THE COURT OF APPEAL

Mahon J

Edwards J

Hedigan J

Neutral Citation Number: [2018] IECA 204

Court of Appeal Record No. 2016 489

THE MINISTER FOR JUSTICE AND EQUALITY

And

Respondent

TOMASZ SKWIERCZYNSKI

Appellant

JUDGMENT of Mr Justice Hedigan delivered on the 27th day of June 2018

1. The surrender of the Appellant was sought by Poland (hereafter "the issuing state") from Ireland in order that a sentence of 5 months and 28 days be imposed pursuant to a European Arrest Warrant (hereafter "EAW") dated 3rd March, 2015. The sentence was imposed on 6th August, 2007 by Judge Robert Studzienny of the Regional Court in Gdansk, Poland in respect of one offence akin to attempted theft. The Appellant was tried and convicted *in absentia.*

Judgment of the High Court
2. The Court found that while the appellant had not been validly notified of the trial date, the notification of conviction and subsequent failed appeal was sufficient to comply with s. 45 of the European Arrest Warrant Act 2003 (as amended) (the 2003 Act) as the rights of the defence were not breached. The learned High Court judge held that the potential unfairness which the *in absentia* provision of s. 45 tries to avoid, has not arisen in this case as the appellant was notified of the judgment and exercised his right of appeal. It was further held that to literally interpret s. 45 and only allow surrender where the precise opt-outs are not met would be absurd. She stated as follows;

> "97. The Court has no doubt that the trial rights of this respondent were fully respected in the issuing state. He received notification of the judgment and exercised his right of appeal. To that extent there is no breach of Article 6 of the ECHR in the issuing state. There is no flagrant denial of rights and therefore there would be no breach of constitutional rights to surrender him. Moreover, the mischief that these trial *in absentia* provisions were designed to avoid, namely the potential for unfairness in such trials, has been abated in this case by the provision to this respondent of a right of an appeal which was in fact exercised.
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> […]
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> The plain intention of the Oireachtas is that surrender is not to be refused simply on the basis that the requested person's situation does not come within one of the exceptions set out in the Table to s. 45 provided that the High Court can be assured that his surrender does not mean a breach of rights of defence."

3. The High Court certified the following question for consideration by this Court:-

> *Where a requested person has been tried in absentia, but his/her situation does not come within one of the exceptions set out in the Table to the European Arrest Warrant Act, 2003 (as amended), may the High Court order surrender provided it can be assured that his/her surrender does not mean a breach of the rights of defence?*

Relevant Statutory Provisions
4. Under the Council (EC) Framework Decision of 13th June, 2002 (2002/584/JHA) (hereafter "the 2002 Framework Decision"), each member state may choose to prohibit surrender where there has been a trial *in absentia*, unless certain conditions are met. Ireland implemented the 2002 Framework Decision through section 45 of the European Arrest Warrant Act 2003 (hereafter "section 45"). The Council (EC) Framework Decision of 26th February, 2009 (2009/299/JHA) (hereafter "the 2009 Framework Decision") amended the 2002 Framework Decision and inserted article 4a, setting out the circumstances under which a member state may choose to surrender a person who has been tried *in absentia*. By an amendment to section 45 of the Act of 2003, Ireland implemented article 4a.

5. Section 45 as amended provides that a person shall not be surrendered unless the EAW indicates that certain conditions have been met. Attached to section 45 is a table, and EAWs are drafted to reflect the paragraphs within the table. Section 45 reads as follows:-

> *"A person shall not be surrendered under this Act if he or she did not appear in person at the proceedings resulting in the sentence or detention order in respect of which the [EAW] was issued, unless the [EAW] indicates the matters required by points 2, 3 and 4 of point (d) of the form of warrant in the Annex to the Framework Decision as amended by Council Framework Decision 2009/299/JHA, as set out in the table to this section.*
>
> *TABLE*
>
> *(d) Indicate if the person appeared in person at the trial*

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

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

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

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

OR

❒ 3.1b. the person was not summoned in person but by other means actually received official information of the scheduled date and place of the trial which resulted in the decision, in such a manner that it was unequivocally established that he or she was aware of the scheduled trial, and was informed that a decision may be handed down if he or she does not appear for the trial;

