates Article 27 of the Framework Decision into domestic law and provides:-

"22.(1) In this section, except where the context otherwise requires, 'offence' means, in relation to a person to whom a relevant arrest warrant applies, an offence (other than an offence specified in the relevant arrest warrant in respect of which the person's surrender is ordered under this Act) under the law of the issuing state committed before the person's surrender, but shall not include an offence consisting, in whole, of acts or omissions of which the offence specified in the European arrest warrant consists in whole or in part.

(2) Subject to this section, the High Court shall refuse to surrender a person under this Act if it is satisfied that—

- (a) the law of the issuing state does not provide that a person who is surrendered to it pursuant to a relevant arrest warrant shall not be proceeded against, sentenced or detained for the purposes of executing a sentence or detention order, or otherwise restricted in his or her personal liberty, in respect of an offence, and*
- (b) the person will be proceeded against, sentenced, or detained for the purposes of executing a sentence or detention order, or otherwise restricted in his or her personal liberty, in respect of an offence.*

(3) It shall be presumed that, in relation to a person to whom a relevant arrest warrant applies, the issuing state does not intend to—

- (a) proceed against him or her,*
- (b) sentence or detain him or her for a purpose referred to in subs. (2)(a), or*
- (c) otherwise restrict him or her in his or her personal liberty,*

in respect of an offence, unless the contrary is proved.

(4) The surrender of a person under this Act shall not be refused under subs.(2) if—

- (a) upon conviction in respect of the offence concerned he or she is not liable to a term of imprisonment or detention, or*
- (b) the High Court is satisfied that, where upon such conviction he or she is liable to a term of imprisonment or detention and such other penalty as does not involve a restriction of his or her personal liberty,*

the said other penalty only will be imposed if he or she is convicted of the offence.

(5) The surrender of a person under this Act shall not be refused under subs.(2) if it is intended to impose in the issuing state a penalty (other than a penalty consisting of a restriction of the person's liberty) including a financial penalty in respect of an offence of which the person claimed has been convicted, notwithstanding that where such person fails or refuses to pay the penalty concerned (or, in the case of a penalty that is not a financial penalty, fails or refuses to submit to any measure or comply with any requirements of which the penalty consists) he or she may, under the law of the issuing state be detained or otherwise deprived of his or her personal liberty.

(6) The surrender of a person under this Act shall not be refused under subs.(2) if the High Court—

(a) is satisfied that—

(i) proceedings will not be brought against the person in respect of an offence,

(ii) a penalty will not be imposed on the person in respect of an offence, and

(iii) the person will not be detained or otherwise restricted in his or her personal liberty for the purposes of an offence,

without the issuing judicial authority first obtaining the consent thereto of the High Court,

(b) is satisfied that—

(i) the person consents to being surrendered under s.15,

(ii) at the time of so consenting he or she consented to being so proceeded against, to such a penalty being imposed, or being so detained or restricted in his or her personal liberty, and was aware of the consequences of his or her so consenting, and

(iii) the person obtained or was afforded the opportunity of obtaining, or being provided with, professional legal advice in relation to the matters to which this section relates,

(c) is satisfied that—

(i) such proceedings will not be brought, such penalty will not be imposed and the person will not be so detained or otherwise restricted in his or her personal liberty before the expiration of a period of 45 days from the date of the person's final discharge in respect of the offence for which he or she is surrendered, and

(ii) during that period he or she will be free to leave the issuing state, except where having been so discharged he or she leaves the issuing state and later returns thereto (whether during that period or later), or

(d) is satisfied that such proceedings will not be brought, such penalty will not be imposed and the person will not be so detained or restricted in his or her personal liberty unless—

(i) the person voluntarily gives his or her consent to being so proceeded against, such a penalty being imposed, or being so detained or restricted in

his or her personal liberty, and is fully aware of the consequences of so doing,

(ii) that consent is given before the competent judicial authority in the issuing state, and

(iii) the person obtains or is afforded the opportunity of obtaining, or being provided with, professional legal advice in the issuing state in relation to the matters to which this section relates before he or she gives that consent.

(7) The High Court may, in relation to a person who has been surrendered to an issuing state under this Act, consent to—

(a) proceedings being brought against the person in the issuing state for an offence,

(b) the imposition in the issuing state of a penalty, including a penalty consisting of a restriction of the person's liberty, in respect of an offence, or

(c) proceedings being brought against, or the detention of, the person in the issuing state for the purpose of executing a sentence or order of detention in respect of an offence,

upon receiving a request in writing from the issuing state in that behalf.

