[2019] IEHC 803

**THE HIGH COURT**

**[2019 No. 195 EXT]**

**BETWEEN**

**MINISTER FOR JUSTICE & EQUALITY**

**APPLICANT**

**AND**

**SLAWOMIR WIKTUR PALONKA**

**RESPONDENT**

**JUDGMENT of Mr. Justice Binchy delivered on the 22nd day of November, 2019**

1. By this application, the applicant seeks an order for the surrender of the respondent to Poland to a European Arrest Warrant dated 29th January, 2019, *("the EAW")*. The EAW was issued by a Judge of the District Court in Zamość.

2. The EAW was endorsed by the High Court on 20th June, 2019. The respondent was arrested and brought before the Court on 31st October, 2019, and this application proceeded on 19th November, 2019.

3. At the opening of this application, I was satisfied that the person before the Court is the person in respect of whom the EAW was issued, and counsel for the respondent confirmed that the identity of the respondent was not in dispute. Counsel for both parties also affirmed that none of the matters referred to in ss. 21A, 22, 23 and 24 of the European Arrest Warrant Act 2003 *("the Act of 2003")* arose, and that the surrender of the respondent was not prohibited for any of the reasons set forth in any of those sections. In the interests of clarity however, I should say that in the points of objection filed on behalf of the respondent, it was pleaded that the surrender of the respondent was prohibited by reason of s. 22 of the Act of 2003, specifically by reason of the breach of the rule of speciality, but this objection was not pursued.

4. At para. B of the EAW it is stated that the warrant is based on an enforceable order, specifically a sentence of imprisonment imposed on the respondent by the Regional Court in Hrubieszów of 23rd August, 2002, which became legally valid on 30th August, 2002. Implicitly, this followed the conviction of the respondent of the offences described in the EAW. At para. D of the EAW it is stated that the respondent appeared in person at the trial resulting in the decision.

5. At para. E of the EAW it is stated that it relates to one offence. That is described in the following terms:-

> *"Slawomir Wiktur Palonka was convicted for committing the following offence: in July 1999 in Hrubieszów, he persuaded Leszek Palonka to bring from abroad, against the law, the intoxicants such as weed of cannabis in unestablished amount, however not lesser than 39.25 grams net."*

The Court was informed during the hearing that Leszek Palonka is the brother of the respondent.

6. Particulars of the provisions of Polish law whereby these actions constitute an offence are briefly provided at para. E.3 of the EAW. It is stated that: *"Article 18 § 2 of the penal code in connection with Article 42 section 1 Act of 24.04.1997 on counteracting of drug addiction/Journal of Law no 75 from 1997, position 468/."* At para. E.1 the issuing judicial authority has ticked the box relating to illicit trafficking in narcotic drugs and psychotropic substances. An issue was raised by counsel for the respondent as to whether or not requesting his brother to bring a small quantity of cannabis into Poland could constitute illicit trafficking, but this line of argument was not pursued on the basis that even if it did not, the actions of the respondent as described in the EAW would correspond to an offence in this jurisdiction.

7. At para. C of the EAW, it is stated that the offence attracts a maximum penalty of five years' imprisonment, and that the respondent was sentenced to a term imprisonment of 10 months. Accordingly, minimum gravity is established.

8. At para. F of the EAW it is stated that the sentence imposed on the respondent was conditionally stayed for a period of three years "*of trial*". This might imply three years from the date of the trial which was 23rd August, 2002, but it is then followed by a statement that the sentence was legally valid on 30th August, 2022 (which is clearly an error, and should state 2002). It is likely that the stay of execution of the sentence therefore was stayed for a period of three years from the latter date, but nothing of significance turns on this point.

9. Para. F then proceeds to state, in effect, that during the period when the sentence of imprisonment was stayed, the respondent was, on 16th January, 2006, convicted of another offence, giving rise to the execution of the sentence of 10 months. The EAW then goes on to state that the respondent did not voluntarily present himself to serve the sentence, hence a warrant for his arrest issued.

10. At this juncture it is necessary to mention that the respondent was the subject of an earlier arrest warrant dated 6th November, 2012 (*"the first EAW").* That warrant was stated to relate to a judgment of the District Court in Nowy Tomysl of 30th June, 2003, which became final on 29th January, 2004. The respondent was also sentenced to 10 months' imprisonment in connection with that offence, but at the date of the first EAW there was 6 months and 27 days' imprisonment outstanding. The first EAW states that the respondent appeared in person at the trial resulting in the decision. The offence is similar in kind to the offence referred to in the EAW save that on this occasion it is stated that the respondent himself transported into Poland dry leaves of cannabis weighing 101.3 grams.