OR

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

OR

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

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

OR

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

OR

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

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

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

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

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

Background

6. The appellant was convicted *in absentia* on the 6th August 2007 in the District Court in Gdansk for the offence of attempting to take a hammer drill from a car with the intention of misappropriation and to the detriment of a named company on the 22nd February 2007. He was given a six month sentence of which five months and 28 days remain to be served. He appealed this judgment but his appeal was subsequently dismissed. It seems that he left Poland after his appeal. He was arrested in Ireland and detained pursuant to the EAW which was endorsed for execution in the High Court on the 21st April 2015. He was granted bail on the 7th January 2016. Following the High Court hearing, his surrender to Poland was ordered on the 24th October 2016. On the application of the appellant, the learned High Court judge agreed to certify a question for the Court of Appeal. The question certified on the 28th October 2016 was as cited above at paragraph 3.

7. The EAW that sought the extradition of the Appellant was in the form prescribed by section 45. The issuing state certified in the EAW that the grounds in section 45 under which a member state may refuse surrender did not apply in the present case. First, although the Appellant was not present for his trial, it could be shown beyond doubt that he had been made aware in advance of the trial date which was the 6th August, 2007. Personal service of the summons for the relevant trial was made on the adult brother of the Appellant on 14th June, 2007. Secondly, the EAW set out that the Appellant received a copy of the judgment concerning his conviction, and was "instructed" of his right to have his case reconsidered on the 24th August, 2007. It stated that the Appellant had failed to file an appeal within the relevant time-limit.

8. In response to this, the Appellant swore an affidavit stating that he recalled being arrested for the offence, but that was the last he heard of the matter from an official point of view. He also stated that he had not been served with the judgment of the said trial. Responding to this affidavit, the issuing state gave additional evidence on 13th April, 2016 that the Appellant had been personally served with the summons. Contrary to what had been indicated on the EAW, the issuing authorities stated that the appeal of the Appellant had been lodged, that it had been dismissed, and that the judgment became valid and final on 2nd October, 2007.

9. The issuing state in additional evidence given on 26th April, 2016 stated that the service of the judgment of the trial on the Appellant was evidenced by a mail receipt signed in person by the Appellant. The receipt was furnished to the Irish Authorities. It was stated that "the mail contained the judgment and the instructions on the right to appeal the concerned enjoyed, signed in person by

the requested subject".

10. In a subsequent affidavit, the Appellant accepted that the signature was his, but could not assist further as he had no recollection of receiving the judgment. No additional information was provided by the issuing state as to the extent of the appeal that took place, however as noted by the learned High Court judge, the Appellant did not dispute the fact of an appeal.

Appellant's Submissions
The Surrender of the Appellant was in breach of the clear and mandatory terms of section 45

11. Section 45 prohibits the surrender of a person who was tried *in absentia* in the issuing state unless certain conditions are satisfied as set out in the table thereto. It is submitted that none of the conditions set out in section 45 were met in the present case. The terms of section 45 are clear and mandatory: unless the conditions are met, a person tried *in absentia* should not be surrendered to the issuing state.

12. The appellant refers the court to the decision in *MJE v. Palonka* [2015] IECA 69, where the Court of Appeal emphasised the mandatory nature of section 45 and the table therein. Peart J. found that "insofar as there may be some conflict between the provisions of the Act on a literal interpretation, and an interpretation which conforms to the objectives of the Framework Decision, the latter interpretation would be contra legem." Peart J. further stated that "the provisions of s. 45 are very clear. Under section 16(1)(c) of the Act, surrender is prohibited unless the European arrest warrant states, where appropriate, the matters required to be stated by section 45."

13. It is submitted that the test applied by the learned judge, as to whether or not a breach of the rights of the defence occurred, is not the test to be applied. Such a test would confer an unintended and unfettered discretion to an executing state, as to whether or not a "breach of the rights of the defence" had been occasioned. The test to be applied is that surrender is prohibited unless the EAW states the matters required to be stated by section 45. There is no scope to add a discretionary ground to the closed, exhaustive grounds set out in section 45.

A literal interpretation of section 45 is the appropriate interpretation

14. Secondly, it is submitted that a literal interpretation of section 45 of the Act of 2003 is the appropriate interpretation. The fact that a person may have exhausted a right of appeal against an *in absentia* conviction in the issuing state is not a condition that permits a trial judge to order that person's surrender.