(8) The High Court shall not give its consent under subsection (7) if the offence concerned is an offence for which a person could not by virtue of Part 3 be surrendered under this Act."

60. Counsel for the respondent submits that Poland had acted in breach of Article 27.2. of the Framework Decision and that in such circumstances, the presumption under s. 22(3) of the Act of 2003 had been rebutted and that this Court should be satisfied that, if surrendered, the respondent would be prosecuted and/or detained in respect of an offence or offences other than those on respect of which surrender had been ordered. He submits that in such circumstances, the surrender of the respondent is precluded by s. 22(2) of the Act of 2003.

61. Counsel on behalf of the applicant submits that in so far as prosecutions had been initiated against the respondent for offences other than those in respect of which surrender had been ordered, such action on the part of the Polish authorities did not amount to a breach of Article 27.2. of the Framework Decision as the respondent had not been restricted in his liberty as a result thereof, save for a brief period when he was subject to pre-trial detention during a time when he was already separately detained, serving a sentence for offences in respect of which surrender had been ordered. By additional information, received by email dated 28th August, 2020, the issuing judicial authority in respect of EAW II Kop 1/18, confirmed that the periods spent in detention following surrender in October 2014, were all in respect of matters for which surrender had been ordered. However, the reply went on to state that while so detained the respondent was the subject of pre-trial temporary arrest from 14th to 28th November, 2014 in respect of other matters. The decisions on temporary arrest had been made prior to his surrender and when it was made known to the relevant authorities that the respondent was in Poland on foot of a surrender which did not relate to those other matters, the said decisions were immediately quashed. The said decisions did not in any way lengthen the periods served by the respondent in respect of the matters for which he had been surrendered. The issuing judicial authority made the point that under the Polish law giving effect to Article 27.2. of

the Framework Decision, there was no bar to proceeding against the respondent for other matters provided he was not deprived of his liberty.

62. Counsel for the applicant submits that it was clear that the Polish authorities had at all times acted with *bona fides*, immediately arranging for the quashing of the temporary detention orders when the error was discovered and in issuing petitions under Article 27 of the Framework Decision to obtain permission from the High Court to prosecute the respondent in respect of such other matters, which petitions were overtaken by the respondent returning to Ireland.

63. Counsel for the respondent submitted that s. 22 of the Act of 2003, and in particular subss. 22(2) and 22(3) had to be interpreted literally so that “proceeded against”, “sentenced” and “detained” in those provisions were to be construed disjunctively so that where the mere initiation of proceedings or sentencing for other offences, without any actual deprivation or restriction of personal liberty, is permitted by the law of the issuing state, that would be sufficient to preclude surrender. He referred the Court to the judgment of McKechnie J. in *Minister for Justice and Equality v. Vilkas* [2018] IESC 69 to support his submission that an interpretation other than that put forward on behalf of the respondent would be impermissible as being *contra legem*.

64. I am satisfied that the Polish authorities acted with *bona fides* in relation to the temporary detention imposed upon the respondent as set out above. I do not find that either (a) the said temporary detention, or (b) the prosecution of the respondent falling short of actual deprivation of, or restriction in, his personal liberty, is evidence of an intention on the part of the Polish authorities to proceed against the respondent and deprive him of, or restrict him in, his liberty in contravention of Article 27 of the Framework Decision or to do so in a manner as envisaged by s. 22(2) of the Act of 2003. I find that the presumption in s. 22(3) of the Act of 2003 is applicable to all of the EAWs before the Court and the contrary has not been proven.

65. In so far as it may be necessary to rule upon the interpretation of s. 22 of the Act of 2003, I accept the interpretation contended for by the applicant. In *Leymann & Pustovarov* (C-388/08 PPU) the Court of Justice of the European Union (“the CJEU”) considered the interpretation of Article 27 of the Framework Decision and at para. 76 stated:-

“76. ... the exception in Article 27(3)(c) of the Framework Decision must be interpreted as meaning that, where there is an ‘offence other’ than that for which the person was surrendered, consent must be requested, in accordance with Article 27(4) of the Framework Decision, and obtained if a penalty or a measure involving the deprivation of liberty is to be executed. The person surrendered can be prosecuted and sentenced for such an offence before that consent has been obtained, provided that no measure restricting liberty is applied during the prosecution or when judgment is given for that offence ...”

