THE HIGH COURT

Record No. 2017/66 EXT

BETWEEN:-

THE MINISTER FOR JUSTICE AND EQUALITY

APPLICANT

AND

MACIEJ ZIELINSKI

RESPONDENT

JUDGMENT of Ms. Justice Donnelly delivered this 8th day of May, 2017.

1. This is the third set of proceedings launched before the High Court in which the surrender of this respondent to Poland has been sought pursuant to a European arrest warrant ("EAW") to serve two sentences covering a total of 99 offences. The question of whether this third set of proceedings is truly based upon a fresh EAW, or is in fact based upon the same EAW that was withdrawn during the course of earlier proceedings, is the major issue in this case. The respondent claims it would be an abuse of process to permit his surrender in the circumstances. For ease of reference, the Court will refer to the EAWs that have been endorsed as "the first EAW", "the second EAW" and "the present EAW" respectively.

2. The respondent also argued other points of objection; under s. 45 of the European Arrest Warrant Act, 2003, as amended ("the Act of 2003") relating to trial *in absentia*), under Article 8 of the European Convention on Human Rights ("ECHR") relating to the right to respect for private and family life, and under s. 43 of the Act of 2003 relating to his age at the time of the offences and the provisions of the Children Act, 2001.

A Member State that has given effect to the 2002 Framework Decision
3. The surrender provisions of the Act of 2003 apply to those member states of the European Union that the Minister for Foreign Affairs has designated as having, under their national law, given effect to the Council (EC) Framework Decision of 13th June, 2002 (2002/584/JHA) on the European arrest warrant and the surrender procedures between Member States ("the 2002 Framework Decision"). I am satisfied that by the European Arrest Warrant Act 2003 (Designated Member States) (No. 3) Order 2004 (S.I. No. 206/2004), the Minister for Foreign Affairs has designated Poland as a member state for the purposes of the Act of 2003.

Identity
4. I am satisfied on the basis of the evidence given by Sgt. James Kirwan, member of An Garda Síochána at the arrest hearing, the affidavit of the respondent, and the details set out in the present EAW, that the respondent, Maciej Zielinski, who appears before me, is the person in respect of whom the present EAW has issued.

Endorsement
5. Subject to further consideration of the validity of the present EAW, I am satisfied that the present EAW has been endorsed in accordance with s. 13 of the Act of 2003 for execution in this jurisdiction.

Sections 21A, 22, 23 and 24 of the Act of 2003
6. Having scrutinised the documentation before me, I am satisfied that I am not required to refuse the respondent's surrender under the above provisions of the Act of 2003.

Part 3 of the Act of 2003
7. Subject to further consideration of s. 37, s. 38, s .43 and s. 45 of the Act of 2003, as amended, and having scrutinised the documentation before me, I am satisfied that I am not required to refuse the surrender of the respondent under any other section contained in Part 3 of the said Act.

The Provisions of Section 38 of the Act of 2003
8. The surrender of the respondent is sought for the purpose of serving two separate sentences which were imposed upon him in respect of 99 separate offences.

The Court commends both parties for the spirit of cooperation shown in the proceedings which resulted in the production of a chart of proposed corresponding offences. The Court will deal with the shorter sentence first and then the longer sentence.

9. By a judgment of the Regional Court in Bydgoszcz dated 3rd March, 2009 (file reference number III K 538/08), the respondent was sentenced to 1 year and 6 months deprivation of liberty. This was imposed in respect of 2 offences. The Court is satisfied, having read the present EAW and other information, that the acts for which he was convicted correspond to the offences proposed by the minister as corresponding offences in this jurisdiction, namely criminal damage contrary to s. 2 of the Criminal Damage Act, 1991 and theft contrary to s. 4 of the Criminal Justice (Theft and Fraud Offences) Act, 2001.

10. The provisions of minimum gravity have also been met and the Court is satisfied that in respect of this first sentence, the provisions of s. 38 of the Act of 2003 do not prohibit the respondent's surrender in respect of these two offences.

11. In relation to the second sentence for which he is sought, this is given its Polish file reference III K 129/04. This is stated to be a sentence of 5 years and 4 months deprivation of liberty. In the first EAW, it is recorded that he has 5 years and 28 days of deprivation of liberty to serve. In the second EAW, it is stated that he has 9 years and 28 days of deprivation of liberty to serve, but the issuing judicial authority sent additional information correcting the position. A signed statement from the translator pointing out that instead of saying that the penalty was 9 months, the translator had written 9 years. In the present EAW, the remaining sentence to be served is stated to be 9 months and 28 days.

12. The respondent raised a point of objection based upon s. 41 of the Act of 2003 (on the basis of double jeopardy). Apparently, this point was made on the basis that the respondent faced a 9 year sentence when he had previously been sentenced to a sentence of 5 years and 4 months. The Court is satisfied that this point of objection has no validity in the circumstances as explained in the previous paragraph and notes that this point was not pursued by the respondent in the present proceedings.

13. The first and second EAWs stated that file reference number III K 129/04 was a cumulative judgment of the Regional Court in Bydgoszcz dated 28th May, 2012 in which the respondent received a total of 5 years and 4 months of deprivation of liberty. It was clarified in the second proceedings following a request for further information by the Court, that the date of the sentence as recorded in the second EAW (and the first EAW) was an error. The date of the sentence should read that it was imposed on 5th April, 2004. It was stated that this was due to a clerical error in Poland which is to be corrected. In due course, that error was corrected and the present EAW was sent over to this Court for execution. This issue will be dealt with further below.