15. The Oireachtas has opted to use the certificate system in order to ensure uniform interpretation. To permit non-certified scenarios such as the one in the within proceedings (where purportedly the appellant exhausted his right to appeal) would result in discretionary and potentially differing interpretations as to precisely what constitutes a breach of the rights of the defence.

16. In *Openbaar Ministerie v. Pawel Dworzecki* (Case C-108/16 PPU, 24th May 2016), the Court of Justice of The European Union (hereafter "CJEU") emphasised that the EU legislature considered it necessary to provide *"clear and common grounds"* for allowing the surrender of persons tried *in absentia*. The purpose of the certificate was to introduce consistency into the outcomes in the executing states.

The learned judge erred in fact in finding that there was a full appeal

17. Even if the interpretation given by the learned High Court judge to section 45 is the correct interpretation, i.e. the surrender of the Appellant may be ordered in circumstances where his rights of defence were not breached, and that an appeal cures any cause for concern arising from the fact that the Appellant was not present at the first instance, it is submitted that there is no precise information as to the nature of the appeal that is asserted to have been enjoyed by the Appellant.

18. The only assertions made by the issuing state as to the nature of the appeal were that either the Appellant had failed to file his appeal in time, or that his appeal had been lodged and dismissed. Counsel for the Appellant points out the contradiction between the information in the EAW and the additional evidence given by the issuing state, in that it could not be true at the same time that the Appellant had failed to file his appeal in time and also that his appeal had been lodged and dismissed.

19. Further, it is submitted that the wording in the table in the EAW does not coincide with the wording set out in section 45. The EAW referred to a "factual consideration of the matter and admission of new evidence", whereas the characteristics prescribed in Article 3.3 of the table are an "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". It is clear therefore that section 45, envisages a full appeal on the merits of the case, of both facts and legal points, not just "a factual consideration of the matter". The critical factual finding by the learned judge in the High Court that there had been a full appeal was not evidentially supported.

Respondent's Submissions
Surrender may be granted even where the situation does not come within the terms of section 45.

20. It is submitted that the clear purpose of section 45 is to ensure that a person tried *in absentia* is not surrendered pursuant to an EAW where his or her rights of defence may have been breached. In the present case, the *in absentia* decision has been overtaken and remedied by the appeal lodged by the Appellant.

21. In *MJE v. Surma* [2013] IEHC 618, Edwards J. confirmed that the amendment to section 45 prompted by the 2009 Framework Decision was purely procedural in nature, and created no substantive right not to be surrendered where there has been a conviction *in absentia*:

> "Neither article 5(1) of Framework Decision 2002/584, nor article 4a(1) of Framework Decision 2009/299, created/creates a substantive personal right, assertable by a person who has been convicted in his/her absence, not to be surrendered on that account. It does not do so because not all trials conducted *in absentia* will have breached, or even may have breached, the overarching right to a fair trial guaranteed in Article 6 of the E.C.H.R., e.g., where the right to be present in person has been unequivocally waived, either expressly or tacitly. Moreover, even where there may be cause for concern in regard to a possible breach of the right to a fair trial, *the deficit is usually capable of being remedied where the person concerned is able subsequently to obtain from a court which has heard him a fresh determination of the merits of the charge, in respect of both law and fact."* (Emphasis added by Counsel for the Respondent).

22. In the present case, any cause for concern which might have arisen from the initial conviction *in absentia* has already been remedied, by the determination of an appeal which the Appellant himself lodged.

23. Surrender may be granted even where the situation does not come within the terms of section 45, if there is no unfairness to the requested person as regards their fair trial rights. In *Dworzecki*, the CJEU stated:

> "50. Furthermore, as the scenarios described in Article 4a(1)(a)(i) of Framework Decision 2002/584 were conceived as exceptions to an optional ground for non-recognition, the executing judicial authority may in any event, *even after having found that they did not cover the situation at issue, take into account other circumstances that enable it to be assured that the surrender of the person concerned does not mean a breach of his rights of defence.*
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> 51. In the context of such an assessment of the optional ground for non-recognition, the executing judicial authority may thus have regard to the conduct of the person concerned. It is at this stage of the surrender procedure that particular attention might be paid to any manifest lack of diligence on the part of the person concerned, notably where it transpires that he sought to avoid service of the information addressed to him."

