HIGH COURT

[2010 No. 412 EXT]

IN THE MATTER OF THE EUROPEAN ARREST WARRANT ACT 2003 AS AMENDED

BETWEEN

THE MINISTER FOR JUSTICE AND EQUALITY

APPLICANT

AND

B.H. (No. 2)

RESPONDENT

EX TEMPORE JUDGMENT of Ms. Justice Donnelly delivered the 31st day of July, 2015.

1. The surrender of the respondent is sought by the Republic of Poland pursuant to a European Arrest Warrant ("EAW") dated 10th March, 2009. A number of points of objection were raised by the respondent, the most substantial of which were trial in absentia under s. 45 of the European Arrest Warrant Act, 2003 as amended ("the Act of 2003"), a challenge to the form of the EAW, correspondence, and objections to surrender on the basis of a potential breach of his fundamental rights in particular but not solely concerning his mental health. During the currency of these proceedings before the High Court, an issue was raised regarding a fitness to plead type issue. A contested hearing on oral evidence took place and in a judgment delivered on 30th July, 2014, Edwards J. was satisfied that the respondent was indeed capable of comprehending the proceedings, making judgments regarding various aspects in respect of which his judgment is required and capable of receiving and comprehending advice and giving appropriate instructions.

2. During the course of the hearing of the s. 16 (1) application for surrender, counsel for the respondent indicated that he was of the view that the judgment of Edwards J. was subject to a right of appeal. Despite enquiry, it remained unclear whether there was a fresh concern about fitness to plead. In light of the opinions of the respondent's consultant psychiatrist given in reports subsequent to the finding of Edwards J., I was of the view that it was being suggested that the matter was a continuing issue and therefore there should be another hearing in light of the time that had elapsed since the previous hearing.

3. At this stage, it is appropriate to remark on the long procedural history to these proceedings, caused mainly by the raising of the unsuccessful fitness to plead issue, by the necessity to seek Polish medical records, by the failure of the respondent to appear on one occasion and by the rather lengthy evidence of Dr. Leader. It is unnecessary to outline the full details but it is certainly regrettable that so much time was taken on issues that were perfectly capable of being resolved much more quickly.

The background to the application

4. The Polish warrant seeks the surrender of the respondent in relation to two separate sentences that were imposed upon him. These were sentences of 2 years imprisonment and 1 year imprisonment. The warrant concerns a total of five offences. The 2 year sentence was imposed in relation to four of those offences. In relation to one of those four offences, it is alleged that "…he was preparing to forge a student card and a school certificate in the way that he was in possession of clean copies of such documents." Further information was given to the effect that the sentenced person was not an authorised person to be in possession of these blank forms of student card and school certificate and "this allows to assume that he was making preparations to forge these documents."

5. Counsel for the Minister submitted that this does not correspond with any offence in this jurisdiction. Forgery is an offence within this jurisdiction and attempted forgery is also an offence. However, the ingredients of the offence of forgery or attempted forgery in this jurisdiction are not satisfied by the above statement by the Polish authorities. On the basis of the Supreme Court decision in *Minister for Justice and Equality v. Ferenca* [2008] 4 I.R. 480, surrender must be refused under the provisions of s. 38 as regards the 2 year sentence imposed on all four matters dealt with under File IIK 677/02.

6. The remaining offence set out in the EAW is that "between 24 March 2002 and 16 May 2001 in Koszalin, acting in short time intervals in order to execute a previously made plan, he stole an Opel Kadet passenger car registration no. [redacted] worth 6000 PLN and then acting together and in collaboration with [PN] he forged the buy and sell contract regarding the stolen car including the seller's signature [SS] acting to the detriment of [SS] and [MB]" (II K 1125/02). The date of the offence was corrected later by the issuing judicial authority to the period "between 24.03.2001 and 16.05.2001".

7. In relation to this final offence, the warrant at paragraph (b) states that the enforceable judgment was in the Local Court in Koszalin on 2nd July, 2003. At paragraph (c), the warrant indicates that a one year sentence was imposed and that one year of that sentence remains to be served.

8. Part (d) of the EAW is in the format that existed prior to the 2009 Framework Decision. Under the heading "Decision rendered in absentia" all the relevant matters have been crossed out. Under paragraph (f), the EAW recites his prison sentence could not be executed because the respondent had not been present under his permanent address, had not been picking up his correspondence and had not turned up at the prison facility to serve his sentence. In those circumstances, there was sufficient basis to regard him as wanted and the arrest warrant issued.

