THE HIGH COURT

Record No. 2016/25 EXT

BETWEEN

THE MINISTER FOR JUSTICE AND EQUALITY

APPLICANT

AND

PIOTR STAWERA

RESPONDENT

JUDGMENT of Ms. Justice Donnelly delivered the 19th day of June, 2017.

1. Poland seeks the surrender of the respondent pursuant to a European arrest warrant ("EAW") issued on 27th November, 2014, for the purpose of executing a sentence of 3 years, 4 months and 29 days of imprisonment remaining from an aggregate sentence of 5 years and 5 months imprisonment imposed upon him in respect of 22 separate offences. Two points of objection were argued on behalf of the respondent.

2. The first point of objection arose in circumstances where the respondent had previously been surrendered to Poland by Order of the High Court for execution of a sentence of 2 years of imprisonment imposed upon him in respect of one of these 22 offences and which said sentence was thereafter served by him in Poland. It was submitted that it was a violation of the principle of *ne bis in idem* (double jeopardy) to surrender him a second time in respect of the same offence. In the alternative, it was argued that these circumstances amounted to an abuse of process. The second substantive point of objection was that two of the offences for which surrender was sought, namely offences of hiding documentation, did not correspond with offences in this jurisdiction.

A Member State that has given effect to the 2002 Framework Decision
3. The surrender provisions of the European Arrest Warrant Act 2003, as amended ("the Act of 2003") apply to those member states of the European Union ("E.U.") 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 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 affidavit of William Kelly, member of An Garda Síochána, the affidavit of the respondent, and the details set out in the EAW that the respondent, Piotr Stawera who appears before me, is the person in respect of whom the EAW has issued.

Endorsement
5. I am satisfied that the 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, as amended
6. Having scrutinised the documentation before me, I am satisfied that I am not required to refuse the surrender of the respondent under the above provisions of the Act of 2003, as amended.

Part 3 of the Act of 2003, as amended
7. Subject to further consideration of s. 38 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.

Section 38 of the Act of 2003
8. In 20 out of the 22 offences, the issuing judicial authority has ticked the box at point (e)1 of the EAW, thereby designating these offences as offences for which correspondence need not be shown. Pursuant to the provisions of Article 2 para. 2 of the 2002 Framework Decision, the 20 offences were designated as either "forgery of administrative documents and trafficking therein", "forgery of currency, including that of the Euro", or "fraud". Each of those offences was punishable by a maximum sentence of at least three years imprisonment in accordance with Polish law. Given the details of the offences as set out at point (e) of the EAW, there is no manifestly incorrect designation of these offences as list offences under the said provisions. In the circumstances, the Court is satisfied that the respondent's surrender is not prohibited in respect of any of the 20 offences which have been so designated.

9. In respect of offences XVIII and XIX, correspondence is required. The details of these offences are stated on the EAW as follows:

> "XVIII. at some time before 19th February 2007, in the town of Wrzesnia, located in the province of wielkopolskie, in his apartment he was hiding documents in the form of a personal ID card no. ACF669622 and a driver's licence no. E1909758, issued in the name of Jakub Wendland, which he had no right to solely dispose of
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> XIX. at some time before 19th February 2007, in the town of Wrzesnia, located in the province of wielkopolskie, in his apartment he was hiding documents in the form of a social insurance ID card Cl000490323, issued in the name of Renata Kedziora, which he had no right to solely dispose of".

10. Not surprisingly the central authority sought further information in respect of these alleged offences. The relevant parts of the letter sent on 28th April, 2015 stated:

> "3. Please confirm whether the driving licence personal identification card mentioned in the offence at No. 18 and the social insurance card in the offence at No. 19 had been stolen from the named injured parties. In other words, please clarify if those documents were taken from the two injured parties without their consent and/or misappropriated from them.
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> 4. Please provide additional information about the circumstances in which the documents were found and were possessed

by Mr. Stawera. The EAW states that the Respondent was '*hiding*' the documents but it should be outlined how they were so hidden by him. Did Mr. Stawera give any reason for 'hiding' the documents?

5. Please provide any information that establishes that Mr. Stawera knew that the documents were stolen or that he disregarded a substantial risk that they were stolen (if the documents were stolen). For instance, did Mr. Stawera know where the documents had come from or provide any explanation for his possession of same? Was any such explanation contradicted or supported by the other facts in the case?"

11. The letter of the central authority had not indicated that the reason this information was sought was for the purpose of establishing correspondence with an offence in Irish law. That might explain why the issuing judicial authority responded in the following way:

"4) According to Polish law, hiding a document a person is not legally authorized to dispose of exclusively, is considered an act subject to criminal liability. Pursuant to Article 276 of the criminal code, anyone who destroys, damages or renders unfit for use, or hides, or removes a document which he or she has no exclusive right to possess is liable to a fine, the restriction of liberty or imprisonment for up to two years. Hiding a document means that a document is made unavailable for persons who have the right to use the same and want to exercise this right. The authorized person not only has no access to the document, but simply does not know where the document is located. Therefore, the fact how somebody else's identity card, driving licence and security identification card got into the requested person's apartment is of no importance for the criminal liability. Moreover, it is obvious that a person who keeps another person's documents must be aware that such person must have lost the documents. A normal and a desirable behaviour in such situation is to return the documents to their legal holder and not to conceal them in one's apartment.

