

## THE HIGH COURT

Record No: 2013/27 EXT

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

BETWEEN/

THE MINISTER FOR JUSTICE AND EQUALITY

Applicant

- AND -

SLAWOMIR PALONKA

Respondent

JUDGMENT of Mr. Justice Edwards delivered on the 4th of November, 2014.

**Introduction**

The controversy in this case concerns how to correctly interpret and apply two interrelated statutory provisions, i.e., s. 16(1)(c), and s. 45, respectively, of the European Arrest Warrant Act 2003 as amended by the European Arrest Warrant (Application to Third Countries and Amendment) and Extradition (Amendment) Act 2012 (hereinafter "the Act of 2003 as amended"). The said provisions are interrelated in circumstances where s. 16(1)(c) of the Act of 2003 as amended requires, as a condition precedent to the making by the High Court of any order for surrender, that the relevant European arrest warrant should state, where appropriate, the matters required by section 45 of the Act of 2003 as amended.

**Relevant statutory provisions**

S. 16(1)(c) of the Act of 2003 as amended, provides:

"16.—(1) Where a person does not consent to his or her surrender to the issuing state the High Court may, upon such date as is fixed under section 13 or such later date as it considers appropriate, 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—

(a) ... ;

(b) ... ;

(c) the European arrest warrant states, where appropriate, the matters required by section 45 (inserted by section 23 of the European Arrest Warrant (Application to Third Countries and Amendment) and Extradition (Amendment) Act 2012);

(d) ... and

(e) ... ."

S.45 of the Act of 2003 as amended, provides:

"45.—A person shall not be surrendered under this Act if he or she 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, unless the European arrest warrant indicates the matters required by points 2, 3 and 4 of point (d) of the form of warrant in the Annex to the Framework

Decision as amended by Council Framework Decision 2009/299/JHA, as set out in the table to this section.

## TABLE

(d) Indicate if the person appeared in person at the trial

resulting in the decision:

1. ☐ Yes, the person appeared in person at the trial resulting in the decision.

2. ☐ No, the person did not appear in person at the trial resulting in the decision.

3. If you have ticked the box under point 2, please confirm the existence of one of the following:

☐ 3.1a. the person was summoned in person on . . . (day/month/year) and thereby informed of the scheduled date and place of the trial which resulted in the decision and was informed that a decision may be handed down if he or she does not appear for the trial;

OR

☐ 3.1b. the person was not summoned in person but by other means actually received official information of the scheduled date and place of the trial which resulted in the decision, in such a manner that it was unequivocally

established that he or she was aware of the scheduled trial, and was informed that a decision may be handed down if he or she does not appear for the trial;

OR

☐ 3.2. being aware of the scheduled trial, the person had given a mandate to a legal counsellor, who was either appointed by the person concerned or by the State, to defend him or her at the trial, and was indeed defended by that counsellor at the trial;

OR

☐ 3.3. the person was served with the decision on . . . (day/month/year) and was expressly informed about the right to a retrial or appeal, in which he or she has the right to participate and which allows the merits of the case, including fresh evidence, to be re-examined, and which may lead to the original decision being reversed, and

☐ the person expressly stated that he or she does not contest this decision,

OR

☐ the person did not request a retrial or appeal within the applicable time frame;

OR

☐ 3.4. the person was not personally served with the decision, but

— the person will be personally served with this decision without delay after the surrender, and

— when served with the decision, the person will be expressly informed of his or her right to a retrial or appeal, in which he or she has the right to participate and which allows the merits of the case, including fresh evidence, to be re-examined, and which may lead to the original decision being reversed, and

— the person will be informed of the time frame within which he or she has to request a retrial or appeal, which will be . . . days.

4. If you have ticked the box under points 3.1b, 3.2 or 3.3 above, please provide information about how the relevant condition has been met:

.....

.....".

### The European arrest warrant

The warrant in this case is dated the 6th of November, 2012. It emanates from Poland which is a designated state for the purposes of the Act of 2003 as amended. The warrant was endorsed for execution in this jurisdiction on the 22nd of January, 2013. It seeks the rendition of Slawomir Palonka for the purpose of executing the balance remaining to be served of a sentence of 10 months imprisonment imposed upon him and based upon a judgment of the District Court in Nowy Tomyśl of the 30th of June, 2003, subsequently amended by a judgment of the Regional Court in Poznań dated the 29th of January, 2004, in respect of a single drug trafficking offence particularised in Part (e) of the warrant. The balance of the sentence remaining to be served amounts to 6 months and 27 days.

The following matters are certified by the issuing judicial authority in Part (d) of the warrant:

"Indicate if the person appeared in person at the trial resulting in the decision:

**\*Yes, the person appeared in person at the trial resulting in the decision - with regard to the judgment of court of first instance, i.e. judgment of District Court in Nowy Tomyśl of 30th June 2003**

\* No, the person did not appear in person at the trial resulting in the decision.