66. Thus, there is no breach of Article 27.2. of the Framework Decision by the issuing state in conducting a prosecution for an offence other than that for which the person was surrendered, without the consent of the executing state, unless and until the prosecution results in the deprivation or restriction of the liberty of the person surrendered.

67. In *Minister for Justice and Equality v. Sliwa* [2016] IEHC 185, Donnelly J. considered the interpretation of s. 22 of the Act of 2003 in the context of petitions by Poland to prosecute the surrendered person (the respondent in the present case) for offences other than those in respect of which his surrender had been ordered. Donnelly J. held at para. 58:-

"58. The Court is satisfied that the interpretation proffered by counsel for the minister with respect to s. 20 ss. 2 is also correct. The phrases in each of the sub clauses, namely 'proceeded against, sentenced or detained for the purposes of executing a sentence or detention order' are immediately followed by the phrase 'or otherwise restricted in his or her personal liberty.' The use of the word 'otherwise' acts as a qualifier to the words in the prior clause. Thus, being 'proceeded against' is to be viewed as involving a deprivation of liberty. Again, in respect of subsection 3, which provides for presumptions and thus does not of itself prohibit surrender, the use of the word 'or' before the reference to 'otherwise restrict him or her personal liberty' is a qualifier on the interpretation of 'proceed against'. Being proceeded against means being proceeded against where there is a deprivation of liberty involved."

At para. 62 Donnelly J. went on to state:-

"62. Even if there was a doubt as to how s. 22 was to be interpreted in so far as a prohibition on proceeding against a person up to the point of sentence is concerned, the conforming interpretation requires this Court to interpret the section and in particular the relevant subsections in accordance with the relevant provisions of Article 27. It is not contra legem to interpret the relevant provisions of s. 22 as permitting an issuing State to prosecute and sentence a person provided that no measure restricting liberty is applied during the prosecution or when judgment is given."

68. I am satisfied that in so far as the respondent has been proceeded against for offences other than those in respect of which his surrender was ordered, such proceedings have not been in breach of Article 27 of the Framework Agreement and I am satisfied that the period when the respondent was subject to temporary detention was a genuine mistake and did not result in any additional deprivation of liberty. I am satisfied that on a proper interpretation of s. 22 of the Act of 2003 there is no basis for refusing surrender pursuant to s. 22(2) thereof. I dismiss the respondent's objections based on s. 22 of the Act of 2003 and the rule of specialty.

Prison Conditions

69. Counsel on behalf of the respondent submits that due to the conditions in which the respondent was likely to be detained, if surrendered, there is a real risk of a breach of his right under Article 3 of the European Convention on Human Rights ("the ECHR") not to be subjected to inhuman or degrading treatment or punishment.

70. In an affidavit dated 22nd January, 2019, the respondent set out his experience of detention in a number of different prisons in Poland following his surrender in October 2014. He described poor conditions including overcrowding, unsanitary cells, inadequate personal hygiene facilities, poor food, inter-prisoner violence and extremely limited access to doctors, telephone and outdoor exercise. He also referred to extracts from a number of reports from various bodies including the U.S. State Department, the Council of Europe's Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment ("the CPT") and human rights groups.

71. In a second affidavit dated 9th December, 2019, the respondent averred, *inter alia*, that he had received threats to his life due to inadvertently giving up the names of drug dealers and he also

set out details as regards his high cholesterol and back pain. He exhibited a report from a Polish newspaper which was critical of Polish prisons.

72. In a third affidavit, the respondent referred back to the incident of giving up names and the resulting threats he received and his health status, as well as referring to further materials concerning conditions in Polish prisons. He states that he has a six-year-old daughter who lives with his former partner in Cork and he wishes to maintain a good relationship with her which would not be possible if surrendered.

73. In a fourth affidavit dated 9th October, 2020, the respondent exhibited further materials in respect of prison conditions, provided more details of his back complaint and exhibited correspondence concerning his request for legal aid in Poland.

74. The Court sought additional information from the Polish authorities regarding the likely conditions which the respondent would be held in if surrendered and received replies from the various issuing judicial authorities, including the following replies:-

Application 2018/16 EXT. – EAW III Kop 4/17, reply dated 2nd February, 2021;

Application 2018/17 EXT. – EAW III K 108/17, reply dated 9th February, 2021;

Application 2019/147 EXT. – EAW II K 4/19, reply dated 28th January, 2021;

Application 2019/356 EXT. – EAW III Kop 87/19, reply dated 29th January, 2021; and

Application 2019/234 EXT. – EAW III K 151/20, reply dated 24th February, 2021.