5) Additionally, we want to emphasize that reconsidering guilt of the requested person or assessment of evidence concerning the concealment of documents under execution of the EAW seems unacceptable, because this question has already been finally adjudicated. The mechanisms of the European arrest warrant is based on a high level of confidence between Member States which execute each EAW on the basis of the principle of mutual recognition (pursuant to item 10 of the preamble in Article 1 clause 2 of the Council Framework Decision of 13th June 2002 on the *European arrest warrant and the surrender procedures between Member States* /2002/584/JHA/)."

12. The central authority wrote again to the issuing judicial authority indicating that unless the documents were stolen from the owners, there may be an issue with dual criminality, as merely hiding documents or possession of documents belonging to another would not necessarily constitute an offence under Irish law. They sought information as to the circumstances in which the documents were found and were possessed by the respondent and that established that he knew that the documents were stolen or that he disregarded a substantial risk that they were stolen (if the documents were stolen).

13. The issuing judicial authority replied by letter dated the 20th of October 2015 that "[a]fter examining the files of case II K 553/10 (and II K 191/08, from which materials concerning Piotr Stawera were severed into separate proceedings) of District Court in Wrzesnia, I can advise that the authorities were unable to ascertain how Piotr Stawera came into possession of the identity documents that led to his conviction. The respondent himself offered no explanation in this regard, while prejudiced person Jakub Wendland stated that he had most probably lost his documents and prejudiced person Barbara Kedziora was never questioned as to these circumstances."

14. In the course of the proceedings, counsel for the minister submitted that the facts as set out in the EAW and the additional documentation would, if committed in this jurisdiction, amount to the offence of theft. Theft is a criminal offence contrary to s. 4 of the Criminal Justice (Theft and Fraud Offences) Act, 2001 ("the Act of 2001"). Section 4 of the Act of 2001 provides as follows:

"(1) Subject to section 5, a person is guilty of theft if he or she dishonestly appropriates property without the consent of its owner and with the intention of depriving its owner of it.

(2) For the purposes of this section a person does not appropriate property without the consent of its owner if—

(a) the person believes that he or she has the owner's consent, or would have the owner's consent if the owner knew of the appropriation of the property and the circumstances in which it was appropriated, or

(b) (except where the property came to the person as trustee or personal representative) he or she appropriates the property in the belief that the owner cannot be discovered by taking reasonable steps, but consent obtained by deception or intimidation is not consent for those purposes.

(3) *…(Not relevant)*

(4) If at the trial of a person for theft the court or jury, as the case may be has to consider whether the person believed —

(a) that he or she had not acted dishonestly, or

(b) that the owner of the property concerned had consented or would have consented to its appropriation, or

(c) that the owner could not be discovered by taking reasonable steps, the presence or absence of reasonable grounds for such a belief is a matter to which the court or jury shall have regard, in conjunction with any other relevant matters, in considering whether the person so believed.

(5) In this section—

"appropriates", in relation to property, means usurps or adversely interferes with the proprietary rights of the owner of the property;

"depriving" means temporarily or permanently depriving."

Section 2 of the Act of 2001 defines "dishonestly" as meaning "without a claim of right made in good faith". The exceptions set out in s. 5 of the Act of 2001 are not relevant to the facts set out in this case.

15. In particular, counsel for the minister relied upon the following elements of the offences committed by the respondent as set out in the EAW and additional information;

- Possession of documentation which is capable of operating as identity documentation.

- Possession of documentation which he did not own.

- Concealment of that documentation (From which is drawn the inference that no permission was obtained from the owners of said documents to have the said documents).

- The above is reinforced by the statement that he had no right to "solely dispose" of the documents.

- Both of the last two points support the proposition that the respondent did not act honestly.

- The facts of concealment in his house support the proposition that the respondent had the intention of depriving the owner of the ID.

- The owner of the ID card and driver's licence most probably lost them, nowhere is said that he gave the respondent any permission to keep them – the opposite is clear.

- The owner of the social insurance card was not contacted and in circumstances where the documents are concealed in somebody else's apartment without any claim of right, lack of consent can be readily implied.

16. Counsel for the minister submitted that presence or absence of reasonable grounds for acting dishonestly, lack of consent or finding the owner of the property are matters that can be established otherwise than by direct proof of same. It was counsel's submission that direct proof of same was not a barrier to a *prima facie* case.