9. Further information dated 19th July, 2013 was received from the issuing judicial authority. This confirmed that the respondent "was present at all hearings including the one on 2 July 2003 when the sentence was passed…". He was sentenced to one year imprisonment on that date with a conditional suspension of its execution for a 3 year trial period. By a further decision of 27th February, 2006, the execution of the sentence passed by the Local Court on 2nd July, 2003 was ordered because the respondent had committed a new intentional similar offence. It is expressly stated that the respondent was present at the hearing when the execution of the sentence was ordered on 27th February, 2006. He appealed that decision but the decision was kept in force. He was

summonsed to turn up willingly at the prison facility on 29th May, 2006 in order to serve his sentence. That summons was served on his mother.

10. The Polish authorities state that the respondent applied for a postponement of the execution of the sentence but was refused. He appealed that refusal and by a decision of 15th September, 2006, such refusal was kept in force. On 29th November, 2006, the Court made an order to the police to bring the respondent to the remand prison in order to serve his sentence. The Polish authorities state "…until this day the sentenced person has been searched for."

11. There was a subsequent application by the respondent for the sentence to be postponed. He was successful. The respondent has raised issues in relation to this which will be dealt with later in this judgment at paragraph 25.

A Member State that has given effect to the Framework Decision
12. The surrender provisions of the Act of 2003 apply to those Member States of the European Union that the Minister for Foreign Affairs has designated as having, under their national law, given effect to the Framework Decision of 13th June, 2002 on the European arrest warrant and the surrender procedures between Member States ("the Framework Decision"). I am satisfied that by the European Arrest Warrant Act 2003 (Designated Member States) (No. 3) Order, 2004 (S.I. 206 of 2004), the Minister for Foreign Affairs has designated Poland as a Member State for the purposes of the Act of 2003.

Section 16(1) of the Act of 2003
13. Under the provisions of s. 16 (1) of the Act of 2003 the High Court, may make an order directing that the person be surrendered to the issuing state provided that:

a) the High Court is satisfied that the person before it is the person in respect of whom the EAW was issued,

b) the EAW, or a true copy thereof, has been endorsed in accordance with s. 13 for execution,

c) the EAW states, where appropriate, the matters required by section 45,

d) the High Court is not required, under sections 21A, 22, 23 or 24 of the Act of 2003 as amended to refuse surrender,

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

Identity
14. I am satisfied on the basis of the affidavit of James Kirwan, member of An Garda Síochána, the affidavit of the respondent, and the details set out in the EAW that the respondent, B.H., who appears before me is the person in respect of whom the EAW has issued.

Endorsement
15. I am satisfied that the EAW has been endorsed in accordance with s. 13 for execution.

Sections 21A, 22, 23 and 24 of the Act of 2003 as amended
16. Having scrutinised the documentation before me, I am satisfied that I am not required to refuse his surrender under the above provisions of the Act of 2003 as amended.

Part 3 of the Act of 2003 as amended
17. Subject to further consideration of s. 37, s. 38 and s. 45 of the Act of 2003 as amended and having scrutinised the documentation before me, I am satisfied that I am not required to refuse the surrender of the respondent under any other section contained in Part 3 of the said Act.

The provisions of s. 38
18. The issuing judicial authority has not indicated that these are offences to which Article 2 para. 2 of the Framework Decision applies. Therefore, it is necessary to establish double criminality or correspondence of offences. Under the relevant part of s. 38(1)(a) of the Act of 2003, a person shall not be surrendered to an issuing state in respect of an offence unless (a) the offence corresponds to an offence under the law of the state, and (b) that a term of imprisonment of not less than four months has been imposed on the respondent in respect of the offence in the Republic of Poland and that the respondent is required under the law of the Republic of Poland to serve all or part of that term of imprisonment.

19. In this case, the minimum gravity terms have been met as he has received a sentence of in excess of 4 months.

20. In the case of the *Minister for Justice, Equality and Law Reform v. Szall* [2013] IESC 7, the Supreme Court (Clarke J.) stated at para. 4.17 "*in* Attorney General v. Dyer *[2004] 1 IR 40, Fennelly J. re-emphasised the principle, which can be traced back to* State (Furlong) v. Kelly *[1970] IR 132, to the effect that the comparison which requires to be conducted in order to determine correspondence is to be based on the acts or omissions which are said to constitute the offence."* After discussing the provisions of s. 5 of the Act of 2003, the Supreme Court also at para. 4.17 held *"there is not, therefore, any material difference, so far as correspondence is concerned, between the law as it stood under the 1965 Act and the law as it now stands under the 2003 Act."*

21. Words in warrants are to be given their ordinary and natural meaning unless the warrant clearly indicates that they are to be given a specific technical meaning. In this case, the allegation is patently one of stealing and therefore, I find correspondence with the offence of theft contrary to s. 4 of the Criminal Justice (Theft and Fraud Offences) Act, 2001.