The Court also received replies from issuing judicial authorities in respect of which the EAW was subsequently withdrawn, including a comprehensive reply in proceedings Application 2018/289 EXT. – EAW II K Kop 1/18, dated 4th February, 2021.

75. Evaluating all of the information before the Court, in particular the information relied upon by the respondent and the replies received from the issuing judicial authorities in respect of EAWs in respect of which surrender continues to be sought, I am not satisfied that there are substantial grounds for believing that, if surrendered, the respondent will face a real risk of a breach of his fundamental rights due to prison conditions in Poland. While the issuing state could not identify the particular prison in which the respondent might be detained, it is clear from the replies received that, if detained, he will have a minimum personal space of three square metres, including furniture but excluding sanitary facilities. His medical condition will be assessed and he will be provided with appropriate medical care. Adequate steps will be taken to ensure his personal safety. Adequate provision for the respondent will be made as regards access to fresh air, exercise, clothing, heating, food and water. The information from the issuing state is provided by persons who can be expected to have knowledge of such matters. I am not satisfied that there is reason to doubt the knowledge, competence and *bona fides* of the persons providing such information.

76. Section 4A of the Act of 2003 provides that it shall be presumed that an issuing state will comply with the Framework Decision unless the contrary is shown. The Framework Decision incorporates respect for fundamental rights. I am satisfied that the presumption provided for in s. 4A of the Act of 2003 has not been rebutted in these matters.

77. Ultimately, bearing in mind the wording of s. 37 of the Act of 2003, this Court has to determine if surrender of the respondent would be incompatible with the State's obligations under the ECHR, the protocols thereto or would contravene a provision of the Constitution. I am satisfied

that surrender of the respondent would not be incompatible with the State's obligations under the ECHR or the protocols thereto and nor would it be contrary to any provision of the Constitution.

78. Counsel for the applicant submits that the respondent had unsuccessfully made the same arguments as regards prison conditions in the 2016 proceedings concerning petitions for consent to prosecute him for other offences. She submits that there was no evidence to demonstrate any deterioration in prison conditions since then.

Fair Trial Rights

79. It is submitted on behalf of the respondent that, if surrendered, he would not receive a fair trial in respect of the intended prosecutions in breach of his right to a fair trial under Article 6 ECHR. In this regard the respondent pointed to what he alleges were breaches in respect of the previous proceedings resulting in convictions and sentences, and in particular short notice of hearing dates, a failure to produce him at hearings and a lack of legal representation. It was submitted that such previous breaches were sufficient to rebut the presumption in s. 4A of the Act of 2003 that "*It shall be presumed that an issuing state will comply with the requirements of the relevant agreement, unless the contrary is shown.*"

80. The respondent relied upon refusals of legal aid in respect of intended trials as evidence that he would not receive a fair trial.

81. As regards the alleged previous breaches of his fair trial rights and pending applications for surrender to serve sentences, I have dealt with these in respect of the individual warrants before the Court. In relation to the complaint that he was given insufficient notice of hearings, it is worth noting that the respondent at no stage indicated that he wished to have the matters adjourned to allow him more time to deal with same, and similarly in relation to a failure to be produced he did not indicate any wish to attend in circumstances where the hearing was to impose a previously agreed penalty. As regards the issue of legal aid, there is a system in place for the provision of legal aid in appropriate cases. The respondent does not allege any deficiency in the law relating to the provision of legal aid but rather his complaint is the refusal of applications for legal aid made by him. The respondent has had the benefit of legal aid in the past. On the basis of the documentation before the Court, the refusal of legal aid appears to be due to the failure of the respondent to provide sufficient or necessary information in respect of such applications.

82. I find that the respondent has failed to adduce cogent evidence sufficient to rebut the presumption in s. 4A of the Act of 2003 in respect of his fair trial rights.

83. I am not satisfied that there is a substantial basis for concluding that, in the past, the respondent has suffered a breach of his fundamental right to a fair trial. Similarly, I am not satisfied that, if surrendered, there is a real risk that the respondent's fundamental right to a fair trial will be breached.

Rule of Law

84. 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 CJEU as regards the rule of law objection and on foot of those decisions the line of objection based on rule of law issues was not pursued.

Conclusion

85. 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.

86. 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.