17. Counsel for the minister relied upon the decision of the High Court in the case of *DPP (at the suit of Garda Sean Breen) v. Valentine* [2009] 4 I.R. 33. In that case, the defendant had been prosecuted for stealing property from "Texas Homebase". A security guard gave evidence of seeing the accused take items from the store called "Texas Homebase". No other evidence was given as to the existence of "Texas Homebase" as a legal person or that "Texas Homebase" was the owner of the articles as alleged. Birmingham J. held at p. 37:

> "*So far as the obligation to prove the property was owned and that the appropriation was without the owner's consent it is the case of course that from time to time there may be difficulties in establishing an owner, the pickpocket in the crowded street being an obvious example and there the jury or judge will have to consider whether the evidence is such that the property in question is proved to be owned by the person unknown and that an absence of consent can be inferred*."

However, Birmingham J. went on to say that no evidence had been laid before the District Court in relation to the nature of the entity referred to or even as to its existence and, in those circumstances, the judge of the District Court had not been correct in convicting the accused.

18. Counsel for the minister also relied upon the decision of the High Court *in Director of Public Prosecutions (at the suit of Garda Thomas Murray) v. Cooney* [2015] IEHC 239. That concerned a prosecution before the District Court for an offence of possession of stolen property without lawful authority or excuse contrary to s. 18 of the Act of 2001. The defendant had been stopped in possession of a bicycle, the chassis number of which had been filed away. The defendant stated that it was his friend's bicycle but then said he had bought it from an unknown person for €30. The defendant also admitted that he had reservations as to whether or not the bicycle was stolen.

19. In his judgment in *DPP (Murray) v. Cooney*, Noonan J. referred to the case of *Noon v. Smith* [1964] 3 All ER 895 from the jurisdiction of England and Wales. In that case, it was stated that larceny can be established by evidence tendered directly proving the offence or by evidence of fact from which any reasonable person can draw the inference that a theft had taken place. Noonan J. also referred to the case of *The People (DPP) v. O'Hanlon* (Unreported, Court of Criminal Appeal, 1st February 1993). In that case, the Court of Criminal Appeal, in answer to a submission that the distributors of the disputed video recorders should have given evidence that there was no way the items could have gotten into possession of the particular firm then the way they did, stated:

> "*Indeed it is probably likely that it is not an essential proof at all to establish that the goods were the property of any particular person or firm; the essential proof is that they have to be shown to have been stolen goods…the court would wish to say that the proof the goods are stolen may be proved by circumstantial evidence and on occasion there may be no direct evidence such as from the actual owner or the thief but each case must depend on its particular circumstances…*".

20. In *DPP (Murray) v. Cooney*, the High Court held that there was more than ample evidence of the circumstantial nature before the District Court which could justify any reasonable person coming to the conclusion that the property in question was in fact stolen. Counsel for the minister relied upon this to demonstrate that the circumstances of the case were sufficient to establish the lack of consent of the owner. The property had been secreted in another person's house and was unavailable to that person and this was *prima facie* evidence of theft.

21. Counsel for the respondent submitted that the minister was not entitled to rely upon a necessary implication that the facts amounted to a statement that the respondent had appropriated the property. He pointed to the case of *Minister for Justice, Equality and Law Reform v. Stanzak* [2010] IEHC 204 in which a similar offence of hiding documents had been alleged against a person. He referred in particular to the statement in that case that "*the convict took it from one of the cars stolen by him, however - as the court decided - he did not do it with the intention of appropriating it, he only aimed at making finding the indicated document by anyone impossible, as a consequence, on the basis of the Polish the law of the offence of theft of a document could not be assigned to him*.".

22. It can be observed in *Stanzak* that the High Court was satisfied that there was correspondence with the offence of possessing stolen property as, pursuant to s. 2 of the Act of 2001, stolen property includes property which has been unlawfully obtained *otherwise* than by stealing. The facts in that case had shown that the respondent had unlawfully taken the documents from the car he had stolen. In the case herein, the minister quite rightly has not pressed the offence of s. 18 of the Act of 2001 as a corresponding offence because, in this case, there is no evidence that the documents were possessed by the respondent as stolen documents, *i.e.* there is no evidence that they were stolen (as in Irish law) by a person other than the respondent or that they were otherwise (than by stealing) unlawfully obtained by the respondent. The issue in the case is whether the respondent in fact stole them, *i.e.* did he dishonestly appropriate them, without the consent of the owners.

23. Counsel for the respondent also referred to the definition of "appropriates" and submitted that there was no usurpation or adverse interference with the proprietary rights of the owner outlined in the facts. Counsel relied upon the information from the issuing judicial authority that these documents were lost in one case or that the whereabouts were unknown in the other case. He submitted that one cannot draw the inference that theft has taken place. He submitted that, in Irish law, one is not prejudiced by not knowing where property that you do not want is to be found. He referred in this context to the fact that the second alleged injured party could have thrown these documents away. He submitted that as there was no information as to what had occurred, no one could know what had occurred.

