[2019] IEHC 544

THE HIGH COURT

[2018/81 EXT]

[2018/99 EXT]

BETWEEN

MINISTER FOR JUSTICE AND EQUALITY

APPLICANT

AND

JANUSZ MAZURKIEWICZ

RESPONDENT

JUDGMENT of Ms. Justice Donnelly delivered on the 24th day of June, 2019

The issue

1. Extradition agreements generally, and the European Arrest Warrant ("EAW") system specifically, permit state parties to require that, as a condition of the extradition, the requesting state will refrain from prosecuting or enforcing a penalty for offences other than the offence for which the requested person has been extradited, unless certain conditions are met. Conditions may include a requirement that consent to prosecution/detention be obtained from the extraditing State or that the extradited person expressly permits such prosecution or detention to take place. This is known as the rule of specialty.

2. Ireland requires the requesting member state to commit to the rule of specialty when it agrees to surrender a person under the provisions of European Arrest Warrant Act, 2003, as amended ("the Act of 2003"). In the present case, the rule of specialty was breached on the occasion of this respondent's previous surrender to the Republic of Poland ("Poland").

3. The main issue in these proceedings is whether the making of orders of surrender of the respondent pursuant to s.16 of the Act of 2003 in respect of two new EAWs would amount to an abuse of process. A related issue is whether the presumption set out in s.22(2) of the Act of 2003, that a member state will not breach the rule of speciality, has been rebutted.

Background

4. On the 19th March, 2010, the respondent was surrendered to Poland for the purpose of prosecution pursuant to an EAW in respect of an offence of theft of a mobile phone and a wallet. In the present proceedings 2018/99 EXT, by way of an EAW dated the 9th January, 2012 ("EAW B"), the surrender of the respondent is sought by the Circuit Court of Rzeszów as issuing judicial authority, to serve four months and 26 days remaining from the sentence of two years and two months' imprisonment imposed upon him on the 14th May, 2010 in Poland for the theft of that mobile phone and wallet. In the EAW dated 2nd February, 2016 ("EAW A") in proceedings 2018/81 EXT, his surrender is sought by the Regional [Both courts are described as "Sąd Okręgowy", the difference between Regional and Circuit is as a result of the translation. In later letters from those courts, the term used is Regional Court and that will be followed in the rest of this judgment] Court in Szczecin as issuing judicial authority, to serve one year, four months and twenty-nine days remaining from an aggregate penalty of one year and five months' imprisonment imposed upon him in respect of an offence of theft and drink driving. That sentence was imposed on him in his absence by the Szczecin-Centrum District Court in Poland on the 20th July, 2010.

5. On the 14th May, 2010, following his conviction, the District Court of Rzeszów released him from preventative detention. As is familiar to these courts by now, pre-trial detention in Poland is treated separately from any subsequent requirement to serve a sentence of imprisonment. A person convicted in Poland is often not required to serve the sentence imposed immediately. Instead, the position is that the person may be released and called upon at a later time to serve the actual sentence imposed. In those circumstances, a separate process of enforcement of the sentence usually begins with a request to a person to attend at a prison to serve their sentence leading to the issuing of a warrant for their arrest to serve that sentence if necessary.

6. In circumstances where the preventative detention of the respondent was no longer mandated by the Rzeszów District Court, the respondent should have been released from custody. I am satisfied that he was not so released, but was kept in custody up to the 10th June, 2010 in respect of a Gryfino District Court conviction for driving whilst being drunk. This amounted to a sentence of 90 days ultimately imposed upon him because of his failure to comply with community service. No request for his detention on that offence had been made to, or granted by, the High Court in this jurisdiction. The respondent had not consented to his detention on that offence. This is the breach of specialty at issue in the case.

7. As will become clear when the facts are set out in more detail, he had given explicit consent to being prosecuted for the offences set out in EAW A and no breach of the rule of specialty was made in respect of those offences. The respondent's point of objection raised the issue of a breach of specialty in relation to those offences.

