Neutral Citation: [2015] IEHC 170

THE HIGH COURT

Record no. 2014/15 EXT

IN THE MATTER OF THE EUROPEAN ARREST WARRANT ACT 2003

Between/

The Minister for Justice and Equality

Applicant

-and-

M.J.B.

Respondent

Judgment of Mr. Justice Tony Hunt, delivered on 23 January 2015.

Pleadings
The application in this case is for the surrender of the respondent pursuant to the provisions of s.16 of the European Arrest Warrant Act 2003 ("the Act"). The warrant in question was issued by Jerzy Zielinski LLM, Judge of the Circuit Law Court in Swidnica, Poland on 10 October 2013. The respondent lodged notice of objection to the making of an order for his surrender on 23 June 2014. The substance of these points is as follows:-

> *1. The respondent does not consent to his surrender to the issuing state pursuant to the European Arrest Warrant herein. The respondent hereby requires the applicant to satisfy the court of all matters that are necessary to succeed in his application for an order for the respondent's surrender to the issuing state pursuant to the European Arrest Warrant Act 2003 (as amended) and/or the Framework Decision.*
>
> *2. There is no offence in the State corresponding to those for which surrender is sought and therefore surrender is prohibited by section 38 of the European Arrest Warrant Act 2003 (as amended).*
>
> *3. The proposed surrender of the respondent in respect of the said offences to the issuing state is prohibited by section 37 of the Act of 2003 (as amended), because it constitutes, inter alia,:*
>
> > *a. A breach of his right to fair procedure, trial in due course of law, and liberty inter alia because of the cumulative, inordinate and unjustified delay in seeking to enforce a judgement rendered on 6 November 2001 and the delay in issuing, endorsing and executing the within warrant,*
> >
> > *b. A disproportionate and impermissible interference with the respondent's right to family and private life under Article 8 of the European Convention on Human Rights.*

Facts
Part B of the arrest warrant recites that a final and enforceable judgement was rendered against the respondent by the District Law Court of Walbrzych on 6 November 2001, which became final and legally valid on 13 November 2001. On 22 July 2004, that District Court ordered the execution of the sentence, which had been conditionally suspended. This decision became final and legally valid on 13 August 2004. By a further decision of 27 January 2005, the same Court suspended again the execution of the sentence for a probationary period of five years and put the respondent on probation. That decision became final and legally valid on 3 February 2006. By a further decision of 30 May 2007, the same Court ordered for a second time the execution of the conditionally suspended sentence, because the respondent committed a similar offence in the course of the aforesaid probation period. This decision became final and legally valid on 26 September 2007. Finally, this part of the warrant recites that "the prescription of the punishment execution shall cease on 13 November 2026".

Part C of the warrant indicates that the maximum length of custodial sentence available was up to 12 years deprivation of liberty, the length of the custodial sentence actually imposed was two years deprivation of liberty and that the sentence remains to be served in its entirety. Part D indicates that the respondent appeared in person at the trial resulting in the imposition of the sentence in question.

Part E of the warrant specifies that it relates to 2 offences, which are described as follows:-

> *I. On 23 May 2001 in Walbrzych, in the province of Dolny Slask, acting jointly and in cooperation, using physical violence against minor Bartosz Blaznik-such as beating him on the whole body and pulling at his clothes-they caused him to become defenceless and then they took from him, with the intention of appropriation, a Nokia 3310 mobile phone of the value PLN600.00 to the detriment of the above named person;*
>
> *II. the same time and in the same place as described in sub-sec I above, acting jointly and in cooperation, using physical violence against minor Michal Koziol-such as beating him on the whole body and pulling at his clothes-they caused him to become defenceless and then they took from him, with the intention of appropriation, a Siemens M 35 mobile phone of the value of PLN 500.00 to the detriment of Ms Henryk Koziol.*

This part of the warrant also specifies the nature and legal classification of the offences is as follows:-

> *"Art. 280(1) of C.Pen - offence against possession - robbery with the use of violence;"*

