[2020] IEHC 398

THE HIGH COURT

[2018/131 EXT.]

IN THE MATTER OF THE EUROPEAN ARREST WARRANT ACT 2003, AS AMENDED

BETWEEN:

THE MINISTER FOR JUSTICE AND EQUALITY

APPLICANT

-AND-

ARTUR JERZY ZIELINSKI

RESPONDENT

EX TEMPORE JUDGMENT of the HIGH COURT (Coffey J.) delivered on the 17th day of February 2020

1. This is a part heard matter in which the applicant seeks an order for the surrender of the respondent to Poland pursuant to a European Arrest Warrant ("EAW") to serve two sentences of imprisonment arising from his conviction for four offences which have been designated for the purposes of this application as offences I,11A, 11B and 11C. At issue at this stage of the hearing of the application is whether the surrender of the respondent is prohibited by s.45 of the European Arrest Warrant Act 2003, as amended and substituted by s.23 of the European Arrest Warrant (Application to Third Countries and Amendment) and Extradition(Amendment) Act 2012.

2. S.16(1)(c) of the Act of 2003 as substituted by s.10 of the Act of 2012 does not permit surrender unless the EAW under scrutiny has indicated the matters required by S. 45 of the Act of 2003 as amended. S.45 of the Act of 2003 as amended prohibits the surrender of a person if he or she did not appear in person at 'the proceedings resulting in the sentence or detention order' in respect of which the EAW was issued unless the EAW indicates, where as appropriate, the matters required by points 2, 3 and 4 of point (d) of the form of warrant in the Annex to the Framework Decision as amended by the Council Framework Decision of 2009 which is set out in full in s.45. The form of warrant set out in the section is commonly known as 'part D' and is strikingly similar if not the same in substance as Article 4a of the Framework Decision.

3. It is now proposed to look at the relevant sentences or detention orders *seriatim*.

4. With regard to Offence I, the Issuing Judicial Authority('IJA') contends that s.45 is of no application by reason of the fact that the respondent was present on all the relevant trial dates in 2004 when his guilt was finally determined and on the 4th May, 2004 when sentence was imposed on him. It is not in dispute, however, that the respondent was not present for a further sentence hearing which took place on the 23rd of August, 2005 when a previously suspended portion of the original sentence was activated. At issue therefore is whether the reactivation of the sentence in the absence of the respondent on the latter date so modified the underlying sentence as to become 'the proceedings resulting in the sentence or detention order' such that his surrender is prohibited by s.45 of the Act of 2003 as amended.

5. The CJEU in the Tupikas case(C-270/17 PPU, judgment of CJEU,10th of August 2017) ruled that in a case whose proceedings result in more than one decision, the 'trial resulting in the decision' within the meaning of the provisions of Article 4a(1) of the Council Framework Decision of 2002 must be interpreted as relating to the decision which finally rules on the guilt of the person concerned and which imposes a penalty on him following a re-examination ,in fact and in law, of the merits of the case. On the same day as it gave its ruling in Tupikas, the CJEU further ruled in the case of Zdziaszek (C-271/17 PPU, judgment of CJEU, 10th of August 2017) that the concept of 'trial resulting in the decision' comprised not merely the proceedings which finally determined guilt but also any subsequent proceeding in which discretion was exercised to adjust the level of sentence that was initially imposed. In the subsequent case of Ardic (C-571/17 PPU, judgment of CJEU, 22nd December 2017) the CJEU ruled that the word 'decision' in Article 4a(1) did not extend to a hearing at which the suspension of a penalty is revoked on the grounds of infringement of the condition or conditions attaching to it provided that the revocation did not change the nature or the level of the sentence initially imposed.

6. At the time of being sentenced on the 4th of May 2004, the respondent had spent a period of 201 days in temporary custody between the 28th of June 2003 and the 23rd of January, 2004, for which he was entitled to credit against any penalty of deprivation of liberty that was imposed on him by virtue of Article 63 of the Criminal Code of Poland. At the original sentence hearing on the 4th of May 2004 the Regional Court of Gdynia sentenced the respondent to deprivation of liberty for two years and imposed a fine in a specified amount which penalty was suspended on condition that the respondent both 'redressed' the damage caused by the offence and underwent supervision by 'a custodian'. It is now apparent from Additional Information provided by the IJA that the sentencing court made an error in that it credited the period of temporary custody against the fine and not against the penalty of deprivation of liberty as required by Polish law.

