[2020] IEHC 98

THE HIGH COURT

[2019 No. 322 EXT]

BETWEEN

MINISTER FOR JUSTICE & EQUALITY

APPLICANT

AND

MAREK ADAM SEDZIK

RESPONDENT

JUDGMENT of Mr. Justice Binchy delivered on the 24th day of February, 2020

1. By this application the applicant seeks an order for the surrender of the respondent to the Republic of Poland pursuant to a European Arrest Warrant dated 26th May, 2017, ("the EAW"). The EAW was issued by a District Judge of the District Court in Krakow, the issuing judicial authority named in the EAW.

2. The EAW was endorsed by the High Court on 7th October, 2019. The respondent was arrested and brought before the Court on 20th November, 2017. This application first opened before the Court on 11th December, 2019, and was then adjourned until 27th January, 2020, following upon a direction by this Court, on 11th December, 2019, pursuant to s. 20 of the European Arrest Warrant Act 2003 (as amended) ("the Act of 2003") to the Central Authority in this jurisdiction, to request certain information of the issuing state which the Court considered essential in order to arrive at a decision on the application.

3. At the opening of the application, I was satisfied that the person before the Court is the person to whom the EAW refers. This was confirmed by counsel for the respondent at the opening of the application.

4. I was further satisfied that none of the matters referred to in ss. 21A, 22, 23 and 24 of the Act of 2003 arise for consideration on this application, and that the surrender of the respondent is not prohibited for any of the reasons set forth in any of those sections.

5. At para. B of the EAW, it is stated that the EAW is based upon a consolidated judgment of the Regional Court in Olkusz, Second Criminal Division, dated 24th March, 2006, which became final on 11th April, 2006, combining the following convictions:

    i. A judgment handed down *in absentia* by the Regional Court in Olkusz Seventh Division – Magistrates' Court – dated 15th September, 2003, which became final on 27th October, 2003.

    ii. A judgement of the same court dated 25th November, 2003, which became final on 20th December, 2003;

    iii. A judgment of the same court, Second Division, dated 13th January, 2004, which became final on 21st January, 2004, and

    iv. A judgment of the same court dated 22nd April, 2004, which became final on 30th April, 2004.

6. At para. D of the EAW, the relevant box is ticked to indicate that the respondent appeared in person at the trial resulting in the decision. The decision concerned is the consolidated judgment dated 24th March, 2006, which became final on 11th April, 2006, combining the sentences imposed following upon the convictions referred to at para. 5 (i) – (iv) above, under case file reference II K 16/06.

7. At para. E of the EAW, it is stated that it relates to four offences. Particulars of each offence are provided. In summary, these are;

   i. On 29th April, 2003, the respondent stole a cell phone from a named person, by running up to her, pulling it out of her hand and running away.

   ii. On 27th July, 2003, the respondent vandalised a Mercedes car causing damage totalling 1,000 Polish Zlotys.

   iii. On 3rd February, 2003, the respondent entered an unlocked apartment and stole two televisions, a watch and an ID card, causing a loss of 1,700 Zlotys.

   iv. On 18th August, 2003, he and others spent 660 Zlotys with the knowledge that the sum had been stolen from two persons who are named.

8. It is clear in each case the acts described in the EAW would, if committed in this jurisdiction, constitute an offence under Irish law, and no argument to the contrary was presented on behalf of the respondent.

9. At para. E of the EAW, particulars are provided of the penalties applicable under Polish law in relation to each of the offences. The offences of theft are subject to a penalty of up to five years, the offence of damaging the property of another is subject to the same maximum penalty, and the offence of receiving stolen property is subject to a maximum term of imprisonment of up to five years. As stated above, the respondent received a consolidated sentence in respect of all offences of two years and eight months' imprisonment, of which one year eleven months and twenty-seven days remain to be served. Accordingly, minimum gravity is established.

10. As stated above, at para. D of the EAW, the box is ticked to indicate that the respondent was present at the trial resulting in the decision. However, this refers to the judgment on the consolidated sentence only, handed down on 24th March, 2006, (and which became final on 11th April, 2006) under case reference II K 16/06. Those proceedings did not address the innocence or guilt of the respondent, but were concerned only with an application advanced by the respondent himself (according to the EAW) to consolidate his sentences with the intent that, under the provisions of Polish law, he would receive a single sentence that is less severe than the total of all four sentences previously imposed.

