THE HIGH COURT
AN ARD-CHÚIRT

[2024] IEHC 511

[2024 No. 136 EXT]

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

BETWEEN

THE MINISTER FOR JUSTICE

APPLICANT

AND

JAROSLAW KLEPACZ

RESPONDENT

JUDGMENT of Mr Justice David Keane delivered on the 15 August 2024

Introduction

1. The Minister for Justice ('the Minister') applies under s. 16(2) of the European Arrest Warrant Act 2003, as amended ('the Act of 2003'), for an order directing the surrender of Jaroslaw Tomasz Klepacz to the Republic of Poland, pursuant to a European Arrest Warrant ('the EAW') issued by the Circuit Court of Zielona Góra, as the issuing judicial authority in that Member State, on 16 May 2024.

Background

2. The EAW seeks the surrender of Mr Klepacz to serve a sentence of 10 months and 20 days imprisonment, representing the remaining part of a sentence of 1 year and 3 months (i.e. fifteen months) imprisonment, imposed upon him on 18 May 2023 by the District Court of Żary for an offence of breach of a restraining order and an offence of assault (decision reference II K 215/23).

3. Mr Klepacz was arrested and brought before the court on 8 June 2024 on foot of an alert ('the SIS II alert') issued on 4 June 2024 under the second generation of the Schengen Information System, established by Council Decision 2007/533/JHA ('the SIS II Decision'). The EAW was produced to the court (McGrath J) when Mr Klepacz came before it again on 19 June 2024. Under s. 14(4) of the Act of 2003, the court fixed 1 July 2024 as the date for the hearing of the s. 16 surrender application. I am satisfied that the person before the court is the person in respect of whom the EAW was issued. Mr Klepacz raises no issue in that regard.

4. By letters dated 1 and 4 July 2024, the Department of Justice wrote to the issuing judicial authority on behalf of the High Court to request the provision of certain specified additional information ('the first and second requests'). The issuing authority provided additional information in response to those requests by letters dated 2 and 5 July 2024 ('the first and second replies').

5. Points of Objection were filed on Mr Klepacz's behalf on 3 July 2024, and, on 10 July 2024, he swore an affidavit to ground his opposition to the application.

6. I heard the application on 16 July 2024. On the basis of the evidence and information before me and, having heard the arguments of both sides, I decided to seek one further specific piece of information from the issuing judicial authority, and I adjourned the hearing for that purpose. By letter dated 19 July 2024, the Department of Justice wrote on behalf of the High Court to the issuing judicial authority once more to seek that information ('the third request'). The issuing judicial authority promptly provided it in a letter dated 25 July 2024 ('the third reply').

7. The hearing of the application then resumed, and concluded, before me on 7 August 2024.

The issues

8. In his points of objection, Mr Klepacz puts the Minister on strict proof both of the matters that it is necessary to establish to obtain an order for surrender under s. 16(2) of the Act of 2003 and of the existence of a corresponding offence under the law of the State for each of the two offences for which the issuing state seeks his surrender, in the absence of which surrender may be refused under s. 38 of the Act.

9. However, the written and oral submissions made on behalf of Mr Klepacz concentrate solely on the third and final point of objection, which is that his surrender is prohibited under s. 37 of the Act of 2003 because it would expose him to a real risk of imprisonment in conditions that would amount to a breach of his right not to be subjected to inhuman or degrading treatment or punishment under Article 3 of the European Convention on Human Rights ('the Convention').

10. Hence, before considering whether the necessary proofs are in order in respect of the application for surrender and whether corresponding offences exist under the law of the State, I will first address that objection.

