THE HIGH COURT

Record No. 2018/307 EXT

BETWEEN

MINISTER FOR JUSTICE AND EQUALITY

APPLICANT

AND

ADAM GRZEGORZ KRUPA

RESPONDENT

JUDGMENT of Mr. Justice Binchy delivered on the 5th day of June, 2019

1. By these proceedings, the applicant seeks an order for the surrender of the respondent to the Republic of Poland pursuant to a European Arrest Warrant ("EAW") dated 22nd May, 2018. The EAW was endorsed by this Court, in accordance with s. 13(2) of the European Arrest Warrant Act 2003 (as amended) ("the Act of 2003") on 8th October, 2018. It was issued by a judicial authority, namely the District Court in Jelenia Góra III Penal Department, by a District Judge in that District Court area.

2. An EAW previously issued on 18th June, 2010 (the "2010 EAW"), in respect of these and other offences. That was the subject of a hearing in respect of which a decision was delivered by Edwards J., *ex tempore*, on 5th November, 2013, whereby he refused to surrender of the applicant. I will address his reasons for refusal presently.

3. At the hearing of these proceedings on 1st May, 2019, I was satisfied that the respondent is the person in respect of whom the EAW of 22nd May, 2018, issued. Furthermore, the respondent did not place his identity in issue at the hearing of this application.

4. Additional information was sought by the applicant from the issuing authority by letter dated 12th October, 2018. A reply was received from the issuing judicial authority dated 16th October, 2018.

5. The respondent was arrested and brought before this Court on 14th February, 2019. Points of objection were delivered on behalf of the respondent on 27th February, 2019 and 29th March, 2019. The respondent swore an affidavit in opposition to this application dated 1st May, 2019. The hearing of this application took place on 1st May, 2019.

6. At the hearing of this application, I was satisfied that the EAW contains all the information required by s. 11 of the Act of 2013. I was also satisfied that the Court was not required to refuse the surrender of the respondent for any of the reasons set forth in ss. 21A, 22, 23 or 24 of the Act of 2013.

7. At para. B of the EAW, it is stated that the warrant is based upon three enforceable judgments:-

(i) A judgment of the Regional Court in Kamienna Góra of 19th August, 2003. Particulars of this offence are given in para. E of the warrant which states as follows:-

> "On 17th April, 2003, in Walbrzyska Street in Kamienna Góra, Lower-Silesian Provence, he was intentionally driving a vehicle Polonez registration number DKA J419 being in the state of insobriety (blood alcohol level at 9:50pm was 1,5 permil)."

At para. D of the EAW, it is stated that the respondent appeared personally at the trial in respect of this matter on 19th August, 2003, in respect of which he received a sentence of five months' imprisonment. At para. E of the EAW, it is stated that this offence carries a potential sentence of up to two years.

(ii) A judgment of the Regional Court in Kamienna Góra of 22nd February, 2006. At para. D of the EAW, it is stated that the respondent did not appear personally at the trial when judgment was pronounced. However, it is stated that during the course of pre-trial proceedings, the respondent had been informed by a public prosecutor of his rights and obligations, including the need to appear at the proceedings, and that he had been advised by the prosecutor of the possibility of concluding the proceedings without a trial, "if he applies for a penalty and passing a judgment". It is stated further that:

> "Adam Krupa also submitted the application on 13 January 2006 to take advantage of Article 335, para. 1 of the criminal proceedings code as well as the art. 387, para. 1 of the criminal proceedings code, namely to pass the judgment and to voluntarily submit himself to the penalty without conducting trial proceedings. In addition he submitted the statement on 13th January, 2006, which confirmed his place of residence and he obliged himself wherein to collect all the correspondence sent to indicated address".

The offence in this case, as described in para. E of the EAW, is described in the following terms:

> "On 23rd July, 2004, in Kamienna Góra, Lower-Silesian Provence, acting in order to obtain financial benefit, he made Kredyt Bank SA with a seat in Warsaw – Branch in Lublin, Krakowskie Przedmieœcie 37 misapply its property as he submitted false written statement on being employed in the company Transport Services Tokarczyk in Kamienna Góra (where in fact he did not work) in the shop Trade–Services of Wieslawa Stasiak in Kamienna Góra in order to obtain a credit to buy goods in the system of hire purchase, and as a consequence, he bought the washing machine "Indesit Wil 150" worth 1399zl, a microwave oven "Samsung" worth 349zl and curling tons "Philips" worth 159zl on the basis of a credit contract no. …. for the amount of 1.907zl thus acting to the detriment of the said bank."