24. Counsel referred to the wording of the EAW itself and submitted that simply hiding a document was not sufficient for the purposes of establishing correspondence. Having no right to dispose of a document did not add anything to the information, as there was no evidence that the respondent was going to dispose of the document. Counsel also referred to the *Valentine* case and said that the issue there was that there had been no evidence regarding the existence of the owner. In this case, he said that there was evidence as to who was the owner but there was no evidence as to their consent or lack of consent. He submitted that this was analogous to the *Valentine* decision as theft had not been made out because of lack of information or consent.

25. In relation to the issues, counsel for the respondent submitted that there must be a necessary implication that it was without the consent of the owner and that there had been appropriation before the court could find correspondence on these offences; in the present case, there was no necessary implication on the facts In respect of s. 4(4) of the Act of 2001, he submitted that this was not necessarily relevant as it related to a defence.

Use of Section 20 of the Act of 2003
26. In light of the submissions that had been made, the Court sought further information from the issuing judicial authority, as follows:

> A) Was it a finding of fact in the conviction of Piotr Stawera that the identification documentation of Jakub Wendland and Renata Kedziora were unavailable to them when they had a right to use the documentation and they wanted to use them?
>
> B) Was it a finding of fact in the conviction of Piotr Stawera that Jakub Wendland and Renata Kedziora had no access to their documentation and did not know where they were located at the time Piotr Stawera hid them".

27. The issuing judicial authority replied by referring to the judgment of the District Court finding the respondent guilty of the offences, the details of which are outlined in the European arrest warrant. The issuing judicial authority went on to say as follows:

> "[t]he nature of these offences is that the rightful owners of the documents that were found in the perpetrator's possession are prevented from accessing them, and that's what the District Court found when finding Piotr Stawera guilty of the offences. These documents constituted the sole property of their owners, who were the only persons entitled to use them.
>
> According to doctrine and case law, "concealing" a document means placing it in a location known only to the perpetrator and unknown to the person solely entitled to dispose of the document […*Ref. made to Polish Supreme Court decision*]. 'Concealing' a document also means that the person rightfully entitled to use it not only cannot access it, but simply does not know where the document is located […*Ref to Polish Court of Appeal judgment*]
>
> The above interpretation was accepted by the District Court in Wrzesnia, which found Piotr Stawera guilty of the two offences under section 276 of criminal code, described above."

28. Further submissions were made by the parties on receipt of this information. Counsel for the minister submitted that the facts established for conviction in Poland would also suffice for conviction in this jurisdiction. She relied on phrases such as "prevented from accessing them", "constituted the sole property of their owners who were the only persons entitled to use them" and "concealing" meaning "the person rightfully entitled to use it not only cannot access it but simply does not know where the document is located".

29. Counsel for the respondent submitted that the question asked had not really been answered, especially as to whether these aggrieved persons had wanted to use the documentation. He submitted that the facts did not establish theft. In particular, there was no information showing that Barbara Kedziora was in fact prevented from access as she was never asked.

Decision
30. Section 5 of the Act of 2003 states as follows:

"For the purposes of this Act, an offence specified in a European arrest warrant corresponds to an offence under the law of the State, where the act or omission that constitutes the offence so specified would, if committed in the State on the date on which the European arrest warrant is issued, constitute an offence under the law of the State.".

31. In the case of the *Minister for Justice, Equality and Law Reform v. Szall* [2013] 1 IR 470, the Supreme Court (Clarke J.) stated at p. 484 "*in* Attorney General v. Dyer *[2004] 1 IR 40, Fennelly J. re-emphasised the principle, which can be traced back to* State (Furlong) v. Kelly *[1970] IR 132, to the effect that the comparison which requires to be conducted in order to determine correspondence is to be based on the acts or omissions which are said to constitute the offence*.". After discussing the provisions of s. 5 of the Act of 2003, the Supreme Court held, at pp. 484-485 "*there is not, therefore, any material difference, so far as correspondence is concerned, between the law as it stood under the 1965 Act and the law as it now stands under the 2003 Act*."

32. Fennelly J. concluded his judgment in Dyer by referring to the "*absence of any allegation, either express or to be implied, of intent to defraud*" in holding that the requirements of the Extradition Act, 1965 in respect of correspondence of offences had not been demonstrated. Therefore, where an element of an offence can be *implied* from the facts which have been presented to the

court by the issuing judicial authority, this is sufficient for the purpose of establishing correspondence with an offence in this jurisdiction.

33. In *Minister for Justice v. Dolny* [2009] IESC 48, Denham J. (as she then was) stated at para. 14:

> "*In addressing the issue of correspondence it is necessary to consider the particulars on the warrant, the acts, to decide if they would constitute an offence in the State. In considering the issue it is appropriate to read the warrant as a whole. In so reading the particulars it is a question of determining whether there is a corresponding offence. It is a question of determining if the acts alleged were such that if committed in this jurisdiction they would constitute an offence. It is not a helpful analogy to consider whether the words would equate with the terms of an indictment in this jurisdiction. Rather it is a matter of considering the acts described and deciding whether they would constitute an offence if committed in this jurisdiction*."