The prison conditions objection

11. In Minister for Justice v Angel [2020] IEHC 699, (Unreported, High Court, 15 December 2020) ('Angel') (at para. 45), Paul Burns J distilled – from the review of the relevant authorities conducted by McDermott J in Minister for Justice and Equality v Pal [2020] IEHC 143 – the following non-exhaustive list of principles that apply to objections to surrender based on an asserted risk of breach of fundamental rights and, in particular, of subjection to inhuman or degrading treatment or punishment in that event:

‘(a) the cornerstone of the Framework Decision is that member states, save in exceptional circumstances, are required to execute any European arrest warrant on the basis of the principles of mutual recognition and mutual trust;

(b) a refusal to execute a European arrest warrant is intended to be an exception;

(c) one of the exceptions arises when there is a real or substantial risk of inhuman or degrading treatment contrary to article 3 ECHR or article 4 of the Charter of Fundamental Rights of the European Union (“the Charter”);

(d) the prohibition of surrender where there is a real or substantial risk of inhuman or degrading treatment is mandatory. The objectives of the Framework Decision cannot defeat an established risk of ill-treatment;

(e) the burden rests upon a respondent to adduce evidence capable of proving that there are substantial/reasonable grounds for believing that if he or she were returned to the requesting country, he or she will be exposed to a real risk of being subjected to treatment contrary to article 3 ECHR;

(f) the threshold which a respondent must meet in order to prevent extradition [or surrender] is not a low one. There is a default presumption that the requesting country will act in good faith and will respect the requested person's fundamental rights. Whilst the presumption can be rebutted, such a conclusion will not be reached lightly;

(g) in examining whether there is a real risk, the Court should consider all of the material before it and if necessary, material obtained of its own motion;

(h) the Court may attach importance to reports of independent international human rights organisations or reports from government sources;

(i) the relevant time to consider the conditions in the requesting state is at the time of the hearing;

(j) when the personal space available to a detainee falls below 3m2 of floor surface in multi-occupancy accommodation in prisons, the lack of personal space is considered so severe that a strong presumption of a violation of article 3 ECHR arises. The burden of proof is then on the issuing state to rebut the presumption by demonstrating that there are factors capable of adequately compensating for the scarce allocation of personal space, and this presumption will normally be capable of being rebutted only if the following factors are cumulatively met:-

(1) the reductions in the required minimum personal space of 3m2 are short, occasional and minor;
(2) such reductions are accompanied by sufficient freedom of movement outside the cell and adequate out-of-cell activities; and

(3) the detainee is confined to what is, when viewed generally, an appropriate detention facility, and there are no aggravating aspects of the conditions of his or her detention;

(k) a finding that there is a real risk of inhuman or degrading treatment by virtue of general conditions of confinement in the issuing member state cannot lead, in itself, to the refusal to execute a European arrest warrant. Whenever the existence of such a risk is identified, it is then necessary for the executing judicial authority to make a further assessment, specific and precise, of whether there are substantial grounds to believe that the individual concerned will be exposed to that risk. The executing judicial authority should request of the issuing member state all necessary supplementary information on the conditions in which it is envisaged that the individual concerned will be detained;

(l) an assurance provided by the competent authorities of the issuing state that, irrespective of where he is detained, the person will not suffer inhuman or degrading treatment is something which the executing state cannot disregard and the executing judicial authority, in view of the mutual trust which must exist between the judicial authorities of the member states on which the European arrest warrant system is based, must rely on that assurance, at least in the absence of any specific indications that the detention conditions in a particular detention centre are in breach of article 3 ECHR or article 4 of the Charter; and

(m) it is only in exceptional circumstances, and on the basis of precise information, that the executing judicial authority can find that, notwithstanding such an assurance, there is a real risk of the person concerned being subjected to inhuman or degrading treatment because of the conditions of that person's detention in the issuing member state.'

12. In the affidavit that Mr Klepacz swore on 10 July 2024 in opposition to the application, he avers that, after the offences took place, he was remanded in custody and served approximately six months, rather than the period of just over four months suggested in the warrant (presumably, in stating that 10 months and 20 days of a 15-month sentence remain to be served). In material part, he goes on to aver:

> 'While on remand, I was subjected to inhuman prison conditions such as being forced to spend 23 hours a day in a cell that may accommodate up to 6 people. These cells also had a toilet and there was only room to sleep. Further, I was only afforded the opportunity to shower twice a week and the cells were dirty and unhygienic.
>
> I say that, after the first two months on remand, I attempted to take my life on two occasions. Due to this, I was moved to a cell on my own for the remaining 4 months. It was approximately 2 metres by 1.5 metres.