Section 45
22. The respondent raised a point of objection relating to s. 45 of the Act of 2003. He objected on the basis that the warrant failed to indicate whether he was present at his trial. In this case the warrant clearly indicated, by crossing out the relevant paragraph in section (d), that this was not a relevant consideration. This is an indication that this was not a trial *in absentia*. It is important that the information required in the Table set out in s. 45 be given. That information requires in the first place that an indication be given that a person was or was not present at the trial. Further information is only required under s. 45 where the indication is that the person was not present at the trial.

23. In this case, the further information clarifies beyond any doubt that the respondent was present at his trial and at the revocation

of his suspended sentence. The information also recites that he also appeared at various subsequent dates concerning the process of execution of the sentence. It is beyond doubt that the provisions of s. 45 have been complied with.

24. Under point of objection no. 1, which dealt with the s. 45 point, sub-paragraphs therein raised a further issue as to whether the sentence was final and binding. I am satisfied that the warrant and additional information clarify that the sentence is final and binding.

The postponement of the Respondent's sentence
25. Section 11 (1)(e) of the Act of 2003 as amended requires that an EAW shall specify that a conviction, sentence or detention order is immediately enforceable against the person, or that a warrant for his or her arrest, or other order of a judicial authority in the issuing state having the same effect, has been issued in respect of one of the offences to which the EAW relates. That is a requirement that a sentence be immediately enforceable against the person. Article 1 paragraph 1 of the Framework Decision states that the EAW is a judicial decision issued by a Member State with a view to the arrest and surrender by another Member State of a requested person, for the purposes of conducting a criminal prosecution or *executing a custodial sentence* or detention order.

26. Counsel for the respondent submitted that the postponement of the sentence prohibits any further reliance on the EAW. He submitted that as it was not enforceable at all times during its currency, it ceases to have any effect. He also submitted that in the absence of an expert on Polish law, there is considerable doubt as to whether it was immediately enforceable when the respondent was arrested. He said that if there is any doubt, the respondent is entitled to the benefit of it.

27. This warrant was received in this jurisdiction on 3rd November, 2010 and it was endorsed for execution on 10th November, 2010. The respondent was arrested on 14th March, 2013 and was brought before the High Court. He was remanded in custody with consent to bail, he subsequently made bail and was remanded on bail since. In the time intervening, he instructed lawyers in Poland to pursue matters on his behalf.

28. The Polish authorities confirm that a postponement of imprisonment of his sentences was granted for a period of 6 months, *i.e.* from 15th September, 2011 to 15th March, 2012. This was on the basis of a hand injury. He did not appear to serve his prison sentence, which resulted in a decision of his "forceful leading to the Prison Facility on 15 May 2012." On 9th August, 2012, the search for the respondent and his apprehension and "forceful leading to the Prison Facility was ordered and on 18 March 2013 warrants were sent after him."

29. From the information provided by the Polish authorities, it is established that the sentence was postponed between 15th September, 2011 and 15th March, 2012. The EAW had been issued prior to that in 2009 and endorsed in 2010. His arrest in this jurisdiction was subsequent to the termination of the postponement. At the point of endorsement and at the point of arrest, the sentence was enforceable. It may be observed that the other sentence set out in the EAW, but which which there is no correspondence, was enforceable throughout the entire existence of the EAW.

30. In this case, the authorities expressly state "the foregoing provision resulted in the withdrawal of detention documentation of the sentenced person and calling off the search for the sentenced person." That was for the limited period of the postponement that the search was called off. Therefore, it is clear that the sentence was not enforceable in Poland during the time between 15th September, 2011 and 15th March, 2012.

31. Counsel for the Minister submitted that, on the basis of the decision in *S.M.R. v. Governor of Cloverhill Prison* [2009] IEHC 442 and on the basis of the decision in *Minister for Justice and Equality v. AB* [2015] IEHC 338, this 6 month period postponement does not invalidate the warrant. In *AB*, the case of *S.M.R.* is discussed as follows:

> *"The High Court (McKechnie J.) held that the court did not have to decide any issues of U.K. law as the EAW, when validly issued, is a separate and distinct document from the underlying domestic warrant. McKechnie J. at para. 67 held with respect to s. 10 of the European Arrest Warrant Act, 2003 ("the Act of 2003") that:*
>
> "Once satisfied that the European arrest warrant has been 'duly issued' I cannot see how that part of s. 10 has any further application. Whilst I have no doubt but that the court when making a s. 13 order (endorsement to execute) or a surrender order under s. 16, can operate the provisions of s. 10, it is still confined by the recited wording to the same event; namely validity at date of issue. As that inquiry has no relevance to this case I cannot, therefore, find an entry point via this route."

32. Counsel for the Minister submitted, without conceding the point, that while a respondent may have an arguable case that his surrender is prohibited if he or she is arrested during a period of postponement, there is no sustainable argument in the circumstances that apply here.