The Present Proceedings

8. The course of the present EAW proceedings in this jurisdiction was not smooth. The respondent swore an initial affidavit that raised some issues about trial *in absentia* but his averments did not provide clarity as to the true situation. The issue as regards breach of specialty as regards the offences contained in EAW A was raised but that was not pursued in light of the information given by the issuing judicial authority. Moreover, the respondent said that he was released from prison in Poland and was unaware of any obligation to remain in Poland. This does not take into account that he was present at the time his sentence was imposed in respect of the offence set out in EAW B and therefore must have known he had a further sentence to serve. That sentence remained outstanding no matter whether there was a condition to remain in Poland or otherwise. He stated he was in custody in Poland until the 10th June, 2010 but did not provide any confirmation of this. He did not refer to having served another sentence.

9. When the matter came on for hearing on the 27th November, 2018, the respondent brought documentation with him, in the Polish language, appearing to indicate that he had been in custody beyond the 14th May, 2010 in respect of an offence other than that for which he had been sentenced. At that point, I permitted the court translator to give evidence in respect of the document. That evidence supported the view that he had been in custody up to 10th June, 2010. This raised at a minimum an issue as to whether he had been given full credit for time spent in custody, because EAW B indicated that he had been in custody up to the 14th May, 2010.

10. Of further note is that while in prison on the 10th June, 2010, the respondent was served with a summons to appear at Szczecin District Court on the 20th July, 2010 in respect of the charges forming the subject matter of EAW A. The date had been wrongly

indicated in EAW A as the 7th October, 2008, but was clarified as being incorrect in further information obtained from the issuing judicial authority. The correct date was 10th June, 2010 and the information was that he collected the summons in person. When the respondent queried this, further information was requested of, and provided by, the issuing judicial authority. The information established without doubt that he had been served in the prison before he was released on the same day. He signed for the summons. The respondent in his final affidavit stated that he does not recall receipt of the summons but accepted that he signed many documents on his release.

11. Despite having been released from prison, the respondent did not attend court in relation to the prosecution for the offences on EAW A. He was sentenced in his absence to one year and five months' imprisonment. I am satisfied on the basis of the information received that the summons was in fact personally served on him and acknowledged by him through his signature. I am satisfied by virtue of the service personally on him that his surrender is not prohibited under s. 45 of the Act of 2003 arising out of the trial *in absentia*.

Information provided by the Issuing Judicial Authorities

12. Following the hearing before me on the 28th November, 2018, the central authority sent a letter to the Polish judicial authorities seeking further information in respect of the warrants. In particular, further information was sought as to the time he had spent in custody from the 14th May, 2010. At that point, the focus in the proceedings was whether the time he had spent subsequently in custody had actually been taken into account in the calculation of time in custody.

13. By letter dated the 11th December, 2018, the Regional Court in Szczecin (dealing with EAW A) sent a reply revealing the respondent had been in custody on remand up to 10th June, 2010. In response to that, the central authority sent another request seeking an explanation as to how he had been in custody for a matter unrelated to either of the present EAWs when he had been surrendered to Poland in March, 2010 in respect of an EAW for a specific purpose.

14. By letter dated 11th January, 2019, the Regional Court in Szczecin replied, saying that they could not fully answer this question. They stated that the only information was that he had been imprisoned in case VIL 73/02 conducted by the District Court in Gryfino.

15. Following a further hearing at which this Court expressed concern, a further request for information under s. 20 of the Act of 2003 was sent. The request highlighted the concern of the High Court about the apparent breach of the rule of specialty as consent was required before he could have been detained on any other matter in accordance with Article 27(4) of the Framework Decision of the 13th June, 2002 on the European arrest warrant and the surrender procedures between Member States ("the Framework Decision"). A series of specific questions was asked by the High Court, including whether the High Court could be assured that such a breach of speciality will not occur again if the requested person was returned.

16. By reply dated the 12th February, 2019, the Regional Court in Rzeszów stated that in accordance with the cited provisions of Polish law, a person surrendered as a result of executing an EAW cannot be prosecuted for crimes other than the ones which constitute the basis of surrender, nor can the imposed custodial sentences or detention orders for such crimes be executed unless certain conditions are met. Those conditions are in effect those set out in the Framework Decision. The issuing judicial authority also said that it could not respond to the issues that had been raised as it did not possess the files in respect of those proceedings.

17. The Regional Court in Szczecin replied on the 19th February, 2019 which included a letter from the District Court of Szczecin-Centre. That letter said that they did not have any information about the judgment in Gryfino which would allow them answer the questions. The letter of the Regional Court also stated that they wish to inform the Court that the case VIK 73/02 of the District Court in Gryfino did not concern the present European Arrest Warrant. This Court takes the view that this statement demonstrated a lack of understanding of the concern of this Court about the apparent breach of the rule of specialty.