I say that the food was inedible and there was no ability to purchase additional food. This caused me to become food deprived. I was also required to take medication offered by the prison and this had adverse effects and made me feel sleepy and dazed.

I feel that if I am incarcerated in Poland, I will be in a similar position….'

13. In the written legal submissions filed on his behalf, dated 1 July 2024, Mr Klepacz relies upon certain parts of the contents of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment ('CPT') report of 22 February 2024 on its visit to Poland between 21 March and 1 April 2022 (CPT/Inf (2024) 10) ('the CPT report'); the Helsinki Foundation for Human Rights report of July 2018 on the rights of persons deprived of liberty in Poland ('the Helsinki report'); and the United Nations Committee Against Torture observations of 29 August 2019 on the seventh periodic report of Poland ('the UNCAT observations'), to submit that he has discharged the heavy onus of establishing reasonable or substantial grounds for believing that he would be exposed to a real risk of imprisonment in conditions of inhuman or degrading treatment or punishment if surrendered to Poland.

14. To enable the court to make a specific and precise assessment of whether such substantial grounds exist, in its second request the court asked the issuing judicial authority to identify the detention institution(s) or prison(s) in which it is intended that the respondent, if surrendered, will be detained, including on a temporary or transitional basis.

15. In its second reply, the issuing judicial authority responded (in material part):

'[A]fter his surrender to Poland, Jaroslaw Klepacz will be put in an appropriate correctional facility in order to serve the prison term mentioned in the EAW.

Under the Polish Penal Enforcement Code, the decision about the choice of a correctional facility in which to put a convict is taken by a special commission – at this stage of the penal enforcement provisions in Mr Klepacz's case it is beyond this court's powers to name a specific correctional facility in which he will be put to serve his term. In order to secure proper conditions for handling particular convicts, preventing harmful influence of depraved convicts, and assuring personal safety, the choice of the correctional facility and custodial system, as well as the placement of convicts within the facility, relies on a classification of convicts, which takes account of their sex, age, former periods in custody, premeditation (or its absence) of the offence, length of remaining sentence, mental and physical health including possible substance addictions, degree of depravation and potential threat to society, nature of the offence, and offender's attitude to their unlawful conduct. A thorough psychological profiling is carried out to classify a convict.

Correction facilities in Poland are within the scope of the Minister of Justice's responsibility. Under the Polish Enforcement Code, the floor area per convict is no less than 3m2.

In Poland, custodial penalties are carried out in a humanitarian way, respectful of the convict's dignity. Torture is banned, as is inhumane or humiliating treatment of convicts. Convicts retain their full civil rights and liberties whose restriction may only have legal basis. The supervision of the lawfulness and appropriateness of the execution of custodial sentences is exercised by a penitentiary judge who regularly visits correctional and temporary-arrest facilities and who has the right to interview convicts in the absence of other persons and process their applications complaints and requests.'

16. In its third request, the court asked the issuing judicial authority to identify the detention institution(s) in which, if he is surrendered, the respondent is to be detained on remand, prior to the decision of the special commission determining the correctional facility in which he is to serve the prison term referred to in the EAW. In making that request the court was guided by the decision of the Court of Justice of the European Union ('CJEU') in Case C-220/18 PPU ML (Generalstaatsanwaltschaft Bremen) ECLI:EU:C:2018:589, which makes clear that the appropriate specific and precise determination of whether there is a real risk of inhuman or degrading treatment cannot concern the general conditions in all of the prisons in the issuing Member State in which the individual concerned might be detained (para. 78) but solely the conditions of detention in the prisons in which, according to the information available, it is actually intended that the person concerned will be detained, including on a temporary or transitional basis (para. 87).