Part F of the warrant recites two further articles of the Polish criminal code, to the effect that a sentence of this duration cannot be executed more than 15 years after the date upon which the conviction became final and legally valid, and that the *"suspension of criminal executive proceedings shall not stop the flow of time limitation except when the convicted offender evades the penalty being carried out. The suspension of the flow of time limitation cannot exceed 10 years."*

The arrest warrant was received by the applicant and endorsed by the High Court for execution on 21 January 2014. The respondent was arrested on foot of the warrant on 10 April 2014 by Garda Maciej Makowski, a member of An Garda Siochana attached to Blanchardstown Garda Station, and was brought before the High Court by her on the same day.

The primary evidence of the respondent relating to the application is set out in his affidavit sworn on 29 July 2014. This establishes that the respondent has been living in Ireland since 2006 and has made Ireland his home. He lives with his partner in Dublin, and his previous partner and eight-year old son live in Longford. Whilst on probation, he met regularly with his probation officer Ewa Balcerzak, and obtained her permission prior to travelling to Ireland in June 2006. He asserts his belief that he had completed his probation in respect of the 2001 offences for which he is now required by the Polish authorities, and also in respect of an offence committed in 2003 in relation to the sale of coal valued at around €150. He states that he is shocked by the fact that he is still wanted to serve a two-year sentence in Poland in circumstances where he believed that he was no longer wanted by the authorities there.

He also asserts that since June 2006 he has been working and living openly in Ireland, and that his whereabouts could easily have been established by the Polish authorities, as the probation service in Poland had his contact details at all material times. He points to the 12 year period between his sentence date and the issue of the warrant in October 2013 as indicating that his surrender is not a matter of great urgency or pressing need. He has not re-offended whilst living in Ireland, and has during that time established a sound home and family life. He has a good and ongoing relationship with his ex-partner and contributes meaningfully to the care and maintenance of his eight-year old son. He states that the impact on his son and current partner is disproportionate and unnecessary having regard to the delay of the Polish authorities in processing this matter.

The affidavit also refers to deterioration in the respondent's mental health since coming to Ireland. He suffered a breakdown towards the end of 2011, and is under the care of a consultant psychiatrist at Phibsborough in relation to psychological problems, with a diagnosis of depressive reaction to stress, and a prescription for a daily anti-depressant medication. It also refers to a setback due to injuries received in a road traffic accident in May 2014. He asserts that surrender to a Polish prison at this point in time will result in a further deterioration in his mental health. Furthermore, he asserts that he is likely to lose his current employment in contract cleaning, with detrimental financial effects for both himself and his dependents.

By letter dated 19 September 2014, after the respondent's notice of objection and affidavit had been received, the applicant wrote to the Circuit Law Court in Swidnica seeking clarification of the following matters:-

> *a) The warrant specifies that the sentence imposed on Mr B. was conditionally suspended. What were the conditions of the suspension?*
>
> *b) If it was a condition of the suspension that Mr B. would cooperate with probation services, did he fulfil that condition?*
>
> *c) Why was the execution of the sentence ordered in 2004?*
>
> *d) As I understand it, the warrant indicates that in 2004 the sentence was conditionally suspended again and the applicant was put on probation. What were the conditions of the suspension? Was it a condition of the suspension that he should not re-offend during a specified period of time?*
>
> *e) Did Mr B. cooperate with probation services post-2004?*
>
> *f) Did Mr B. have the permission of his probation officer to come to Ireland in June 2006?*
>
> *g) What "similar" offence did Mr B. commit which led to the order for the sentence to be executed in 2007, and when was that offence committed?*
>
> *h) Please explain why the European arrest warrant was only issued on 10 October 2013 in circumstances where the respondent was liable to serve the sentence from 26 September 2007.*
>
> *i) Please respond to any of the averments made by Mr B., if you wish to do so. Any such response will be presented to the High Court for consideration."*

By letter dated 24 September 2014, Judge Marzena Rzepecka-Wiatrowska LLM of the District Law Court in Walbrzych replied as follows:-

