

THE HIGH COURT

[2022] IEHC 38
[2021 No. 034 EXT]

BETWEEN

MINISTER FOR JUSTICE

APPLICANT

AND

ARTUR MACHACZKA

RESPONDENT

JUDGMENT of Mr. Justice Paul Burns delivered on the 24th day of January, 2022

1. By this application, the applicant seeks an order for the surrender of the respondent to the Republic of Poland ("Poland") pursuant to a European arrest warrant dated 17th March, 2020 ("the EAW"). The EAW was issued by Judge Michal Ziemniewski, of the Regional Court in Poznan, as the issuing judicial authority.
2. The EAW seeks the surrender of the respondent in order to prosecute him in respect of 2 deception-type offences alleged to have been committed between 6th February, 2001 and 8th March, 2001 as regards the first offence and on the 25th August, 2000 in respect of the second offence.
3. The EAW was endorsed by the High Court on 15th February, 2021 and the respondent was arrested and brought before the High Court on 2nd June, 2021 on foot of same.
4. I am satisfied that the person before the Court, the respondent, is the person in respect of whom the EAW was issued. No issue was raised in that regard.
5. I am satisfied that none of the matters referred to in ss. 21A, 22, 23 and 24 of the European Arrest Warrant Act, 2003, as amended ("the Act of 2003"), arise for consideration in this application and surrender of the respondent is not precluded for any of the reasons set forth in any of those sections.
6. I am satisfied that the minimum gravity requirements of the Act of 2003 have been met. Each of the offences in respect of which surrender of the respondent is sought carry a maximum penalty in excess of 12 months' imprisonment.
7. Section 38(1)(b) of the Act of 2003 provides that it is not necessary for the applicant to establish correspondence between the offences to which the EAW relates and offences under the law of the State, where the offences referred to in the EAW are offences to which Article 2.2 of the European Council Framework Decision dated 13th June, 2002 on the European Arrest Warrant and the Surrender Procedures Between Member States, as amended ("the Framework Decision"), applies and carry a maximum penalty in the issuing state of at least 3 years' imprisonment. In this instance, the issuing judicial authority has certified that the offences referred to in the EAW are offences to which Article 2.2 of the Framework Decision applies, that same are punishable by a maximum penalty of at least 3 years' imprisonment and has indicated the appropriate box for "*swindling*". There is no manifest error or ambiguity in respect of the aforesaid certification such as would justify this Court in looking beyond same. In any event I am

satisfied that, if necessary, correspondence could be established between the offences referred to in the EAW and the offence under the law of this State of deception contrary to s. 6 of the Criminal Justice (Theft and Fraud Offences) Act, 2001.

8. The respondent objects to surrender on the basis that the offences to which this EAW relates have already been the subject matter of an application for surrender which was refused by Mr. Justice Edwards in *The Minister for Justice, Equality and Law Reform v. Machaczka* [2012] IEHC 434 on 12th October, 2012. In essence, counsel for respondent submits that the respondent is entitled to the benefit of an issue estoppel and/or an accrued right to enjoy the benefit of the decision of Mr. Justice Edwards. In the alternative, he submits that the proceedings amount to an abuse of process.
9. Edwards J. refused surrender on the basis that same would constitute a disproportionate interference with the respondent's right to respect for his private and family life as provided for by Article 8 the European Convention on Human Rights ("the ECHR") and is therefore precluded by s. 37 of the Act of 2003. Edwards J. held that there were truly exceptional circumstances justifying the refusal as follows:-
 - (i) The respondent suffered from a progressive schizoaffective disorder which was difficult to treat and he had made 2 serious suicide attempts;
 - (ii) The respondent's condition had been stabilised to some extent through the use of clozapine combined with cognitive behavioural therapy and family support;
 - (iii) Clozapine was not licensed in Poland for prescription to patients suffering from schizoaffective disorders and the evidence before the court was that cognitive behavioural therapy would not be available to the respondent. Further and most significantly, the respondent would be separated from his family who are providing essential support for him;
 - (iv) The psychiatric evidence was that, if returned to Poland, there was a very serious risk that the respondent would commit suicide due to the withdrawal of clozapine, separation from his family and the absence of alternative treatment; and
 - (v) It was not realistic or reasonable to expect the respondent's partner and their daughters to move to Poland in the event of his surrender and, even if they did, their contact with him would be confined to periodic prison visits.