18. The enclosed letter from the District Court in Szczecin-Centre, stated, *inter alia*, that the court there did not intend to proceed against the respondent for any other case and that the principle of specialty will be applied to him in the future. The District Court also expressly stated that they had "*never maintained, that the principle of speciality has no application with respect to the person of Janusz Mazurkiewicz and this principle will be applied also in future*." The District Court stated that, in a letter dated 22nd April, 2010, the respondent had expressed his consent to prosecute him in respect of the case file in respect of which his surrender is sought in EAW A.

19. A further request for information was sent by the central authority on the 7th March, 2019, seeking information about the nature of the offence in Gryfino and also asking about the status of that case. Information was requested as to why the consent of the Irish High Court was not sought for the requested person's detention when he had been returned on foot of the earlier European Arrest Warrant.

20. By letter dated 18th March, 2019, the Regional Court in Szczecin enclosed a reply of the District Court in Gryfino. In that reply, the Gryfino District Court gave information about the nature of the offence (drunk driving) and the imposition of the original penalty on the 23rd May, 2003. A penalty of six months and a duty to provide unpaid social work for 30 hours a month had originally been imposed together with a further penal penalty and a ban on driving. That letter simply stated that at present, all aspects of the proceedings had been dealt with. It also said that the District Court was not able to provide any more details relating to the case, as the case files had been destroyed in 2014.

21. Having heard the submissions and having received a further affidavit from the respondent making claim as to breach of specialty in respect of this offence, this Court sought further precise information as to how this breach of specialty arose. By letter dated the 7th May, 2019, the history of the communications to date and the High Court's concerns were set out in detail. Reference was made to the specific objection the requested person claimed he had made to his detention to the District Court in Gryfino by letter from Rzeszów in or around early May, 2010. Records were sought from the authorities in Poland including the Ministry of Justice, the Central Authority of Prisons, or the Public Prosecution Service which might explain what had occurred. The request also stated that the High Court might consider it helpful if the various authorities could explain how the rule of specialty might be specifically upheld in this particular case if surrender was ordered.

22. By reply dated the 13th May, 2019, the Regional Court in Szczecin sent the answer of the District Court in Gryfino. The District Court in Gryfino, by letter dated 10th May, 2019, stated that the penalty of the restriction of freedom of six months was referred for enforcement to the District Court in Stargard. On the 16th March, 2005, the District Court in Stargard changed the unfulfilled penalty of restriction of freedom into a substitute penalty of deprivation of freedom of 90 days in length. It stated: -

> *"[f]rom the information of the penitentiary establishment in Lupkow, it follows, that [the respondent] was serving the above penalty in the period from the 6th April 2010 to the 10th June 2010 because on the 9th June 2010, the District*

Court in Stargard issued an order of release".

23. The judge of the Criminal Division of the District Court in Gryfino stated that in a telephone call with the District Court in Rzeszow, she established that the respondent had a judgment passed on him on the 14th May, 2010 for a penalty of two years and two months. She then enclosed documents sent by the penitentiary establishment of £upków. She also said that they were not in possession of any other documents connected with the case VIK 73/02.

24. Amongst the enclosed documents was a letter dated the 9th April, 2010 from the deputy director of the penitentiary establishment in Rzeszów to the Gryfino Court. In that letter the deputy director asked for a decision regarding the execution of the penalty of 90 days for "the clearing up of doubts". He stated that the prisoner had been taken over from Dublin to Poland on the 19th March, 2010 on the grounds of a European Arrest Warrant. The deputy director then asked for a decision –

> *"whether in respect of the temporarily arrested person the Article 607 E subs. 1 of the Code of Criminal Procedure finds application and whether the substitutive penalty of 90 days of deprivation of freedom adjudicated by the judgment of the District Court in Gryfino reference symbol of files VIK 73/02 is to be carried out".*

25. A further letter dated the 25th May, 2010 from the deputy director of the penitentiary establishment in Lupków is also important. In the intervening time having served his sentence in Rzeszów, it appears the respondent had been transferred to Lupków to serve the 90-day penalty. In his letter, the deputy director of Lupków penitentiary raised the issue that "*there is a justified supposition that the deprivation of freedom of [the respondent]*" arising from the judgment of the District Court in Gryfino and the enforcement documentation from the Stargard Court, "*took place contrary to the binding law"*. The deputy director referred to the EAW, which did not include the Gryfino case. He referred to the Code of Criminal Procedure which stated that a person could not be prosecuted for offences other than those for which they had been surrendered; or could not be deprived of their freedom in respect of other offences.

