

## THE HIGH COURT

[2013/260 EXT]

BETWEEN

MINISTER FOR JUSTICE AND EQUALITY

APPLICANT

AND

TOMASZ LESZEK NOWAKOWSKI

RESPONDENT

JUDGMENT of Mr. Justice Hunt delivered on 9 October 2015.

**Facts**

1. This is an application for the surrender of the respondent pursuant to the provisions of s.16 of the European Arrest Warrant Act 2003 ("The Act"). The warrant in question was issued by a judge of the Penal Division of the Regional Court in Bydgoszcz on the 9th September, 2013. The respondent objected to the surrender sought by the applicant by an updated notice lodged on the 29th July, 2014. The substance of this notice is as follows:-

*1. The respondent does not consent to his surrender to the issuing state pursuant to the European Arrest Warrant herein. The respondent hereby requires the applicant to satisfy the court of all matters that are necessary in order to succeed in his application for an order for the respondents surrender to the issuing state pursuant to the European Arrest Warrant Act 2003 (as amended) and/or the Framework Decision.*

*2. There is no offence in the state corresponding to those for which the surrender is sought and therefore surrender is prohibited by s.38 of the European Arrest Warrant Act 2003 (as amended).*

*3. The proposed surrender of the respondent in respect of the said offences to the issuing state is prohibited by s.38 of the Act 2003 (As Amended), because it constitutes, inter alia, a disproportionate and impermissible interference with the respondents' right to family and private life under Article 8 of the European Convention on Human Rights.*

*4. A breach of the respondents rights under Article 3 of the European Convention on Human Rights. The respondent is under medical care relating to a number of ongoing health issues. The respondent believes that if surrendered he will be exposed to unhygienic prison conditions and will not be afforded adequate medical treatment in prison and as a result there is a real risk that the respondent will be subjected to inhuman or degrading treatment contrary to his rights under Article 3 of the ECHR.*

2. Part B of this warrant recites that it is based on a judgement with force of law of the Provincial Court in Naklo Nad Notecia dated the 21st April, 2006, case file reference number II K 67/06. Part C recites that a custodial sentence or detention order of one year and four months of imprisonment was imposed in relation to this matter, and that the punishment of one year, one month and sixteen days of imprisonment remains to be served. Part D of the warrant indicates that the respondent appeared in person for the hearing where the decision was rendered. Part E of the warrant specifies that it relates to two offences, which are described as follows:-

*(i) On 21 of November and 21 of December 2005, in Wojnowo, Commune Sicienko, he threatened in words his father Henryk Nowakowski to deprive him of life, and the threats arouse the father's fear that they could be fulfilled, at the same time, on 21 November he pushed his father and hit him with his hand, which caused the father's contused wound of the bony face and resulted in violation of bodily integrity;*

*(ii) On 07 February 2006, in Wojnowo, Commune Sicienko, he used force by strangling his hands around the neck of his father, and so tried to interfere with the witness Henryck Nowakowski in order to influence him in connection with aggravating evidence regarding punishable threats and violation of bodily integrity.*

3. The first offence is described as "an offence against freedom under Article 190 s.1 of Polish Penal Code and Article 217 s.1 of Polish Penal Code in connection with Article 11 s.2 of Polish Penal Code." The second offence is described as "an offence against the administration of justice under Article 245 of Polish Penal Code". Part F of the warrant states that the time limit for the execution of the punishment expires on the 29th April, 2021.

4. An affidavit of Garda Paul Lynch of Macroom Garda Station sets out that on the 13th April, 2014 he was on duty at an address at Cullen, Co. Cork and in possession of a copy of the arrest warrant for the respondent, which had been endorsed by the High Court for execution on the 12th of November, 2013. He arrested the respondent at that time and place, and the respondent subsequently confirmed that he was the person depicted in a photograph attached to the warrant. Garda Lynch then took certain further procedural steps and the respondent was brought before the High Court on the 14th April, 2014.

5. The primary evidence of the respondent relating to the application is set out in his affidavit sworn on the 29th July, 2014. This establishes that the respondent has been living in Ireland since 2008 and now lives with his partner and two children aged nine and five years old in County Cork, where he works on a local farm to provide an income for his family, who are dependent on his support. As is apparent from the terms of the warrant, the offences in question relate to incidents with his father back in Poland. He states that he is now on good terms with his father and that his surrender will serve only to disrupt his family and impose great hardship on them.

6. Since coming to Ireland it appears that the respondent suffered from a serious illness and underwent surgery to remove a large portion of his large intestine in St. Vincent's Hospital Dublin on the 1st November, 2009. As a result of this surgery he is on medication and is prescribed Warfant and Protium, which he takes on a daily basis. He expresses a fear of deterioration in his health should he be

surrendered to Poland and placed in prison there. He also asserts that as his partner and children are totally dependent on him for financial and emotional support, and that it is likely that if he is returned to Poland they will also have to return with him. Accordingly, he maintains that in those circumstances and in the light of his medical condition, his surrender would be a disproportionate interference with his rights and those of his family.