34. It was also stated in *Dolny* that the natural and ordinary meaning of the words are to be applied. Denham J. (as she then was) relied on *Wilson v. Sheehan* [1979] I.R. 423 in which the Supreme Court (Henchy J.) stated at p. 429: "*When it comes to the words in the warrant by which the factual content of the specified offence is identified, the correct rule is that those words should prima facie be given their ordinary or popular meaning unless they are used in a context which suggests that they have a special signification*."

35. From the above, it readily can be understood that the comparison of the title of the offence in Poland, namely "hiding a document that the perpetrator has no right to solely dispose of", with an offence of the same nature in this jurisdiction is not the basis for the statutory test of correspondence. The consideration to be made is of the acts or omissions which formed the offence in Poland and thereafter to decide if those acts or omissions would constitute an offence if committed in this jurisdiction.

36. Counsel for the minister's submission that, the offence of "theft" is one which seeks to protect the property rights of citizens by criminalising interferences with those property rights, is accurate. Her submission is also correct that the offence covers situations beyond simply taking property directly from the person of another. However, those statements must not obscure the fact that the legislature has chosen to protect property in a particular manner; by means of creating specific criminal offences. For a criminal offence to be committed, the ingredients of the offence, which include the state of mind of an accused, must be established beyond reasonable doubt. Whether the particular ingredients in any given case have been established is of course a matter for a judge or jury, but the nature and extent of the ingredients of the offence required to be established before guilt can be found, is a matter of law. Therefore, counsel for the respondent is also correct in his submission that each ingredient of the offence of theft must be shown to have been established on the facts of the Polish conviction if correspondence with an offence is to be demonstrated. If the facts do not establish that the owners of these documents did not give consent, or if their property rights were not being usurped because, for example, they may have given their property away, then the facts would not amount to a crime in this jurisdiction.

37. This Court must establish whether the ingredients of the crime of theft in each case have been satisfied by virtue of the acts which have been set out in the EAW and the additional documentation. These are the acts which formed the basis for the convictions in Poland of this respondent for the two offences of hiding documents. It is an issue of law whether those facts, either expressly or by implication, amount to offences of theft if committed in this jurisdiction. Conversely, it is not a matter for this Court to establish whether the acts would amount to the offence of theft in Polish law. Therefore, a statement by a previous issuing judicial authority that the facts in that other case did not amount to the offence of theft in Polish law, does not affect the determination which this Court has to make, *i.e.* whether as a matter of law the acts found to have been committed would constitute the crime of theft in Irish law.

38. In the view of this Court, in convicting the respondent of the offences, the Polish court found the following:

a) The respondent possessed documentation which was capable of operating as identity documentation;

b) The documentation was not his own;

c) The documentation was the sole property of their owners;

d) The owners were the only persons entitled to use the documentation;

e) The respondent was not entitled to solely dispose of the documentation;

f) The owners were prevented from accessing their documentation by the actions of the respondent in hiding them;

g) He concealed the documentation by placing them in a location known only to him and which location was unknown to the persons solely entitled to use the documentation;

h) By concealing the documentation, the persons rightfully entitled to use it could not access it and did not know where the documentation was.

i) No further information as to how the respondent came into possession of the documentation was available to the Court in Poland, but one person probably lost their documents while the other owner was not asked about this.

39. Of relevance to the Court's determination are the following questions:

- Do the above facts include explicitly or by implication a finding that the respondent appropriated the property in the sense that he usurped or adversely interfered with the proprietary rights of the owner?

- Do the above facts include a finding explicitly or by implication that the owners did not consent to the respondent having the documentation?

- Do the above facts either expressly or by implication include a finding that the respondent acted dishonestly, *i.e.* without a claim of right made in good faith?

- Do the above facts either expressly or by implication include a finding that this was done with the intention of depriving the owners of the documentation?

40. The final two questions are easily disposed of: there is no doubt that the facts demonstrate that this was done dishonestly and with the intention of depriving the owners of the documentation. This is a necessary implication of what has been stated; he concealed the documentation when he had no right to possess it or dispose of it and there was no claim of right made in good faith. The fact that the documentation was identification documentation which he was not entitled to have and that the owners were the only people entitled to use that documentation, also demonstrates that he had no claim of right made in good faith to this documentation. It is also clear that the intention was to deprive the owners as they could not access the documentation and did not know where it was; they were, in the words of the issuing judicial authority "prevented from accessing" the documentation.

41. The facts also establish that the proprietary rights of the owners have been usurped or adversely interfered with. These owners have been prevented from accessing their documentation in circumstances where the documents were concealed from them in a place they did not know. They were the only persons entitled to use the documentation and instead the documentation had been concealed in a place they did not know. In its ordinary and popular meaning, being prevented from accessing documentation means having property rights interfered with.