26. The deputy director at Lupków went on to state that: -

> *"The sentenced Janus Mazurkiewicz has been surrendered with the preservation of the principle of specialty exclusively for the case conducted by the District Court in Rzeszow, reference symbol of files 2K 336/05, in which case the preventive measure in the form of a temporary arrest was revoked on the 14th May 2010. Since the 14th May 2010, the sentenced person has been remaining in the penitentiary establishment only in connection with the carrying out of the 90 days of the substitutive penalty of deprivation of freedom in the case VIK 73/02, the end of which penalty elapses on the 5th July 2010".*

That letter appears to have been addressed to the Regional Court in Krosno.

27. The next letter is from the District Court in Stargard and is dated the 9th June, 2010 where they asked for the return of the enforcement documentation concerning the respondent. The letter then stated: -

> *"At the same time we are informed that our court did not tell anybody to bring into execution the substitutive penalty in contravention of the provisions of the Code of Criminal Procedure concerning the EAW".*

There is a handwritten insertion on that letter apparently dated the 10th June, 2010, as follows: -

> *"I have carried out a telephone conversation and Judge Marian Jesion, who is of the opinion that the a/m content the penitentiary unit should recognise as a valid document from which it follows that the sentenced person should be released".*

It should be noted that the translator's remark is that the handwritten insertion is poorly legible.

28. The next document is dated 10th May, 2010 but I am satisfied that this date is incorrect and it should read 10th June, 2010. The document recorded the date of termination of the carrying out of the penalty as the 10th June, 2010 and that his release was ordered by the District Court of Stargard on the 9th June 2010.

29. The final letter is dated the 11th June, 2010 and is from the director of the penitentiary establishment in Lupków. This is directed towards the Head of the Second Criminal Division of the District Court in Stargard. In this letter, it is stated that the enforcement documentation cannot be returned as requested because the sentenced person had begun to serve the penalty in the case from the 6th April, 2010 until 10th June, 2010 when the order of release came in. It said that he had served the penalty of 65 days in length and that the documentation was the basis for putting him in the penitentiary unit.

30. The director then stated that a body of the enforcement proceedings namely a director of a penitentiary establishment, is not entitled to take a decision on the carrying out, or the abandoning of the carrying out, of any adjudication directed for carrying out by a court, if it is formally correct. He stated that every adjudication is brought into execution immediately after the receipt thereof if it concerns a person already deprived of freedom or after the admission of a person whom the adjudication concerns. He referred to a section of an ordnance which unequivocally specified the mode of procedure in case of a justified supposition that a deprivation of freedom took place contrary to the law (the notification of the competent penitentiary judge), "*however such a supposition does not constitute a basis for a refusal to carry out the adjudication*". The director proceeded to state: -

> "*The penitentiary unit to which comes in the enforcement documentation, concerning the sentenced person surrendered to the Polish Republic on the grounds of the European Arrest Warrant, do not have at their disposal, a sufficient documentation in order to establish, whether there does not occur any circumstances mentioned in Article 607 E, subs. 3 of the Code of Criminal Procedure, Item 1-8 and the penalty, in spite of not being covered by the EAW, is subject to execution. Where such a knowledge should possess, the court directing the adjudication for execution*". [As per the furnished translation]

Legal submissions

31. Counsel for the respondent relied upon the fact that there was a clear breach of specialty amounting to 28 days' deprivation of freedom (extending to 65 days when his detention was based at least in part on the other offence) and that no explanation had been given for that breach. Indeed, counsel submitted, not only was there no explanation for how the breach occurred, but there was no expression of regret. In counsel's submission, it was particularly egregious that it was only after repeated requests from this Court

that any documents which made reference to the breach of specialty had been forthcoming from the Polish authorities. Counsel submitted that the final tranche of documents did not provide an explanation as to what occurred. Furthermore, despite the respondent having personally raised specialty as a concern during his detention, the Polish authorities failed to remedy the situation with the speed that was required.