7. The respondent expanded upon these concerns by a further affidavit of the 15th December, 2014. He gives further details of his medical condition and of the development of a chronic venous ulcer on his right leg, which he describes as a life long problem requiring dressing and the prevention of infection if the skin becomes broken. He is currently under the care of a consultant haematologist at Cork University Hospital and attends a haematology clinic once a month to check his Warfarin levels and a dressing clinic to have his ulcer treated. He has been advised by his consultant haematologist that if he is imprisoned in Poland it would be important that he would have access to a standard anticoagulant clinic and a consultant haematologist, together with access to a dressing clinic and to appropriate care for the venous ulcer on his right leg.

8. The respondent also asserts that conditions in Poland's prisons can be harsh and expresses a concern that he may not be provided with appropriate medical care if his surrender is ordered by this court. In the light of his expressed concern that the medical conditions that have occurred since he came to Ireland will deteriorate if he returns to Poland, he retained a lawyer in Poland to make representations to the prison service there in relation to these issues. He exhibits a reply from that service dated the 19th November, 2014, which did not allay his concerns regarding the potential management of his health issues should he be required to serve his sentence there.

9. The application and objection initially came on for hearing on the 16th December, 2014. The ground of objection relating to correspondence of the two offences set out in the warrant with offences in Irish law was rightly not pursued by the respondent. At that hearing, the respondent advanced objections to surrender based on the health issues referred to above and on assertions relating to the history of the cases in Poland. In that respect, it was argued that the respondent had in fact commenced service of the sentence imposed on him in respect of these offences and had been released under the supervision of the Polish Probation Services, to whom he had communicated his intention to travel to Ireland. It became clear that the assertions of the respondent relating to harsh conditions and substandard medical treatment were related to the respondent's experiences during this period of custody. Specifically, it was asserted that the authorities had ignored the respondent's requests for treatment in connection with dental difficulties suffered by him at that time. Counsel for the respondent (Mr. Ferry) suggested that in the light of the specific and serious medical conditions suffered by the respondent since he came to Ireland, the court should require particular satisfaction that these conditions would be adequately addressed by the Polish authorities prior to ordering a surrender to serve the balance of the sentence in question. In this respect, Mr. Ferry relied upon the judgment of Edwards J delivered on the 13th May, 2011 in the matter of the *Minister for Justice and Law Reform v Michal Sebastian Mazurek*. Mr. Ferry pointed out that up to that time, the only information relating to this issue had been that obtained at the expense of the respondent by his various legal advisers. However, I was of the opinion that the case put forward by the respondent was not adequately evidenced by the contents of the affidavit evidence produced by him at that time. I was satisfied of the various formal matters required of the Applicant by s.16 of the Act, but adjourned the matter to the 21st January, 2015 for further consideration of the Article 3 objection raised by the respondent.

10. By that date, the respondent had filed a further affidavit, which also raised issues pertaining to an allegation of delay, and the applicant required further time to seek information from the Polish authorities concerning this aspect of the matter. On that date, the applicant kindly agreed to route a request for further information to the Polish authorities pursuant to the provisions of s.20 of the Act. This request had attached to it precise details of the respondents medical condition as communicated to the court by counsel and by the various affidavits and exhibits furnished by the respondent, and requested details of the treatment that might be made available by the Polish authorities to the respondent in respect of these specific matters in the event of a surrender.

11. The hearing was adjourned to the 18th February, 2015 when further material obtained from the Polish authorities pursuant to the s.20 request was placed before the court. Mr. Ferry submitted that the material received in reply did not fully or adequately address the respondent's medical issues. In addition, Mr. Ferry raised a further concern arising out of this correspondence, with reference to a suggestion that it indicated that surrender was being sought in respect of the sentence referred to in the warrant being activated by reason of the commission of subsequent offence by the respondent, together with the imposition of a further penalty in respect thereof. Mr. Ferry put forward his client's specific instructions that he had no knowledge of involvement in any criminal matters other than those recited in the arrest warrant.

This aspect of the matter is not a continuing concern, in that information subsequently supplied by the Polish authorities confirmed to my satisfaction that the respondent was well aware of the further matter that was before the Polish courts in March, 2008. It appears that the respondent had submitted a letter signed by him in January, 2009 to the Polish authorities, on the subject of his further conviction of March, 2008. It is regrettable that the untruthful assertion of the respondent that he had no knowledge of this subsequent matter caused the waste of considerable time and expense by all concerned in investigating and resolving this issue. Thereafter, the only live objection to surrender was that based on the respondent's medical issues. His untruthfulness concerning his conviction of March 2008 led me to the conclusion that no significant weight could be attached to any evidence of the respondent on the medical issue, unless corroborated by independent sources.