> *"In reply to your letter I wish to inform you that under the judgment of 6.11.2001 the District Law Court in Walbrzych imposed the aggregate sentence of 2-year imprisonment suspended for a probation period of five years on M.B. obliging him to refrain from drinking too much alcohol and to co-operate with probation services. The subject was obligated to observe legal order throughout the probation period - in particular, not to commit new offences - and to fulfil the conditions imposed on him by the court.*
>
> *Although M.B. co-operated with probation officer during the probation period he committed a new similar offence, of which he was convicted, sentenced by the District Law Court in Walbrzych on the day of 2.9.2003, file ref. no. II K 486/03, to 10-month imprisonment conditionally suspended for a probation period of 4 years and placed under the supervision of a probation officer.*
>
> *Due to the commission of the above-mentioned offence, in the decision rendered on the day of 22.07.2004, the Court ordered the execution of the 2-year prison sentence imposed on M.B. and under the final and legally valid judgment rendered by the District Law Court in Walbrzych on 6.11.2001 because during the probation period he had committed a new intentional and similar offence (handling stolen property), of which he was convicted and sentenced under the final and legally valid judgment. Pursuant to Art. 75 of the Polish criminal code the ordering of the execution of the former sentence was mandatory in that situation.*
>
> *The subject twice requested for the postponement of the execution of the sentence - and was twice granted it - and then for the subsequent suspension of the sentence pursuant to Art. 152 of the Polish punishment execution code, which he was granted as well - in the decision rendered on 27.01.2006 the District Law Court in Walbrzych suspended the execution of the sentence for a probation period of 5 years and placed the subject under the supervision of a probation officer. The condition of that subsequent suspension, as in the case of the previous one, was that the subject would not*

commit a new offence throughout the 5-year probation period.

On the day of 15.03.2006, i.e. during the probation period, barely 2 months passed after the subject had been granted the suspension of the sentence, he committed, again, a new offence - he stole a baby carriage/stroller of the value of PLN300, of which he was convicted and sentenced, under the final and legally valid judgment rendered by the District Law Court in Walbrzych on 18.12.2006, file ref. no. XK 991/06, to 1-year imprisonment conditionally suspended for a probation period of 5 years and placed under the supervision of a probation officer. It should be stressed that the subject did not observe legal order again and that his committing another offence resulted in mandatory ordering the execution of the sentence regardless of the subjects co-operation with the probation services or his having the permission of his probation officer to go abroad. So, in the decision rendered on 30.05.2007 the court ordered the execution of the sentence and the same as in the previous case, pursuant to Art 75.(1) of the Polish criminal code the ordering of the execution of the sentence was mandatory. The said decision became final and legally valid on 26.09.2007 but it could not be executed right away because on 21 December 2007 the subject's defence counsel filed a request for the postponement of the execution of the sentence. In the final decision rendered on 7 May 2008 the Circuit Law Court dismissed that request. M.B. was therefore well aware of the fact that he had committed another offence on 15.03.2006 and of the fact that he was required to serve the 2-year prison sentence.

After that the subject's defence counsel repeatedly filed requests for the postponement of the execution of the sentence but they were all turned down (there were 9 negative decisions altogether in years 2007-2014).

On the day of 18.04.2009 the subject's defence counsel filed a petition for clemency, which foreclosed taking steps for the issuance of European arrest warrant. On 20 March 2012 the President of the Republic of Poland did not grant a pardon to M.B. Only after the presidential decision the efforts to put the subject in prison could be -and were- resumed and on 10 October 2013 the European arrest warrant was issued.

As far as the objection and affidavit are concerned, it was neither his going abroad nor his, satisfactory or unsatisfactory, co-operation with the probation services that led to ordering the execution of the sentence in this case- it was his disregard of legal order manifested by re-offending. The arguments made by the subject in the above-referred-to objection -including the argument of his mental health- were repeatedly presented to the Polish court and examined by it following his requests for the postponement of the execution of the sentence, which the court refused to accede to.