Edwards J. also emphasised that the respondent had been found unfit to plead by a Polish court in the past. Edwards J. was not satisfied that the respondent had fled from Poland to evade justice as such a finding would not have due regard for the respondent's mental illness.

10. The respondent's partner, Karolina Malecka, swore an affidavit dated 21st June, 2021 in which she avers that Edwards J. already refused surrender in respect of the matters the subject matter of the current EAW. She exhibits her affidavits in the earlier proceedings, including the various medical reports exhibited therein. She also exhibits a transcript of

the evidence of the respondent's treating psychiatrist at the time, Dr. Doran. She avers that attempts to cancel the underlying warrants in respect of the respondent's arrest have been unsuccessful. She avers that the respondent remains on clozapine therapy and his dosage has been increased in the last few years. He attends a psychiatric hospital on a monthly basis. She employs the respondent in her beauty business where he carries out menial chores. She states that he would be unable to work in any role other than that which he has now. She indicates that the respondent has been extremely stressed since his arrest on foot of the current EAW.

11. The Court sought additional information from the issuing judicial authority as to the circumstances concerning the re-issue of the EAW and whether clozapine or an equivalent thereof was available to treat the respondent. By reply dated 15th September, 2021, the issuing judicial authority indicates that the decision to issue the original European arrest warrant was taken on 30th July, 2007 and the present EAW *"is solely a new EAW form completed in connection with the decision pertaining to the change of the Polish law with regard to the statute of limitations"*. More time was sought to deal with the pharmacological query. By a further reply dated 21st October, 2021, the issuing judicial authority indicates that it sought information from a neurological specialist, Prof. Dr. Jerzy T. Marcinkowski, and a specialist in forensic medicine, Dr. Czeslaw Zaba. It is indicated as follows:-

"... the experts state that under the law in force in Poland clozapine or its equivalent may be prescribed in psychiatric treatment, including treatment of schizoaffective disorder, because it is a neuroleptic from the group of atypical antipsychotics, a dibenzodiazepine derivative showing sedative, antipsychotic and moderate antipsychotic effects, which relieves the positive symptoms of schizophrenia. It should be emphasised, however, that due to the risk of hematopoietic complications (agranulocytosis), clozapine is used only in schizophrenic patients who do not respond to or tolerate other drugs used in schizophrenia and in patients with psychosis in the course of Parkinson's disease when other methods of treatment have proved ineffective. The drug can be administered only to patients with a normal differential and normal white blood cell count and when it is possible to perform systematic checks of blood counts."

12. It is well established law in this jurisdiction that the principle of res judicata does not apply to proceedings seeking surrender or extradition. The refusal of a court to surrender on foot of a warrant is not of itself a bar to a subsequent request for surrender on a fresh warrant and this is particularly so where the earlier refusal was based on some technical defect or inadequacy in the warrant before the court. It is equally well established that this does not mean that an issue estoppel may not arise in the context of such proceedings. In *Minister for Justice v. Tobin* [2012] IESC 37, [2012] 4 I.R. 147, Murray J. explained at para. 145:-

"[145] On the question of res judicata I would observe that no issue concerning the application of that doctrine arises in this case, the parties having acknowledged the

established principle that the doctrine does not apply to extradition cases (the general application of the doctrine of res judicata should not be confused with the subsidiary principle of issue estoppel, which would apply, or with other issues)."