14. The sentence of 5 years and 4 months, file reference number III K 129/04, was a cumulative judgment arising out of sentences imposed in respect of offences on three separate occasions:

> a) The first judgment is file reference number III K 496/01 and covered 37 offences. In relation to each of these offences, the Court is satisfied, having scrutinised the papers, that the acts for which the respondent was convicted correspond to the offences proposed by the minister as corresponding offences on the list put before the Court. These are various offences corresponding with burglary, theft and criminal damage.
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> b) The second judgment is file reference number III K 1755/00 and this covered a further 22 offences. The Court is also satisfied that the acts the respondent committed would, if committed in this jurisdiction, correspond to the offences proposed by the minister. These are various offences corresponding with burglary, theft and criminal damage.
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> c) The third judgment is file reference number III K 1866/01 and it covers a further 38 sentences. The Court is also satisfied that the acts the respondent committed would, if committed in this jurisdiction, correspond to the offences proposed by the minister. These are various offences corresponding with burglary, theft and criminal damage or attempts at these offences.
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> d) The requirements of minimum gravity have been met in respect of each of the above 97 offences.

15. Therefore, the terms of s. 38 of the Act of 2003 have been satisfied with respect to this second sentence of 5 years and 4 months covering the 97 offences set out in the EAW under file reference III K 129/04.

Section 43 of the Act of 2003
16. The respondent claims that his surrender for the 97 offences set out in file III K 129/04 is prohibited by s. 43 of the Act of 2003 on the grounds of age, as he was a juvenile at the time of the commission of the offences. His argument in this regard is quite nuanced. He relied upon s. 49 of the Children Act, 2001 and submitted that there is a statutory bar to prosecuting a person who is admitted to a juvenile diversion programme.

17. Section 43 of the Act of 2003 provides that "[a] person shall not be surrendered under this Act if the offence specified in the European arrest warrant issued in respect of him or her corresponds to an offence under the law of the State in respect of which a person of the same age as the person in respect of whom the European arrest warrant was issued could not be proceeded against by reason of his or her age."

18. Under that section, the prohibition on surrender is on the ground that the person could not be proceeded against in this State by reason of his or her age. The submission by this respondent relied upon the law of this State which provides a prohibition for the prosecution of juveniles who have been admitted into the juvenile diversion programme. That is not an *age* bar but a bar based upon a particular process. On that basis, s. 43 of the Act of 2003 does not apply.

19. There is in any event a problem for the respondent. If there was to be a bar under s. 43 of the Act of 2003 based upon age, when taken with the juvenile diversion programme, it would have to be based upon reciprocity. In this case, there is no evidence that there was acceptance of the respondent into a juvenile diversion scheme, indeed his prosecution in court is *prima facie* evidence that there was no such scheme applied to him.

20. For those reasons, the Court rejects this point of objection.

Section 45 of the Act of 2003
21. The issuing judicial authority has completed point (d) of the European arrest warrant. It was completed separately for each of the two sentences at issue.

22. In relation to the judgment in III K 538/08, the present EAW stated that the respondent was not present at his trial but point (d) 3.2 (using the nomenclature in the Table in s. 45 of the Act of 2003) is completed. The present EAW states that, knowing of the set trial, the respondent granted a power of attorney to a defence lawyer who was appointed by him/her or by the State to defend her/him at the trial and that defence lawyer in fact defended her/him at the trial.

23. No explanation as to how that condition was fulfilled was provided in the European arrest warrant. This is required by the provisions of the Council (EC) Framework Decision of 26th February, 2009 (2009/299/JHA) on the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial ("the 2009 Framework Decision"), as implemented by s. 45 of the Act of 2003, as amended. A request for further information in the previous proceedings was sent by the central authority on 24th October, 2016.

24. The issuing judicial authority responded on 3rd November, 2016 to state that the respondent had been "represented by counsel who in fact conducted his defence at the sitting." The reply said that the respondent was correctly summonsed to the date of the hearing but he was not present. The central authority sent a further request dated 2nd December 2016, asking "[…] whether there is any information available that would show the respondent actually mandated the lawyer to represent him, as has been stated at section (d) 1.c of the warrant". The issuing judicial authority replied on 16th December, 2016 by saying that "[t]he counsel was instructed by the convict of his own choice, so the issue of his remuneration, whether it was paid or not by the convict Zielinski remains their own business between the convict and his counsel."

25. Counsel for the respondent submitted that this did not state how the lawyer had been mandated. In the present set of proceedings, the respondent swore an affidavit saying that he does not know who represented him on 3rd March, 2009 because he did not authorise anybody to do so or to give instructions in relation to same. He also swore in this affidavit that he was arrested in Poland in November 2007 for what he understood to be an allegation that he had broken a window. He denied involvement and says that, because of this, he was placed in custody. He says that the prosecutor visited him and that he was informed that if he accepted responsibility, he (the prosecutor) would release him in time for Christmas. He says he did sign a document to this effect

and he was released a short time afterwards. He says he assumed the matter was at an end.

26. Counsel for the minister asked the court to consider the arguments that were being presented on behalf the respondent against the factual background in the case. This respondent had sworn two affidavits in the context of all the proceedings before the Court, but had failed to engage with the circumstances as to how the judgments had come about. Counsel submitted that the respondent is remarkably silent in his affidavits as to how the cumulative judgment came about, *i.e.* file reference number III K 129/04. On the contrary, the additional information shows that it was the respondent himself who applied to have the individual judgments against him combined. It was the respondent's application that resulted in the decision of 5th April, 2004 to impose the cumulative sentence. The respondent has failed to disclose to the Court that it was he who had made that application.