The application and objection came on for hearing on 9 December 2014, when the applicant was represented by Ms Joanne Williams and the respondent was represented by Mr John Ferry.

Submissions
The respondent's central submission was that the court ought to exercise discretion to refuse surrender based on the matters pleaded in paragraph 3 of the notice of objection. Paragraphs 1 and 2 were not seriously pursued by him. It was argued that the combination of the passage of time, delay by the authorities in the requesting state, the respondent's probation history, the minor nature of his re-offending behaviour, his good behaviour in this jurisdiction and his personal circumstances outweighed any public interest in surrender, and would constitute a disproportionate interference with the personal rights of the respondent in the individual circumstances disclosed by the facts of the case. In this regard, Mr Ferry referred to the decision of the High Court in ***The Minister for Justice and Equality -v- E.S. [2014] IEHC 376*** (Edwards J.).

In reply, Ms Williams disputed that there was an unwarranted or excessive interference with the family or other personal rights of the respondent. The central theme of her submission was that the probation history relied upon by the respondent was irrelevant to the proposed surrender of the respondent, where this was based on further offending as the event triggering a recall to prison, which was a separate condition of the suspension of the relevant sentence to the requirement to co-operate with the probation services.

She submitted that the respondent was aware at all material times of the activation of his sentence, as he had pursued appeals in that respect, and the fact that he was permitted by the probation services to leave Poland did not create any form of legitimate expectation that he would not be subject to recall to prison for breach of the conditions of his sentence.

She argued that a conviction warrant carried particular weight, and that the only relevant type of delay is that which is unexplained. In this case, any delay was explained by the Polish authorities as being attributable to the activities of the respondent in bringing various applications there. She also submitted that paragraph 3(a) of the notice of objection was not evidenced by affidavit, and that there was no sufficiently disproportionate interference with the personal rights pleaded in paragraph 3(b) to displace the public interest in surrender.

In this respect, she referred to the decisions of the High Court in ***The Minister for Justice and Equality -v- Anthony Craig [2014] IEHC 460*** (Edwards J.).and ***The Minister for Justice and Equality -v- J.A.T. [2014] IEHC 320*** (Edwards J.).

The matter was listed again on 18 December 2014, when the probation history outlined on the previous hearing was confirmed as accurate, and a medical report by a consultant psychiatrist, Ewa Tomalczyk, was formally exhibited and verified by an affidavit from her dated 12 December 2014. This report related the respondent's stressed condition to the legal process and the ongoing prospect of custody in Poland.

Specifically, by order of 8 March 2012, the Local Court in Walbrzych released the respondent from probation supervision under the provisions of Art. 742(2) of the Penal Code because:-

"the course of supervision has been realised correctly; the supervision has been running from July 2006; in his place of residence the convicted person enjoys a good opinion, the local police station has not reported any reservations regarding the convicted person's demeanour, the aforementioned person has been reporting to the probation officer about his current situation (even after leaving for Ireland, where he had gone for work of which fact the probation officer was aware); he lives a settled life actively cooperating with the probation officer during the re-socialisation process, he works in Dublin; he is determined to realise the aims of the re-socialisation process, so the behaviour of the aforementioned convicted person supports an assumption that the supervision has achieved expected outcomes, and the education aspects argue in favour of making a decision as per the initial part of this document."

By letter dated 18 December 2014 (received in January 2015), Judge Marzena Rzepecka-Wiatrowska further confirmed that on 24.10.2014 the District Law Court of Walbrzych once again refused to postpone the execution of the sentence imposed on the

respondent, which said the decision was upheld by the Circuit Law Court of Swidnica on 15 December 2014.

Section 16 of the Act
On a surrender hearing pursuant to this section, where the court is requested by the applicant to make an order directing that the be surrendered to such person as is duly authorised by the Poland to receive him, and where the respondent does not consent to his surrender, the court must be satisfied that all requirements of the section have been met before acceding to the request of the applicant.