1. If you have ticked the box under point 2, please confirm the existence of one of the following:

~~\* a. the person was summoned in person on . . . (day/month/year) and thereby informed of the scheduled date and place of the trial which resulted in the decision and was informed that a decision may be handed down if he or she does not appear for the trial;~~

OR

~~\* b. the person was not summoned in person but by other means actually received official information of the scheduled date and place of the trial which resulted in the decision, in such a manner that it was unequivocally established that he or she was aware of the scheduled trial, and was informed that a decision may be handed down if he or she does not appear for the trial;~~

OR

**\* c. being aware of the scheduled trial, the person had given a mandate to a legal counsellor, who was either appointed by the person concerned or by the State, to defend him or her at the trial, and was indeed defended by that counsellor at the trial – with regard to the case held before the court of second instance, i.e. the judgment of Regional Court in Poznań of 29th January 2004**

OR

~~\* d. the person was served with the decision on . . . (day/month/year) and was expressly informed about the right to a~~

~~retrial or appeal, in which he or she has the right to participate and which allows the merits of the case, including fresh evidence, to be re-examined, and which may lead to the original decision being reversed,~~

AND

~~\* the person expressly stated that he or she does not contest this decision~~

OR

~~\* the person did not request a retrial or appeal within the applicable time frame;~~

OR

~~\* the person was not personally served with the decision, but~~

~~— the person will be personally served with this decision without delay after the surrender,~~

AND

~~\* when served with the decision, the person will be expressly informed of his or her right to a retrial or appeal, in which he or she has the right to participate and which allows the merits of the case, including fresh evidence, to be re-examined, and which may lead to the original decision being reversed,~~

AND

~~\* the person will be informed of the time frame within which he or she has to request a retrial or appeal, which will be 7 days.~~

2. If you have ticked the box under points 1b, 1c or 1d above, please provide information about how the relevant condition has been met:

.....  
.....".

For some reason Part (d) of the warrant does not utilise the same paragraph numbering convention as that specified in the "Table" to s. 45 of the Act of 2003 as amended. However, apart from that aberration the s. 45 "Table" has been accurately reproduced in all other respects, both as regards form and content. Moreover, the intention of the issuing judicial authority is clear in terms of what it is that he has certified.

To the extent that Part (d) departs from the form of the s. 45 "Table" by using a different paragraph numbering convention the Court is satisfied that this irregularity merely represents a defect in a non-substantial detail in the European arrest warrant, and that no injustice would be caused to the respondent by forgiving it. It may in the circumstances be forgiven under s. 45C of the Act of 2003 as amended, which provides:

"**45C.**— For the avoidance of doubt, an application for surrender under section 16 shall not be refused if the Court is satisfied that no injustice would be caused to the person even if—

(a) there is a defect in, or an omission of, a non-substantial detail in the European arrest warrant or any accompanying document grounding the application,

(b) there is a variance between any such document and the evidence adduced on the part of the applicant at the hearing of the application, so long as the Court is satisfied that the variance is explained by the evidence, or

(c) there has been a technical failure to comply with a provision of this Act, so long as the Court is satisfied that the failure does not impinge on the merits of the application."

## The Issue

The controversy in the case centres on the fact that the issuing judicial authority, having opted to rely on the condition set out at what should be paragraph 3.1b of the Table, failed to provide any supplementary information, at what should be paragraph 4 of the Table, concerning how the relevant condition had been met.

Counsel for the respondent points to the mandatory language used in s. 45, namely that a person tried in absentia "**shall not be surrendered ...., unless the European arrest warrant indicates the matters required by points 2, 3 and 4 of point (d) of the form of warrant in the Annex to the Framework Decision ...**" (the Court's emphasis).

Counsel also relies upon the fact that s. 16(1)(c) makes it a condition precedent to surrender that "*the European arrest warrant states, where appropriate, the matters required by section 45*".

The issue therefore is whether supplementary information is required to be provided in Part (d), in the paragraph corresponding with paragraph 4 of the s.45 Table, where an issuing judicial authority has sought to rely on any of the paragraphs corresponding with paragraphs 3.1b, 3.2 or 3.3 of the s. 45 Table.

In that regard, counsel for the applicant makes the point that although s. 45 uses the mandatory language "**shall not**", the imperative thereby created is then qualified by the reference to "*the matters **required** by points 2, 3 and 4 of point (d) of the form of warrant in the Annex to the Framework Decision*" (this Court's emphasis). Similarly, the condition precedent to surrender created by s. 16(1)(c) is also qualified. What is required for a valid surrender is that "*the European arrest warrant states, **where appropriate**, the matters required by section 45*" (this Court's emphasis). Counsel for the applicant points to the permissive language used in paragraph 4 of the s. 45 Table, i.e., "*If you have ticked the box under points 3.1b, 3.2 or 3.3 above, please provide information*

about how the relevant condition has been met: ...” and suggests that the provision of supplementary information is not mandatory.