32. Counsel placed particular reliance on *AA v. Medical Council* [2003] 4 I.R. 302. In that case, Hardiman J. had said it was a "*very material fact*" that no explanation had been provided as to why the doctor in question had not raised the matters at issue in the proceedings in the course of his first set of judicial review proceedings. It was submitted that the lack of an explanation was a determining feature of that judgment. In the present case, the Polish authorities were in a similar position and the failure to explain effectively put this Court in an impossible position.

33. Counsel also relied upon the comments of Pitchford L.J. in *Sofia City Court, Bulgaria (Appellant) v. Demintrinka Atanasova – Kalaidzhieva (Respondent)* [2011] E.W.H.C. 2335 (Admin). It was accepted that the factual context of that case was very different, but reliance was placed the following statement of principle of Pitchford L.J. at para. 36: -

> *"We fully expect that the facts of this case are wholly exceptional. A finding of bad faith has already been made by the Divisional Court for reasons which were fully expressed. We consider that the Sofia City Court owed to the United Kingdom a mutual obligation of respect. Had this court received any meaningful recognition by the issuing authority of the court's concerns in 2009 it might have been in a position to repose some confidence in the good faith of the present request. The Sofia Court cannot have been under any misunderstanding as to this court's concerns and the need to respond to them. We do not consider that this is a case in which the abuse argument strays outside its permissible ambit. We are not persuaded that the Senior District Judge had any better reason to accept the good faith of this prosecution than did the Divisional Court in 2009. We accept that this latest request was an abuse of the process of the court. For this reason, we dismiss the appeal".*

34. The respondent was careful to couch his submissions as being peculiar to his specific case. He did not argue that the breach of specialty which occurred in this case would mean that all subsequent surrenders to Poland would have to be prohibited. Instead, he submitted that the breach of specialty was directly linked to him and that it had gone unexplained and should therefore be refused on abuse of process grounds or otherwise.

35. Counsel also relied upon the decision of this Court in *Minister for Justice and Equality v. Downey* [2019] I.E.H.C. 119 at para. 82 which referred to the dicta of O'Donnell J. in *Minister for Justice and Equality v J.A.T. No. 2* [2016] 2 I.L.R.M. 262 concerning "*an abuse of the Court's process in the sense that it would no longer be the administration of justice".* Counsel also referred to the decision from Canada in *Government of the United States of America v. Gavin Tollman* [2006] OJ 3672. Molloy J. of the Ontario Superior Court of Justice confirmed the jurisdiction to stay extradition proceedings on abuse of process grounds. She said that the abuse of process power applied to any conduct that reached into the jurisdiction and undermined the integrity of the judicial system of, in that case, Canada. In that case, it was stated that it was not open to a party to excuse previous abusive actions by eventually resorting to the appropriate legal process. It should be noted that in that case, the earlier relevant process had been an attempt to use deportation procedures to obtain jurisdiction over the person rather than by using extradition proceedings.

36. The respondent submitted that the principles in the decision of the CJEU in *Aranyosi and Caldararu v. Generalstaatsanwaltschaft Bremen* (C-404/15 and C-659/15 PPU, Grand Chamber, 5th April 2016) were also applicable here. The High Court had asked for an explanation and had not received it. The Court was entitled to stay surrender until such time as an explanation was received.

37. Counsel for the minister relied upon the case of *J.A.T. No. 2.*, but submitted that the facts in this case were entirely different from the facts in that case. In *J.A.T. No. 2*, there were complex and multifaceted issues and it was the cumulative effect of those issues which had given rise to the abuse of process.

38. The minister did not suggest that a breach of the rule of specialty is anything other than a serious matter, nor did he suggest that the High Court should close its mind to it. However, it was submitted that assurances had been provided that the Gryfino matter had now been fully disposed of and that it was not intended to proceed against the respondent in relation to any other matter other than those contained in the EAWs before the Court. Those were assurances by judicial authorities and must be given due weight.