24. It is submitted that the Court of Justice has thus clearly held that surrender may be ordered even where none of the Article 4a exceptions apply. The Respondent submits that this interpretation is consistent with *MJE v. Lipinski* [2016] IECA 145, commenting that the 2009 Framework Decision's "objective was to bring greater clarity to the existing arrangements, and not to alter them in a substantive way."

25. It is submitted that Article 4a of the Framework Decision, as interpreted by the Court of Justice in *Dworzecki*, does not require that one of its listed exceptions apply before surrender can be ordered, provided that the executing judicial authority can be satisfied that surrender would not result in a breach of the rights of defence.

Purposive Interpretation of Section 45

26. It is submitted that section 45 ought be interpreted in a purposive manner so as to allow for surrender following an *in absentia* conviction if the rights of the defence are clearly provided for. In the present case, there has been an appeal, lodged by the Appellant himself. A purposive interpretation of section 45 and one which would conform with the obvious objectives of the 2009 Framework Decision is that, where the person convicted *in absentia* has already availed of a right to appeal, surrender is not prohibited. The mischief which the 2009 Framework Decision set out to address (that being unfairness resulting from an *in absentia* conviction) is simply not present in this case, where the earlier *in absentia* decision has been overtaken by and remedied by the appeal.

27. It is clear from the terms of paragraph 3.3 of the Table in section 45 that surrender will not be prohibited where there exists a future opportunity to lodge an appeal. It would be absurd to read section 45 so as to mean that surrender should be prohibited where there has been a past opportunity to lodge an appeal and that appeal process has been exhausted. The clear implication of section 45 is that the opportunity to appeal an *in absentia* conviction cures any potential cause for concern arising out of the fact that the requested person was not present at first instance.

28. It is submitted that it is appropriate to apply section 5(1)(b) of the Interpretation Act 2005 as was done by the learned High Court judge in this case, resulting in a purposive interpretation of section 45. This means that surrender may be ordered where none of the exceptions in section 45 apply, provided that the trial judge can be satisfied that surrender would not result in a breach of defence rights. In the present case, where the Appellant has already availed of an appeal from the *in absentia* conviction, it is clear that his defence rights would not be breached by his surrender.

The Nature of the Appeal

29. The Appellant's contention that there was "no evidence whatsoever" to demonstrate that he had been entitled to or availed of a full appeal ignores the evidence contained in the Warrant itself. It is stated at paragraph 2.1(d) of section D of the EAW that the Appellant was expressly instructed of his right to participate in a reconsideration or in an appeal "both enabling factual reconsideration of the matter and admission of new evidence, and both leading potentially to the quashing or changing of the original judgment".

30. The Appellant dismisses the description of the appeal in the EAW on the basis that the wording in the English version of the EAW is not the same as the wording set out in Article 4a of the Framework Decision or section 45 of the 2003 Act. However, as was accepted by the learned High Court judge, the relevant paragraphs in the original Polish version of the EAW are identical to those in the Polish version of the 2009 Framework Decision, "apart from some very minor reordering of words". It therefore is submitted that the Appellant's dismissal of the evidence contained in the EAW on the basis that different wording is used in the English translation of the EAW is unjustified.

31. Without prejudice to the foregoing, it is submitted that the wording used in the English translation of the EAW clearly describes a broad appeal which is sufficient to protect the defence rights of an accused who was absent when convicted at first instance. The Appellant's contention that legal issues could not have been reconsidered as part of the appeal is highly speculative, and ignores the mutual trust and confidence which underpins the EAW system. The Appellant lodged the appeal and accordingly it is open to him to provide evidence in relation to the nature and extent of the appeal which was offered. No such evidence has been offered. The Appellant has stayed silent on the issue of the appeal. It is submitted that he has clearly failed to establish that the appeal of which he availed was inadequate.