Analysis and Determination by the Court on Section 45 of the Act of 2003

27. The reliance by the issuing judicial authority on a particular part of point (d) in the present EAW is, in effect, a certification by the issuing judicial authority that a particular state of affairs occurred. Other than where there is certification that either the respondent was present at trial or had been personally summonsed on a specified date and thereby informed of the date and place of his trial, the issuing judicial authority is obliged to give information about how the referred condition of point (d) has been fulfilled. Information was not supplied on the face of the EAW but was supplied by the issuing judicial authority in additional information. The Court is bound to have regard to the principles of mutual trust and confidence when it comes to consideration of that information. The Court must, in accordance with the Court of Appeal decision in *Minister for Justice and Equality v. Palonka* [2015] IECA 69, consider whether the information provided is sufficient amplification of the certification it has given.

28. In respect of the two offences under file III K 538/08, the issuing judicial authority has stated that the respondent was summonsed properly and that he was represented by what, in effect, was a private lawyer at the hearing. The requirement in point (d) 3.2 is firstly that the respondent must be aware of the scheduled trial. That is a different requirement to being aware of the scheduled date and place of the trial. To a certain extent, if a person has instructed a lawyer to defend them at the trial, it is axiomatic that they were aware of the scheduled trial. In this case, there is the further information that he was summonsed. I accept that the information provided demonstrates that the respondent was aware of the scheduled trial. The issuing judicial authority has given information that this was a private instruction, *i.e.* not a court-appointed or court-assigned lawyer. In those circumstances, a mandate has been given. It is not necessary for the Court to see the details of that mandate, simply to be sure that this was a personal mandate or instruction given by a client and not simply a lawyer assigned by a court who has never in fact been mandated by the client to act. In the circumstances, the provisions of s. 45 of the Act of 2003 *prima facie* have been complied with.

29. In the present proceedings, the respondent contests the information that has been provided and therefore the Court must adjudicate on whether it should reject the certification given by the issuing judicial authority. The Court is satisfied that it must consider what weight, if any, to attach to the affidavit of the respondent in the present proceedings in dealing with the issue of s. 45 of the Act of 2003 in the context of the statement by the issuing judicial authority that the respondent knew of the proceedings and mandated a lawyer to appear on his behalf at the trial.

30. The respondent swore an affidavit in the course of the second set of proceedings which was entirely silent as to his state of knowledge (or lack thereof) as to the proceedings in file reference number III K 538/08. In that affidavit, the respondent claimed that his surrender was sought so that he might be imprisoned in Poland for a long period and said it was disproportionate and fundamentally failed to reflect the full picture. He also said that he had been imprisoned in Poland in the period between 2001 and 2007. After that affidavit had been sworn on 21st November, 2016, the issuing judicial authority sent further information on 2nd December, 2016 as set out above. At no point, either prior to or during the hearing of the proceedings in relation to the second EAW, did the respondent give any further information. During the course of that hearing, the Court made certain observations about the lack of information provided by the respondent, although the Court acknowledged that the respondent was not obliged to furnish information and could make a challenge under s. 45 of the Act of 2003 on the basis of the information or lack of information provided by the issuing judicial authority. It was only after that hearing that the respondent swore his final affidavit setting out what he claims occurred while he was in prison apparently in relation to the offences at issue.

31. The fact that a respondent has provided late evidence to a court is something that a court is entitled to take into account when considering the weight to be attached to the evidence. In this case, the respondent is now contending that he signed a document in which he would be released *by the prosecutor* if he accepted responsibility. He says that, upon signing such a document, he assumed the matter was at an end and that it had been dealt with *by the prosecutor* in a swift manner that can happen in Poland. The Court does not have knowledge of any other case in which it was proven or even alleged that a prosecutor in Poland makes determinations as to sentence. It may be that a prosecutor can recommend to a court that a certain sentence be given but the respondent has given no basis for his statement that the prosecutor can deal with these matters. There is no judicial knowledge on the part of this Court as to any such process and, indeed, it must be stated that the experience of the Court is entirely to the contrary. From the EAWs that have come before the High Court, it appears that it is always a Polish court that imposes sentences (even if the circumstances in which that may have come about may differ from how it might occur in this jurisdiction).

32. On the basis of the lateness of the respondent's evidence, its sheer implausibility and the fact that it is mere assertion, in circumstances where the respondent could have obtained, if he so wished, the services of a Polish lawyer to access his file and place the information before the Court (as so many other respondents have done), the Court rejects his evidence that he was due to be released by a prosecutor. On the contrary, the Court is certain that this respondent did know that there was to be a court hearing in respect of this matter. His latest affidavit confirms that he in fact did know about these proceedings, a fact to which he had not averred previously. The Court is also satisfied to reject this respondent's assertion that he never mandated any lawyer to represent him. The Court accepts the statement of the issuing judicial authority that it was not a court appointed or court assigned lawyer who represented him, but it was a private lawyer instructed by the respondent. The sheer implausibility of a lawyer appearing for the respondent without instructions and apparently without pay makes the respondent's contention unbelievable in the absence of any supporting evidence.

33. The Court is satisfied that the respondent knew of the trial and that he was represented by a lawyer of his own choice instructed by him and that the issue of remuneration was a matter for the respondent himself. This was not a state/court appointment of a lawyer, but a private relationship between the respondent and his lawyer. It is not necessary for further detail of that mandate to be given (indeed, it may not be possible to obtain it as that is a matter between lawyers and their clients). It is sufficient that a lawyer appeared before the court on behalf of the respondent in the issuing state and that that court was satisfied that the lawyer was instructed by the respondent as client. It is also clear that the respondent knew of the trial because he was correctly summonsed and indeed because he instructed the lawyer.