### **The Medical Issue**

12. On this issue, I am satisfied independently of the respondent that he is suffering from the medical conditions and requires the future treatment, care and supervision as outlined by his consultant haematologist Dr. Susan O'Shea in her reports. The broad details of her conclusions are already set out above. However, I do not rely on the general assertions made by the respondent as to the harshness of prison conditions as allegedly experienced by him in serving the first part of the sentence in question in this case. The respondent has not provided cogent evidence that the general prison conditions pertaining in Poland are such that he is at real risk of suffering inhuman or degrading treatment from that source alone. In addition, in the light of his lack of credibility on other matters, I likewise attach no weight to complaints made by him in respect of an alleged failure by the Polish authorities to provide minor dental treatment required and requested by him during his previous period of incarceration. Consequently, the matter in issue falls to be decided solely by reference to the response of the Polish authorities to my request for an indication as to their proposed approach to the diagnosis and opinion of Dr. O'Shea.

13. The narrow and specific issue is as to whether the respondent has established by credible evidence a real risk that he will be exposed to inhuman and degrading treatment by reason of his anticipation that the Polish authorities will fail to provide the necessary treatment for the medical conditions diagnosed since he left Poland to reside in Ireland. The following general principles may be distilled from the Mazurek decision referred to above:-

- (i) The court must act upon the normal presumption that the courts of the issuing Member State will, as is required by Article 6.1 of the Treaty on European Union, respect human rights and fundamental freedoms.

(ii) The prohibition on torture, inhuman or degrading treatment imposed by Article 3 of the European Convention on Human Rights and Fundamental Freedoms precludes surrender pursuant to the Council framework decision on the European arrest warrant where there is established a real risk of ill-treatment contrary to Article 3.

(iii) The subject matter of this inquiry is, therefore, as to the level of danger to which the respondent is exposed.

(iv) It is not necessary to prove that the person will probably suffer inhuman or degrading treatment. It is enough to establish that there is a real risk arising out of a rigorous examination. The mere possibility of ill-treatment is not sufficient to establish such a case.

(iv) In carrying out the requisite analysis, the court should consider all the material before it, including material obtained of its own motion. In this case, I submitted a specific request pursuant to the provisions of s. 20(3) of the Act regarding the particulars of the treatment that would be made available in relation to the respondent if he was surrendered back to Poland.

(v) The respondent bears an evidential rather than a legal burden in relation to the establishment of a real risk of being subjected to treatment contrary to Article 3 of the ECHR.

(vii) The applicant is entitled to adduce evidence to dispel any doubts that may arise in this case.

(viii) The court should examine the foreseeable consequences of sending a person to the requesting State. Independent international materials may be considered by the court in carrying out this examination. No such material was relied upon by either party in this case.

14. I am satisfied by the information emanating from Dr. O'Shea that the respondent now suffers from the serious medical conditions outlined by her, and that he is in need of constant supervision and treatment as also outlined in her reports. It is a reasonable inference that the consequences of any failure on the part of the Polish authorities to provide appropriate healthcare for the respondent in these circumstances would amount to subjecting the respondent to inhuman and degrading treatment contrary to the provisions of Article 3 of the ECHR.

15. As noted above, the respondent's Polish lawyer initially communicated with the authorities there in this regard. The response of the authorities simply amounted to general confirmation that:-

*"A convicted person is provided with free medical care, medications and sanitary products. All decisions about the form of treatment, including administration of medicines and provision of specialist consultations are made on the basis of the patient's current health conditions by a doctor designated to work with people remaining in the prison."*

It further confirmed that:-

*"In certain circumstances, there is a possibility of conducting necessary examinations and administering treatment in cooperation with out of prison health services."*

16. I expressed the view in the course of the hearing that this type of general statement was insufficient to meet the reasonable anxiety of the respondent as to access to the specific treatment regime established by his Irish consultant, and that these concerns were underlined rather than allayed by terminology in the correspondence indicating that necessary examinations and treatment required outside of prison might arise as a matter of "possibility", or in "certain circumstances" only. I believed that the respondent was entitled to know where the facts of his situation fitted within these generalised statements.