13. Whether or not a finding that surrender is precluded by reason of s. 37 of the Act of 2003 will act as a permanent bar to surrender must to some extent depend upon the nature of the issue determined by the court at that time. For instance, one might consider a case in which surrender was found to be precluded by reason of s. 37 of the Act of 2003 due to prison conditions in the issuing state, and in particular an inability to guarantee the requested person would have a minimum amount of personal space whilst in custody. In such circumstances there does not appear to be any logical reason why such a finding should, in itself, act as a permanent bar to surrender and defeat a future application for surrender when prison conditions have been improved and the minimum personal space will be available. It may well be that other issues might come into play such as delay, abuse of process or exceptional personal circumstances, but the original decision not to surrender should not act as an automatic bar to future surrender.
14. In the present case, Edwards J. held that surrender was precluded by reason of s. 37 of the Act of 2003 as it would amount to a disproportionate interference with the respondent's right to respect for his private and family life as provided for by Article 8 ECHR. He held that there were truly exceptional circumstances justifying a refusal of surrender. One of those circumstances was the lack of availability of clozapine to treat the respondent's schizoaffective disorder condition. If that was the only ground upon which surrender had been refused then, subject to what other arguments might be made, it is difficult to see how a subsequent application for surrender could be refused if the said drug would now be available to the respondent.
15. As regards the availability of the drug clozapine or its equivalent to treat the respondent whilst in custody, counsel on behalf of the respondent submits that the response from the Polish authorities is ambiguous insofar as it states at one point that "clozapine or its equivalent may be prescribed in psychiatric treatment, including treatment for schizoaffective disorder" but goes on to state that "*clozapine is used only in schizophrenic patients who do not respond to or tolerate other drugs used in schizophrenia and in patients with psychosis in the course of Parkinson's disease when other methods of treatment have proved ineffective*". He submits that there is a clear medical distinction between schizophrenia and schizoaffective disorder and that while the letter from the Polish authorities initially indicates that the drug may be prescribed in psychiatric treatment, including treatment of schizoaffective disorder, it goes on to state that it is only prescribed for schizophrenic patients in limited circumstances.
16. The solicitor for the respondent, Mr. Edward McGarr, swore an affidavit dated 15th November, 2021 in which he exhibits a report from Pawel Jerzycki MD, a clinical psychiatrist, dated 7th November, 2021. Dr. Jerzycki, had provided a report to the High Court in the earlier proceedings before Edwards J. in 2012. The updated correspondence from Dr. Jerzycki indicates that having read the "*incredibly concise opinion*" issued by the

Polish court experts, one might conclude that clozapine could be used in Poland on schizoaffective patients. Dr. Jerzycki states "*Unfortunately, this opinion is misleading*". He sets out that schizoaffective disorder is not listed in the summary of product characteristics for clozapine which is currently in force in Poland and therefore it cannot be legally prescribed in Poland for patients with that condition. He cites a recent example in which a doctor successfully used an antiviral medicine in patients with a viral disease but that the disease was not listed in the Polish summary of product characteristics and, as a result of its use, the doctor was fined 5 million PLN. Dr. Jerzycki indicates that any medical practitioner who prescribed clozapine in Poland to a person suffering from schizoaffective disorder would carry a significant risk of prosecution.

17. The Court furnished the Polish authorities with the letter from Dr. Jerzycki dated 7th November, 2021 and sought additional information in respect of same. The Court also sought additional information as to the date on which the Polish law had changed so as to enable the re-issue of the EAW and an explanation for any lapse of time between the change in that law and the re-issue of the EAW.
18. By additional information dated 8th December, 2021, the issuing judicial authority indicates that the relevant change in Polish law took effect on 2nd March, 2016, although an earlier amendment had come into effect as of 1st July, 2015. It is difficult to ascertain the impact of these provisions on the proceedings in Poland. However, having regard to the mutual respect underpinning the European arrest warrant system, the Court accepts that the provisions cited had the effect of extending the limitation period so as to permit prosecution as stated by the issuing judicial authority, particularly in the absence of any information to the contrary.
19. Mr. McGarr, swore a further affidavit, dated 13th December, 2021, exhibiting an addendum to Dr. Jerzycki's report of 7th November, 2021, in which Dr. Jerzycki opines that clozapine cannot legally be used to treat the respondent in Poland and due to potential adverse side effects, any doctor who administered same contrary to Polish regulations would most likely face serious punishment in the event of an adverse outcome.
20. By further additional information dated 10th January, 2022, the issuing judicial authority enclosed a forensic medical report from the Department of Forensic Medicine of Poznan University which indicates that clozapine could be prescribed to the respondent as part of his treatment for schizoaffective disorder if detained in Poland, but this is subject to a number of conditions.
21. It is beyond the scope of these proceedings for this Court to make a determination as to the legality or advisability of prescribing clozapine for the treatment of this particular respondent in Poland. On the basis of the mutual trust and confidence which underpins the European arrest warrant system, I am satisfied to accept the position as outlined in the additional information furnished by the issuing judicial authority and provided by the Department of Forensic Medicine of Poznan University that clozapine can be used in the treatment of the respondent if the necessary conditions for such use are met. The

conditional availability of clozapine for the treatment of the respondent in Poland does represent a material change in circumstances. However, that conditional availability of clozapine does not dispose of the objections to surrender in this matter.