7. Arising from the fact that the respondent committed a further offence during the period of suspension, the matter was re-entered before the Regional Court of Gdynia on the 23rd of August 2005. On that date and in the absence of the respondent, the Court removed the suspension, ordered enforcement of the penalty of deprivation of liberty and sought to correct the error that it had made earlier by purporting to credit the time spent in temporary custody against the two-year sentence. Unhappily, a further error was made in that instead of crediting the full 201 days which the respondent had spent in temporary custody against the penalty of deprivation of liberty, the Court appears to have credited only a period of 37 days representing the period the respondent spent in temporary custody between the 28th of June, 2003 and the 6th of August, 2003.I am satisfied nonetheless that the hearing of the 23rd of August 2005 related merely to the execution or application of the initial sentence such that it was a hearing at which the original sentence was activated. In so holding I am satisfied that the crediting exercise that was carried out albeit incorrectly was a non-discretionary and purely arithmetic exercise and as such did not change either the nature or the level of the sentence initially imposed.

8. Despite having previously nominated two different periods, namely, two years in the EAW and two years less 37 days in the first tranche of Additional Information, the IJA now states that it seeks the surrender of the respondent in respect of offence I to serve a sentence for which full credit of 201 days will be given. It would appear, however, that there is in fact no underlying sentence or detention order which sanctions or limits the respondent's deprivation of liberty for the relevant period of one year and 164 days. Instead there are two purported sentencing decisions, the earlier of which fails to give any credit for time spent in custody and the latter of which fails to give due credit as required by Polish law. As it appears to be accepted that both decisions are erroneous, I will hear counsel as to whether the miscalculation of credit due in the relevant sentence can be cured whether by appropriate assurances and undertakings being furnished by the IJA or otherwise. If the manifest error in the sentence is not amenable to rectification before this court, surrender is refused in respect of Offence I.

9. I now turn to a consideration of the remaining sentences in respect of Offences IIA,B and C which were imposed by way of two sentences in 2005 and thereafter consolidated into a cumulative sentence that was imposed on the respondent at his request in 2011.The respondent was neither present nor legally represented at either of the two trials which resulted in the relevant convictions and sentences in 2005 or at the sentence hearing in 2011. As all relevant decisions relating to the respondent's guilt in respect of all three offences were made in 2005 and were not thereafter reviewed, it is accepted by the applicant that the two trials in 2005 which lead to the conviction and sentence of the respondent in respect of the relevant offences were 'proceedings resulting in the sentence or detention order' in respect of which the EAW was issued so that surrender must be refused by this Court unless the characteristics of the relevant trials were such that they each fall within at least one of the exceptions provided for in s.45. As the relevant sentences were consolidated in 2011, it is further accepted by the applicant that the sentences are so entangled as not to be amenable to severance with the result that a failure to show compliance in respect of either of the relevant trials must sound in the prohibition of the surrender of the respondent for all three offences.

10. I turn first to a consideration of the trial in respect of Offence IIA. It is not in dispute that the respondent was not present on the 24th of February 2005, when conviction and sentence were imposed on him in respect of the relevant offence. Although the IJA has provided information in respect of condition 3.1d, the applicant has conceded that the information so provided does not comply with s.45. The applicant instead relies primarily on condition 3.1b of part D as a cure for the respondent's in absentia conviction whereby the IJA has certified that the respondent actually received official information in such a manner that it is unequivocally establishes that he was both aware of the scheduled trial and informed that a decision might be handed down if he did not appear for the trial.

11. It is not in dispute that the verdict in respect of the offence was made "in a consensual mode", that is to say, that the respondent pleaded guilty and negotiated a sentence in advance which is apparently a feature of Polish criminal proceedings. Accordingly, it can

at a minimum be inferred that he was aware of the allegation made against him and the existence of criminal proceedings.

12. The respondent has sworn an affidavit in which he has positively asserted that he was not notified of the trial. The box for condition 3.1b has been filled in to indicate that the respondent was served with notice of the trial on the 15th of February 2005 and asserts that there is a note on what is referred to as 'Card 45' in the main case file indicating that the respondent acknowledged receipt of the relevant notice. It is further asserted in the relevant part D that there is a note on what is referred to as 'Card 48' in the main case file confirming that the respondent was properly notified of the hearing. By Additional Information dated 23rd January 2020, the IJA reasserted these facts and furnished verifying documents. Specifically, it furnished an "Acknowledgment of Receipt" which refers to the date of the sentence hearing and the appropriate court reference number which apparently bears the respondent's signature acknowledging that he received a dispatch on the 15th of February 2005, which the IJA asserts contained notification of the date of the sitting of the Regional Court in Gdynia scheduled for the 24th of February, 2005. This document is described as Card 45 in the case file. The IJA has also furnished a further document described as Card 48 which is headed "Minutes of Court Sitting on the 24.02.05" which apparently bears the signature of the Presiding Judge and which records that the accused person was properly notified.