34. I am satisfied that, in respect of the sentence imposed on file reference number III K 538/08, the respondent's surrender is not prohibited by the provisions of s. 45 of the Act of 2003.

35. In respect of file reference number III K 129/04, and its three constituent judgments, the issuing judicial authority have filled in point (d) 1 stating that the respondent did appear at the trial resulting in the decision. The respondent raised a particular objection to that matter because he had sworn on affidavit that he had been in Ireland since 2008. Counsel also submitted that the Polish authorities were explaining the delay on the basis that the respondent had been searched for in Poland but not found and that they could not have it both ways.

36. The respondent never sought to make a case that this was a situation where a suspended sentence had been reactivated, but the Court had a concern that the gap in time between the date of the three original judgments and the cumulative judgment of May 2012, together with the respondent's apparent residence in Ireland, might raise a so-called *Lipinski* point pursuant to the case of *Minister for Justice and Equality v. Lipinski* [2016] IECA 145. The Court made a request for information pursuant to the provisions of s. 20 of Act of 2003, in particular requesting information about the respondent's presence at the hearing in Poland in May 2012.

37. What transpired was that there was a clerical error on the EAW in respect of these matters. That sentence was passed on 5th April, 2004. He was present at the trial when the sentence was passed. Furthermore, it was his motion to combine the three sentences of deprivation of liberty. His penalty was not suspended but they were to be executed in an appropriate sequence after completion of serving of another penalty in another case.

38. I am satisfied that the respondent was present at his trial and that his surrender is not prohibited under s. 45 of the Act of 2003.

Section 37 of the Act of 2003
39. The respondent claims that his right to respect for his family and private life will be violated if he is surrendered in respect of these matters.

40. He makes a number of arguments. His main argument is that the vast majority of these offences were committed at a time when he was under 18 years of age. However, the 1 year and 6 month sentence relates to the matters which were committed in 2007 when he was 24 years old.

41. He relies upon the fact that he has been in Ireland since 22nd January, 2008. He received a PPS number shortly after his arrival in the State and has worked with Kepak, then Liffey Meats, and finally with Kildare Meats. He says that Ireland is now the centre of his life. His immediate and extended family live here, namely his mother and father, his brother and sister. Three of his sisters have their own families with children. A sister lives with his father and his mother lives with him.

42. He had a prior relationship in this jurisdiction and has a child from that relationship. He is now in another relationship with a woman who has 3 children that they rear together. He says that he looks after his own child regularly because her mother has psychological issues. He looks after the child at weekends and after work. It was because of his commitments to his child that this Court granted him an early bail hearing after which he was granted bail.

43. The respondent views his request for surrender as disproportionate and states that it fails to reflect the full picture in that he had been imprisoned in Poland between 2001 and 2007. The respondent raised the issue with regard to the question of delay. He relies upon the fact that the Polish issuing judicial authority stated that it was only in 2014 that they knew he was residing in Ireland.

44. At the hearing, the respondent made his argument on the basis that his surrender was prohibited by Article 8 of the European Convention on Human Rights. The respondent relied in particular on the fact that he was under 18 when the majority of the offences were committed and that he was in Ireland for a considerable period and had specific parental responsibilities.

45. The Supreme Court (O'Donnell J.) has stated at para. 11 in the case of *Minister for Justice and Equality v. J.A.T*. (No. 2) [2016] IESC 17 that:-

"It would not […] 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."

46. In this case, there is no need for the court to dwell on the Article 8 point to any great extent. In the view of the Court, this is a case where there is a relatively high public interest in the surrender of a person who was clearly a recidivist offender. If the only sentences which had been imposed were in respect of the offences committed in 2000/2001 when he was under 18 years, the public interest could not be viewed in the same way. However, in this situation, he went on to commit further offences in 2007. He left the jurisdiction of Poland and came to Ireland at a time when he knew that these matters were outstanding against him. This was the immediate cause of the delay since that time. Although time elapsed since then, the delay has not been such as to reduce the public interest in his surrender for serving these sentences to below a moderately high threshold.

47. On the other side of the individual balancing act that the Court engages in are the respondent's circumstances. What he puts in the balance as regards his private and family interests are those which are to be expected from a person who is being sought for extradition. He has an established life here and is a parent of a child with whom he does not live but takes care of. He is also involved in a relationship where his partner has children. There is no evidence of any particularly unusual or oppressive consequences to him or to any of the children. His evidence of the difficulties his child may face because of his former partner's circumstances are not backed up by any specific evidence regarding the child or evidence from the child's mother. His evidence does not give the Court reason to accept that his situation and that of his child (or his present partner's children) are such that surrender would be disproportionate. The Court has taken into account the best interests of the children, but in light of the moderately high public interest in his serving of these sentences, his surrender is not disproportionate. The facts in this case do not demonstrate the type of circumstances which would demand a more in depth analysis or show a necessity for the Court to seek further information.

48. In light of the circumstances, the Court rejects this point of objection.

Objection Based Upon the Endorsement of the Present European Arrest Warrant
49. The respondent contends that the present EAW, endorsed on 21st March, 2017, is not a valid European arrest warrant. This arises in circumstances where a s. 16 hearing was heard on 3rd February, 2017 in respect of the second EAW which had been endorsed by the High Court on 17th October, 2017 and which in almost all respects was identical to that before the Court in these proceedings. At the conclusion of the hearing on 3rd February, 2017, the matter was adjourned, the Court indicating a desire to have additional information from the issuing judicial authority. The information requested related to the indication that this respondent had appeared in person at his trial and in particular made reference to the cumulative judgment of the Regional Court in Bydgoszcz dated 28th March, 2012. This date turns out to have been due to a clerical error in Poland. In light of that, the issuing judicial authority

sent to the central authority an amended EAW (the present EAW), in which the date of 28th May, 2012 was replaced by the date 5th April, 2004.