11. While the High Court ordered the surrender of the respondent pursuant to the first EAW, the Court of Appeal upheld his appeal against that order, on the grounds that the first EAW did not contain the information required by s. 45 of the Act of 2003. The issuing judicial authority had ticked the box corresponding to box D.3.2 of the standard form of EAW, but had failed to provide the additional information required by para. D.4. It is unclear if the conviction of 29th January, 2004, is the same conviction as that referred to

in the EAW as giving rise to the revocation of the sentence imposed on the respondent in connection with the offence that is the subject of the EAW, but again I do not believe that anything of significance turns on this point. It was however necessary to record the history of the first EAW in order to understand fully one of the objections raised on behalf of the respondent. I turn now to address those objections.

**Objections**

12. In his notice of objection dated 14th November, 2019, the respondent objected to his surrender on the following grounds:-

(1) That his surrender is prohibited by part three of the Act of 2003 by virtue of:

i. Section 37 of the Act of 2003 on the grounds that it will lead to a breach of his constitutional and/or Convention rights and in particular his right to liberty and his personal and family rights as protected by Articles 40 and 41 of Bunreacht na hÉireann and Articles 3, 5 and 8 of the Convention;

ii. Section 38 on the grounds that the offences leading to the conviction of the respondent in Poland do not correspond with offences in this jurisdiction. This argument was not pursued.

iii. Section 45 of the Act of 2003 on the grounds of the trial of the respondent in *absentia*. Of course the EAW states that the respondent was present in court at the trial resulting in the decision and the imposition of the sentence on the respondent, for which his surrender is sought. However, it is argued on behalf of the respondent that the revocation of the suspension of the term of imprisonment imposed upon the respondent took place in his absence and that this, taken together with the violation of his personal and family rights referred to above, constitute grounds to refuse the surrender of the respondent.

(2) That the respondent's surrender is also prohibited under s. 22 of the Act of 2003 – as mentioned above this argument was not pursued.

(3) That the respondent's surrender should be refused on grounds of procedural estoppel and/or abuse of process. This argument was advanced on the basis of the decision on the Court of Appeal to refuse to surrender the applicant pursuant to the application advanced under the first EAW. It was not fleshed out in any great detail, but as I understand the argument it is closely related to the delay argument to which I refer the next paragraph. It is argued that, having regard to the fact that there was a previous application for the surrender of the respondent, which was refused, the issuing authorities should, at the latest, have made this application soon after the decision of the Court of Appeal in May of 2015, and not waited to issue the EAW until 29th January, 2019.

(4) The surrender of the respondent should be refused on grounds of gross delay. The offences of which the respondent was convicted occurred more than 20 years ago, when the respondent was just 18 years of age. The conviction itself was recorded more than 17 years ago, and the suspension of the sentence imposed on the

respondent was activated approximately 14 years ago. Between 2013 and 2015 the respondent was before the courts in this jurisdiction in relation to the first EAW. In these circumstances it is submitted that there has been an unwarranted and inordinate delay in seeking the surrender of the respondent, who has moved on with his life, and who has family responsibilities. It would therefore be unduly prejudicial and disproportionate to surrender the respondent.

(5) The respondent's sentence was activated without notice to him and on the basis of another conviction which was recorded in *absentia*. It may well be that that is the conviction for which his surrender was refused by the Court of Appeal, but this is not certain.

(6) The surrender of the respondent would be contrary to Article 49(3) of the European Charter on Fundamental Rights, on the grounds that it is disproportionate to the criminal offence.

(7) There has been a failure to comply with s. 11 of the Act of 2003, and insufficient details for the proper determination of the application has been provided.

13. While raising a variety of points, ultimately the case as argued on behalf of the respondent revolved around the question of proportionality of his surrender having regard to all of the factors in the case and in particular:-

(1) The antiquity of the offences;

(2) The relatively minor nature of the offences as reflected in the sentence imposed and the suspension thereof;

(3) The lapse in time since the conviction of the respondent;

(4) The fact that the suspension of his sentence occurred without notice to him, and appears to have followed a conviction in *absentia* for another offence;

(5) The unexplained delay in the issue of the EAW, not least having regard to the fact that he was the subject of an earlier EAW, the first EAW, and that surrender for same was refused in 2015 and;

(6) In the meantime the respondent has "*moved on with his life*". He was 18 when he committed the offence referred to in the EAW. He is now 38 and has been living in this country since 2005. He has a dependent 8-year-old child and is in employment.