The following matters have been established by the evidence adduced:-

a) the person before the court is the person in respect of whom the European arrest warrant was issued;

b) the European arrest warrant was endorsed for execution in the state in accordance with s. 13 of the Act;

c) the warrant was duly executed;

d) the warrant is a conviction type warrant and the respondent is wanted in Poland for the purpose of serving the entirety of the suspended sentences of two years deprivation of liberty described above;

e) the respondent appeared in person at the trial resulting in the sentences imposed on him;

f) the offences in question as described in Part E of the warrant correspond clearly with the offence of robbery in this State as set out in s.14(1) of the Criminal Justice (Theft and Fraud) Offences Act, 2001, for the purposes of s.5 of the Act of 2003;

g) the punishment for the offences concerned exceeds the minimum gravity threshold set out in s.38(1)(a) of the Act of 2003, namely that a potential sentence of at least 12 month imprisonment or deprivation of liberty be available to be imposed by the court in the issuing state;

h) there are no circumstances that would cause the court to refuse to surrender the respondent under s. 21A, s. 22, s. 23 or s. 24 of the Act;

i) Poland is designated by the European Arrest Warrant Act 2003 (Designated Member States) (No.3) Order 2004 for the purposes of the Act as being a state that has under its national law given effect to the Framework Decision.

Accordingly, it appears that the applicant is entitled to an order for the surrender of the respondent to Poland unless the respondent establishes the proposition that the rendition measure sought by the applicant would have a disproportionately adverse effect on his family or other personal rights, when balanced against the public interest in surrender.

Public interest
The decision of the High Court in ***The Minister for Justice and Equality -v-Wislaw Ciecko*** (18/12/2013, Edwards J.) summarises in the following terms the enquiry to be carried out in a case such as this:-

"In summary what is required is a balancing of the public interest in extradition against private law considerations relevant to the particular circumstances of the requested person. The exercise is case specific. The evidence will obviously differ in every case. The starting point is to determine what the public interest in extradition is in the particular case.

It was stated by Mr Justice McKechnie in his judgement in the Supreme Court in ***The Minister for Justice and Equality - v- Ostrowki*** *[2013] IESC 24, that there will be a public interest in extradition in every case. It is a constant in the vertical sense, as McKechnie J. put it. Sharing, as I do, this view, it is to be found incorporated within the principles expounded in both T.E. and R.P.G. It arises as a matter of public policy. In general, and without factoring in specific features peculiar to the individual case, it is widely recognised as being of importance that criminals are not permitted to evade justice, and that fugitives are located and returned to face trial or serve their sentences as the case may be. This is required for the maintenance of public confidence in a state's criminal justice system and in the forces of law and order. It is also necessary for its deterrent effect.*

However, as McKechnie J. also explained in ***Ostrowski****, the public interest in extradition will not necessarily be afforded the same weight in every case, because obviously the circumstances of cases may vary. Some cases will involve more serious offences than others. The sentences potentially to be imposed, or that were available to be imposed, may also vary. Moreover, in a conviction case, the sentence actually imposed is an important yardstick, particularly because it is likely to reflect factors taken into account by the sentencing court that may not necessarily appear on the warrant, e.g., aggravating or mitigating circumstances peculiar to the case or the individual concerned. For example, an ostensibly severe sentence imposed for what would in general terms be regarded as a relatively petty crime, might reflect the fact that the respondent is a recidivist criminal, with a long criminal record in the issuing state."*

As to the yardstick of sentence actually imposed, the sentences imposed in this case are reasonably lengthy, but presumably suspended in their totality because of mitigating factors pertinent to the respondent at that time. Therefore, this situation in this case is perhaps the opposite of that alluded to by Edwards J. in ***Ciecko***, being the imposition of suspended sentences for what might otherwise be regarded as serious crimes. There is no doubt but that the original offences (corresponding to robbery of mobile phones from young persons) must be regarded as serious, and could have been punished in Poland by up to twelve years deprivation of liberty.