50. The present EAW states at point (k) 4 that it was dated 16th December, 2014 but underneath the following is noted:

> "Date of supplementation: December 18, 2014
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> Date of supplementation: January 11, 2015
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> Date of correction: September 27, 2016
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> Date of correction: March 15, 2017."

51. Counsel for the respondent submitted that this is an "amended EAW" and that on its face it purports to be the *same* EAW that had originally been issued. He submitted that the only interpretation is that it was the original EAW that was withdrawn in this case. Counsel referred to a number of cases in which it has been established that it is acceptable for a second set of extradition warrants to be issued, *e.g. Bolger v. O'Toole and Ors (Ex tempore*, Supreme Court, Denham J., 2nd December, 2002). However, he submitted that this is the same warrant and relies upon the case of *Minister for Justice and Equality v. Swacha* [2016] IEHC 796 to submit that where there is an attempt to "come again", it must be on a fresh set of warrants.

52. Counsel relied upon the statement by the Supreme Court in *Minister for Justice Equality and Law Reform v. Koncis* [2011] IESC 37 to the effect that *"[t]he execution of a European arrest warrant is subject to a decision by a judicial authority: in Ireland this is the High Court, or, on appeal, this Court."* (para. 51). He also relied upon the case of *Minister for Justice Equality and Law Reform v. O'Fallúin* [2010] IESC 37 in which the Supreme Court (Murray C.J.) stated that *"[w]here it is established that a judicial authority within the meaning of the Act of 2003 has in fact issued the European Arrest Warrant in question it seems to me that it should be considered to have been 'duly issued' within the meaning of that section."* In *O'Fallúin*, the Supreme Court went on to say that the Act does not confer on the courts a general discretionary power to refuse to surrender and neither does the 2002 Framework Decision envisage such a power.

53. Counsel for the respondent also referred to the decision in *Minister for Justice and Equality v. Swacha* at para. 57 which states:

> *"The Court is satisfied that there is nothing in the 2002 Framework Decision or in the Act of 2003 or s. 11 of the Act of 2003 in particular that requires an issuing judicial authority to issue either, a fresh EAW or to provide additional documentation by other means in order to correct an inaccuracy in the EAW as originally issued. The manner in which an EAW is 'corrected' is properly a matter for the issuing judicial authority. A 'corrected version' of an EAW may be accepted as a European arrest warrant within the meaning of the Act and the 2002 Framework Decision."*

54. Counsel accepted that at first glance, the foregoing *dicta* may be considered as contrary to his argument but submitted that the situation is different in the present case. He submitted that this was a corrected and supplemented EAW which was endorsed and accepted by the High Court. If there was a problem with the EAW, it simply could not be cured by putting additional information into it. Counsel further submitted that it would fly in the face of judicial cooperation if the issuing state could simply intrude on the matter while it is at hearing in this jurisdiction.

55. He also submitted that this was the same EAW that had been issued for a third time. Using the terminology adopted by the Court to describe the three versions of the EAWs before the Court, it can been seen that the first EAW was endorsed on the 24th March, 2015 and the respondent had been arrested on 25th May, 2016 and remanded on continuing bail until 17th October, 2016 when that order was vacated. The second EAW was then endorsed on 17th October, 2016 and he was rearrested on that same date. The second EAW was struck out on 21st March, 2017 and the present EAW was endorsed on that date. He was then arrested on that date in respect of the present EAW but released on the same bail terms and conditions.

56. Counsel conceded that the *Swacha* point had not been raised by him in respect of the second European arrest warrant. That second EAW had been stated to be a corrected version. Counsel submitted that this did not affect his argument on this occasion as the ramifications were perhaps more egregious. Counsel asked rhetorically how it could be that the issuing judicial authority could send a new EAW with amendments when this EAW was under consideration by the court. In his submission, the issuing judicial authority could not "set at nought" proceedings then in being in this jurisdiction. They could not amend an EAW which was under consideration by the court in this jurisdiction.

57. Counsel for the respondent also submitted that the circumstances amounted to an abuse of process. Counsel relied upon the decision in *Minister for Justice and Equality v. J.A.T.* (No. 2) [2016] IESC 17 in which the Supreme Court held that surrender could be refused where there was an abuse of process. Counsel submitted that he was not advancing an ulterior motive to the issuing judicial authority, however, he submitted that it was the Irish system of justice which applied to these proceedings and which could not be abused. Counsel submitted that there may also be a distinction to be drawn between supplementing an EAW (or giving additional information) while a matter is in the case management list, from supplementing an EAW while it is at hearing.

58. It was submitted that it was not necessary for the matter to be a wilful or conscious interference with the hearing that took place here, but nonetheless the issuing judicial authority did interfere. Counsel submitted that the reason these EAWs were apparently reissued was down to error on the part of the issuing judicial authority. In the first EAW, it had wrongfully been stated that the remaining sentence was one of 5 years and 28 days. The second EAW wrongly stated that 9 years and 28 days remained instead of 9 months and 28 days. Furthermore, the date of the imposition of that sentence was wrongly stated on both the first and the second European arrest warrant. Counsel submitted that his client should not have to suffer three arrests in circumstances where there were errors on the part of the issuing judicial authority. He submitted that his client had suffered a lot during the course of the entirety of the proceedings against him. These were also historic proceedings against him. He submitted that it could not be in accordance with due process that this situation is permitted.