17. In its third reply, the issuing judicial authority states in material part:

'[I]f Mr Klepacz is surrendered to Poland on foot of the EAW and transferred by air he will be put in a temporary custody facility located in an area which falls within the same local jurisdiction as the airport does: in the case, it would be Warszawa-Okęcie airport, so Mr Klepacz would be held in 'Areszt Śledczy w Warszawie-Bialolęce' facility. Next, following the procedures, he would be put in a penitentiary facility indicated by the penitentiary commission. At the moment, it is not possible to specify the exact length of the period in temporary custody in respect of Mr Klepacz before he is put in prison. However, pursuant to Art. 79b I of the Penal Enforcement Code, the convicted person is put in the temporary custody facility for as long as necessary, but no longer than 14 days.'

18. In his affidavit, Mr Klepacz prefaces his complaints about the conditions of his detention in Poland by acknowledging that at the material time he was being held on remand. He does not identify the detention institution(s) or prison(s) in which he was held on remand. He does not provide any medical evidence in support of his claim that his mental health and physical health were adversely affected.

19. In his written legal submissions, Mr Klepacz acknowledges that the criticism in the CPT report on which he relies (at para. 53) – that the official minimum standard of 3m2 of living space per prisoner remained unchanged, despite the recommendation of the CPT that it should be 6m2 for single occupancy cells and 4m2 per person for multiple-occupancy cells – was made in the context of a periodic visit that focussed on conditions in remand prisons. As against that, the information provided by the issuing judicial authority in its second reply does appear to confirm that, under the Polish Enforcement Code, 3m2 of living space remains the minimum standard in Polish correctional facilities.

20. The criticisms in the Helsinki report of prison conditions in Poland describe the position as it was over six years ago in, or prior to, July 2018 and, thus, cannot provide a reliable guide to the current position, particularly as conditions were then seen to vary according to the age of the penitentiary facility concerned and as a program to modernise prison services had already then begun. The same is true of the UNCAT observations, which are now almost five years old, and which criticise certain aspects of the conditions in historic buildings and older penitentiary units (at para. 29) as they would have been in, or before, August 2019.

21. On the basis of the evidence and material available to the court, I am not persuaded that there are substantial or reasonable grounds for believing that if Mr Klepacz is returned to Poland, he will be exposed to a real risk of being subjected to treatment contrary to article 3 ECHR.

22. There is a default presumption that the issuing state will act in good faith and will respect the requested person's fundamental rights. The threshold necessary to rebut that presumption is not a low one. The burden rests on the requested person to adduce evidence capable of proving that there are substantial/reasonable grounds for believing that if he is returned to the requesting country, he will be exposed to a real risk of being subjected to treatment contrary to Article 3 of the Convention. While I may attach importance to reports from independent human rights organisations, such as the Council of Europe Committee on the Prevention of Torture, the specific prison conditions I must consider are those in which the requested person will be held, and which prevail at the time of the hearing.

23. The information available to the court establishes that, if returned to Warsaw in Poland by air as a sentenced person, the respondent will be placed in an identified local temporary custody facility for a period not exceeding 14 days before being transferred to a penitentiary facility nominated by the penitentiary commission. The temporary custody facility concerned is not one of the two establishments that were the subject of the CPT report, so that the specific criticisms of those establishments in that report are not material. I have no evidence, and little or no material before me, touching on the specific conditions in which Mr Klepacz will be held if surrendered, apart from the assurance that under the Polish Enforcement Code, the floor area per convict is no less than 3m2.

24. The position on the significance of the minimum living space available to a prisoner as an element of the assessment of whether conditions of detention amount to inhuman or

degrading treatment contrary to Article 3 of the ECHR is by now clear. While the CPT document Living Space per prisoner in prison establishments – CPT standards, 15 December 2015, (CPT/Inf (2015) 44), confirms a 'rule of thumb' minimum prison accommodation living space of 6m2 for a single occupancy cell and 4m2 for a multiple-occupancy cell (in each case, excluding sanitary facilities) (at para. 9), it goes on to acknowledge that minor deviations from those minimum standards may not amount to inhuman or degrading treatment, as long as other alleviating factors are present (at para 21).