42. I do not consider the respondent's submission that there was a failure to answer the final part of the question, namely whether they wanted to use the documentation, and that such failure showed a lack of interference with proprietary rights, is sustainable. The reference in the s. 20 question had been influenced by the suggestion in submissions that the reply of the issuing judicial authority dated 8th May, 2015 was not a statement of facts in the case but simply one of law. The Court sought to ensure that the legal situation as outlined there had applied to the facts in this case. In hindsight, perhaps that was unnecessary, as the Court, in reliance on the principles of mutual trust and mutual recognition, which form the basis of the operation of the EAW system, was entitled, if not obliged, to find that the Polish court would only have convicted where the ingredients of the offence had been met. Where the facts are set out and an explanation given as to the legal basis for that finding, then that may well be sufficient into the future. In this case, the reply of the issuing judicial authority confirmed that the legal ingredients of the Polish offence were carried out by the respondent. The reference to "prevented from accessing" the documentation confirms what was being stated in the earlier reply.

43. The final issue concerns the lack of consent on the part of the owner. The reference in the *Valentine* case to the lack of proof is to proof under Irish law. Irish law may require that, where identifiable, an owner ought to give evidence as to lack of consent, although that is by no means clear in the *Valentine* judgment. Indeed, one can imagine a prosecution for robbery/murder where for obvious reasons an identifiable owner cannot give evidence of lack of consent. The proof of lack of consent will come from the circumstantial evidence. For the purposes of extradition, this Court is not concerned with the means by which an ingredient of an offence is to be proved or has been proved in the issuing state. The issue of concern is whether the required ingredient is alleged against the person (in a prosecution case) or has been found against them (in a conviction case). Therefore, the High Court is not to concern itself with whether the lack of consent was proven in a manner acceptable in this jurisdiction; the High Court must consider whether the findings of fact, *i.e.* the acts on which the application for surrender is based, would, if committed in this jurisdiction, amount to an offence.

44. The Court is satisfied that the facts impliedly (and possibly expressly) demonstrate that lack of consent on the part of the owner has been established. The Court considers that the prevention of access to their identity documents, their sole right to use them, the fact that the documents were concealed and they did not know where they were and that the person who was concealing them had no right to them, demonstrates beyond doubt that lack of consent of the owners has been established in Poland. If those facts were found by a court in this jurisdiction, the court would be obliged to hold that there was no consent of the owner to the dishonest appropriation that had taken place of those documents. The means of proof of those facts is irrelevant because with or without direct testimony or information from the owners of the documentation, the Polish court has been able to make certain findings of facts as above. The Polish Court did not require any further information from the owners to make its findings of facts and those findings of facts are the "acts" upon which this Court must assess whether correspondence has been established. Those "acts" demonstrate expressly or by necessary implication that this property, namely the documentation, was dishonestly appropriated without the consent of the owners.

45. The Court is satisfied that the facts of the offences for which the respondent has been found guilty in Poland in relation to hiding documents would, if proven in this jurisdiction, establish that he is guilty of theft. The provisions of minimum gravity have been met. The provisions of s. 38 of the Act of 2003 have therefore been satisfied and the respondent's surrender is not prohibited thereunder.

Section 41 of the Act of 2003

46. The respondent was surrendered by Order of the High Court dated 4th November, 2010 to Poland in respect of the same offence that now appears as Offence XXII in this present European arrest warrant. The previous EAW, dated 23rd November, 2009, had sought his surrender to serve a two year sentence imposed in Poznan Circuit Court on 27th May, 2008 for offence XXII. The previous EAW stated that he had been in custody in respect of that offence from 6th March, 2007 to 27th May, 2008. In the present EAW, that offence is included in the aggregate sentence of five years and five months imprisonment for which his surrender is now sought.

47. The present EAW explicitly states that the remaining term of imprisonment to be served is "3 years, 4 months and 29 days' imprisonment (the periods between 6th March 2007 and 27th May 2008, between 26th June 2010 and 28th June 2010, and between 4th November 2010 and 12th August 2011, served by the respondent in custody, or counted towards the custodial sentence)." The period between March 2007 and 27th May 2008 were pre-trial remand periods in custody and the periods in June 2010 and between November 2010 and 12th August 2011 related to time he spent in custody in relation to the EAW and to time he spent serving the sentence post surrender. In the respondent's submission, the above periods amount to more than two years in custody in respect of his sentence on Offence XXII.

48. Counsel for the respondent submitted that the effect of the above is that the respondent has served his sentence for the purposes of Article 3.2 of the 2002 Framework Decision. He pointed to s. 41 of the Act of 2003 as containing the domestic provisions equivalent to Article 3.2 of the 2002 Framework Decision. Section 41 of the Act of 2003 provides as follows:

> "A person shall not be surrendered under this Act for the purpose of his or her being proceeded against in the issuing state for an offence consisting of an act or omission that constitutes in whole or in part an offence in respect of which final judgment has been given in the State or a Member State."