13. I am satisfied on the basis of the assertions made and evidence offered in respect of the trial on the 15th of February 2005 that the respondent was aware of the scheduled trial. Although requested by point 4 of point (a) of the form of warrant set out in S.45 of the Act as amended to provide information as to how condition 3.1b has been met, the IJA has not provided any information in support of its certification that the official information received by the respondent unequivocally establishes that the respondent was informed that a decision might be handed down on the scheduled trial date if he did not appear at his trial. In MJE v Palonka (2015) IECA 69 the Court of Appeal held that the providing of the information sought by point 4, where applicable, is not optional but mandatory and is therefore a 'matter' which requires to be stated by S.45 if surrender is not to be prohibited by S.16(1)(c) of the Act. It is for the IJA to engage with the request for such information and to place it before this Court. Absent such information, I cannot be satisfied that the EAW meets the entirety of condition 3.1b . Accordingly, I refuse surrender in respect of Offence IIA. For the reasons already stated this conclusion is also dispositive of the application insofar as it relates to Offences IIB and C which I also hereby refuse.

14. Assuming that I am wrong in this conclusion, I will also consider the proceedings resulting in the decision relating to offences II B and II C which took place on the 17th of February 2006. It is common case that the respondent was not present at the trial which the IJA contends is cured by condition 3.1a of part D and the fact that he was "personally served" by "registered correspondence" on the 16th of January 2006 for the main trial on the 10th of February, 2006. It is further asserted that although the delivery of the verdict was adjourned until the 17th of February 2006, the respondent was properly notified of the

adjourned hearing date. The respondent asserts that he was not notified of the trial and the Minister has very properly conceded that although there is evidence that he was served by registered correspondence which apparently does suffice under Polish Law, such service does not suffice for the purpose of Article 4a of the Framework Decision. The Minister submits nonetheless that the conduct of the respondent in moving to Ireland without leaving a forwarding address constitutes a "manifest lack of diligence" on his part as envisaged by the CJEU in the *Dworszecki* case (C-108/16 PPU, judgment of CJEU, 24th May 2016) such that this Court can be assured that the surrender of the respondent would not breach his rights of defence. As the relevant statutory provisions do not expressly provide for such an exception, the Minister contends for a purposive reading of s.45 of the Act of 2003 as amended which the respondent counterargues is clear and unambiguous and therefore capable only of a literal reading.

15. The respondent has sworn in these proceedings that he gave his side of the story to the police which he believed had been accepted because he heard no more about the allegations. The Additional Information dated 3rd January 2020, however, discloses a materially different sequence of events.

16. On the 10th of February 2004, the respondent in the course of preliminary proceedings provided explanations and was advised of the rights and obligations of an accused person by means of a document headed "Advice on the Rights and Obligations of a Suspect" which is dated the 10th of December, 2004, and which apparently bears his signature. That document discloses that the respondent was *"inter alia"* advised of his obligation to appear on each 'call' during the proceedings and to notify the authority conducting the proceedings about each change of his place of residence or if residing abroad, to designate an addressee for the service of documents in Poland. The Additional Information further discloses that on the 3rd of March 2005, the respondent was summoned to a first trial hearing when a copy of the relevant indictment was served upon him together with a further document advising him on his rights and obligations which he acknowledged with his own signature on the 25th of March, 2005. Critically, the respondent attended on the first trial date on the 13th of April, 2005, on which date he provided explanations to the court and was advised of the consequences of failing to attend the next trial date which was set for the 18th of May, 2005. The respondent did not attend the next trial date in May 2005 and in August 2005 he moved to Ireland without apparently complying with his obligation to notify the relevant authority conducting proceedings about his change of his place of residence or designating an addressee for the service of documents in Poland. I accept that the Additional Information sets out the true history of what occurred and accept the Minister's submission that the respondent made a series of choices the cumulative effect of which were to put himself beyond the reach of the police, the prosecutor and the courts in Poland.

17. I therefore find that the in absentia conviction and sentence in controversy arose from a manifest lack of diligence on the part of the respondent. The issue that remains is whether this is of any legal consequence in Irish law having regard to the fact that s.45 of

the Act of 2003 as amended makes no express provision for the fall back option which is now relied upon and contended for by the Minister.