59. Counsel for the minister asked the court to consider the arguments that were being presented on behalf of the respondent against the factual background in the case. Counsel for the minister asked rhetorically "if this is not a fresh warrant, then what is the warrant". Counsel pointed out that a request was made by the Court under s. 20 of the Act of 2003 and the issuing judicial authority replied stating there was an error. It was unfortunate that it had not been spotted previously but the issuing judicial authority responded accordingly. They issued a corrected version of the EAW that was presented. Counsel submitted that the Court had viewed this as the most appropriate process to take and that it had all been done in the presence of the respondent and no objection had been taken to that application. It was also an illustration of dialogue between judicial authorities.

60. The present application for surrender had been adjourned to respect the respondent's right to due process so that he could place any further material before the court if he so wished. The respondent is not making a case that that had amounted to an abuse of process. However, where an abuse of process is being alleged, it is usual that a party would show how they have been affected by the abuse of process. No such evidence has been laid before the Court in this case.

61. In counsel's submission, the cases of *O'Fallúin and Bolger* demonstrated that on receipt of a new EAW, the court is entitled to proceed on the basis of it. If a second application for surrender is made, that can be considered. A second or a third EAW is not an abuse of process *per se*, however, the court is required to consider all of the circumstances.

62. With respect to the question of whether the corrected version was properly accepted as an EAW, counsel relied on the *dicta* in *Swacha*. The corrected version may be accepted as an EAW within the meaning of the Act. In counsel's submission, a fresh EAW was before the Court and it was upon that EAW the Court was acting.

63. Counsel submitted that the suggestion that it was the same EAW does not stand up to scrutiny. It may be a similar document to the previous document but it was a corrected document and it can be acted upon. Indeed, it was submitted, that if the reverse situation had applied and the Court had failed to act upon that EAW, that it would be argued that the original version of the EAW was invalid.

64. As regards the abuse of process, while the respondent was entitled to ask the court to have regard to the background (including the fact that the warrant had to be corrected, that there was delay and that he had been subjected to three arrests), it was not the case that there had been an abuse of process. Counsel relied upon the legal principle set out in *Minister for Justice and Equality v. J.A.T.* (No. 2) in which the Supreme Court (O'Donnell J.) stated at para. 4 as follows:

> *"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. All agreements are based on broad reciprocity and there is, therefore, a further interest and benefit in securing the return to Ireland for trial of persons accused of crimes, or the return of sentenced offenders. There is also a corresponding public interest in avoiding one country becoming, even involuntarily, a haven for persons seeking to evade trial in other countries. There is no option in this jurisdiction for a court, in most cases, to direct a trial of the offence here (whatever the practical difficulties involved). This means that the decision to refuse to surrender in individual cases will provide a form of limited immunity to a person so long as they remain in this jurisdiction. The question is, therefore, not where a person should be tried, but whether they should be tried at all so long as they remain in Ireland. There is, therefore, a closer analogy in this regard to be drawn between the analysis of claims involved in domestic criminal proceedings and surrender/extradition than there is between surrender and deportation, for example. Trial and, if appropriate, sentence in this jurisdiction may always involve an interference with family and other relationships, and it is necessary, therefore, to assess the additional interference occasioned by trial abroad in circumstances where it may also be appropriate to take account of the fact that arrangements exist to facilitate prisoners who wish to serve their sentences in their home state. I think it is fair to say that 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. It is important that courts should also rigorously scrutinise the factual basis for any such claims against that background."*

65. Counsel for the minister submitted that the circumstances of this respondent do not go beyond the norm. While the Court may be entitled to have regard to the fact that the proceedings went on a little longer, there has been no inordinate delay. Counsel submitted that this case is far removed from that of *J.A.T.* (No. 2). There was a specific finding in *J.A.T.* (No. 2) that there was an abuse of process. The facts here are very different - there was a very quick response and, in one way, it demonstrates how there should be a dialogue between issuing judicial authorities. Furthermore, the respondent has failed to identify specific prejudice to him arising from any such delay.

66. Counsel for the respondent replied saying that this was an amended EAW and not a fresh one. Counsel also relied upon para. 6 of the decision in *Minister for Justice and Equality v. J.A.T.* (No. 2) in which the Supreme Court stated it was important to maintain a distinction between the principles of *res judicata* and the closely associated principles established in *Henderson v. Henderson* (1843) 3 Hare 100, 67 E.R. 313 and *A.A. v. The Medical Council* [2003] 4 I.R. 302 on the one hand, and the law relating to warrants on the other hand. It was pointed out that the position in relation to warrants is fundamentally different as there can be no process of amendment.

67. Counsel pointed to the fact that these were low level offences and that the respondent has already served 6 years in relation to them. He also pointed to the position with regard to the numerous errors in the European arrest warrants.

The Court's Analysis and Determination

Is this a fresh warrant?

68. This Court has dealt with the issue of "corrected" EAWs in the case of *Minister for Justice and Equality v. Swacha*, cited earlier in this judgment. In *Swacha*, an initial EAW was sent to this jurisdiction which did not include, as required, the new form point (d) of the EAW in order to satisfy the 2009 Framework Decision and the corresponding amended provisions of s. 45 of the Act of 2003. The issuing judicial authority sent over what was said to be a corrected version of the EAW which included the new form point (d) but which was signed by a second judge as the original judge had died in the interim. In *Swacha*, it was observed that the Court is obliged to focus on its own role and function in the execution of EAWs as provided for by the Act of 2003 which implements the 2002 Framework Decision. Relying on the decision in *O'Fallúin*, the Court held that a document which purports to be a validly issued EAW must be accepted as such.