22. It must be noted that the lack of availability of clozapine for the treatment of the respondent, if surrendered to Poland, was not the sole ground upon which surrender was refused by Edwards J. While this was undoubtedly a significant factor in the reasoning of Edwards J., ultimately, he refused surrender on the basis that same would amount to an infringement of the respondent's right to respect for his private and family life as provided for by Article 8 ECHR. Edwards J. gave considerable weight to the fact that the respondent's condition had been stabilised to some extent through the use of clozapine but also by reason of cognitive behavioural therapy and the support provided to him by his family. While relying upon the lack of availability of clozapine in the first *Machaczka* proceedings, Edwards J. went on to state at para. 279:-

"... Further and most significantly, he [the respondent] would be separated from his family who, as I have said, are providing essential support for him." (Emphasis added)

This family support would not be available to him even in the event that his family moved to Poland.

23. There is nothing before the Court to indicate that the respondent no longer requires the essential support provided to him by his family or that the family have ceased to provide such support. Indeed, the affidavit sworn by the wife of the respondent indicates that he continues to rely upon and receive significant support from his family. It would appear therefore that the most significant and essential factor regarded by Edwards J. as representing a truly exceptional circumstance remains in place. Bearing in mind the judgment of the Supreme Court in *Minister for Justice and Equality v. Vestartas* [2020] IESC 12, I am satisfied that even though clozapine is conditionally available for the treatment of the respondent if surrendered to Poland, the personal and family circumstances of the respondent continue to be truly exceptional so as to justify a refusal of surrender.
24. The issue of abuse of process in the context of the Act of 2003 came before the Supreme Court in *Minister for Justice and Equality v. J.A.T. No. 2* [2016] ISEC 17. That case concerned an application on behalf of the United Kingdom ("the UK") for the surrender of the respondent to face prosecution in respect of what were referred to in the European arrest warrant as 'tax fraud offences', which were alleged to have occurred between 1997 and 2005. A European arrest warrant seeking the respondent's surrender was issued on 7th March, 2008. The respondent was arrested on foot of same and his surrender was refused by the Supreme Court on 21st December, 2010. A second European arrest warrant was issued and the respondent was arrested on foot of same on 24th July, 2012. The UK authorities stated that the second warrant had taken into account the judgment of the Supreme Court in the first set of proceedings. His surrender was ordered by the High

Court despite a finding of abuse of process. On appeal, the Supreme Court refused surrender, with no dissenting judgments.

25. Denham C.J. was satisfied that there was an evidential basis upon which the High Court could, and did, find that there was an abuse of process. She was satisfied not to interfere with that finding. She regarded the issue which the Supreme Court had to determine as whether, in light of the findings of the High Court, it was sufficient or appropriate for the High Court to simply admonish the parties responsible while surrendering the appellant.

26. As regards delay, at para. 65 Denham C.J. was of the opinion that:-

"65. The time which has passed since the alleged offences, the first arrest on the first EAW, the second EAW, and the hearing of this appeal, is not of itself a factor upon which a request for surrender would be refused. However, this time period has to be considered in light of all the circumstances of the case."

27. In terms of how a court should normally deal with an abuse of process, she further stated at paras. 72-77:-

"72. In general, if there is an abuse of process by authorities they should not benefit. The rule of law, and the right to fair procedures, requires that such a general principle be applied.

73. Of course, there may be circumstances where a court considers that there has been an abuse of process, but to a limited degree, and applying the principle of proportionality, a surrender procedure could proceed. However, such a finding would arise only in a situation where a process was found to be an abuse, but in a limited manner, and with limited effect.