11. Since no information was provided as regards the attendance of the respondent at the trials which resulted in a final decision regarding the guilt or innocence of the respondent in respect of the charges brought against him, the Central Authority here sought further information in this regard by letter dated 2nd August, 2019, whereby it requested a

completed section D table in respect of each of the judgments handed down in *absentia*. At para. E.3 of the EAW, it was indicated that just one of these judgments had been handed down in *absentia*, that being the judgment of 29th April, 2013, under reference K 218/03.

12. The issuing judicial authority responded by providing a completed section D in connection with all of offences. In the cases of offences reference numbers K 102/03 and K 479/03, it ticked box 1, indicating that the respondent appeared in person at the trial resulting in the decision in each case. However, in case reference numbers 218/03 and 388/03, it ticked box number 2 indicating that the respondent did not appear at the trial resulting in the decision. In each case, having ticked the box at point 2, the issuing judicial authority then proceeded to cross out all boxes at point 3, contrary to the direction in point 3 which states: *"If you have ticked the box under point 2, please confirm the existence of one of the following*:…"

13. However, information was provided at point 4, even though it is conditional on the ticking of one of the boxes under points 3.1b, 3.2 or 3.3. In case reference K 218/03 it is stated that the respondent knew about the criminal proceedings because he was interviewed as a suspect on 27th May, 2003, and was informed as to the decision to bring charges against him. It is further stated that during the interview he admitted the charges. It further states that the first hearing was scheduled for 15th September, 2003, and the respondent did not attend court in person. Almost identical information is provided in relation to case file reference K 388/03.

14. Following upon the opening of this application before this Court on 11th December, 2019, this Court directed that further information should be sought from the issuing judicial authority. Included in the information request was an enquiry as to whether or not the respondent was afforded the opportunity to reopen the question of his guilt or innocence at the hearing of the application for a consolidated judgment. This resulted in a reply dated 10th January, 2020. In answer to that question, the issuing judicial authority stated that in an application for a consolidated judgment, *"the court does not re-examine the case or give a guilty or not guilty verdict".* The response (to the request for further information) also stated that, as regards case reference 218/03, a notice of hearing was personally served on the respondent on 27th July, 2003. Accordingly, on the face of it this indicates that the issuing judicial authority might have ticked box 3.1a in relation to this offence. The additional information also states that a transcript of the order made by the court on 15th September, 2003, (whereby he was convicted of the relevant offences) together with the appeal guidelines were sent to the respondent on 25th September, 2003, but he "*did not claim the papers*" which were returned following two attempted deliveries.

15. As regards case file reference 388/03, it is stated that the notice of the hearing was served on him, but the respondent did not receive the papers because they were returned following two attempts of service of the same upon him.

16. Points of objection were delivered on behalf of the respondent on 10th December, 2019. The respondent placed the applicant on full proof of all mattes required by the Act of 2003. It was pleaded in a general way that the EAW does not contain all of the information required by the Act of 2003, and so the application should be refused by reason of non-compliance with s. 11 of the Act of 2003.

17. It was also pleaded that surrender of the respondent is prohibited by reason of s. 45 of the Act of 2003, in circumstances where the EAW/ further information indicated that two of the judgments had been obtained in circumstances where the respondent was not present, and in respect of which he does not have a right to a retrial or appeal. It was also pleaded that surrender is prohibited pursuant to s. 37 of the Act of 2003 by reason of an interference with the rights of the respondent under Article 8 of the European Convention on Human Rights.

18. In any event, only one point of objection was pursued at the hearing of this application, that being that surrender of the respondent is prohibited by s. 45 of the Act of 2003. Before addressing that objection, two further matters arise out of the further information received from the issuing judicial authority dated 10th January, 2020. These are:

    i. In proceedings relating to the consolidation of several sentences, the court does not re-examine merits of the case, and accordingly does not deliver a verdict on the innocence or guilt of the person concerned. It follows from this that in these proceedings, the trial resulting in the decision for the purposes of determining the innocence or guilt of the respondent, is not the judgment described in the EAW as being the decision on which the warrant is based, under case reference K-16/06, but rather is the judgment, in each of the four cases concerned, in which the guilt of the respondent was finally determined.

    ii. Secondly, in answer to a specific question from this Court, the issuing judicial authority confirmed that while there are circumstances in which a consolidated sentence may be "*de-aggregated*" those circumstances have no application in this case. Accordingly, there is no mechanism whereby the consolidated sentence may be proportionately reduced in the event that the respondent is not surrendered in respect of all four convictions to which the consolidated judgment relates.

Discussion and decision

19. It is not in dispute that the respondent was not present for the hearings at which his guilt was determined in case reference numbers 218/03 and 388/03. However, in case 218/03 it is stated that a notice of hearing was personally served on the respondent, and while the issuing judicial authority did not tick box 3.1a in para. D, I think that this Court can be satisfied from the additional information provided that the respondent was served with notice of the proceedings on 27th July, 2003, and would therefore have been aware of the hearing date of 15th September, 2003.