69. As in the *Swacha* case, "*there is no evidence even to suggest that the procedure adopted by Poland invalidates these EAWs as a matter of Polish law*." (para. 53). This Court also held in *Swacha*, "*[t]he manner in which a European arrest warrant may be issued as 'corrected' is a matter of procedural autonomy for the issuing state.*" (para. 53).

70. Notwithstanding the above, as was pointed out in *Swacha*, the court is not bound to accept every purported EAW placed before it as valid; see the decision of the Court of Justice of the European Union ("CJEU") in *Bob–Dogi* (Case C-241/15, Second Chamber, 1st June, 2016) and the Supreme Court decisions in *Minister for Justice v. Herman* [2015] IESC 49 and *Minister for Justice v. Connolly* [2014] 1 I.R. 720.

71. In the circumstances of this case, there is no lack of clarity in respect of the present European arrest warrant. As regards the issue of whether it is indeed a fresh EAW and thereby valid as an EAW upon which the High Court must exercise its function, the dicta from Swacha referred to above is relevant in that it confirms that "[t]he manner in which an EAW is "corrected" is properly a matter for the issuing judicial authority" and that such a "corrected version" may be accepted as a European arrest warrant. The word "may", being used to indicate that there could be other reasons why the EAW is not a valid European arrest warrant.

72. This Court has no doubt that the previous (first and second) EAWs were withdrawn by the issuing judicial authority as they were no longer the EAWs upon which surrender was sought. In turn, what was placed before this Court by the issuing judicial authority, was a "corrected" European arrest warrant. This brought to an end each of the previous proceedings in respect of the earlier (first and second) European arrest warrants. The Court was then obliged in turn to consider the issue of the endorsement of the "corrected" European arrest warrants. The present "amended" or "corrected" EAW is the subject matter of these proceedings. In those circumstances, the present EAW is undoubtedly an EAW for the purposes of the Act of 2003.

73. The Court takes the opportunity to observe that the phrase "fresh warrant" may indeed be an unhelpful shorthand to describe the process which may or may not occur in the issuing state. The High Court is obliged to consider whether the surrender of the respondent is required under the provisions of the Act of 2003. When the High Court is presented with what purports on its face to be an EAW emanating from an issuing judicial authority within the meaning of the Act of 2003, the High Court is bound to act upon that European arrest warrant. It is the receipt by the central authority of a "European arrest warrant" meaning "a warrant, order or decision of a judicial authority of a Member State, issued under such laws as give effect to the Framework Decision in that Member State, for the arrest and surrender by the State to that Member State of a person in respect of an offence committed or alleged to have been committed by him or her under the law of that Member State", that triggers the procedures set out in the Act of 2003. If an EAW is sent in an amended or corrected form, it is on that EAW that the authorities in this State must act. In that sense, the EAW is "a fresh warrant" in this jurisdiction, when compared with earlier versions of the European arrest warrant. Whether the issuing state regards it as a "fresh warrant" or an "amended warrant" is not entirely germane to the duty on the High Court as executing judicial authority to take appropriate steps on the EAW that is presented to it.

74. The Court does not accept that the dicta in *J.A.T. (No. 2),* relied upon by the respondent, which states that as regards warrants there is no process of amendment, requires a finding that the present EAW cannot be regarded as a new, separate or fresh EAW which required a fresh endorsement. In the view of this Court, the *dicta* in *J.A.T.* (No.2) must be read in light of its context, which was to demonstrate a difference between the process of adjudication upon warrants and that of civil proceedings generally. Indeed, the *dicta* can be understood as supporting the position that, in this jurisdiction, when an "amended warrant" is presented to the High Court, the court must consider it a "fresh warrant" to be dealt with anew in accordance with the provisions of the Act of 2003.

75. Most importantly, this Court does not accept, however, that the *dicta* in *J.A.T. (No. 2)* must be taken as a binding statement that every other issuing judicial authority is prohibited from engaging in a process by which they can amend or correct their EAWs and transmit those corrected or amended versions to this court for execution of that version of the European arrest warrant. The purpose of the 2002 Framework Decision is not to harmonise substantive or even procedural criminal laws but to provide for a system of simplified surrender based on mutual recognition of judicial decisions based upon the principles of mutual trust and confidence. Where other jurisdictions permit amendments to EAWs and an amended EAW is presented to the authorities in the jurisdiction for execution, the central authority and the High Court as executing judicial authority are bound to carry out their functions under the Act of 2003 in respect of the EAW in its amended form.

76. The Court, therefore, rejects the respondent's contention that this present EAW is not a valid warrant.

Abuse of process

77. In addition to submitting that this is an invalid EAW, counsel for the respondent urged upon the Court that it was an abuse of process to interfere with the ongoing hearing of the previous proceedings in respect of the earlier EAW by withdrawing the EAW and sending on a corrected version. This abuse of process has to be considered in the context of the delay in the proceedings, the fact that the respondent has now been subjected to three separate arrests and ongoing bail conditions and that these proceedings have been extended beyond the time in which the proceedings might otherwise have concluded.

78. It is now well established that the issuance of a second or subsequent extradition warrant does not amount *per se* to an abuse of process. The case law demonstrates that this pertains even where there have been adjudications on the previous or prior extradition warrants. In the circumstances of this case, there have been two previous EAWs upon which this respondent has been arrested but in each case, the EAW was withdrawn prior to the determination of whether the respondent should be surrendered thereon or not.