25. In its judgment in the case of Muršić v. Croatia (Application no. 7334/12, Grand Chamber, 20 October 2016), the European Court of Human Rights confirmed the standard predominant in its case-law that 3m2 of floor surface per detainee in multi-occupancy accommodation is the relevant minimum standard under Article 3 of the Convention (para. 136), such that living space of less than 3m2 in multi-occupancy prison accommodation gives rise to a strong presumption of a violation of Article 3 (para. 137), whereas living space of between of between 3m2 and 4m2 is to be considered a weighty factor in the relevant assessment and will amount to a violation of Article 3 if coupled with other inappropriate physical conditions of detention related to, in particular, access to outdoor exercise, natural light or air, ventilation, room temperature, privacy in toilet use, and sanitation and hygiene (para. 139). The only information before me is that under Polish law, the floor area per convict can be no less than 3m2.

26. I have no information before me concerning detention conditions in either the identified local temporary detention facility or the as-yet-unascertained penitentiary facility in which the respondent will be held that would allow me to conclude that he will have living space of more than 3m2 but less than 4m2 in either of those facilities, nor any information that would allow me conclude that, should it exist, such a constraint would be coupled with other inappropriate conditions of detention capable of creating conditions of detention that would amount to inhuman or degrading treatment contrary to Article 3 of the ECHR.

27. In this case, there is no objective, reliable, specific, and properly updated information before me that demonstrates deficiencies in detention conditions in Poland that may be systemic or generalised, or that affect a group of which the respondent is a member, or which may affect any of the places where he is to be, or is likely to be, detained.

28. In the circumstances I have described and given the test I must apply, I am not persuaded that Mr Klepacz has discharged the burden of adducing evidence capable of establishing that there are substantial or reasonable grounds for believing that, if returned to Poland, he will be detained in conditions that will expose him to a real risk of being subject to inhuman or degrading treatment or punishment.

29. For that reason, I reject this ground of objection.

The EAW - necessary proofs under s. 16(2) of the Act of 2003

30. On the information and evidence before me, I am duly satisfied that:

(a) the EAW, which does not relate to a conviction in absentia, has been provided to the court,

(b) the person before the court is the person in respect of whom the EAW issued (upon which no dispute has been raised),

(c) I am not required under s. 22, 23 or 24 of the Act of 2003 to refuse to surrender Mr Klepacz (as none of the matters referred to in those sections of the Act arise), and,

(d) the surrender of Mr Klepacz is not prohibited under any of the provisions of Part 3 of the Act of 2003. I have rejected Mr Klepacz's argument that his surrender is prohibited under s. 37 of the Act. I am satisfied that each of the offences for which his surrender is sought corresponds to an offence under the law of the State. I conclude that the acts constituting the first offence would, if committed in the State on the date when the EAW issued, constitute the offence of contravention of an order, contrary to s. 33 of the Domestic Violence Act 2018. That conclusion results in part from the respondent's concession at the hearing that the persons identified in the EAW as the subjects of the restraining order are his former partner and his mother. In addition, I conclude that the act constituting the second offence would, if committed in the State on the date when the EAW issued, constitute either the offence of assault, contrary to s. 2 of the Non-Fatal Offences Against the Person Act 1997 or that of assault causing harm, contrary to s. 3 of that Act. Thus, there is no basis to refuse surrender under s. 38(1A) of the Act of 2003. Quite separately, I am satisfied that a term of imprisonment of not less than four months (specifically, one of 15 months) was imposed on the respondent for those offences, of which a term of 10 months and 20 days remains to be served, so that his surrender is not prohibited under s. 38(1)(a)(ii) of the Act. None of the other matters referred to in Part 3 of the Act arises.

Conclusion

31. It follows that, having due regard to the obligation to surrender under s. 10 of the Act of 2003, I will make an order under s. 16(2) of that Act, directing the surrender of Mr Klepacz to such person as is duly authorised by the Republic of Poland to receive him.