## Decision

This Court agrees with the submissions made by counsel for the applicant. In circumstances where two interpretations of the relevant provisions are open, it is necessary to consider not just the narrow wording of the two provisions themselves, but also to consider their place within the scheme of the legislation viewed as a whole.

In *Minister for Justice and Equality v. Pawel Surma* [2013] IEHC 618 (Unreported, High Court, Edwards J., 3rd December, 2013) this Court previously examined s. 45 of the Act of 2003 as amended, and looked in detail at its purpose in terms of transposing Council Framework Decision 2009/299/JHA and giving effect to the substantial body of jurisprudence that has developed from the European Court of Human Rights concerning the right to be present in person guaranteed by article 6(3) of the European Convention on Human Rights, and trials *in absentia*.

In my judgment in the *Surma* case I said the following with respect to paragraph 4 of the s. 45 Table:

“In reality the new s. 45 makes provision for a system of judicial certification (not unlike that which can be invoked under article 2(2) of Framework Decision 2002/584 to obviate the need for demonstration of double criminality in respect of certain categories of offence) and in that regard it appears to be firmly anchored to the principle of mutual recognition. Pursuant to the principle of mutual recognition, the executing judicial authority is obliged to surrender once the issuing judicial authority has indicated the matters required in points 2, 3 and 4 of point (d), and save in exceptional circumstances, the executing judicial authority would not be entitled to look behind that which has been certified. However, in this Court’s view it could not be the case that all competence on the part of an executing judicial authority is ousted by a purported certification in the manner provided for, because point 4 of point (d) requires the provision of amplifying information to support a bald certification in any of the alternative scenarios contemplated under points 3.1b, 3.2 or 3.3 of point (d).

The scheme clearly contemplates that the executing judicial authority must have some entitlement to review the assessment of the issuing judicial authority in those scenarios, otherwise there is no logical reason why amplifying information would be required to be provided at point 4. It is, in this Court’s judgment, clearly envisaged that a person facing surrender should be able to challenge the information provided by the issuing judicial authority in support of its certification. That said, respect for the principle of mutual recognition would also demand that where a certification has been provided, it will require the adduction of cogent evidence suggesting that that which has been certified could not in fact be the case before an executing judicial authority would be justified in seeking to look behind what has been certified. However, at the end of the day the executing judicial authority retains competence to assess whether the proceedings conducted *in absentia* in the issuing member state complied with the standards mandated under the E.C.H.R., and in doing so, it must have due regard to the jurisprudence of the E.Ct.H.R.”

Approaching the matter in that way, an issuing judicial authority is not obliged to provide amplifying information at the place in Part (d) corresponding with paragraph 4 of the s. 45 Table. However, if the issuing judicial authority fails to do so, and the respondent puts forward cogent evidence tending to contradict that which has been baldly certified at either paragraphs 3.1b, 3.2 or 3.3, the executing Court will have no alternative but to resolve the conflict in the respondent’s favour and refuse to surrender the respondent notwithstanding the matter baldly certified at either paragraphs 3.1b, 3.2 or 3.3.

In the present case, however, the respondent has not put forward any evidence at all, not to mind cogent evidence, tending to suggest that that which has been certified in Part (d) of the warrant at the paragraph corresponding with paragraph 3.1b of the s. 45 Table is incorrect. He has put forward nothing on affidavit to suggest that the matter certified has been incorrectly certified. Nor does he point to any substantive information contained within the warrant itself that on any view of it could suggest that that might be the case.

The respondent’s objection is an entirely technical one. He says simply that because the paragraph corresponding with paragraph 4 of the s. 45 Table was left blank by the issuing judicial authority he should not be surrendered. I cannot agree with him.

In the Court’s view the European arrest warrant does, in the circumstances of this case, indicate the matters “required” by points 2, 3 and 4 of point (d) of the form of warrant in the Annex to the Framework Decision. Because the respondent has not raised any issue concerning the correctness of the matter certified at the paragraph corresponding with paragraph 3.1b of the s. 45 Table, the paragraph corresponding with paragraph 4 of the s. 45 Table is redundant. No supplementary information is required in the circumstances of the case. If the respondent had sought to challenge the correctness of the matter certified at the paragraph corresponding with paragraph 3.1b of the s. 45 Table, the Court might well have taken the view that the provision of supplementary or amplifying information at paragraph 4 was indeed “required”. However, the respondent has not sought to challenge the correctness of the matter certified.

## Conclusion

The Court is not precluded by the terms of s. 16(1)(c), and/or s. 45, from surrendering the respondent in the circumstances of this case.