Article 3.2 of the 2002 Framework Decision provides:

> "if the executing judicial authority is informed that the requested person has been finally judged by a Member State in respect of the same acts provided that, where there has been sentence, the sentence has been served or is currently being served or may no longer be executed under the law of the sentencing Member State;"

49. This Court has recently given judgment in respect of the provisions of s. 41 of the Act of 2003. In *Minister for Justice and Equality v. Imran* [2017] IEHC 245, this Court held that it was obliged to follow the decision of the High Court in *Minister for Justice and Equality v. Guz* [2012] IEHC 388. In *Guz*, the High Court (Edwards J.) held that the reference to "in whole or in part" was not capable of being given a conforming interpretation with Article 3.2 of the 2002 Framework Decision and that s. 41 of the Act of 2003 caught within its terms a wider set of circumstances than that provided by Article 3.2 of the 2002 Framework Decision. As in the *Imran* case, counsel for the minister sought to argue that s. 41 of the Act of 2003 only applied to judgments given in a member state other than the issuing state. Furthermore, counsel for the minister sought to distinguish the *Imran* case by submitting that the plain and ordinary meaning of s. 41 of the Act of 2003 had not been argued.

50. The Court rejects the submission that the plain and ordinary meaning of the section was not considered within the *Imran* decision. The meaning of the section also had to include the interpretation of "member state" as set out in accordance with the interpretation set out in the Act of 2003. In those circumstances, s. 41 of the Act of 2003 applies, in its plain and ordinary meaning, to judgments issued in both the issuing judicial state as well as all other member states.

51. The position in the present case is entirely different, however, to the circumstances that applied in *Imran* and in *Guz*. In both *Imran* and *Guz*, it was uncontested that the judgment at issue in the issuing state was a final judgment. The argument put forward by the minister in each case was that the new offence was an entirely different offence and therefore there had been no final judgment on this new offence. In circumstances where the High Court was obliged to find that s. 41 of the Act of 2003 covered the situation which included final judgment in the issuing state on part of the offences, surrender was thereby prohibited in both *Guz* and *Imran*.

52. In contrast to *Guz* and *Imran*, the present EAW deals with the exact same offence as previously. According to Polish law, this was not a final decision in respect of the sentence, as clearly that sentence was subsequently aggregated as part of an overall sentence. The situation therefore is more akin to the decision in *Minister for Justice, Equality and Law Reform v. Renner-Dillon* [2011] IESC 5.

53. In *Renner-Dillon*, in accordance with the decision of the Court of Justice of the European Union ("CJEU") in *Mantello* (Case C-261/09) [2010] E.C.R. I-11477, it was held that final judgment must be viewed from the perspective of the legal system of the issuing judicial authority. The CJEU in *Mantello* stated at para. 55 that where an "*issuing judicial authority, applying its national law and in compliance with the requirements deriving from the concept of 'same acts' as enshrined in Article 3(2) of the Framework Decision, expressly stated that the earlier judgment delivered under its legal system did not constitute a final judgment covering the acts referred to in the arrest warrant issued by it and therefore did not preclude the criminal proceedings referred to in that arrest warrant, the executing judicial authority has no reason to apply, in connection with such a judgment, the ground for mandatory non-execution provided for in Article 3(2) of the Framework Decision*.".

54. The submission of this respondent revolved around an interpretation of Article 3.2 of the 2002 Framework Decision to the effect that he could not be surrendered where he had served the final sentence. However, as the CJEU has said in *Mantello*, the issue of final judgment must be considered from the point of view of the issuing judicial authority. In the present case, no issue was raised about the fact that an aggregate sentence could be imposed in Poland; it is clearly implicit that such a process is entirely lawful by the Polish authorities and that the principles of mutual trust and mutual recognition require this Court to make that presumption. Furthermore, this Court has much knowledge of the fact that aggregate sentences may be imposed in Poland. Those aggregate sentences, being superficially comparable to concurrent sentences imposed in this jurisdiction, are imposed for the benefit of an accused person. In Poland, where separate sentences are imposed, they are to be served separately and an aggregation of sentences results in a diminution of the totality of the overall sentence.

55. In the instant case, it was the respondent's request to aggregate his sentence. That is entirely understandable in circumstances where, as the respondent himself admits, a sentence of four and a half years was imposed on him in respect of offences I to XXI as contained in this European arrest warrant. When aggregated with the two year sentence imposed in relation to Offence XXII, the overall length of the sentence imposed upon him was reduced by just over twelve months.

56. In those circumstances, there is no doubt that the two year sentence which he had received for offence XXII was not a final judgment according to Polish law. The Court is satisfied that the respondent's surrender is not prohibited under s. 41 of the Act of 2003 as he had not been finally judged.

Abuse of Process

57. The respondent submitted that the circumstances of his surrender on this EAW for the same offence and the sentence for which he has already served, would amount to an abuse of process. It was not contested that there can be a second surrender in respect of the same offence, but the argument was that the respondent had already been surrendered and had served this sentence.