74. In this case there is an accumulation of factors.

75. It is clear, and remains the law, that simply because a second European arrest warrant is issued that does not of itself indicate any abuse of process. See Bolger v. O'Toole, unreported Supreme Court, 2nd December, 2002, and Gibson v. Gibson, ex tempore, Supreme Court, 10th June, 2004, Keane C.J..

76. In analysing a case where there has been a finding of an abuse of process, the circumstances of each case are relevant and critical to the ultimate decision.

77. I have reviewed the circumstances of this appeal, which include the following factors:-

- (a) this is the second EAW issued in relation to the offences alleged;*
- (b) failings in the first EAW could have been addressed in the first application;*
- (c) a considerable time has passed since the alleged offences and a considerable time has passed since the arrest of the appellant on the first EAW;*

- (d) *the medical condition of the appellant, who is a vulnerable person;*
- (e) *the medical condition of the appellant's son, for whom the appellant is a significant carer;*
- (f) *the family circumstances;*
- (g) *the oppressive effect which the two sets of EAWs have had on the appellant; on his son; and on his family;*
- (h) *no explanation has been given for delays;*
- (i) *there has been no engagement by the authorities with the issues as to the first EAW or the delays;*
- (j) *the Central Authority has a duty to bring to the attention of the issuing State authorities defects or internal contradictions in a warrant, and to consider whether all the documentation is complete and clear, before being relied upon for the purpose of seeking to endorse an EAW;*
- (k) *the duty of the Court to protect fair procedures; and*
- (l) *the principle that a party in litigation should not benefit from proceedings which were de facto abusive of the Court's process."*

28. Having taken such factors into account, Denham C.J. concluded at para. 85:-

"85. While no single factor, as set out above, governs this appeal, in circumstances where the High Court has found, correctly in my view, that there has been an abuse of process, I am satisfied that the factors, referred to in this judgment, taken cumulatively, are such that there should not be an order for the surrender of the appellant."

29. From the foregoing, it is clear that Denham C.J. accepted that there had been an abuse of process and regarded the listed factors as relevant matters in determining that the appropriate judicial response to same was to refuse surrender.

30. O'Donnell J., with whom MacMenamin and Laffoy JJ. concurred, reluctantly agreed that the appropriate judicial response was to refuse surrender at para. 1 of his judgment:-

"1. I was myself doubtful, however, that even cumulatively, the matters relied on by the appellant were sufficient to justify a refusal of surrender in this case. But in the light of the views of my colleagues, and the judgment of the Chief Justice, I do not dissent from the Order proposed. I would, however, emphasise that this is a rare, and indeed exceptional case. While exceptionality is not in itself a test, it can be a useful description, and it is, in my view, only cases which can truly be so described that will be those rare cases in which it may be said that surrender would

offend due process and interfere with the rights of the appellant to such an extent that it must be refused."

31. O'Donnell J. sought to identify the principles involved, to identify the factors grounding a refusal and to determine the weight to be accorded to them. He doubted whether it was appropriate or useful to introduce the concept of a 'duty of care' on the part of requesting authorities or the Irish authorities. He emphasised that the law of European arrest warrants was intended to provide a new and streamlined process for surrender between Member States and represented a significant departure from the earlier approach. In his view, the starting point was that considerable weight is to be given to the public interest in ensuring that persons charged with offences face trial. As a decision to refuse surrender will often provide a form of limited immunity to a person so long as they remain in this jurisdiction, he stressed it is only if some quite compelling feature, or combination of features, is present that it would be appropriate to refuse surrender on grounds of due process or interference with rights. At para. 4 of his judgment, he emphasised it was important that the court should rigorously scrutinise the factual basis for any such claims against that background.
32. As regards the case before him, O'Donnell J. identified 3 factors as having been asserted as cumulatively leading to an order refusing surrender, namely the fact that it was a repeat application, delay/lapse of time and Article 8 ECHR/private and family rights aspects. He emphasised that a repeat application based on a fresh warrant could not in itself be regarded as an abuse of process. Dealing with delay/lapse of time, he was not satisfied that, taken alone or in conjunction with the repeat application, delay/lapse of time in the circumstances constituted an abuse of process or justified refusal of surrender, as outlined at para. 9 of his judgment. Turning to the remaining factor of rights pursuant to Article 8 ECHR, O'Donnell J. noted that the respondent was in a very difficult health situation but emphasised that the matter was not to be tested against some generalised consideration of personal sympathy, but rather as to whether the circumstances were such that it rendered it unjust to surrender the respondent. He noted that the respondent was the primary and, effectively, sole caregiver for his son, in circumstances where that care was particularly important, and that his son would undoubtedly suffer very severely if the appellant was surrendered for trial. He stated that, on their own, such matters would not justify refusal of surrender.
33. He then set out what he considered to be the relevant factors to be weighed cumulatively at para. 10 of his judgment:-

