

THE HIGH COURT

[2021] IEHC 179
[2017 No. 52 EXT]

BETWEEN

MINISTER FOR JUSTICE AND EQUALITY

APPLICANT

AND

JAROSŁAW LIWIŃSKI

RESPONDENT

JUDGMENT of Mr. Justice Paul Burns delivered on the 12th 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 15th September, 2016 ("the EAW"), issued by Circuit Court Judge Joanna Zaremba as the issuing judicial authority. The surrender of the respondent is sought for the purpose of prosecuting him in respect of two offences of trafficking in narcotics allegedly committed in 2007.
2. The EAW was endorsed by the High Court on 13th March, 2017 and the respondent was arrested and brought before this Court on 9th March, 2018.
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 maximum penalty for each of the offences referred to in the EAW is 10 years' imprisonment.
6. By virtue of s. 38(1)(b) of the Act of 2003, it is not necessary for the applicant to show correspondence between an offence in the EAW and an offence under Irish law where the offence in the EAW 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 carries a maximum penalty in the issuing state of at least 3 years' imprisonment. In this instance, the issuing judicial authority certified that the offences are offences to which article 2(2) applies, that the offences carry a maximum penalty in the issuing state of at least 3 years' imprisonment and it has ticked the relevant box at part E of the EAW for "*illicit trafficking in narcotic drugs and psychotropic substances*". I am satisfied that the procedure under s. 38(1)(b) of the Act of 2003 has been properly invoked and relied upon so that it is not necessary for the applicant to establish correspondence with an offence in this jurisdiction. In any event, I am satisfied that such correspondence does exist. No issue was raised in respect of correspondence.

7. This matter was adjourned on a number of occasions to await the outcome of various pending legal challenges. When the matter eventually came on for hearing, counsel for the respondent indicated that there was a single objection to surrender, viz. that surrender is precluded as the respondent had already been prosecuted and served two years and six months' imprisonment in respect of same.
8. The respondent swore an affidavit dated 10th April, 2018 in which he avers that he had:-

"previously been charged for the same matter and I was detained for 2.5 years between June 2007 and December 2009 and ultimately a 4.5 year prison sentence was imposed. I was imprisoned at Ostroleka Prison and at Czerwony Bor Bialeka Prison. I believe that sentence may have been later rescinded as I was released by a Judge."
9. The Court informed the issuing judicial authority of the respondent's averment as set out above and sought additional information. Possibly due to meanings being lost in translation, a protracted series of communications took place between the Court and the issuing judicial authority. There was some misunderstanding on the Polish side as to when a reply had been sent and the two replies eventually received did not provide sufficient clarity. The replies indicated that surrender was still being sought in respect of both offences but one of the replies stated *"... according to the statement of the defendant, this is the case in which the first sentence has been revoked"*. By letter dated 28th August 2020, the Court sought clarification that the respondent was incorrect in his assertion that he had been sentenced for the matters and the sentence had been revoked. By reply dated 23rd September, 2020, the issuing judicial authority indicated that the EAW remained valid and had not been revoked.
10. The solicitor for the respondent, Mr. Barry Fitzgerald, swore an affidavit dated 2nd November, 2020 in which is exhibited a decision of the District Court in Warsaw dated 26th May, 2009 to extend the temporary arrest of, *inter alia*, the respondent to 20th December, 2009. In that decision, it states that all defendants are in temporary arrest from 20th June, 2007. (It is noted the spelling therein of the respondent's surname is "Litwiński").
11. By letter dated 9th November, 2020, the Court furnished a copy of the affidavit of Mr. Fitzgerald and a copy of the order of the District Court in Warsaw and set out a detailed set of questions to the issuing judicial authority as to whether the respondent had ever been prosecuted, convicted, sentenced or imprisoned in respect of either of the offences referred to in the EAW. By reply dated 5th January, 2021, it was indicated that the respondent *"has not been previously prosecuted for any of the crimes that are the subject of the European arrest warrant"*, but then went on to state that the respondent *"was sentenced by the Court of First Instance for committing two crimes that are the subject of the European Arrest Warrant, but the Court of Second Instance overturned the sentence in this regard and referred the case back for reconsideration"*. It was indicated that *"Due to the decision of the Court of Second Instance, Jarosław Liwiński was not convicted and*

thus did not serve his sentence for any of the crimes that are the subject of the European Arrest Warrant in whole or in part”.