Supplementary Submissions of the Respondent

32. The Court granted liberty to the parties to file supplemental submissions in the event of judgment being given in the cases of *Openbaar Ministerie v. Tupikas* (Case C-270/17 PPU, 10th August 2017) and *Openbaar Ministerie v. Zdziaszek* (Case C-271/17 PPU, 10th August 2017) both references from Dutch courts to the CJEU, in the event of those judgments being of relevance to the present proceedings. Judgments in both cases were delivered on 10th August, 2017 and it is submitted that the judgments are of pointed and explicit relevance to the instant case.

33. *Tupikas* concerned a request for surrender from Poland. He had appealed a sentence of 2 years, however the EAW contained no information as to his being present or even aware of the appeal proceedings. The question posed by the Dutch court was whether or not the focus should be on the trial at first instance, or the appeal procedure that affirmed the conviction and sentence. The CJEU held:

> "81. Consequently, in the event that proceedings have taken place at several instances which have given rise to successive decisions, at least one of which was given *in absentia*, it is appropriate to understand by 'trial resulting in the decision', within the meaning of Article 4a(l) of Framework Decision 2002/584, the instance which led to the last of those decisions, provided that the court at issue made a final ruling on the guilt of the person concerned and imposed a penalty on him, such as a custodial sentence, following an assessment, in fact and in law, of the incriminating and exculpatory evidence, including, where appropriate, the taking account of the individual situation of the person concerned.
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> […]
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> Accordingly, it is at that procedural stage that the person concerned must be able to fully exercise his rights of defence in order to assert his point of view in an effective manner and thereby to influence the final decision which could lead to the loss of his personal freedom.
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> […]
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> In those circumstances, even assuming that the rights of the defence have not been fully respected at first instance, such a breach may validly be remedied in the course of the second-instance proceedings, provided that the latter proceedings provide all the guarantees with respect to the requirements of a fair trial."

34. Counsel for the Respondent submits that there is express and unambiguous evidence that the Appellant appealed the first instance decision himself. It follows from Tupikas that the suggested defects as regards the first instance procedure are irrelevant, given that appeal proceedings were instituted by the Appellant.

35. In *Zdziaszek* the CJEU considered whether or not surrender could be ordered where the issuing judicial authority had not actually provided certification of one or more of the circumstances under article 4a, but the executing judicial authority was of the opinion that there had been no interference with the rights of the defence. This is of explicit relevance to this case. In essence it is the very same issue that arises in this case. The CJEU concluded:

> "107. Accordingly, the Court has already held that the executing judicial authority may, even after it has found that those cases do not cover the situation of the person who is the subject of the European arrest warrant, take account of other circumstances that enable it to ensure that the surrender of the person concerned does not entail a breach of his rights of defence (see, to that effect, judgment of 24 May 2016, Dworzecki, C-108/16 PPU, EU:C:2016:346, paragraphs 50 and 51).
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> 108. Thus, Framework Decision 2002/584 does not prevent the executing judicial authority from ensuring that the rights of defence of the person concerned are respected by taking due consideration of all the circumstances characterising the case before it, including the information which it may itself obtain."

36. The analysis of the learned High Court judge in the present case mirrors that of the CJEU to the issues in Zdziaszek. The CJEU commented:

> "[…] he had a full appeal of his conviction *in absentia*. Such an appeal unquestionably ensures that his Article 6 rights under the ECHR have been met and that there has been no unfairness in the provision of a trial *in absentia*."

37. It is submitted that *Tupikas* and *Zdziaszek* are fatal to the Appellant's case. *Tupikas* makes clear that no actual issue in relation to trial *in absentia* arises in circumstances where the alleged defect concerns a first instance procedure that was appealed. *Zdziaszek* conclusively answers the question certified for the purpose of the appeal in a manner adverse to the Appellant.

Supplementary Submissions of the Appellant

38. The finding in the High Court that a "full appeal" took place is unsupported by the evidence. The evidence cannot on any rational view support a finding that there was such an appeal hearing. In fact, there is no express evidence that there was an appeal hearing of any kind.

39. It is accepted that the judgments in *Tupikas* and *Zdziaszek* mean that if the Appellant had enjoyed a full appeal on the merits which was heard on notice to him (notwithstanding that he had been tried *in absentia* at first instance) his surrender would not breach Article 4a of the Framework Decision. This Court however would search in vain for evidence of a "full appeal" or an appeal that safeguarded the rights of the defence in the present case.