"10. It seems to me to be relevant that this is a second application, and moreover, that there has been avoidable delay on the part of the authorities in both jurisdictions in the preparation, submission, and execution of a second warrant, even though the evidence of the respondent's circumstances, and those of his son, had been adduced in the first European Arrest Warrant proceedings. 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."

34. As regards matters that could be properly addressed by admonishment, O'Donnell J. doubted whether same would amount to an abuse of process at all.
35. From the foregoing, it appears that O'Donnell J. ultimately agreed that the facts in *J.A.T. No. 2* constituted an abuse of process, as he refused surrender. While he disagreed with the separate judgment of Denham C.J. on some of the issues which she had included in her estimation of relevant factors, he expressly prefaced his judgment by indicating that, in light of the views of his colleagues and the judgment of the Chief Justice, he did not dissent from the decision to refuse surrender. He was clear that each of the factors said to constitute an abuse of process would not in itself justify a refusal to surrender and, even taken cumulatively, the matter was close to the margin.
36. Having regard to the public interest in ensuring that persons charged with offences face trial, O'Donnell J. expressed doubt as to whether such factors would be sufficient to prevent surrender for very serious crimes of violence. However, he fell short of saying that such factors could never be sufficient to prevent surrender. He stated at para. 3, *"Something is either an abuse of process, or it is not"*, while he went on to indicate at para. 12:-

"12. But the normal and logical remedy for an abuse of process is the striking out or staying of the proceedings constituting abuse."

O'Donnell J. therefore appears to have left open the possibility that if the factors constituting abuse of process were sufficiently exceptional, the appropriate remedy would be to strike out or stay the proceedings.

37. Bearing in mind the judgments given by the members of the Supreme Court in *J.A.T. No. 2*, I am satisfied that the present case is one of those rare matters where refusal of surrender is justified on the basis of the cumulative effect of the following factors:-
- (i) this is a repeat application;
 - (ii) in the context of a repeat application, there has been a significant lapse of time between the earlier and present applications;
 - (iii) there has been a significant lapse in time between the change in Polish law extending the limitation period and the issue of the repeat EAW;
 - (iv) there has been a considerable lapse in time between the alleged commission of the offence and the repeat application;

- (v) the respondent suffers from significant mental health problems, known to the Polish and Irish authorities from the previous proceedings, and the repeat application could be expected to adversely impact upon this condition, including his suicidal ideation, and indeed there is evidence before the Court is that it has done so;
 - (vi) in refusing surrender on foot of the previous application, Edwards J. had emphasised at para. 279: " 279. Further, and most significantly, he [the respondent] would be separated from his family who, as I have said, are providing essential support for him." This family support would not be available to him even in the event that his family moved to Poland. There is nothing before the Court to indicate that the respondent no longer requires the essential support provided to him by his family or that the family have ceased to provide such support. The evidence before the Court indicates that such family support is still required and is being provided. It would appear therefore that this most significant factor remains in place; and
 - (vii) the alleged offences in respect of which surrender is sought do not involve allegations of violence.
38. Taking the combined effect of those factors into account, I am satisfied that the present application can be regarded as one of those rare instances where surrender may be refused on grounds of abuse of process within the meaning of that phrase as used in J.A.T. No. 2. I should point out that while the phrase 'abuse of process' is used in this context, there is no suggestion of any lack of *bona fides* or misconduct on the part of the Polish or Irish authorities in bringing this application.
39. I refuse the application for an Order for the surrender of the respondent to Poland.