33. On the basis of the decision in *S.M.R.*, the question of the validity of this EAW is not a matter for this court. In particular, in this case it was established that at the point of endorsement, at the point of arrest and at the stage of the s. 16 hearing, the sentence is immediately enforceable within Poland. The Polish authorities continue to seek him. Therefore, this ground does not provide a basis for prohibiting his surrender.

34. It is appropriate to comment that if the Polish authorities decide to postpone a sentence and thereby withdraw all detention documentation during the period of postponement, it is difficult to understand how they may wish to have that person arrested and detained in another Member State. At the very least, that has the potential to deprive people of their liberty in circumstances where the true intent of the Polish court was the exact opposite. Good practice, at a minimum, would appear to require a suspension of the EAW, and notification of that fact, to the executing Member State. Perhaps in this case the Polish authorities were of the view that the second set of offences permitted his arrest in any case (that sentence apparently not having been postponed). Nonetheless the potential to cause difficulties at a surrender hearing was ever present. In any event, the withdrawal of a domestic warrant such as occurred in *S.M.R.*, or the postponement of the sentence at a point when the warrant had been endorsed but not executed and prior to arrest, does not invalidate the EAW and thereby require his surrender to be refused.

Section 10 (d) – "Fled"
35. Counsel for the Minister raised as a point for the consideration of the Court, that the EAW was issued prior to the amendment of the Act of 2003 by the provisions of the Criminal Justice (Miscellaneous Provisions) Act, 2009. In those circumstances, the respondent may not be surrendered if he had not fled from the issuing state. In the recent decision of *Minister for Justice and Equality v. Szall* [2015] IEHC 374, at para. 13, McDermott J. stated with respect to the judgment of Macken J. in *Minister for Justice, Equality and Law Reform v. Piotr Sliczynski* [2008] IESC 73:-

> "The learned judge stated that if it were objectively established that there was a deliberate decision to leave Poland in breach of terms as to residence and notification imposed in respect of a suspended sentence which were known to the appellant, it was reasonable for a trial judge to conclude that the appellant left in circumstances which made it impossible for him to serve the sentence imposed, even if his subjective motivation for leaving was for some other personal reason. The appellant was found to have left the requesting state in circumstances in which he breached the terms and conditions of his suspended sentence. Therefore, it followed that the appellant on an objective assessment of the evidence had 'fled' the issuing Member State because he left in circumstances which made it impossible for the sentence to be executed (see also Fennelly J. in *Gheorge* to the same effect)."

36. In the present case, the respondent left Poland in circumstances where it is reasonable to conclude on an objective basis that he knew he had a sentence to serve. He was present when the suspended part was revoked and he made a subsequent attempt to have the sentence postponed while in Poland. That has clearly been established on the information provided by the Polish authorities. I have no hesitation in finding that he "fled" and thus his surrender is not prohibited under the provisions of the original s. 10 (d) of the Act of 2003.

Section 37
37. It is under this heading that the respondent makes a number of complaints. They are premised upon his personal circumstances and his mental illness.

38. The respondent swore an affidavit on 2nd June, 2013. He said that he was then 32 years old having been born on 6th April 1982. He is a Polish national. He said he had been resident in Ireland at that time for 7 years. He said he was a law abiding businessman. It appears that he got an opportunity in 2012 to lease and run a supermarket in Dublin. He employs 3 people there. He then opened a second where his wife and himself also employ 3 people. He stated that they had serious and wide-ranging commitments to suppliers and also with respect to payment of taxes and rates to Local Authorities. He claimed a right of establishment here.

39. He said that he was a troubled teenager at the time of the alleged offences and said he was under the influence of an older, criminally-disposed individual. He said he suffered at the time and continues to suffer from Hodgkin's Disease. He said he "…also suffered from severe delusional behaviour known as Delusional Syndrome, apparently associated with that disease". From the medical reports placed before the court, it appears that the Hodgkin's Disease is irrelevant to any issue of mental illness. He said he was not diagnosed with these conditions until 2003/2004 and had, at that time, begun to abuse alcohol. He referred to a copy of medical certificates from 2003/2004.

40. He said that he was never served with any papers and had never avoided service of any papers on him in connection with the alleged offences. He also said that he had never seen any court order from 2003 or later as alleged. Insofar as this was an attempt to say that he had never received any notification whatsoever about this offence, it became obvious from the further information provided by the issuing judicial authority that this was patently untrue. In particular, the further information established that within Poland he had sought and obtained a postponement of the sentence at one stage due to a hand injury as referred to above.

41. The respondent said that he remained in Poland until January 2006 and left because of the generally poor social and economic conditions there and to get away from malign influences. He said he came to Ireland but did not state when. As stated above, I have no doubt but that he fled from Poland to avoid serving this sentence. He said he gained various employment here over the years, first as a casual labourer in the building trade but then as an employee with established firms. He said that his then girlfriend followed him to Ireland. They married in 2008 and have set up home here.