12. The respondent swore a second affidavit, dated 21st January, 2021, in which he re-affirms the contents of his first affidavit concerning having been prosecuted for the offences and that the sentence imposed may have been rescinded.
13. By letter dated 25th January, 2021, the Court re-furnished the issuing judicial authority with the affidavit of Mr. Fitzgerald and the order of the District Court in Warsaw, and posed a series of further questions. By reply dated 8th February, 2021, the issuing judicial authority furnished a copy of the decision of the Circuit Court in Warsaw to issue the EAW dated 15th September, 2016. This appears to show the following:-
 - (a) on 4th June, 2008, the court received a bill of indictment against, *inter alia*, the respondent, in which he was charged with three offences;
 - (b) the first two offences are the offences in respect of which surrender is sought. The third offence is a drugs-related offence said to have occurred on 20th June, 2007;
 - (c) on 27th May, 2013, the respondent was found guilty of all three offences and a cumulative term of imprisonment of 4 years' and 6 months was imposed; and
 - (d) on appeal, the verdict was set aside as regards the first two offences and remitted back, while the conviction was upheld as regards the third offence. The period in actual detention from 26th August, 2009 to 27th November, 2009 was put towards the sentence of 6 months' imprisonment imposed as regards the third offence.
14. Counsel for the respondent submitted that there was still some ambiguity over what offences the respondent had been imprisoned in respect of for approximately 2 years and 6 months, and that the respondent was maintaining that it was in respect of the offences in the EAW.
15. By letter dated 23rd February, 2021, the Court requested the issuing judicial authority to confirm that the period of detention from 26th August, 2009 to 27th November, 2009 was set against the 6-month sentence imposed in respect of the third offence referred to above and to confirm that the respondent was incorrect in saying he had been in custody from June 2007 to December 2009, or to indicate what offences such detention related to. By reply dated 25th February, 2021, it is confirmed that the respondent was subject to pre-trial detention from 26th August, 2009 to 27th November, 2009 and this was included towards his sentence in respect of the third offence as stated above. It is also indicated that from 20th June, 2007 to 27th February, 2008, the respondent served a sentence in respect of a robbery and from 27th February, 2008 to 26th August, 2009, he served a sentence in respect of another robbery.
16. The respondent swore a third affidavit dated 3rd March, 2021, in which he disagrees with the last response received from the issuing judicial authority, denied serving the sentences referred to therein and maintained he had been detained only in respect of

the two offences which are the subject matter of the EAW and the third offence for which he received a sentence of 6 months' imprisonment.

17. On the basis of the mutual trust and confidence which underpins the European arrest warrant system, I accept the information from the issuing judicial authority that the respondent did not serve a period approximately from June 2007 to December 2009 in custody in respect of the offences which are the subject matter of the EAW. He did spend a period in pre-trial detention from 26th August, 2009 to 27th November, 2009 in respect of three offences, including the two offences the subject matter of the EAW, and this was credited against the sentence of 6 months' imprisonment imposed in respect of the third offence. He had been convicted of the two offences in the EAW but the conviction was set aside and remitted back to the lower court. His surrender is now sought to face retrial for those offences. I note that in his affidavits, the respondent did not mention any appeal and in particular did not mention the two offences being remitted back for reconsideration, but merely stated his belief that the 4 years and six-months' sentence "*may have been later rescinded*". I am not satisfied that there is any reason to refuse to surrender the respondent to face such retrial. I further note that the respondent's surrender is sought to face trial where, in accordance with s. 4A of the Act of 2003, it is presumed that the issuing state will comply with the requirements of the Framework Decision unless the contrary is shown, which includes respecting fundamental rights. The presumption in s. 4A has not been rebutted. I dismiss the respondent's objection to surrender.
18. I am satisfied that the surrender of the respondent is not prohibited under part 3 of the Act of 2003 or any other provision of that Act.
19. It follows that this Court will make an order pursuant to s. 16 of the Act of 2003 for the surrender of the respondent to Poland.