The issuing authority ticked the "fraud" box in respect of this offence. This offence is stated at para. E of the EAW, to carry a penalty by way of sentence of imprisonment for a period of up to five years. In para. C of the EAW it is stated that the respondent was sentenced to a period of one year of imprisonment in respect of this offence.

(iii) The third enforceable judgment to which the EAW relates concerns five offences in respect of which the fraud box has also been ticked. These are stated to have occurred on different dates in July and August 2004. At para. D of the EAW, it is stated that the respondent did not appear personally at the trial when the judgment was pronounced, although he had been duly informed about its time and date. The date of the trial (and judgment) was 10th August, 2005. It is stated that he was familiar with the date and time of trial because notification in respect of same had been collected by his wife. It is also stated that he was sent the judgment, together with instructions in relation to his right to have the case re-examined, and that this judgment, and the instructions, were collected on 1st September, 2005 by his wife. The offences concerned are stated to carry penalties of up to eight years. The respondent was sentenced to two years' imprisonment.

8. It is apparent from the above that minimum gravity is established in relation to all offences.

Points of Objection

9. (i) The respondent contends that this application is an abuse of process in circumstances where this Court has already adjudicated on an earlier warrant in respect of the same offences, concluding at the time that the respondent should not be surrendered. It is further submitted that this fact should have been disclosed to this Court at the time of endorsement of the EAW.

(ii) The respondent contends that surrender is prohibited by s. 45 of the Act of 2003 by reason of the fact that it is clear from the face of the warrant that in relation to the second and third judgments, he was not summonsed in person to attend court and nor did he receive notification of the judgments. Moreover, the warrant does not state that he would be afforded the right to a retrial on these offences with which those judgments are concerned, if surrendered.

(iii) While the issuing authority has ticked the box indicating that the offences in respect of which surrender is sought are "fraud" offences, it is not clear from the warrant to which offences described in the warrant this relates, but it is clear that it could not relate to some of the offences referred to in the warrant.

(iv) Surrender should be denied because of the interference that it would cause to the private and family life of the respondent contrary to Article 8 of the European Convention on Human Rights, having regard to the delay in the issue of the warrant, relating as it does to offences dating back to a period between 2003 and 2006, with no reason being provided for the delay in circumstances where the respondent has at all times resided at the same address in this country.

Previous Decision on 2010 EAW

10. It is not in dispute that the offences with which the EAW is concerned were, together with other offences, the subject of the 2010 EAW. On that occasion, Edwards J. refused surrender. In relation to the first offence with which this EAW is concerned, he refused surrender because, having made inquiries, it was impossible to demonstrate correspondences with offence in Irish law by reason of the difficulty in showing correlation between the Polish scientific units used for the purposes of measuring blood alcohol, and the units used in Irish legislation. Having asked the issuing authority to provide the blood alcohol levels concerned in milligrams of alcohol per hundred millilitres, the applicant received a reply from the issuing authority dated 30th July, 2013, in which it was stated that, in Poland, "the alcohol level is measured only as percentage concentration of alcohol in blood or in milligrams per one cubic decimetre of exhaled air; therefore, the Court is unable to determine its level in milligrams per hundred millilitres of blood".

11. In the EAW the subject of this application, the blood alcohol level is stated to be "1.5 per mil". Upon receipt of this EAW, the applicant again raised the same query with the issuing authority, and was informed that "the amount of alcohol in the air exhaled by Adam Krupa was, on 29 per mil, which equals 0,645mg/dm3." This was the first suggestion that a breath sample was being relied upon by the issuing authority. All samples referred to up to that time were referred to as blood samples.

12. In any case, at the hearing of this application, the applicant was unable to put forward any evidence to the Court to demonstrate that the level of alcohol identified in the breath sample provided by the respondent in 2003, exceeds the levels permitted in this jurisdiction. As regards this offence, nothing at all had changed since the decision of Edwards J. in 2013. It follows that surrender must against be refused because it is impossible to demonstrate that the actions of the respondent on the occasion in question constituted an offence in Irish law.