42. His wife also swore an affidavit in the proceedings. She confirmed coming over from Poland to be with him and that they have set up the two shops together. She said that "apart from coping with the Respondent's continuing health difficulties, it is a matter of great prejudice to me and my future that I should be deprived of his capacity and support in running these shop-units." She said it would be financially disastrous and she fears bankruptcy. She said she would be unable to go to Poland to ensure the respondent's welfare and proper medical treatment. That affidavit was sworn in June 2013. At the time of that affidavit being sworn, it turned out that the respondent was receiving little if any medical treatment.

43. The court has had the benefit of the reports from three consultant psychiatrists reports. The respondent's consultant psychiatrist, Dr. Ann Leader, was cross-examined at length on behalf of the applicant. I will deal with her evidence in more detail later but it is noteworthy that it was Dr. Leader's reports which triggered the issue of fitness to plead.

Fitness to plead
44. Strictly speaking, fitness to plead is not an issue that pertains to an extradition hearing as it is not a criminal trial. Extradition proceedings are *sui generis*. In circumstances where the respondent is facing loss of his liberty through the process of surrender, it is appropriate, where the interests of justice require, that enquiry is conducted into the ability of the respondent to comprehend what is going on in the proceedings, to make judgments with respect to the various aspects of the proceedings in respect of which his judgment is required or was required and to give appropriate instructions. The term "fit to plead" will be used in this judgment in a general way to connote these matters, unless it is otherwise indicated.

45. As stated previously, Edwards J. had made appropriate enquiries and found the respondent fit to plead. My own concern is with his fitness to plead at the time of the s. 16 hearing.

46. Much of the judgment of Edwards J. dealt with the particular evidence before him. I do not have regard to the findings of fact that were made by Edwards J. on the basis of that evidence. This judgment is delivered on the basis of a consideration of the facts before me. However, on occasion the transcript was referred to in the cross-examination of Dr. Leader and on re-examination and I am entitled to have regard to relevant matters arising therefrom.

47. As the issue of fitness to plead was one that the respondent's counsel was not prepared to concede, it was necessary for the Minister to have a fresh assessment of the respondent. The respondent objected to Prof. Kennedy seeing him and indeed to any other doctor from the Central Mental Hospital. Prof. Kennedy had given an opinion which was related to the limited issue of fitness to instruct and participate in court proceedings. The Minister arranged for Prof. Brendan Kelly, consultant psychiatrist of the Mater Misericordiae University Hospital to assess him.

48. Prof. Kelly concluded that the respondent had a psychotic mental illness for which he was being treated. He did not fulfil criteria for "mental disorder" as defined in s. 3 of the Mental Health Act, 2001 ("the Act of 2001"). He stated that a person can have a significant mental illness but not meet the criteria for mental disorder under the Act of 2001. Those are the criteria for involuntary treatment and detention. His psychotic mental illness was said to be still of considerable severity, albeit significantly (if still partially)

attenuated by his treatment with anti-psychotic medication as evidenced by the fact that he has not required hospitalisation here in Ireland but required it three times in Poland. Prof. Kelly says that the respondent requires ongoing treatment with antipsychotic medication and ongoing monitoring by a psychiatrist.

49. Prof. Kelly used the fitness to plead criteria set out in s. 4 (2) the Criminal Law (Insanity) Act, 2006. This provides:

> "An accused person shall be deemed unfit to be tried if he or she is unable by reason of mental disorder to understand the nature or course of the proceedings so as to -
>
> a) plead to the charge,
>
> b) instruct a legal representative,
>
> c) in the case of an indictable offence which may be tried summarily, elect for a trial by jury,
>
> d) make a proper defence,
>
> e) in the case of a trial by jury, challenge a juror to whom he or she might wish to object, or
>
> f) understand the evidence"

50. Dr. Kelly says that the respondent understood the nature or course of the proceedings. He says that the respondent claims he is not guilty and understands possible alternative pleas clearly. He can instruct his legal representative and says that he will tell his solicitor that he is not guilty and that it would be unjust to send him to Poland. He says that his solicitor will tell this to the judge or he might say it himself. He says that the respondent understands about electing for trial by jury and understands the nature and purpose of a jury. He says that the respondent can make a proper defence and can challenge a juror. He says that he can understand evidence very well and discussed the nature of possible evidence against him and possible evidence in his defence. He says the respondent is fit to plead.

51. From the above, it can be seen that the 2006 Act criteria may be less than satisfactory when directly applied to extradition proceedings. For example, many of the questions asked by Prof. Kelly are irrelevant as they relate to the preparation for and participation in a trial of guilty or innocence. The respondent is sought for surrender to serve a sentence. His trial has been heard. The real issue before the Court is his ability to understand the matters in the s. 16 hearing. Nonetheless, the fitness to plead criteria provide a basis to adjudicate on the matter.

