

**THE HIGH COURT**

[2021] IEHC 196  
[2020 No. 185 EXT.]

**BETWEEN**

**MINISTER FOR JUSTICE AND EQUALITY**

**APPLICANT**

**AND**

**PRZEMYSŁAW WITEK**

**RESPONDENT**

**JUDGMENT of Mr. Justice Paul Burns delivered on the 16th day of March, 2021**

1. By this application the applicant seeks an order for the surrender of the respondent to the Republic of Poland ("Poland") pursuant to a European arrest warrant dated 18th March, 2020 ("the EAW").
2. The EAW was issued by Judge MA Tomasz Kaszyca, of the District Court in Wrocław as the issuing judicial authority. The surrender of the respondent is sought thereby to enforce a sentence of one year of imprisonment imposed on 1st December, 2003, of which 11 months and 28 days remain to be served. The EAW was endorsed by the High Court on 30th July, 2020 and the respondent was arrested and brought before this Court on 22nd January, 2021.
3. I am satisfied that the person before the Court is the person in respect of whom the EAW was issued. This was not put in issue by the respondent.
4. I am satisfied that none of the matters referred to in ss. 21A, 22, 23 and 24 of the European Arrest Warrant Act, 2003, as amended ("the Act of 2003"), arise and that the surrender of the respondent is not prohibited for the reasons set forth therein.
5. I am satisfied that the minimum gravity requirements of the Act of 2003 are met. The sentence to be served in respect of each warrant is in excess of 4 months' imprisonment.
6. Section 38(1)(b) of the Act of 2003 provides for a procedure whereby it is not necessary for the applicant to establish correspondence, or double criminality as it is sometimes referred to, where the offence is an offence to which article 2(2) of the Council Framework Decision dated 13th June, 2002 on the European Arrest Warrant and the Surrender Procedures Between Member States, as amended ("the Framework Decision"), applies and which carries a maximum penalty of at least 3 years' imprisonment under the law of the issuing state. At section (e.I) of the EAW, the issuing judicial authority has invoked the procedure provided for at s. 38(1)(b) by certifying that the offences carry a maximum penalty of at least 3 years' imprisonment and ticking the box for "*fraud*", as the relevant offence to which article 2(2) of the Framework Decision applies. However, at part E.II of the EAW under the heading "*Full description of offence(s) not covered by section e.1 above*", the issuing authority has listed both offences. There is therefore some ambiguity in relation to the invocation of the tick-box procedure. While the Court could infer that the reliance on the tick-box procedure is only in respect of the second offence involving the stolen credit card, it is unnecessary for the Court to draw such inference as I am satisfied that correspondence can be established between both offences in the EAW

and an offence under the law of this State. As regards offence I, correspondence can be established between that offence and the offence of theft contrary to s. 4 of the Criminal Justice (Theft and Fraud Offences) Act, 2001 ("the Act of 2001"). As regards offence II, correspondence can be established between that offence and the offence at common law of attempted deception contrary to s. 6 of the Act of 2001 and/or the offence of handling stolen property contrary to s. 17 of the Act of 2001, or the offence of possessing stolen property contrary to s. 18 of the Act of 2001. Correspondence was not seriously put in issue.

7. Counsel for the respondent submitted that surrender is precluded by s. 37 of the Act of 2003 as it would constitute an unjustified and disproportionate interference with the respondent's right to a private and family life as guaranteed under article 8 of the European Convention on Human Rights ("the ECHR").
8. The respondent filed an affidavit on 2nd March, 2021, in which he avers that in 2002, when the offences were committed, he suffered from drug addiction and following an ultimatum from his partner, in an effort to turn his life around, he moved to Ireland in 2005 and obtained employment with a supermarket. He succeeded in stabilising his lifestyle, his partner joined him in Ireland, he has worked for the same supermarket chain since 2005 and is now a supervisor. He and his partner had a son in Ireland in 2009. The family live in private rented accommodation. His wife has only limited English and so has restricted employment prospects. His parents in Poland are now deceased. The family are dependent upon his income and face eviction if he is surrendered. Most importantly, as a recovered addict, the respondent is extremely fearful that if he is imprisoned, he will relapse into drug abuse and addiction. The respondent's partner, Jowita Litwic, swore an affidavit confirming the respondent's previous and current circumstances and the family's concerns should surrender occur. The respondent's solicitor filed an affidavit on 2nd March, 2021 exhibiting a report from a Polish legal expert and averring that his efforts to obtain a medical report had been unsuccessful.
9. It should be borne in mind that rights under article 8 ECHR are not absolute, but rather are expressly stated to be subject to interference by public authorities where necessary in a democratic society. Article 8 ECHR provides:-
  - "1. *Everyone has the right to respect for his private and family life, his home and his correspondence.*
  2. *There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."*
10. In *Minister for Justice & Equality v. Vestartas* [2020] IESC 12, MacMenamin J. stated as follows at para. 68:-