Consequently, bearing in mind that the Polish courts saw fit to suspend the sentences on more than one occasion, this gives rise to a moderately strong general public interest in seeing that sentences of this type, which are subsequently activated by reason of re-offending, are actually served as a matter of public policy, together with a corresponding public interest in the respondent's extradition to face execution of the sentence in question.

The respondent has raised considerations pertaining to delay in this case. Where this arises as an issue, it is necessary to first identify the relevant time period or periods, and then to consider the explanations or reasons underlying the periods in question.

According to Part B of the warrant, the activation of the two year suspended sentences imposed in 2001 did not become final and legally valid until 26 September 2007. This was due to the stealing of the baby carriage/stroller by the respondent on 15 March 2006. It appears from the information supplied by the Polish court that the execution of a suspended sentence is mandatory in the circumstances in that jurisdiction, irrespective of any other matters favouring the offender, although the suspended sentence received by the respondent in 2003 did not actually result in the first sentences becoming active, nor is this offence the subject of a rendition request. Steps taken by the respondent postponed execution of the sentence until May 2008, when his request for a deferral was dismissed by the Circuit Law Court. The respondent left Poland in June 2008 to come to Ireland, with the permission of his probation officer.

Accordingly, it appears that no delay can be laid at the door of the Polish authorities until June 2008. Although the letter from the Polish court indicates that there were numerous further requests for postponement of execution filed after that date, precise details of such applications are not available, and there is no suggestion that such applications by themselves would have prevented the issue of a European arrest warrant for the respondent. By contrast, it appears that an application for presidential clemency under Polish law has this effect, and since the respondent had such a request pending between April 2009 and March 2012, when the President of the Republic of Poland did not grant a pardon to the respondent, this period cannot be held against the requesting state.

However, there was no apparent bar to the issue of an arrest warrant between June 2008 and April 2009, after which no action was possible until March 2012. Although it might be excessive to criticise the failure to act during this early period, the combination of the failure to act before the petition for clemency was lodged, together with the passage of the three years taken to consider and dismiss the petition, ought to have resulted in the authorities moving with alacrity once action became possible again.

On the other hand, this overall period cannot prejudice the position of the respondent, as he had left the requesting state with the express permission of his probation officer, his whereabouts and contact details were known at all times to the relevant authorities, he was discharged from probation supervision by court order at the end of this period, and he vigorously pursued all remedies available to him under Polish law. There is no suggestion that he was not free to leave Poland, although the situation here may be distinguished from the facts of ***E.S.***, as the respondent was well aware that his sentence was still an issue. Neither is there a suggestion that the respondent was not entitled to explore extensively all means of redress within the Polish system. If responsibility is to be attributed for delay during these processes, it lies at the door of the Polish authorities, rather the respondent.

Despite the somewhat frantic activity on the part of the respondent on various fronts in respect of these sentences, when the petition for clemency was dismissed it took the relevant authorities a further 19 months to issue a warrant for the arrest of the respondent. No information whatsoever was furnished to explain this particular period of delay, which is clearly solely attributable to the authorities of the requesting state, save the assertion that efforts to put the respondent in prison "resumed". There is no elaboration of the meaning of that phrase in the particular context of this case.

Having regard to the protracted history of this case, and the personal circumstances of the respondent, which were well known to various Polish authorities, it might be thought that a pressing or urgent need for recall of the respondent to prison would have resulted in an arrest warrant being produced immediately upon the dismissal of the clemency petition, or within a short and reasonable time thereafter. The issue is whether a period of unexplained delay of 19 months in issuing the arrest warrant may be regarded as significant on the specific facts of the case.

A particular period of delay is neither long nor short in itself, and the significance of any applicable period is obviously case-specific, but viewed against the background of this respondent's case, a delay of 19 months prior to the issue of an arrest warrant must be regarded as significant, unreasonable and excessive. Nothing further was required by the issuing authorities in order to act after the end of the clemency procedure. Moreover, the bare explanation that efforts of the authorities "resumed" during the period in question is entirely inadequate. The passage of this period of time cannot be explained by any want of knowledge or detail as to the respondent's precise whereabouts during this time. A pressing social need for rendition of the respondent ought to have been evidenced by speedy action when this became possible; the absence thereof tends to indicate that any social need was less than pressing.