39. Counsel relied upon the judgment of O'Donnell J. in *J.A.T. No. 2* when he stated at para. 8 that: -

> *". . . in the present context, it must be kept in mind that the issue for an Irish court, in respect of which it is required to administer justice, relates principally to the surrender, and it is the process in relation to that which must be the primary focus of any such inquiry. I would not, therefore, have considered that the issuance of a second warrant in this case amounts to, or even comes close to being an abuse of the process".*

40. Counsel submitted that while the Court had to be cognisant of the previous breach of specialty, there were a number of matters which the Court had to take into account. These included the EAWs before the Court, the public interest in surrendering persons to serve sentences in respect of criminal offences, the fact that the respondent had been convicted of the offences, and the warrants are for detention, the fact that assurances had been specifically provided and the fact that he was being returned to a member state of the European Union with the protections that entailed.

Analysis and Decision

41. The respondent has carefully crafted his submissions to focus on what he submits is the failure of the issuing judicial authorities to provide an explanation for the breach of specialty which occurred in this case. The main submissions of the respondent, both written and oral form, had been made to the Court prior to receipt of the letters from the penitentiary institutions dealing with the question of imprisonment. At the resumed hearing, the respondent maintained that his submissions were unaffected by the receipt of those documents on the basis that nowhere did they contain an explanation as to how the breach of specialty occurred.

42. An analysis of the various replies received by this Court establishes that, the issuing judicial authorities in both Szczecin and Rzeszów did not give any precise indication as to how or why the breach of specialty had happened. They do however provide information from sources available to them. Moreover, the information reveals that the District Court in Gryfino had destroyed the relevant documentation in 2014. The totality of the replies from the issuing judicial authorities demonstrate that the District Court in Gryfino made significant enquiries as to what had occurred, the judge even telephoning the District Court in Rzeszów for further information concerning the sentence on EAW B. It is expressly stated that the District Court in Gryfino is not in possession of any other documents connected with the case. In the letter of the District Court in Stargard dated 9th May, 2010, that court stated that they did not demand that the penalty be executed *"in contravention of the provisions of the code of criminal procedure concerning*

the EAW." In those circumstances, including the absence of documentation, I am satisfied that the judicial authorities in Gryfino (or the issuing judicial authorities) could not give a considered view as to how or what had occurred. It seems from the contemporaneous documentation, that neither the penitentiaries nor the relevant court were clear as to how the breach of specialty had arisen.

43. It was only when this Court sought information from any other relevant authorities, that a further search appeared to have been made. It is regrettable that such a search only came about at that stage. That search finally revealed that there was in fact a breach of specialty and that at an early stage, the director of the penitentiary was aware that a breach may have occurred and had sought further information. It is appropriate to draw the inference that his concern may have been brought about by the efforts of the respondent to alert the authorities to this fact. Undoubtedly however, it does seem that specialty was an issue to which the director of the penitentiary was alive and alert so as to ensure that a person was only imprisoned in accordance with law.

44. The correspondence reveals that the director of a penitentiary must enforce a sentence if all other conditions appear on their face correct. In other words, a director of a penitentiary cannot question whether specialty has been catered for in a given case if a warrant of imprisonment is presented to the penitentiary for execution. There was, it appears, a delay prior to the relevant court reaching a decision in the case. As stated above, the relevant court (Stargard) wrote to the penitentiary stating that it had not asked for the execution of the penalty. There is no explanation as to how or why the papers for the enforcement of the penalty arrived at the prison. On the other hand, when the court which had the responsibility for the enforcement of the penalty was presented with the fact that an apparent breach of specialty had occurred, that court ordered his release. Both issuing judicial authorities, in the course of their replies, gave assurances that Polish law applied the principle of specialty.

45. In those circumstances, I am not satisfied that it can be said that there has been no attempt to place an explanation before this Court as to how the breach of specialty occurred. What has been furnished is an incomplete explanation, but that lack is due in part to the absence of documentation from the relevant timeframe. More importantly however, even at the time there did not appear to be any reason for the breach which was apparent to either the penitentiary or the relevant court; the relevant court in Stargard had expressly stated in a letter contemporaneous with the order for release, that it had not ordered the detention in contravention of the legal code. It is also clear from the documentation that it is the Polish courts that have the general responsibility for the execution of penalties (that is consistent with the experience of this Court in dealing with Polish warrants).

46. Most importantly, what is apparent from the documentation, is that neither the court nor the penitentiary were seeking deliberately to ignore the rule of specialty. On the contrary, the documentation reveals that the rule of specialty applies and where there is an apparent breach, there is a remedy. Although no precise reason as to how or why the breach of the rule of speciality occurred, what has been established is that the penitentiary was concerned that the law be applied and that the Polish court that had apparently ordered the detention, ordered his release when it considered the matter.