20. The same cannot however be said of the conviction under case file reference 388/03. The respondent was neither present in court, and nor are any of the circumstances set forth in the table to para. D of the EAW indicated as being of any application.

21. It is not in dispute that, as a general principle, where the Court finds that a person may not be surrendered for any one of the offences the subject of a consolidated sentence, it is not possible to order the surrender of the person concerned because it is not possible to disentangle the sentence in respect of which surrender has been found to be prohibited from the remaining offences (although this Court has done so in circumstances where the issuing state has provided an assurance that the consolidated sentence will be proportionately reduced, but as indicated above, that is of no application in these proceedings). This principle was established in *Minister for Justice, Equality & Law Reform v. Ferenca* [2008] 4 IR 480.

22. However, it is the applicant's case in these proceedings that the Court should order the surrender of the respondent (in respect of all offences) having regard to the conduct of the respondent and his own lack of diligence in not attending court or arranging for representation in court in case reference 388/03. The additional information provided states that the decision to charge the respondent was made on 29th July, 2003, and on the same day charges were presented to him personally. He received guidelines on his rights and obligations. He was interviewed as a suspect and admitted the charges and chose not to make a statement. Having regard to all of these circumstances, on the basis of the decision of the Court of Justice of the European Union ("CJEU") in *Dworzecki* (C 108/16 PPU) it is submitted that the Court may make an order for the surrender of the respondent in respect of this offence, even though he was tried *in absentia* and did not receive the notification of the hearing date.

23. Moreover, the applicant argues, the Court is not prohibited by s. 45 of the Act of 2003 from making an order for surrender in these circumstances. It is submitted that the Court must interpret s. 45 in a manner that is consistent with the law of the European Union, provided that the interpretation is not *contra legem*. Reliance is placed in this regard on the decision of the CJEU in the case of Pupino.

24. It is further submitted that such an interpretation of s. 45 would not be *contra legem*, and that it is open to the Court to interpret the use of the word "*shall*" as meaning "*may*". Reliance was taken upon the decision of this Court in the cases of *Minister for Justice & Equality v. Tomas Skwierczynski* [2018] IECA 204 and *Minister for Justice & Equality v. Surma*, a decision of Edwards J. of 3rd December, 2013.

25. The respondent, on the other hand, submits that s. 45 demands a literal interpretation. There has not been compliance with the section and therefore surrender is prohibited. The Court is precluded from taking any other approach, and the respondent referred this Court to its own decision in the case of *Minister for Justice & Equality v. Zarnescu* [2020] IEHC 6.

26. As is apparent from the decision in *Zarnescu*, the decision of the Court of Appeal in the case of *Skwierczynski* turned on the fact that in that case the appellant not only had a right of appeal against the decision delivered *in absentia*, but he had actually exercised that right of appeal. Accordingly, the Court determined that his rights of defence had been adequately protected and that his surrender was not therefore prohibited by s. 45 of the Act of 2003. The circumstances in *Zarnescu*, as here, were very different and it was not open to the Court to arrive at any such conclusion.

27. Moreover, since delivering the decision in *Zarnescu*, and since the hearing of this application, this Court has become aware of the decision of the Court of Appeal in the case of *Minister for Justice & Equality v. Slawomir Palonka*. The Court was not referred to that decision either in these proceedings or in *Zarnescu*.

28. In *Palonka* the Court was required to consider whether or not it was obliged to refuse the surrender of the respondent in that case by reason of the fact that box 3.2 of para. D had been ticked, but no information had been provided at point 4 of para. D which states: *"If you have ticked the box under points 3.1b, 3.2 or 3.3 above, please provide the information about how the relevant condition has been met…*" At para. 27 of her decision in the matter, Finlay Geoghegan J. in the Court of Appeal stated:

> *"Accordingly I have concluded that point 4 of point (d) of the Annex to the European arrest warrant contains a mandatory requirement to provide information about how the condition was met where, as on the facts herein, the issuing authority has ticked the equivalent to box 3.2. Hence s. 45 required the European arrest warrant issued by the Republic of Poland in respect of the appellant to state the information required by point 4 of point (d) in the Annex to the European arrest warrant. As it did not do so the High Court was precluded by ss. 16(1)(c) and (e) from making an order for surrender."*