40. It is submitted that the issuing state did a complete turnabout as regards the scope and content of the appeal in question. Initially, it was stated that the Appellant was convicted *in absentia*, served with the judgment and instructions as to his rights and that he did not appeal. When information was requested from the issuing state as to the manner in which the Appellant was served with the first instance judgment, it was stated by the issuing state that the Appellant lodged an appeal, and that this appeal was not granted and the first instance judgment became final. No explanation has been given as to the two contradictory positions as to what happened regarding the appeal.

41. Basic information about the alleged appeal has not been provided by the issuing state, such as: the name of the appellate court; the date of the appeal hearing; the nature of the appeal hearing; any notification of the appeal hearing; the Appellant's attendance at an appeal hearing.

42. *Tupikas* implies that an appeal constitutes a "trial" within the meaning of article 4a if the appeal hearing involves a fresh assessment of the merits of the case. *Zdiaszek* states that if after one is convicted and sentenced, and subsequent proceedings are conducted where there is a discretion to amend the sentence previously imposed, such proceedings must also be taken into account for article 4a purposes.

43. *Tupikas* and *Zdziasek* make clear that the occurrence of a full appeal on the merits can permit surrender where the first instance trial was conducted *in absentia*. However, in order for the issuing authority to rely on this, the same level of information as set out in section 45 must be provided in respect of the full merits appeal. Detailed information about such an appeal is required in order to ensure the rights of defence are not breached. The finding of the High Court that the Appellant enjoyed a full appeal is untenable.

44. It is submitted that section 45 offers protection above and beyond that offered by the Framework Decision in that the Oireachtas has legislated for a mandatory ground of refusal. It is submitted in passing that given the judgments in *Tupikas* and *Zdziasek*, section

45 is now in breach of the State's obligations under the Framework Decision as the section cannot be interpreted *contra legem*. The decisions in *Tupikas* and *Zdziasek* are in line with the finding of the learned High Court judge in the present case, who held that the phrase "shall refuse" in section 45 meant "may refuse" because the section is enacting into the law of Ireland optional grounds for non-surrender. However, this task of deciding whether or not section 45 is in breach of the European obligations of the State does not arise, as it is impossible for the Respondent to show that there was a "full appeal".

Second Supplemental Submissions of the Appellant
45. When the present appeal was heard by this Court on 4th July 2017, a decision of the Supreme Court was pending in *Minister for Justice and Equality v. Lipinski* [2017] IESC 26. The Supreme Court decided that it would make a preliminary reference to the CJEU. In light of the two judgments in *Tupikas* and *Zdziasek*, the Supreme Court withdrew its reference to the CJEU in *Lipinski*. The Supreme Court deferred giving judgment in Lipinski pending the determination of a preliminary reference made to the CJEU in the Dutch case of *Rechtbank Amsterdam v. Ardic* (Case C-571/17 PPU, 22nd December 2017).

46. The surrender of *Ardic* was sought by Germany from the Netherlands in order that two custodial sentences might be executed. The sentences were imposed in 2009 and 2010 following trials for which Mr Ardic was present in person. Having served a portion of each sentence, the German court suspended the balance of the two sentences for a particular period and on conditions. In April 2013, the German court revoked the suspended sentences and ordered that the remainder of the sentences be executed on the ground that Mr Ardic had breached the conditions attached thereto, including on the basis that he had evaded probation supervision. Mr Ardic was not present for the hearings at which the suspended sentences were revoked, nor was he notified of such hearings i.e. the suspension revocation decisions were handed down *in absentia*.

47. The issue for the CJEU was whether or not each hearing at which the suspended sentences were revoked was a "trial resulting in the decision" in terms of article 4a. The CJEU held that article 4a:

> "must be interpreted as meaning that the concept of 'decision' referred to therein relates to the judicial decision or decisions concerning the criminal convictions of the interested person, namely the decision or decisions that definitively rule, after an assessment of the case in fact and in law, on the guilt of that person and, where relevant, on the custodial sentence imposed on him."