79. The second EAW was withdrawn at a stage after the application for surrender had commenced and was part heard. The circumstances upon which that occurred have been explained above and arose where this Court sought further information arising in particular out of what transpired to be an incorrect date referred to in that second European arrest warrant. The issuing judicial authority, with admirable promptness, replied by acknowledging that the date was incorrect and by correcting this by way of a corrected EAW which was duly endorsed by this Court on 21st March, 2017.

80. In *J.A.T. (No. 2),* O'Donnell J. at para. 3 expressed doubt "*that it is appropriate or useful to introduce a concept of 'duty of care' on the part of requesting authorities or the Irish authorities.*" If a warrant is defective that is sufficient. It is important, as O'Donnell J. also stated at para. 3, that, "*[…] courts should be astute to detect and prevent improper or mala fide conduct, but it is equally important that a valuable jurisdiction is not diluted by allowing the legal test to spread into negligence and to become the familiar search for something that can be described as careless".*

81. In the course of the second set of proceedings against this respondent, this Court exercised its power under s. 20 of the Act of 2003 to request further information from the issuing judicial authority as to details on the European arrest warrant. If the Polish judicial authorities had concluded that it was appropriate to reply to that request by sending additional information, this Court would have continued on with the inquiry it was engaged in within the context of the previous proceedings. An abuse of process argument could not have been sustained in those proceedings and was unlikely to have been made. The application for surrender on foot of the second EAW would have been dealt with on the basis of the information received.

82. The s. 20 request in the previous set of proceedings triggered in the issuing state a process whereby the original EAW was

corrected and the corrected EAW was sent over to this jurisdiction for execution. In this case, there is no suggestion of *mala fides* on the part of the issuing judicial authority in adopting that procedure. At best, what is being attributed to them is an unwitting interference with the court procedures in this jurisdiction allied to an imputation of carelessness on the part of the issuing judicial authorities in respect of the errors that appeared on the earlier versions of the European arrest warrant. It is submitted that this has resulted in oppression and prejudice to this respondent.

83. This Court has no hesitation in saying that the mere fact that the "amended" or "corrected" EAW was sent over in response to a request for information does not amount of itself to a prohibited interference with proceedings before the court. As O'Donnell J. in *J.A.T. (No. 2)* observed, there is a distinction between civil proceedings and the issue of warrants. Although, as had been observed previously by the High Court, it is not always a helpful analogy to refer to the situation that might occur in this jurisdiction, if the authorities in criminal proceedings in this State realised in the course of a contested arrest hearing that they could not rely upon a particular arrest as lawfully grounding jurisdiction and thereafter withdrew proceedings, this would not of itself prohibit the authorities from seeking to rely upon a fresh arrest. In this case, the issuing judicial authority was entitled to take the view that, in accordance with their procedures, the situation now required a corrected EAW to be issued and for the previous EAW to be withdrawn. The Act of 2003 mandates the High Court to exercise its functions over EAWs that are sent to this jurisdiction for execution. In those circumstances, there is no abuse of the process of the Irish courts.

84. Moreover, the request by the issuing judicial authority has remained constant during the entire course of all the proceedings brought against this respondent: namely that he be surrendered for the purpose of serving the remainder of the sentences which he has been ordered to serve in the issuing state. During the course of those overall proceedings, further information was required before the central authority or the High Court were in a position to exercise their functions in respect of the application for surrender under s. 16 of the Act of 2003. The fact that the material requested was provided by way of "corrected" EAWs is not *per se* an abuse of process.

85. The respondent has claimed that he has suffered prejudice or oppression as a result of what occurred. In particular, he refers to his three separate arrests in relation to this matter and the consequential delay in finalising the proceedings and that he has found the whole experience stressful.

86. Although the respondent has certainly been subjected to three arrests in this case, those arrests must be viewed in context. In relation to the first arrest, there was a contested bail application. In light of the fact that the respondent had certain parental/guardian responsibilities, this Court heard the contested bail application at the time of his arrest. The Court granted him bail on that day. His second arrest came about in circumstances where he was due in Court under his bail conditions in respect of the first European arrest warrant. His arrest, although a deprivation of liberty, was as minimally invasive of his liberty as possible. He was released in short order on the same bail terms as had applied originally. This process was repeated when the third and final EAW was placed before the court, his previous EAW was withdrawn and this present EAW was endorsed and he was available for arrest. Once again, the bail terms were set as before and the interference with his liberty was minimal. 87. In respect of the proceedings themselves, time was given to the respondent to consider his position with regard to this third and final European arrest warrant. The Court invited the parties to accept that all the previous documentation, including affidavits, that were relied upon in the prior set of proceedings could form part of this new set of proceedings. This was accepted on behalf of both parties. Furthermore, the Court invited the parties and the parties accepted quite properly that the submissions that had been made in respect of the points of objection could be relied upon insofar as they remained relevant to the present set of proceedings. An early date for the hearing of these proceedings was set.

88. The respondent has therefore not been subjected to anything other than entirely minimal deprivations of liberty on the second and third arrest and to a very short extension of the time taken for the hearing of these proceedings to the extent of a week or so.

89. In light of all the circumstances as set out above, neither the actions of the issuing judicial authority nor the effect that their conduct has had on the respondent amounts to an abuse of process. There are no grounds for refusing to surrender this respondent on the basis of the issuance of the third European arrest warrant.

Conclusion
90. For the reasons set out in this judgment, the Court rejects all of the points of objection filed on behalf of the respondent. The Court, being otherwise satisfied that the requirements of s. 16(1) of the Act of 2003 have been met, may make an Order for the respondent's surrender to Poland to such other person as is duly authorised to receive him.