In ***Ciecko***, Edwards J. found that the facts of that case justified the view that substantial unexplained delay significantly diluted an otherwise moderately strong public interest in the respondent's extradition. This heavily diluted public interest subsequently enabled Edwards J. to hold that private interest considerations which otherwise would not carry extraordinary weight were sufficient to balance the scales against surrender.

It should also be noted that Edwards J. characterised the offences in ***Ciecko*** as being "relatively minor". In this case, although the robbery offences committed by the respondent in 2001 do not fall into this category, the stealing of a baby stroller (worth less than €80) by him in 2006, which ultimately caused the issue of this warrant, can be reasonably regarded as relatively minor. This offence apparently justified the imposition of a ten-month sentence suspended for five years, even though it was the fourth offence committed by the respondent, and was committed by him during the currency of a number of suspended sentences. This factor, together with the successful completion of a lengthy period of probation supervision, may both be regarded as minor factors in favour of the respondent.

These factors also serve to distinguish this case from the facts of ***Craig,*** which concerned a request for the return of a murder convict who had escaped from lawful custody. The High Court understandably found that there was a strong and continuing pressing social need for recall to prison in such a case. The applicant laid emphasis on the fact that Edwards J. in that case found that the conduct of the respondent in that case in escaping from lawful custody and becoming a fugitive meant that the delay in that case was attributable to him rather than the requesting state, and did not serve to eliminate, or even dilute the substantially, the significant public interest that existed in favour of the respondent's rendition.

The actions of the respondent in this case are entirely different in character to those attributable to the respondent in ***Craig***. Unlike Mr Craig, the whereabouts of the respondent and his contact details were readily available to the authorities in the requesting state at all material times. Insofar as delay might be "attributable" to his conduct, that conduct consisted of the open pursuit of legal remedies through the courts and political system of his native country, rather than walking out of lawful custody and becoming a fugitive in another jurisdiction. Lastly, the respondent in this case completed all other aspects of his rehabilitation, as evidenced by the recitals in the court order of March 2012, which is undoubtedly has more merit than escaping from lawful custody and becoming a fugitive prior to the completion of a sentence for the most serious offence in the calendar.

Although the assortment of relevant factors in this case differs somewhat from those set out in ***Ciecko***, the unexplained delay in seeking a warrant between March 2012 and October 2013 must be regarded as substantial, having regard to the particular background features of the case. Accordingly, this unexplained delay results in a conclusion that private law considerations relating to

this respondent must be balanced against a heavily diluted public interest in surrender. Therefore, the facts of this case are more akin to ***Ciecko*** then to those of the case of ***J.A.T.*** relied on by the applicant, where the balancing exercise carried out by Edwards J. involved individual personal rights being balanced against a substantial public interest in rendition. That is not the balance applicable to any proportionality exercise arising on the facts of this case.

Proportionality
The material provisions of s.37 of the Act of 2003 prevent the surrender of a person under the Act if this would be incompatible with the State's obligations under the European Convention of Human Rights or under the Constitution. The respondent claims that surrender would cause a disproportionate interference with the rights set out in paragraph 3(b) of the notice of objection, as recited above.

The test and approach to be applied to such a claim has now been clearly enunciated by the Supreme Court decision in ***Ostrowski***. Denham C.J. cited the judgement of Fennelly J. in ***The Minister for Justice, Equality and Law Reform -v- Gheorghe*** [2009] IESC 76 as follows:-

> *"It is a regrettable but inescapable incident of extradition in general and, as in this case, surrender pursuant to the system of [EAW], that persons sought for prosecution in another state will very often suffer disruption of their personal and family life. Some states have historically refused to extradite their own nationals, but that is a special case. The Framework Decision expressly provides that, in Article 1, that it does not "have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in article 6 of the Treaty on European Union." No authority has been produced to support the proposition that surrender is to be refused where a person will, as a consequence, suffer disruption, even severe disruption of family relationships."*