48. After *Ardic*, the Supreme Court delivered its judgment in Lipinski. the Supreme Court held that "trial" within the meaning of article 4a does not include a hearing where suspension of a sentence is revoked, unless the decision changes the nature or the level of the sentence imposed. Clarke C.J. considered the fact that Mr Lipinski was not present for his appeal hearing:-

> "[…] it was, in substance, clear on the facts, that the circumstances permitting surrender were present because Mr. Lipinski was fully represented at and aware of his appeal. The potential difficulty stemmed from the fact that the [EAW] document did not contain that information, as the Framework Decision standard form suggests that it should.
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> […]
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> [A] court could and should assess whether the objective factors permitting surrender in the absence of actual presence of the accused at a relevant hearing, were present even though the [EAW] document did not contain an appropriate reference to those facts."

49. In the present case, there is no evidence as to the nature of any appeal nor of compliance with article 4a in respect of any such appeal. On this basis alone, and in light of the CJEU judgment in *Tupikas* and the Supreme Court decision in *Lipinski*, it is respectfully submitted that the appellant's appeal must be allowed.

50. Finally, in circumstances where all Polish European arrest warrant cases in the High Court (regardless of whether or not surrender is sought for prosecution or for execution of a custodial sentence) are being adjourned pending the outcome of the reference made by the High Court in Minister for Justice and Equality v. Celmar No. 3 [2018] IEHC 153, it is respectfully submitted that the present appeal should not be determined pending the outcome of same.

Second Supplemental Submissions of the Respondent
51. The appellant contends that the decision of the CJEU in *Ardic* and the related decision of the Supreme Court in *Minister for Justice v. Lipinski* are authorities in favour of non-surrender in this case. This is simply not so. The issue under consideration in both those cases was whether a process of activating a suspended sentence should be regarded as a trial for the purposes of article 4a and thereby attract the same requirements in terms of notification. In Lipinski, following from the decision of the CJEU in *Ardic*, the Supreme Court held that "trial" within the meaning of article 4a does not include a hearing where suspension of a sentence is revoked, unless the decision changes the nature or the level of the sentence imposed. *Ardic* and subsequently Lipinski clearly affirmed the conclusions reached in *Tupikas* which are wholly dispositive of the appellant's case. It was held in *Tupikas* that defects as regards first instance procedures are irrelevant if a person subsequently enjoys a right to a full appeal, in accordance with the framework decision. In the present case, there is express and unambiguous evidence that the appellant appealed the first instance decision himself. In line with *Ardic, Lipinski* and *Tupikas*, the appeal enjoyed by the appellant cured any defects in the first instance procedure. The present appeal should therefore be dismissed.

52. The appellant's suggestion that the present appeal ought not be determined pending the outcome of *Celmer* is a wholly opportunistic one. The appellant never sought to raise any issue in relation to the Polish criminal justice system before the High Court. Moreover, it ignores the reality of the appellant's situation as distinct from that of *Celmer*. The appellant is not facing a trial or re-trial in the event of surrender. He has already been tried, and appealed the finding of that trial, and has raised no complaint in relation to same save for the issue of whether or not article 4a has been adequately complied with.

Decision
53. This appeal is one that is brought "on a point of law only" pursuant to s. 16(12) of the 2003 Act. However the role of the Court of Appeal is not limited to simply answering the question of law posed to it by the learned High Court judge. This is clearly established in the case of *Minister for Justice v. Connolly* where at para. 21- 23 Hardiman J. stated as follows:

> "It will thus be seen that, in the case just cited, once an appeal was found to lie, the fact that such appeal could only raise 'a point of law only' did not prevent this Court, once seised of the appeal, from reversing the trial judge's refusal to deliver the respondent out of the State on a ground which was manifestly and purely factual. This was whether the respondent was on risk of dying, as opposed to merely suffering a further acute coronary event which 'might well prove catastrophic in further limiting heart muscle pump function'. Though this is clearly a technical matter, it is equally clearly

not a 'point of law'.

22. It appears to me that this resolution of *Minister for Justice v. S.M.R.* [2007] IESC 54, [2008] 2 IR 242 can only have been possible on the basis that, however restrictive the right to initiate an appeal might be, once it has been properly initiated so that the Supreme Court is seised of it, this Court can decide any issue and make any order which the High Court decided, or might have decided.

23. I therefore think that it is open to this Court in the present appeal to consider any point which arises, and not simply the particular point which was certified."