29. Prior to arriving at that conclusion, Finlay Geoghegan J. considered the well-known principles of statutory interpretation as set out in *Howard v. Commissioners of Public Works* [1994] 1 IR 101 and also the obligation of the courts to apply and interpret provisions of national law as far as possible in the light of the wording and purpose of the Framework Decision (*Minister for Justice, Equality & Law Reform v. Altaravicius* [2006] 3 IR 148) provided that the Court does not strain the interpretation to the extent of interpreting national legislation *contra legem*. In her decision, Finlay Geoghegan J. considered not just the provisions of s. 45 of the Act of 2003, but also ss. 16(1)(c) and (e) of the Act of 2003 which, taken together with the opening paragraph of 16(1) of that Act provides as follows:

> *"16(1) Where a person does not consent to his or her surrender to the issuing state, the High Court may…make an order directing that the person be surrendered to such other person as is duly authorised by the issuing state to receive him or her, provided that:*

(c) *The European Arrest Warrant states, where appropriate, the matters required by s. 45…*

(e) *The surrender of the person is not prohibited by Part 3."*

30. At paras. 15 and 16 of her judgment, Finlay Geoghegan J. stated:

"15. To put it another way if the European Arrest Warrant discloses that the person, whose surrender is sought did not appear in person at the proceedings resulting in the sentence or detention order in respect of which the European Arrest Warrant was issued then s. 16(1)(c) does not permit a surrender unless the European Arrest Warrant indicates the matters required by s. 45.

16. This interpretation, in my view, is the only interpretation permitted by the words used by the Oireachtas in s. 16(1)(c) and s. 45 and is consistent with and confirmed by s. 16(1)(e) of the Act of 2003 as amended. As appears, this is a further and distinct condition which must be met in accordance with the proviso in s. 16(1). A person may only be surrendered provided that "the surrender of the person is not prohibited by Part 3". Section 45 of the 2003 Act falls within Part 3 of the Act. Hence s. 16(1)(e) as amended also prohibits the surrender of a person to whom s.45 applies i.e. who has not appeared in person at the proceedings resulting in the sentence or detention order in respect of which the European Arrest Warrant was issued, unless there is compliance with s.45 i.e. the European Arrest Warrant indicates the matters required by the section."

31. In his judgment in *Palonka*, Peart J., with whom Finlay Geoghegan J. concurred, arrived at the same conclusion. At para. 28 of his judgment, he noted that s. 16(1)(e) of the Act of 2003 had been amended in 2012. As originally enacted that subsection made provision for a refusal of surrender where *"(e) the surrender of the person is not prohibited by Part 3 or the Framework Decision (including the recitals thereto*)". The effect of the amendment in 2012 was to delete the underlined words, Peart J. held that "*this makes it very clear that when considering whether surrender is prohibited, the Court is required to do so by reference to the provisions of the Act alone, and 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."* He went on to say, at para. 29:

> *"The provisions of section 45 are very clear. Under section 16(1)(c) of the Act surrender is prohibited unless the European arrest warrant states, where appropriate, the matters required to be stated by section 45… To give the section a purposive interpretation in the light of the stated objectives and provisions of the Framework Decision would in this case fly in the face of clear national legislation."*

32. It is of course the case that the decision of the CJEU in Dworzecki was handed down by the CJEU almost exactly a year after the decision of the Court of Appeal in Palonka. As

mentioned earlier, the applicant in this case relies on *Dworzecki*, arguing that it affords the Court flexibility in its interpretation of the Act of 2003, to the extent that it may take into account the conduct of the respondent in considering whether or not surrender is prohibited by s. 45 of the Act of 2003. However, as I pointed out in Zarnescu, Dworzecki is concerned with an interpretation of the Framework Decision, and not the Act of 2003. To interpret the Act of 2003 in the manner contended for by the applicant would, in the words of Peart J. in *Palonka*, *"fly in the face of clear national legislation*."

33. To all of the above I would add that in the more recent decision of this Court (Coffey J.) in the case of *Artur Jerzy Zielinksi*, an *ex tempore* judgment delivered on 17th February, 2020, Coffey J. refused an order for surrender on the grounds that the requirements of s. 45 of the Act of 2003 had not been met, even though he also found, in the case of some of the charges at least, that the in *absentia* and conviction and sentence arose from a manifest lack of diligence on the part of the respondent. He, too, considered *Dworzecki, Palonka* and *Skwierczynski*, but considered the latter to be a decision on its own narrow facts.

34. I am in no doubt at all that, notwithstanding the level of involvement that the respondent in these proceedings had in the various proceedings before the Polish Courts, this Court in nonetheless precluded from making an order for the surrender of the respondent because the requirement of s. 45 of the Act of 2003 have not been satisfied. The application must, therefore, be refused.