47. I am satisfied, that: -

(a) the Polish judicial authorities have sought to put the relevant information before this court as to what occurred,

(b) the information provided excludes *mala fides* as a basis for the error in breaching speciality, and

(c) there is no *mala fides* in the delay in responding to the letter from the deputy director of the penitential in Rzeszow.

It is also important to note that the Polish court responsible for the execution of the penalty indicated at the time it directed the respondent's release that it did not accept that it had asked for the penalty to be executed contrary to the rule of specialty.

48. On a factual level, the respondent's claim that there has been an abuse of process based upon the absence of explanation must fail. There is no abuse of process in the *AA v. Medical Council* sense, where there is explanation by way of contemporaneous documentation to be satisfied that there was no *mala fides* on the part of the Polish penal and judicial authorities responsible for incarceration, even if the precise mechanism as to how the breach of specialty occurred was not identified.

49. I am not satisfied that a requirement that issuing judicial authorities express "regret" over previous breaches of the rule of specialty is a matter that can or should be imported wholesale into a calculation of whether there has been an abuse of process. It cannot be assumed that a judicial authority has authority to signify "regret", particularly for the actions of another, even another judicial, authority. In the present case, the judicial authorities engaged, albeit after some initial lack of urgency, with seeking out what information they could find as to what occurred. They also gave specific assurances about the rule of specialty. The absence of apology or expression of regret does not render it an abuse of the process of this court to extradite him in the present case. That is not to say that in another case an expression of regret would not be required, but that may depend on the facts. In the present case the absence of intention to breach the rule has been demonstrated and that is sufficient.

50. Furthermore, as a matter of law, I am not satisfied that the respondent's reliance upon the dicta of Hardiman J. in *AA v. Medical Council* is entirely apposite in the circumstances of this case. *AA v. Medical Council* involved the taking of a second set of proceedings where no explanation has been given as to why the issue had not been dealt with in the first set of proceedings. In this case, there is no second set of proceedings.

51. EAW A and EAW B have an existence entirely independently of the original EAW upon which the respondent was surrendered to Poland. The two year and two month sentence on EAW B in respect of an offence of theft was imposed upon him after his surrender for prosecution in respect of the offence. He was released from custody in relation to that offence when the sentence was imposed upon him. That sentence is the subject matter of EAW B and it is the first and only EAW issued in respect of that sentence. In relation to EAW A, there was no prior EAW issued in respect of these offences. On that basis, the dicta of Hardiman J. cannot arise in the present circumstances.

52. Moreover, the case of *J.A.T. No. 2*, on which the applicant relied, and to which the respondent referred, is authority for the fact that the Court must be careful not to extend the abuse of process jurisdiction beyond that for which it was intended. An abuse of process may be more easily identified where *mala fides* has been demonstrated. It is not restricted only to cases of bad faith. In certain situations, negligent behaviour may lead to a situation where an abuse of process had occurred. As this Court stated in *Downey*, the issue is whether returning the requested person to another jurisdiction can truly be said to be the administration of justice. It is the process of this Court that is at stake. In assessing whether there has been an abuse of process, the court must take into account all relevant circumstances.

53. In the course of these proceedings, an issue arose as to whether the rule of specialty applied for the protection of an individual or was a rule which only operated at the level of state's interest. In my view, it is not necessary to resolve that issue with any finality in

these proceedings. It is however, important to note that, the rule of specialty, as applied by the Act of 2003, operates to the benefit of an individual whose surrender is requested by another member state. This is because if the presumption set out in s. 22 of the Act of 2003 is rebutted, the High Court must prohibit the surrender of a person to a state where specialty will be breached. In the specific context of the Act of 2003, the rule of specialty operates to protect a person against surrender to a member state where that rule will be breached. In the present case, the provisions under which the Court could refuse to surrender based upon s. 22 of the Act of 2003 have not been fulfilled in this case. The presumption has not been overturned. On the contrary, it is clear that the law in Poland provides for the rule of specialty. Furthermore, it has been established that they do not intend to pursue him for any other offence or penalty.