14. The respondent relies upon the decision of Edwards J. in the matter of *Minister for Justice & Equality v. BH* [2013] IEHC 445, a decision delivered on 25th September, 2013, wherein at p. 18 and following Edwards J. set forth the 22 principles of law for application in cases where Article 8 of the Convention is engaged. Chief among these, for the purpose of these proceedings are:-

*"(3) The test is one of proportionality, not exceptionality.*

*(4) Where the family rights that are in issue are rights enjoyed in this country, the issue of proportionality involves weighing the proposed interference with those rights against the relevant public interest.*

*(6) …the assessment must be individual and particular to the requested person and family concerned…*

*(14) In so far as it is necessary to weigh in the balance the rights of potentially affected individuals on the one hand, with the public interest in the extradition of the requested person, on the other hand, the question for consideration is whether, to the extent that the proposed extradition may interfere with the family life of the requested person and other members of his family, such interference would constitute a proportionate measure both in terms of the legitimate aim or objective being pursued and the pressing social need which it is suggested renders such interference necessary.*

*(15) reliance on matters which could be said to typically flow from arrest, detention or surrender, without more, will little avail the affected person.*

*(17) It will be necessary for any Court concerned with the proportionality of a proposed extradition measure to examine with great care in a fact specific enquiry how the requested person, and relevant members of that person's family, would be affected by it, and in particular to assess the extent to which such person or persons might be subjected to particularly injurious, prejudicial or harmful consequences, and then weigh those considerations in the balance against the public interest in the extradition of the requested person.*

*(19) The demonstration of exceptional circumstances is not required to sustain an Article 8 type objection because in some cases the existence of common place or unexceptional circumstances might, in the event of the proposed measure being implemented, still result in potentially affected persons suffering injury, prejudice or harm. The focus of the court's enquiry should therefore be on assessing the severity of the consequences of the proposed extradition measure for the potentially affected person or persons, rather than on the circumstances giving rise to these consequences.*

*(21) If children's' interests are to be properly taken into account by an extradition court, it will require to have detailed information about them, and about the family as a whole, covering all considerations material to or bearing upon their welfare, both present and future. Primary responsibility for the adduction of the necessary evidence rests upon the party raising Article 8 rights in support of an objection to his or her surrender."*

15. In these proceedings, the respondent's solicitor swore an affidavit in opposition to the application. In this affidavit, it is averred that the respondent lives and works in Carrickmacross, Co. Monaghan and that he has been residing in Ireland since 2005. It is further averred that he was in a relationship with a named person for 17 years, (but not any longer) and together they have an 8-year-old son. While they are not now living together, it is averred that the couple are on very good terms and that his son stays with the respondent every weekend, and that the respondent cares for him and contributes to his maintenance. It is further averred that the respondent works with a named employer and that he has a brother who also resides in Ireland with his children.

16. The Court was also referred to the decision of the Supreme Court in the case of *Minister for Justice & Equality v. J.A.T. No. 2* [2016] IESC 17. In that case, surrender of the respondent was refused for a combination of reasons. Firstly, the High Court determined that there had been an abuse of process on part of the applicant and the Supreme Court did not interfere with this finding. Secondly, there had been a significant delay in that application also. The crimes alleged dated back to 1997. The first EAW in that case issued on 7th March, 2008 and the second issued on 13th June, 2011. There was also a lapse of time between the first and second EAW. Thirdly, the respondent had significant health difficulties, in addition to which he was effectively the sole care giver for his son who, because of difficulties of his own, was particularly reliant on that care. In his judgment, O'Donnell J. stated at para.s 10 and 11:-

> *"10. These factors - repeat application, lapse of time, delay, impact on the appellant's son, and knowledge on the part of the requesting and executing authorities of those factors - when weighed cumulatively, are powerful. Even then, and without undervaluing the offences alleged here, it is open to doubt that these matters would be sufficient to prevent surrender for very serious crimes of violence. This illustrates that the decision in this case is exceptional, and even then close to the margin.*
>
> *11. In any future case, where all or any of the above factors may be relied on, it would not, in my view, be necessary to carry out any elaborate factual analysis or weighing of matters unless it is clear that the facts come at least close to a case which can be said to be truly exceptional in its features. Even in such cases, which must be rare, it is important that the considerations raised are scrutinised rigorously."*