18. S.45 of the Act of 2003 as amended requires the Court to refuse surrender if the respondent did not appear in person at the proceedings resulting in the sentence or detention order unless the EAW indicates the matters required by s.45 as amended and demonstrates that the application falls into one of the seven exceptions specified at point 3 in the Table which is set out in full in the section. The Dworzecki case upon which the Minister relies concerned the interpretation of exceptions to an optional ground for non-recognition as provided for in Article 4a of the Council Framework Decision of 2002 as amended by the Council Framework decision of 2009, neither of which have direct effect in this State. It is clear that s.45 as amended was enacted to transpose and thereby give effect to the relevant provisions of the EU Council Framework Decisions adopted under the Treaty of European Union and in particular the amending Council Framework Decision of 2009. Although they are not of direct effect, this Court as a national court is under a duty to apply national law in conformity with the relevant Framework Decisions. The principle of conforming interpretation is not unqualified, however, and does not extend to requiring a national court to interpret national legislation contra legem, a fortiori, where as in this case the relevant ground of non-recognition is optional. As recently stated by the Supreme Court in MJE v Vilkas (2018) IESC 69 the duty to interpret conformably does not require a national Court to 'arrive at an interpretation that the plain terms of the section simply cannot bear'.

19. In MJE v Palonka the Court of Appeal stated that the provisions of s.45 as amended were 'clear and mandatory' and were such as not to permit of any derogation or discretion. The Court stated that:

> 'Insofar as there may be some conflict between the provisions of the Act on a literal interpretation, and an interpretation which conforms to the objectives of the Framework Decision, the latter interpretation would be contra legem'.

20. By contrast in MJE v Skwierczynski (2016) IEHC 802 Donnelly J in the High Court rejected a literal interpretation of s.45 as substituted. In that case the respondent had not been notified of the date of his trial at first instance but had received notification of the judgment and had exercised his right of appeal, in which he was unsuccessful. Part D as drafted and when strictly construed appears to allow surrender where a full appeal was available to a respondent but does not specifically address the follow on scenario where such an appeal was available and taken. Donnelly J ordered surrender and stated that:

> 'the plain intention of the Oireachtas is that surrender is not to be refused simply on the basis that the requested person's situation does not come within one of the exceptions set out in the Table to s.45 provided that the High Court can be assured that his surrender does not mean a breach of rights of defence'.

21. The Court of Appeal dismissed an appeal against the decision of the High Court on the basis that it would be manifestly absurd if s.45 permitted surrender where there was

available an appeal but not where an appeal was available and had actually been taken. Following a line of authority beginning with the Ardic case, the Court of Appeal held that the respondent's exercise of his right to a full appeal cured any defects in the first instance procedure. It would appear therefore that the appeal was allowed not because the Court could be assured that there was no breach of rights of defence but rather because it was found on the facts of the case that the appellant had in fact exercised his defence rights albeit unsuccessfully on a full appeal. Critically, the fact that an appeal was taken in such circumstances necessarily and logically implied that an appeal had been available to the respondent.

22. Whether for these reasons or otherwise, Donnelly J in MJE v Iocabuta (2019) IEHC 250 referred to the decision of the Court of Appeal in Skwierczynski and said that it was possibly more correct to characterise the decision of the appellate court as one based upon the 'narrow facts of the case' rather than 'a clear upholding of the general principle' that the she had articulated in the High Court. No less significantly, she referred to the subsequent decision of the Supreme Court in Vilkas and stated that the decision in Skiewerzynski might have to be revisited in the light of what was said by the Supreme Court in that case.

23. Having considered the relevant authorities and the recent judgment of Binchy J in MJE v Zarnescu delivered on the 13th of January 2020 in which he adopted and applied a similar interpretation of the section, I am of the view that the decision of the Court of Appeal in Skiewerzynski is to be considered as a decision on its own narrow facts and cannot be read as a judgment which binds this Court to read a 'manifest lack of diligence' exception into the provisions of s.45 of the Act of 2003 as amended. It may well be that such an exception is desirable and indeed necessary to achieve conformity with the relevant Council Framework Decisions but the wording of the section is explicit and clear such that its plain terms cannot bear the interpretation that the Minister asks this Court to put upon it. Accordingly, I refuse surrender in respect of Offences IIB and IIC. This finding is also dispositive of the application in respect of Offence IIA.

24. In summary therefore I refuse surrender in respect of Offences IIA,B and C and will further refuse surrender in respect of Offence I unless I am persuaded and assured that the error in the underlying sentence can be lawfully rectified before this Court whether by way of undertaking or otherwise.