54. Furthermore, I am satisfied that the mere fact that a breach of specialty has occurred in an individual case, does not of itself establish that in that case or indeed in respect of other people who may be surrendered, that a breach of specialty will occur. In those circumstances the fact of a breach in the past by a member state does not of itself establish that a breach or breaches will occur the future. Indeed, the general presumption under s. 4(a) of the Act of 2003, that member states will comply with their obligations under the Framework Decision, precludes the High Court from adopting such a simplistic approach.

55. As I have stated, the breach of specialty did not occur because of any *mala fides* on the Polish authorities. Indeed, the *bona fides* of the authorities is apparent, the relevant court authority had not wanted it to occur and the relevant penitentiary had sought to bring it to the attention of the Court as a potential breach. It has not been possible to explain exactly why it occurred but I accept that such explanation may never have been available given the contemporaneous documentation that was finally made available to this Court. I am satisfied that there was no deliberate institutional intention to breach the rule of specialty. The absence of *mala fides* does not prevent the finding of an abuse of process in an appropriate case but it is nonetheless a relevant consideration in assessing whether there has in fact been an abuse of process.

56. I must also assess the consequences for this individual in determining whether there has been an abuse of process. The situation is that this respondent has spent 28 days in custody. I have been given no assurance from the issuing judicial authorities that those days will be offset against the penalties he must now serve, if surrendered. No such request was made of the Polish authorities and indeed it may not be possible to offset penalties, given different legal principles which may apply in Poland. There were also delays in seeking his surrender to serve these sentences. He has been living in this jurisdiction for some time. While he has established himself here, there is no specific feature of his personal or private life that gives rise to any particular concern about any oppression arising from the effect of the delays. He lives and works with his adult son in this jurisdiction.

57. Although the offences are not at the most serious nor are the sentences the most lengthy, I am satisfied that the public interest in his surrender, despite the delay and other factors remains of moderate intensity. His specific private and family life interests are not such that on their own it would be a disproportionate interference with the right to respect for his personal life to surrender him to serve the sentences imposed upon him in respect of these crimes.

58. Turning then to the added factor of the breach of the rule of specialty, it must be emphasised that the mere fact that the rule of specialty was violated in respect of an earlier surrender does not of itself amount to an abuse of process preventing a later surrender. It does not give a person an effective immunity from further lawful requests which of themselves are in order. In the present case, two valid EAWs are in existence. They are new requests for surrender and this Court has an obligation to surrender, unless it can be said that surrender is otherwise prohibited because to do so would strike at the administration of justice.

59. The fact that he has spent 28 days in custody in breach of the rule of specialty, is also not of itself determinative of this issue. In any breach of the rule of specialty, loss of liberty will be engaged. It is noteworthy, that the breach which was remedied by his early release from the 90-day sentence. As an aside it is observed that the respondent, despite his complaint about his wrongful continued detention, apparently took no proceedings for damages in respect of that breach.

60. A mistake was made in Poland; the rule of specialty was breached. The respondent was released when the discrepancy was brought to the attention of the appropriate court, even if there was some initial delay in the matter being addressed by the right court. According to contemporaneous documents, there was no identification as to how the mistake was made and the court responsible stated that it had not ordered the particular detention in breach of the rule of specialty. There is an assurance now that he is not wanted for any other matters and that the rule of specialty is applied in Poland.

61. In my view, this is not a situation where it can be said that it would be an abuse of process to surrender him. Even though the offences and sentences are not particularly serious, there is a public interest in ensuring that Ireland fulfils its duties under extradition agreements generally and the Framework Decision specifically. In all the circumstances as set out above, I am satisfied that there has been no abuse of process.

Conclusion

62. I have considered and rejected the objection that it would be an abuse of process to surrender the respondent based upon the previous breach of the rule of specialty. I am also satisfied that: -

(a) the respondent is the person in respect of whom each of the EAWs has issued,

(b) that each of these EAWs has been endorsed in accordance with s. 13 of the Act of 2003 for execution in this jurisdiction,

(c) that his surrender is not prohibited by s. 45 on either of the EAWs,

(d) that the High Court is not required to refuse the surrender under ss.21A, 22, 23 or 24 of the Act of 2003, and

(e) that his surrender is not prohibited by Part 3 of the Act of 2003.

63. I, therefore, may make an order for his surrender to such other person as is duly authorised by the issuing state to receive him.