Denham C.J. then continued as follows:-

> *"In almost all cases of surrender, family rights, article 8 rights, are affected. However, it is only in an exceptional case that article 8 rights would outweigh the requirement to surrender. This is not such an exceptional case. Thus, there is no foundation upon which to find for the respondent on this ground. Therefore, the general principle of proportionality does not arise in these circumstances.*
>
> *Even if the principle of proportionality might arise in some circumstances, even if it could be a factor in a case, there is no basis in the principle of proportionality upon which to refuse to surrender the respondent in this case."*

Consequently, the Supreme Court has clearly stipulated that an exceptional case must be established to permit such rights to set aside the normal requirement to surrender. McKechnie J. also referred to a requirement for the facts in such a case *to "demonstrate the likely existence of harmful consequences, peculiar to the respondent, which are of such significance as to outweigh the public interest in ordering his return."* These do not include matters falling within the expected consequences which might flow from, and which are inherent to the operation of the extradition process itself.

It is a reasonable conclusion that the exercise of ordinary family or personal rights is inevitably compromised by the usual or inherent consequences of rendition. Consequently, in broad terms, surrender must take place unless there is some exceptional feature relating either to the public or private interests in a case which renders surrender disproportionate. Disproportion cannot usually be found on facts where the public interest remains strong and the private interests are not out of the ordinary.

Where the public interest is found to be significantly diluted, there is room for the assessment of the proportionality of surrender within the context provided by the provisions of s.37 of the Act of 2003. As a significant dilution of the public interest is present in this case, it is permissible to balance the private interests asserted by the respondent against the modified and weakened public interest in rendition.

Decision
The fact that the respondent had some medical difficulties and was accruing a family life in Ireland was apparently well known to both the Polish courts and to the probation service. However, the loss of family contact, the existence of relatively ordinary medical conditions or the potential loss of employment are not normally factors that weigh heavily against surrender, as such features are generally inherent in the extradition process. If the public interest was strong, there would be nothing in the material placed before the court by the respondent to justify a finding of disproportion in his favour.

The particular feature of interest in this case is the existence of the respondent's eight-year-old son. The boy does not reside with the respondent, but he is responsible for the provision regular care and maintenance. The potential effect of the loss of contact with his father for two years at this time of his life is obvious, and set out by the respondent at paragraph 5 of his affidavit. Although the evidence on this aspect of the case is general in nature, it is reasonable to conclude that this child's best interests would be vindicated by the continued provision of care and support by his father. The respondent is also the father of a baby due in February 2015, although this is not a terribly significant consideration.

In the light of the combination of factors relied upon by the respondent, the failure to seek an arrest warrant for over 18 months in the circumstances of the case constitutes disrespect for the private or family life of the respondent, and rendition at this time would be exceptionally disproportionate to any social need to imprison the respondent for a period of two years in 2015, arising out of a minor theft committed almost 9 years ago, itself triggering suspended sentences imposed almost 14 years ago. (This is without reference to or account of the period between October 2013 and April 2014 which was required to transmit and execute the warrant, in order to bring the respondent within the European arrest warrant system operative in this jurisdiction).

Having regard to the fact that there exists only a heavily diluted public interest in the respondent's rendition, I am satisfied that the adverse effects on the respondent and his young child that will arise in the event of the respondent being surrendered are such as to render the proposed surrender a disproportionate measure in the all of the circumstances of the case.

Augmenting this primary feature is a combination of minor and subsidiary factors in his favour, namely the potential effects on his medical and employment situation; the impending addition to his family; the minor nature of the triggering offence; the permission of his probation officer for his departure; his open contact with various Polish authorities whilst present in Ireland; the testament to his good character in the court order of March 2012 releasing him from probation, and his good behaviour whilst in this jurisdiction.

The court will, in those circumstances, uphold the s.37(1) objection set out in paragraphs 3(a) and (b) of the notice of objection and refuse to surrender the respondent.