52. Prof. Kelly had the EAW, as this had been provided to Prof. Kennedy from whom Prof. Kelly received 3 volumes of material including Prof. Kennedy's own reports which made explicit reference to the content of the EAW as being to serve a custodial sentence

53. Prof. Kelly gave a further report on this matter following a telephone conversation with Dr. Ann Leader at her request. Dr. Leader stated that he had a particular paranoid delusion about a certain member of his legal team. According to Prof. Kelly, such a delusion was not present when Prof. Kelly examined the respondent on 29th April, 2015. Prof. Kelly said that when he spoke with the respondent on that date, the respondent spoke very clearly about his legal situation and legal team. He said he discussed the matters in some depth with him on that date in order to assess the respondent's fitness to plead and provide instruction. He confirmed that he was thus "fit to plead" and provide instruction, notwithstanding his mental illness and its associated delusions and hallucinations.

54. Dr. Leader provided the court with five separate reports dated 15/10/2013, 27/01/2014, 01/12/2014, 20/01/2015 and the 06/05/2015. She was cross-examined at length over the course of a number of days. A great deal of that length of time can be explained by the undated notes of the examinations carried out by Dr. Leader which were loose-leafed and not kept in order in the file. The confusion was further compounded by Dr. Leader writing on the originals in an attempt to put order on the notes. The notes themselves were on occasion lacking in detail.

55. The evidence of Dr. Leader revealed that she was satisfied from the outset that the respondent had psychotic symptoms. She was of the view that he had paranoid delusions particularly relating to his solicitor. She had not stated a particular mental illness in any report but at one stage in her evidence she said "I feel that this man is suffering from a very severe paranoid psychosis most probably schizophrenia." It is clear from the evidence before me that Prof. Kelly is of a similar view in so far as he refers to "a psychotic mental illness…of considerable severity" and therefore, the court is dealing with a man with a significant mental illness. I do, however, comment that in so far as it was stated by Prof. Kelly that this was being attenuated by his treatment with antipsychotic medication, it appeared from the cross-examination of Dr. Leader which brought forth further information from the respondent's chemist, that he was not in fact taking the medication prescribed. I take from this that it is therefore likely that if he was to take the medication that his symptoms would not be as significant.

56. On the issue of fitness to plead, it became clear that Dr. Leader had not addressed this in her earlier reports. It may be that a consultant forensic psychiatrist, which Dr. Leader is not, may have automatically conducted a fitness to plead test where there was evidence of a mental illness. I do not take anything of significance from the failure to address the issue at the outset, as the request to Dr. Leader was to "examine our client and present us with a medico legal report on his current and long term prognosis." She did examine him with commendable speed and diagnosed a mental illness in which he displayed definite symptoms of psychosis. She had concerns about him and continued to treat him although encouraging him to seek treatment elsewhere. He did not do that. However, Dr. Leader's concerns were quite justified about his mental health as can be seen from the report of Prof. Kelly.

57. The issue of fitness to plead appears to have been addressed in an oblique way in her third report of 1st December, 2014 when she said "I am very concerned that he is not acting in his own self interest because of mental illness." In her fourth report of 20th January, 2015, she stated that he "has almost no insight." She said he was very stressed by the legal process and he does not trust his legal team. She said he had "very significant delusions about one of the solicitors." She said that "…the severity, content and nature of his delusions affect his ability to plead." She said that his paranoid and delusional thinking extended into the full understanding of the legal process regarding the charges against him. She also said that the respondent said he did not mind going to prison at home (Poland), describing how he could find some honest workers in jail whom he could then hire in Ireland.

58. In Dr. Leader's fifth report of 6th May, 2015 she said that from repeated examination that she was concerned that his delusions were affecting his judgment in relation to his dealings with his solicitor. He mistrusted a particular female solicitor and had paranoid delusions about her. His present solicitor was so concerned about the respondent that he had barred the respondent from the solicitor's office. Dr. Leader said she was concerned that the delusions may prevent the respondent from having a frank and open

relationship with his legal team.

59. In her own evidence, she stated that the respondent does understand the charge but she said she did not think he understood the implications. She said his reference to bringing prisoners from Poland back to Ireland to work was delusional. She also referred to his view that he would only spend a short time in prison in Poland. She said that his delusion was affecting the relationship with his solicitor and affecting his understanding of the consequences of the legal process and that was why he was not fit to plead.

60. It is striking from the notes of the examination in March 2015 that the respondent was able to inform Dr. Leader that the "2 year sentence gone" and that only the 1 year sentence was left. This is a reference to what had occurred during the ongoing hearing of the case and the concession by counsel for the Minister that there was no correspondence in relation to the 2 year sentence. That is an obvious indication that the respondent was following the court proceedings and understood them. It is also abundantly clear that even at the outset of these proceedings, the respondent was able to give detailed, coherent instructions in relation to his own solicitor for the purpose of a draft affidavit being prepared for him to approve and to swear.