54. In the appellant's grounds of appeal at para. 4 it is claimed that the evidence did not support the learned High Court judge's finding that the appellant had had the benefit of a full appeal. In his submissions at para. 19, the appellant claims that there was no evidence whatsoever to show that he had been entitled to or availed of a full appeal. In submissions in court, Mr. Munro, senior counsel on his behalf submitted that there was no evidence of a proper appeal. He pointed out that the Polish authorities initially stated that the appellant had not applied for an appeal but now stated that he did and that it was rejected. Finally, the appellant in his submissions at para. 40 argues that the appeal described in the EAW referred to a factual consideration of the matter and the admission of new evidence. He argues that this does not equate to a full appeal on the merits and on the law.

55. In considering this appeal it is useful to observe that the role of the High Court in dealing with EAW matters is in the nature of an inquiry. The High Court must be satisfied of the matters set out at s. 16 of the EAW Act. There is however in this regard a duty of candour on the part of the person whose surrender is sought. It is of some significance that the appellant has remained silent on what has become one of the central points in the case i.e. did he or did he not appeal. The issuing authority initially in the EAW form opted for the subparagraph that indicated the appellant did not appeal. Subsequently by a letter of the 13th April 2016, the issuing authority stated that he had lodged an appeal but it was dismissed. When the inconsistency of this was pointed out by the Irish authorities, the issuing authorities responded by providing a mail receipt acknowledgment slip signed by the appellant. This demonstrated that he had in fact been served with the judgment which included instructions on his right to appeal. He acknowledged his signature. This was notwithstanding his previous sworn statement that the last he ever heard of the case was when he left the police station following his arrest and that he was not served with notice of the judgment. This inevitably calls his credibility into question.

56. In the light of the judgments of the CJEU in the *Tupikas* and *Zdziaszek* cases it is now conceded that if the appellant had the right to a full appeal in accordance with the framework decision then any defect that might have arisen in relation to the first instance trial is cured thereby. The evidence contained within the EAW shows that the appellant did have a right of appeal. In the light of the appellant's silence in the face of the issuing authority's statement that he did appeal and that that appeal was dismissed I can find no basis for disagreeing with the finding of fact made in this regard by the learned High Court judge to the effect that he did appeal and that his appeal was dismissed. Thus any defect in the first proceedings is clearly cured. The argument is made that because the EAW merely refers to a factual reconsideration and the admission of new evidence but does not refer to admission of legal argument means that legal argument would be precluded is a thoroughly hypothetical one and equally improbable. Lastly, the argument that Article 45 of the 2003 Act (as amended) cannot be interpreted so as to allow for surrender where an appeal has actually been taken is untenable. I agree with the learned High Court judge's judgment that such an interpretation cannot be correct. It would be absurd if a person could be surrendered where there was available an appeal on return but not where an appeal was available and had actually been taken.

57. In further submissions delivered following the recent Supreme Court judgment in *Lipinski,* the appellant submits that the decision of the CJEU in *Ardic* and the related decision of the Supreme Court in Lipinski are authorities in favour of non-surrender in this case. However, the issue in both those cases concerned activation of a suspended sentence and whether that should be regarded as a trial for the purposes of Article 4A. Did such a trial attract the same requirements in terms of notification? The Supreme Court has held in Lipinski that trial within the meaning of Article 4A does not include a hearing where suspension of a sentence is revoked unless the decision changes the nature or the level of the sentence imposed. *Ardic* and subsequently Lipinski affirm the conclusions reached in *Tupikas* which are dispositive of this case. It was held in *Tupikas* that defects in first instance procedures are irrelevant if a person subsequently enjoys a right to a full appeal. As decided above, the appellant appealed the first instance decision. This appeal as also noted above, in accordance with *Ardic, Lipinski* and *Tupikas*, cured any defects in the first instance procedure.

58. The question asked by the High Court may be answered affirmatively. The appeal should be dismissed.

59. This Court was asked to refrain from delivering judgment until the *Tupikas* and *Zdziaszek* judgments were delivered by the CJEU. That has now occurred. We are asked to further delay delivery of judgment in order to await the result of the reference to the CJEU in the case of *Celmar No.3*. I can find nothing in the issues referred that would affect the decision of this Court on the question of law which has been submitted to it. There is therefore no further reason to delay.