13. In relation to offence No. 2, there is information in the EAW that was not in the 2010 EAW. This information is to the effect that the respondent applied, pursuant to provisions in the Polish Criminal Code to have judgment marked against him and a specific penalty imposed upon him. It is stated that he voluntarily submitted himself to that penalty, without the conduct of trial proceedings. It is further stated that he submitted a statement in which he confirmed his residence and that he obliged himself to collect all correspondence sent to him at that address.

14. In relation to this information, it is submitted that the EAW makes it clear that the applicant did not appear personally at the trial when judgment was pronounced and nor was he served with the decision of the Court or with notice of his right of appeal, or his entitlement to request a retrial within the applicable timeframe. It is submitted that these are requirements of s. 45 of the Act of 2003 and since these requirements have not been met, then surrender in relation to this offence should be refused. In substance, there is no difference between the information now set forth in the EAW now before the Court, and that in the 2010 EAW, on the basis of which Edwards J. refused to make an order of surrender in 2013.

15. Section 45 of the Act of 2003 is mandatory in its terms. If a person did not appear at the proceedings which resulted in the sentence in respect of which the EAW was issued, then surrender must be refused unless the EAW indicates that one of the matters set forth at paras. D.3.1 – 3.4 of the standard form of EAW applies. In this case, instead of ticking the relevant applicable boxes, all of the non-applicable paragraphs have been struck out except for para. D.3.3 which has been left in the EAW, but not in a form exactly as in the prescribed form. Paragraph D.3.3 of the EAW states:-

"Adam Krupa was sent the judgment at the indicated address, however, it was not collected. Notification about the letter was sent twice, though with no effect - / -

And

Or

> Adam Krupa failed to apply for re-examination of the case in due time and submit the appeal against the judgment."

16. This last paragraph is not in exact conformity with the standard prescribed form of EAW which requires that para. D.3.3 should state:-

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

17. So, therefore, the EAW states, in relation to this offence, that the respondent entered a written plea and submitted himself to a penalty, without the necessity for court proceedings. Presumably, therefore, for this reason the paragraphs that relate to service of a summons to court have been struck out from the EAW.

18. The EAW then goes on to state that the judgment was "sent" to the respondent at the address provided by him, on two occasions, and that the respondent did not then appeal against that judgment.

19. The procedure leading to the imposition of sentence on the respondent is not as envisaged by s. 45 of the Act of 2003, nor indeed by the Framework Decision itself. The Framework Decision 2002/584 in its original form permitted Member States to opt out of surrendering sentenced persons if they had been sentenced by trial in absentia. Framework Decision 2009/299 then addressed the problems associated with trials in absentia by requiring provision for surrender to be made in domestic legislation where certain conditions were met. However, these conditions did not include circumstances in which a person has entered a written plea, as a result of which the necessity to attend court did not arise under domestic legislation of the requesting State.

20. Moreover, para. D.3.3 of the EAW requires a statement, to the effect, that judgment was served upon the respondent, and not merely "sent" to him. If such a condition cannot be met, because of the absence or unavailability of the sentenced person, then the requesting State may overcome this difficulty by affording the requested person the choice of a retrial. That choice has not been exercised in this case either.

21. For all of these reasons, I consider that the surrender of the respondent, in connection with the second offence, is prohibited by s. 45 of the Act of 2003.

22. As regards the third offence, it remains subject to the same difficulty that arose at the time that Edwards J. delivered his decision in relation to the 2010 EAW. The sentence imposed on the respondent in connection with this offence was also imposed following a trial *in absentia*. As Edwards J. observed:-

> "It cannot be established that the respondent knew the time and date of the trial and the issuing State is not prepared to give an undertaking as to a retrial."

23. While it is stated on the EAW that the summons to court was collected by the respondent's wife and also that the notification of the judgment was collected by his wife, the same information was contained in the additional information submitted with the 2010 EAW. It is clear from the decision of the Court of Justice of the European Union (the "CJEU"), in the case of *Openbaar v. Pawel Dworzecki*, Case C-108/16 PPU ECLI:EU:C:2016:346, that such service is inadequate. In addressing the issue at para. 48 of its judgment, the CJEU stated:-

> "In order to achieve the objective referred to in that provision [i.e. Article 4a(1)(a)(i) of framework decision 2002/584], however, it must be unequivocally established that that third party actually passed the summons on to the person concerned."

24. Since that has not been established in this case, surrender in respect of this offence must also be refused.