61. Having considered all of the evidence before me, I accept the evidence of Prof. Kelly that he is fit to plead. This evidence was not challenged in cross-examination. His report details his focused approach to the assessment of fitness to plead and his conclusions appear the rationale corollary of the observations he made and his own findings on examination. However, I have also paid careful attention to the evidence of Dr. Leader and even if it were the only evidence relating to the fitness to plead issue, I would not accept her conclusions in that regard in the particular circumstances of this case. She has concerns about the affect on his relationship with his solicitor because he has a delusion about a particular person. That concern does not reach the threshold for establishing that he is unable to instruct a legal representative. While there is such an issue with his delusions about a particular solicitor, arrangements have been put in place to deal with any issue of that nature. It is notable that his solicitor has sworn a number of affidavits in these proceedings and while expressing concern that he is not in a fit mental or physical state to deal with current proceedings, he does not provide any detail beyond relying on Dr. Leader's view. It is also noted that he instructs this solicitor in relation to business.

62. In any event, the question for me is whether he is capable of understanding these proceedings and capable of giving instructions. In my view, it is beyond doubt that he is so capable. That is established from all of the evidence before me and in particular in relation to relevant matters that I have outlined already. I also find in relation to his view as to what may happen when he goes to Poland, that he understands that he is going to face a custodial sentence. He is aware of the consequences of this case and anticipates early release from prison. Indeed, it may be observed that his view on early release from a Polish prison may turn out to be correct. Early release from prison is not unheard of either in this jurisdiction or in Poland. He also may very well be able to find people in prison who would very much like to come to Ireland to work. In any event, that does not affect his fitness to plead. Finally, in so far as Dr. Leader referred to affecting his judgement regarding his dealings with his solicitor, the court must be very wary of trespassing on areas that are solely areas of judgement as distinct from questions of capacity to instruct. A person, once mentally capable, is quite entitled to act on a basis that a reasonable person might view as indicative of bad judgement. The issue here is ability to comprehend the proceedings, to instruct solicitors and related aspects in relation to that and I am quite satisfied that he is fit to plead in the sense that I outlined at the beginning of this issue.

Article 3

63. The respondent placed before the Court certain media articles that dealt with conditions in Polish prisons for those with mental illness. The first of these is undated and unattributed to any particular media outlet. Indeed, that article was more about a complaint about a particular person who despite "intellectual retarded condition" was sentenced. The second article also is undated, unattributed and relates to the same man. The third article, again undated and unattributed, relates to another man but again is a complaint about the fact that a mentally ill man had been sentenced to prison.

64. It was not really advanced to any extent at the hearing that there would be a specific breach but in so far as the issue was raised in the points of objection and on affidavit, it is appropriate that the Court address it.

65. The law in this regard has been set out in *Minister for Justice, Equality and Law Reform v. Rettinger* [2010] IESC 45 and applied in a large number of other cases. The test is a significant one, there must be substantial grounds for believing that the respondent would be at real risk of suffering inhuman and degrading treatment if surrendered. The Court has to bear in mind the presumption in s. 4A of the Act of 2003. The Court must be forward-looking. Any examination that is to be carried out must be done so in a rigorous fashion.

66. I am quite satisfied that nothing has been raised that would give any cause for concern in relation to Article 3 rights. The test has not been met. There is simply nothing to suggest that the Court should even by its own motion seek further information.

67. This case can be contrasted with the case of *Minister for Justice, Equality and Law Reform v. Machaczka* [2012] IEHC 434 where there was a large amount of evidence regarding treatment of prisoners suffering from mental illness. In that case, an assurance was given to the Court that the respondent would be given the same standard of medical care as any other Polish citizen suffering from the same condition. In the present case, I do not require an assurance as there is no evidence before me that reaches a threshold to put the court on any further enquiry. In other words, there is simply no evidence before me when considering matters that I am required to consider under *Rettinger* that there are any grounds that suggest or indicate a real risk that the respondent would be subjected to inhuman and degrading treatment. There is no necessity to examine this issue in any greater detail.

Article 8

68. His constitutional/family rights were not addressed at any great length in the s.16 hearing. The law in this area is set out in a number of judgments of this Court such as *Minister for Justice and Equality v. P.G.* [2013] IEHC 54 and *Minister for Justice and Equality v. T.E.* [2013] IEHC 323 where Edwards J. identified twenty-two principles of general application in Article 8 issues.

69. The Court must engage in a case specific enquiry. The issue is one of proportionality but not exceptionality. Delay may be considered as a factor going to the calculation of the public interest.