58. The Court has no hesitation dismissing the argument concerning abuse of process. The respondent accepts, and indeed it was his argument under the s. 41 point, that he has been given full credit for the time for which he has served in respect of the previous sentence. There is no oppression here by surrendering him to essentially serve the sentence in respect of offences I to XXI, in circumstances where the sentence for those twenty one offences was reduced because it was aggregated with the previous sentence. In those circumstances, there is no abuse of process.

59. Furthermore, the Court is not entirely convinced that, as regards an aggregation of sentences, it is correct to say that the earlier sentence has already been served. It is true to say that the length of time served for the earlier sentence has been fully taken into account but the new sentence is imposed as an aggregation of all the offences that have been committed. In those circumstances, a person is now serving a new sentence but one for which they have fully been given credit for all time served previously in custody. Overall, the aggregation of the sentences is in ease of a respondent and the respondent is given credit for periods of time served. There is no oppression or harassment or prejudice to a respondent in these circumstances. Furthermore, there is no abuse of process where the request for surrender is now made to include the offence for which he was previously sentenced and for which sentence he served, where all the information is provided to the court in respect of that sentence and to the fact that he has been given credit for the period of time served. The Court rejects this point of objection.

Section 45 of the Act of 2003

60. This section was included in the points of objection filed on behalf of the respondent. At the hearing, the respondent did not make submissions in respect of the section but said it was a matter for the court to decide on the basis of the correspondence that had occurred in the course of the proceedings between the central authority and the issuing judicial authority.

61. In this case, there were initially three different sets of proceedings in Poland. In relation to Case No. III K 80/08 or 135/08 which

relates to Offence XXII, the respondent was present at those proceedings. Therefore, his surrender is not prohibited by the provisions of s. 45 of the Act of 2003.

62. In relation to the Case No. II K 553/10, the issuing judicial authority has stated that the respondent was present at the first hearing and thereafter his legal representative appointed by the court was present at the subsequent hearing. The respondent has sworn an affidavit that he pleaded guilty to those matters and that he was thereafter legally represented by his lawyer who was mandated by him to appear for him. These relate to offences I to XXI. In those circumstances, his presence at the trial in which he pleaded guilty is sufficient to comply with the provisions of s. 45 of the Act of 2003. In any event, the Court is quite satisfied in accordance with the decision of the CJEU in *Openbaar Ministerie v. Pawe³ Dworzecki* (Case C-108/16 PPU, Fourth Chamber, 24th May, 2016) that his full defence rights have been met which is what s. 45 of the Act of 2003 and the provisions of the 2009 Framework Decision were designed to protect.

63. In this EAW, the issuing judicial authority had indicated that the person did not appear in person at the trial resulting in the decision and they indicated that they were relying on the equivalent of 2.1b and 2.2 in the Table to s. 45 of the Act of 2003 which is derived from Article 4a of the 2002 Framework Decision as amended by the 2009 Framework Decision. In the information as to how the relevant condition was met, it was stated that the notice in relation to the hearing concerning the aggregation of the sentences was served on him at his Polish address and received by his aunt who made an undertaking to pass the notification onto him. His solicitor was also notified of the hearing and requested that the hearing take place in the respondent's absence. He received an authenticated copy of the judgment and lodged an appeal against the judgment. That judgment was upheld by the Court of Appeal in Poznan. Further information has been provided to the court which bears out that the respondent did give a mandate to the legal counsellor to make this application. That in fact is confirmed by the respondent in his affidavit.

64. The issuing judicial authority were requested to complete a further point (d) in relation to the separate judgments that were imposed but did not do so in the context where they believed that they were entitled to rely upon what had been stated. The Court is not obliged at this point to make a decision as to whether that is a correct interpretation of the requirement of point (d) in the European arrest warrant or indeed s. 45 of the Act of 2003. The Court is, however, quite satisfied that if there be a defect in the completion of the form in that regard, it is a defect in form only and is not one of substance as all of the information has been provided in additional documentation. In so finding, the Court is cognisant of the decision of the Court of Appeal in the *Minister for Justice and Equality v. Palonka* [2015] IECA 69 to the effect that it is mandatory that the section does not permit any derogation or discretion in relation to compliance with s. 45 of the Act of 2003 or any part of it. The requirement in s. 45 of the Act of 2003 is to indicate the matters required by points 2, 3 and 4 of point (d) of an EAW and in this case, those matters have been indicated in the context of the overall information provided to the court. There is no injustice in surrendering the respondent in circumstances where all of the information has been provided and shows that in respect of each of these individual court cases as well as the overall court case the conditions required by the Table in s. 45 of the Act of 2003 and by the 2009 Framework Decision have been met.

65. In any event, the Court is quite satisfied that, in accordance with the decision of the CJEU in *Dworzecki*, the respondent's rights to defence, *i.e.* his fair trial rights, have been fully met in the issuing state. In all of those circumstances, the Court is satisfied that his surrender is not prohibited by s. 45 of the Act of 2003.

Conclusion

66. For the reasons set out above, the Court is satisfied that it may make an order that the respondent be surrendered to such other person as is duly authorised by Poland to receive him.