17. Earlier in that judgment, at para. 4, O'Donnell J. had stated:-

> *"An important starting point, in my view, is that considerable weight is to be given to the public interest in ensuring that persons charged with offences face trial. There is a constant and weighty interest in surrender under an EAW and extradition under a bilateral or multilateral treaty. People accused of crimes should be brought to trial. That is a fundamental component of the administration of justice in a domestic setting, and the conclusion of an extradition agreement or the binding provisions of the law of the European Union means that there is a corresponding*

*public interest in ensuring that persons accused of crimes, in other member states or in states with whom Ireland has entered into an extradition agreement, are brought to trial also. There is an important and weighty interest in ensuring that Ireland honours its treaty obligations, and if anything, a greater interest and value in ensuring performance of those obligations entailed by membership of the European Union."*

18. There are some similarities between the facts of this case and those pertaining in *J.A.T. No. 2*. The lapse of time in this case is even longer than the delay in *J.A.T. No. 2*, where the delay between the offence and warrant was 14 years. In this case the delay was 20 years This is also a second application, although it must be observed that in this case, the second application arises out of a different offence. However, counsel for the respondent urges that the issuing judicial authority in this application should have been on notice of the whereabouts of the respondent by reason of the first EAW proceedings, and should have moved swiftly. The respondent has a dependant son.

19. On the other hand, there are also significant differences between the circumstances pertaining in these proceedings and those pertaining in *J.A.T. No. 2*. The respondent does not have health difficulties in this case, and while he has a dependent son, he does not have a dependent son with an unusual dependence upon him, and nor is he the sole provider of care to his son. Indeed, it appears that his son is in the primary custody or care of his mother. I think it is correct to say that the respondent's family circumstances are not out of the ordinary, and the impact of his surrender both on the respondent himself and on his family will be typical of the impact that surrender will have on any family. Indeed, it is probably not very different to the impact that imprisonment in this jurisdiction would have on the respondent and his family if he were required to serve a similar sentence for similar offences here, save for the obvious difference that it would be far more difficult for his family to visit him for the duration of his 10-month sentence. As Edwards J. stated at para. 15 of his decision in *BH*, reliance on matters which could be said to typically flow from arrest, detention, or surrender without more, will little avail the effected person. It seems to me that whether one takes the approach set out by O'Donnell J. in *J.A.T. No. 2* or follows the principles in *BH*, the result is the same.

20. As to the question of proportionality, when one weighs the "*considerable weight*" to be given to the public interest in the surrender of the respondent to serve a sentence for the offences of which he is convicted on the one hand with the interference with his family life, which I have found to be the normal consequences that inevitably flow from surrender, on the other hand, it is difficult to see how the surrender of the respondent could be considered disproportionate. While it was argued that it does not appear that the offences of which the respondent was convicted were particularly serious, it is difficult to know at this remove just how serious they were and the extent to which the respondent was engaged in importation of drugs for personal use or for supply to others. The fact is that trafficking in drugs at any level is treated with seriously, and even if the respondent's activities are at the lower end of that particular scale, the offences could not be regarded as trivial or such as to diminish the public interest in enforcing the penalty

imposed on him for his conviction of those offences, in circumstances where the impact on the respondent and his family is that which typically flows from surrender and detention.

21. As to delay, it is well settled that delay in and of itself does not constitute a basis for refusal to surrender. Taken together with other factors, when present, it may result in a refusal of surrender that would not otherwise result if delay were not also present. But in this case, the other factors are not present.

22. Finally, as regards the s. 45 argument advanced on behalf of the respondent, this depends not upon his conviction for the offences in respect of which his surrender is sought, but upon his conviction of another offence which resulted in the revocation of the suspension of the sentence imposed upon him. This issue is dealt with resolutely in the decision of the European Court of Justice in the case of *Ardic* [Case C-571/17] in that case, the ECJ held:

> *"Where a party has appeared in person in criminal proceedings that result in a judicial decision which definitively finds him guilty of an offence and, as a consequence, imposes a custodial sentence the execution of which is subsequently suspended in part, subject to certain conditions, the concept of 'trial resulting in the decision', as referred to in Article 4a(1) of Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, as amended by Council Framework Decision 2009/299/JHA of 26 February 2009, must be interpreted as not including subsequent proceedings in which that suspension is revoked on grounds of infringement of those conditions during the probationary period, provided that the revocation decision adopted at the end of those proceedings does not change the nature or the level of the sentence initially imposed."*

23. It is not in dispute that the decision to revoke the suspension of sentence in this case did not change the nature or the level of the sentence initially imposed upon the respondent. Accordingly, the argument that the respondent's surrender would be contrary to s. 45 of the Act of 2003 must also be rejected.