70. In this case, the respondent is sought for an offence committed when he was 19 years old. It was an offence of stealing a car and then forging documents with a view to selling the car. He acted in concert with another. He received a one year sentence. The offence was in 2002. There was a relatively quick conviction and sentence and thereafter there was a long history regarding the carrying out of the sentence in circumstances where the respondent utilised the criminal justice system, as he was entitled to do, to either reverse the sentence or have it postponed. It is clear that he was wanted throughout the period. There is very little, if any, unexplained delay as it is quite clear that the Polish authorities were engaging with the process of seeking his imprisonment. Any delay since the warrant was sent to Ireland cannot be laid at the door of the Polish authorities. It is also clear that he fled Poland.

71. In those circumstances, there is a moderately high public interest in his surrender. It is only moderately high because of the natural effluxion of time and the relatively less serious nature of the offence and length of sentence.

72. As against that, he has clearly established himself here with his wife, he runs two shops and he now has a mental illness of some severity. In *Machaczka*, the Court prohibited the surrender on Article 8 grounds in circumstances where the respondent suffered from mental illness. The facts of that case are as far removed from this case as possible. The respondent therein was at serious risk of committing suicide if returned to Poland. In this case, it is expressly stated that he is not at risk of suicide. In that case, the person was under intensive treatment in this jurisdiction. There was an issue with his powerful medication being available to him in Poland. He would be separated from his family who were providing essential support. Those factors are not present in this case. I have no evidence that the medication would not be available to the respondent. He is, in fact, mostly not taking the medication it appears. There is no real evidence other than the assertion that his wife is ensuring his welfare and providing treatment. Apart from attending Dr. Leader, he does not attend anyone else. The effects on his business are in no way particularly injurious. Indeed, in this case his wife is part of the business and I do not accept her assertion of financial ruin.

73. Therefore, on balancing the matters as I must do, the public interest in his extradition against private interests, I am quite satisfied that it would not be a disproportionate interference with his right to respect for his private and family life if he is surrendered to Poland to serve this sentence.

Other issues
74. For the sake of completeness, I will deal with the other matters raised in the points of objection. These were not argued but neither were they abandoned.

75. At para. 2 of the points of objection, it is stated that the EAW is not in the form as set out in the Annex to the Framework Decision as it does not provide sufficient clarity as to the penalties. This matter has been dealt with in the course of this judgment. I will restate that he is clearly wanted to serve a one year sentence of imprisonment.

76. At para. 4 of the points of objection, it was stated that the applicant is required "to prove the contents of Paragraphs E and F therein". This is a misunderstanding of the law relating to extradition and surrender that has been clearly articulated by the Superior Courts. No proof of the contents of a warrant are required. The court operates on a presumption of good faith and in the EAW context on the basis of mutual trust.

77. At para. 5, it stated that the court should conduct an enquiry into the fundamental unfairness of the respondent's pre-trial detention and/or sentencing and/or the initiation of this application and the inequality of arms as between the respondent and the prosecutorial authorities in the issuing state having regard to the European Convention on Human Rights ("ECHR"). This is a bald statement that has not been followed through with any or any sufficient evidence to support any implicit contention contained therein that his rights have been violated or will be violated. It ignores the principles of good faith and mutual trust that the Court accords to the practices of another Member State. In the absence of any evidence to the contrary, the Court is required to give effect to that presumption of good faith and is not obliged to carry out an enquiry into these matters.

78. I have, however, considered the Article 3 and Article 8 issues above in the context of the evidence and have ruled against him. In relation to Article 6 rights, no evidence was placed before me that even began to address the very high threshold has been reached to show that the respondent has suffered or will suffer an egregious breach of his right to a fair trial.

79. In relation to Article 7, this is not grounded at all in any of the papers and it is a wholly unstateable ground of objection. There is a reference to a breach of his Article 16 rights but again this is wholly unstateable on the papers. Similarly with respect to Article 2, 3 and 4 of Protocol 7, these points are also wholly unstateable grounds of objection.

80. His objections regarding delay and lapse of time as a stand alone argument are unsustainable in light of the decision in *Minister for Justice, Equality and Law Reform v. Stapleton* [2008] 1 I.R. 669. Those issues of delay and lapse of time were considered and rejected as part of the Article 8 concerns.

81. His argument about his right of establishment here has been dealt with as an Article 8 point.

82. I have also considered his health issues as set out above. For the sake of completeness, the fact that he has had cancer and other issues that may have been undiagnosed at the time of the sentence is not a ground to refuse surrender and they do not affect any of the matters in terms of the assessment of Article 3 or Article 8 issues as set out earlier.

83. For the reasons stated above, I may make an order for his surrender under s. 16 of the Act of 2003 to such person as is duly authorised by Poland to receive him.