"68. *In carrying out an assessment in our law for the purposes of s.16 of the Act, therefore, it is not accurate to speak of the task as one which is not governed by any predetermined approach, or pre-set formula, balancing competing public and private interests. In fact, the constant and weighty public interest in ordering surrender is not only underlined by Article 8(2) considerations such as necessity under law, freedom and security, but the words of ss.4A and 10 of the Act. The test must be seen in light of the clear exposition in the judgments in Ostrowski. A court may often have to take private and family rights considerations into account. But it can only do so having regard to the limitation contained in Article 8(2) of the ECHR, and the public interest considerations inherent in the Act and the Framework Decision. To surmount these, in any case, would necessitate that the evidence requirement be high. The assessment does not involve a balance between the rights of the public and those of the individual. It is one, rather, where, as the Act provides, a court shall presume that an issuing state will comply with the requirements of the Framework Decision - unless the contrary is shown on the basis of cogent evidence.*"

11. As regards delay, in *Vestartas*, MacMenamin J. stated at para. 89 that:-

"89. *Though a matter of legitimate concern, in this case the delay is to be viewed against the respondent's private and family circumstances. Unless truly exceptional or egregious, delay will not alter the public interest, although there may come a point where the delay is so lengthy and unexplained as to constitute an abuse of process, or to raise other constitutional or ECHR issues.*"

12. It is clear that there is a significant public interest in surrender where the requirements of the Framework Decision are met. How s. 37 of the Act of 2003 is to be approached in light of this significant public interest, particularly as regards article 8 ECHR, is set out by MacMenamin J. in *Vestartas* at para. 94:-

"94. *The contrast with the exceptional facts in J.A.T. is plain. For an Article 8 defence to succeed, it can only be on clear facts based and cogent evidence. The evidence must be sufficient to rebut the presumption contained in s.4A of the Act (see, para. 41 above). The circumstances must be shown to be well outside the norm; that is, truly exceptional. In the words of s.37(1), they must be such as would render an order for surrender 'incompatible' with the State's obligations under Article 8 of the ECHR. This would necessitate that the incursion into the private and family rights referred to in Article 8(1) was such as to supervene the limitations on the right contained in Article 8(2), and over the significant public interest thresholds set by the 2003 Act itself.*"

13. In the current matter, there has been a significant lapse of time between the date of the offending/date of sentence and the issuing of the EAW. There has been no significant delay in the prosecution of the EAW proceedings. Bearing in mind the reasoning of the Supreme Court in *Vestartas*, I do not regard the said lapse as so egregious in itself as to justify refusal of surrender. It is extremely unfortunate that the respondent's offending

when he was approximately 25 years old has come back against him some 19 years later when he has successfully turned his life around and has a family to support. The Court has considerable sympathy for the respondent. However, taking the delay along with the respondent's personal circumstances into account, I am not satisfied that the circumstances of this matter are so egregious or exceptional that a refusal of surrender is justified under s. 37 of the Act of 2003. The respondent appears to have left Poland in the knowledge that he was subject to the criminal proceedings in the EAW and does not appear to have made any effort over the years to regularise his position in Poland. The EAW was issued approximately a year ago by a judge. In such circumstances, the Court can assume that the judge issuing same considered proportionality. Section 37 of the Act of 2003 does not give this Court a jurisdiction to simply substitute its own view of proportionality for that of the issuing judicial authority. Whilst surrender will be disruptive of the respondent's current circumstances, I do not regard such disruption as being truly exceptional so as to justify refusal of surrender. Significant disruption to the private and family life of an accused or requested person is almost an inevitable consequence of criminal or surrender proceedings. There is no evidence before the Court to indicate that the respondent's health or addiction needs cannot be adequately met if surrendered.

14. Ultimately, bearing in mind the terms of s. 37 of the Act of 2003, this Court must determine whether the respondent's circumstances are such as would render an order for surrender incompatible with the State's obligations under article 8 ECHR. While acknowledging and commending the efforts the respondent has made to turn his life around, I am satisfied that an order for surrender would not be incompatible with those obligations. I dismiss the respondent's objections to surrender. The Court can only hope that once back in Poland, the relevant authorities will have regard to the respondent's personal and family circumstances when determining how long he is to actually spend in detention, however that is entirely a matter for those authorities.
15. The respondent had initially indicated an objection to surrender based on prison conditions in Poland. At hearing, counsel for the respondent conceded that his evidence in that regard fell short of putting the Court on enquiry as regards same.
16. I am satisfied that surrender in respect of the EAW is not precluded under part 3 of the Act of 2003 or any part of that Act.
17. It follows that this Court will make an order pursuant to s. 16(1) of the Act of 2003 for the surrender of the respondent to Poland in respect of same.