17. Accordingly, at my request, the applicant kindly sought confirmation that the respondent would have access to the specific treatment outlined in the correspondence of Dr. Susan O'Shea, Consultant Haematologist, dated 30th September, 2014 if he was surrendered to the Polish authorities. The relevant portion of the response to that request consisted of an assurance that *"the convict shall in the penal institution be covered by the specialist care just as it has been mentioned in the letter dated 19th November, 2014"*. It may be pointed out that this assurance does not address the deficiencies perceived by me in that earlier letter. The response continued:-

*"And in case of his surrender the instructions included in the letter of Dr. Susan O'Shea concerning continuation of specialist treatment (warfarin therapy) shall immediately be passed on the Prison Service of the competent penal institution."*

18. Counsel for the applicant (Mr. Benson) submitted that there was a presumption that the respondent's human rights would be respected on his return, and that the information furnished by the Polish authorities in respect of the medical treatment required by the respondent and that it amounted to a sufficient assurance by the Polish authorities that the respondent would receive the specific treatment referred to in the request. Therefore, there was no real risk established that the respondent would be subjected to inhuman or degrading treatment in the circumstances of this case. Mr. Benson invited me to consider submitting a further request for information to the Polish authorities if I regarded the reply as unsatisfactory. I declined to submit a further request, on the basis that the application should stand or fall on the information available to the court following the response to the initial request, which was sufficiently clear in terms of the information required.

19. In my view, the response to the request for further information did not materially advance the situation disclosed by the initial reply to the respondent's lawyers in November 2014. If the system of general medical provision available in Polish prisons covers the specific requirements of the respondent as clearly communicated to the requesting State, it should have been possible to obtain a simple and unequivocal statement that this is so. The response that particulars concerning the respondent will be furnished to the prison medical officer on surrender is a very limited assurance, and does not go beyond the normal procedures that might be expected when a prisoner is admitted to any prison system. In this case, it adds nothing in that a diagnosis and medical prescription is already to hand, and it would hardly be open to a prison doctor to come to a different conclusion to that of Dr. O'Shea. It fails utterly to address the specific request as to the treatment that would be made available in the light of the respondent's established diagnosis and current medical care plan.

## Conclusion

20. The respondent has clearly failed to make out the ground of objection that his surrender would constitute a disproportionate and impermissible interference with his right to family and private life under Article 8 of the ECHR. It does not seem to me that this

objection was seriously pursued at the various hearings. For completeness, I find that the normal strong public interest in rendition has not been diluted in any way by the surrounding circumstances of this case, and this strong public interest has not been counterbalanced by anything other than the ordinary and foreseeable consequences of rendition upon the respondent's private and family life.

21. However, I am satisfied that the objection to surrender based on treatment of the respondent's medical condition has been made out. It should be stressed that this is not based on any general assertions about the harshness of Polish prison conditions or on the overall adequacy of the scheme of medical treatment available to prisoners in that jurisdiction. The decision in this case centres solely on the individual circumstances of the respondent and the specific response of the requesting State to notification of those circumstances. His condition is not trivial or transient, and the consequences of the absence of proper treatment and supervision are established and serious. If the Polish authorities had furnished a simple declaration that they were prepared to provide for the respondent the specific treatment regime prescribed by his Irish consultant, I would have been quite happy to act upon that assurance and to operate upon the presumption that the respondent's rights would then be respected by the Polish authorities in the event of his surrender, by the provision of promised and necessary treatment and care. Instead of simple clarification, there is still no clear assurance that the scheme of general medical provision in Polish prisons would extend to that which is clearly necessary to maintain the respondent's health. Dr. O'Shea makes it perfectly clear that any deficiency or inadequacy in the respondent's treatment regime could have very serious consequences. In this respect, she stated that he was referred to her because of a significant history of thrombosis. Thrombophilia testing confirmed that he has congenital anti-thrombin deficiency, which is a rare but serious thrombotic disorder requiring life-long anticoagulation. He also has a history of portal vein thrombosis and previous deep vein thrombosis in the right leg. His congenital condition significantly increases his risk of spontaneous thrombosis, and he has already had at least one life threatening event with a portal vein thrombosis, which resulted in bowel resection. Dr. O'Shea further confirms that *"if his Warfarin is discontinued or his INR is sub-therapeutic, he is at risk of a further thrombosis which could be life-threatening"*.

22. Having regard to the medical evidence concerning the respondent's individual situation, in the absence of a specific assurance that the respondent will be provided with the necessary supervision and treatment to obviate life-threatening complications, I am satisfied that the respondent has established by inference from the failure of the Polish authorities on two occasions to confirm that he will receive the treatment and care deemed necessary by his Irish doctor that there is a probable and real risk that he will not receive this treatment if returned to Poland. It must follow from this that there is a real risk to him of the inhuman and degrading consequences which would inevitably follow from the absence of appropriate care. Accordingly, I refuse the application for the surrender of the respondent on this basis.

### **Appearances**

For the applicant: Jim Benson, (instructed by the Chief State Solicitor).

For the respondent: John Ferry, (instructed by Crowley Millar Solicitors).