

THE HIGH COURT

[2021] IEHC 198
[2019 No. 394 EXT.]

BETWEEN

MINISTER FOR JUSTICE AND EQUALITY

APPLICANT

AND

KRZYSZTOF SŁAWOMIR ZIÓŁKOWSKI

RESPONDENT

JUDGMENT of Mr. Justice Paul Burns delivered on the 15th day of March, 2021

1. In 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 24th October, 2019 ("the EAW"). The EAW was issued by Robert Studzienny, Judge of the Regional Court in Gdańsk, as the issuing judicial authority. The EAW seeks the surrender of the respondent to enforce a sentence of 4 years and 10 months' imprisonment imposed on 27th August, 2004, of which 2 years, 8 months and 7 days' imprisonment remains to be served.
2. The EAW was endorsed by the High Court on 3rd February, 2020 and the respondent was arrested and brought before the High Court on 23rd September, 2020.
3. I am satisfied that the person before the Court is the person in respect of whom the EAW was issued. No issue was raised in this respect.
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 have been met. The remaining sentence to be served is in excess of 4 months' imprisonment. No issue was taken in respect of minimum gravity.
6. I am satisfied that correspondence has been established between the five offences in respect of which the sentence in question was imposed and the offences in this State of robbery, attempted robbery, assault, threatening to cause serious harm to another and theft. No issue was taken in respect of correspondence.
7. The sentence in respect of which surrender is sought was imposed by the Regional Court in Gdańsk on 27th August, 2004 and is a cumulative sentence combining two earlier sentences as follows:-
 - (a) sentence case reference number IV K 312/03 of the Regional Court in Gdańsk imposed on 30th December, 2003; and
 - (b) sentence case reference number II K 91/03 of the District Court in Sopot imposed on 23rd January, 2004.

The respondent was granted conditional early release by the Regional Court in Elbląg on 4th April, 2008 but on 25th March, 2011, the Regional Court in Gdańsk revoked the early release (IV Kop 483/11/Owz) and ordered enforcement of the remainder of the sentence.

8. The respondent objected to surrender on the following grounds:-
- (i) surrender is precluded by s. 45 of the Act of 2003;
 - (ii) surrender is precluded by reason of the failure of the issuing state to set out how the remainder of the sentence to be served is calculated; and
 - (iii) surrender is precluded by s. 37 of the Act of 2003.
9. The respondent swore an affidavit dated 28th October, 2020 in which he avers that he has been residing in Ireland since 2011. Following a workplace accident, he is now in receipt of disability allowance and has a pending personal injuries case. Other members of his family also reside in Ireland. He also avers that he was released on 24th June, 2008 from the sentences to which the EAW relates and was subject to a period of post-release probation supervision which he complied with. He moved to Kraków in 2009 and then to Ireland. He avers that he has no knowledge of the proceedings which led to the decision of 25th March, 2011 to revoke his conditional release, having no notice of same and not instructing any lawyer in respect of same.

Section 45 of the Act of 2003

10. Section 45 of the Act of 2003 derives from article 4a of the European Council Framework Decision dated 13th June, 2002 on the European Arrest Warrant and the Surrender Procedures Between Member States, as amended ("the Framework Decision"), and deals with sentences imposed *in absentia* and provides:-

"45. A person shall not be surrendered under this Act if he or she did not appear in person at the proceedings resulting in the sentence or detention order in respect of which the European arrest warrant was issued, unless the European arrest warrant indicates the matters required by points 2, 3 and 4 of point (d) of the form of warrant in the Annex to the Framework Decision as amended by Council Framework Decision 2009/299/JHA, as set out in the table to this section.

Table

- (d) *Indicate if the person appeared in person at the trial resulting in the decision:-*
- 1. *Yes, the person appeared in person at the trial resulting in the decision.*
 - 2. *No, the person did not appear in person at the trial resulting in the decision.*
 - 3. *If you have ticked the box under point 2, please confirm the existence of one of the following:-*

3.1a. *the person was summoned in person on . . . (day/month/year) and thereby informed of the scheduled date and place of the trial which resulted in the decision and was informed that a decision may be handed down if he or she does not appear for the trial;*

OR

3.1b. *the person was not summoned in person but by other means actually received official information of the scheduled date and place of the trial which resulted in the decision, in such a manner that it was unequivocally established that he or she was aware of the scheduled trial, and was informed that a decision may be handed down if he or she does not appear for the trial;*

OR

3.2. *being aware of the scheduled trial, the person had given a mandate to a legal counsellor, who was either appointed by the person concerned or by the State, to defend him or her at the trial, and was indeed defended by that counsellor at the trial;*

OR

3.3. *the person was served with the decision on . . . (day/month/year) and was expressly informed about the right to a retrial or appeal, in which he or she has the right to participate and which allows the merits of the case, including fresh evidence, to be re-examined, and which may lead to the original decision being reversed, and*

the person expressly stated that he or she does not contest this decision,

OR

the person did not request a retrial or appeal within the applicable time frame;

OR

3.4. *the person was not personally served with the decision, but*

— *the person will be personally served with this decision without delay after the surrender, and*

— *when served with the decision, the person will be expressly informed of his or her right to a retrial or appeal, in which he or she has the right to participate and which allows the merits of the case, including fresh evidence, to be re-examined, and which may lead to the original decision being reversed, and*

— *the person will be informed of the time frame within which he or she has to request a retrial or appeal, which will be . . . days.*

4. *If you have ticked the box under points 3.1b, 3.2 or 3.3 above, please provide information about how the relevant condition has been met."*

11. The parties were in agreement that the hearing which resulted in the cumulative judgment of 27th August, 2004 was a hearing for the purposes of s. 45 of the Act of 2003 and thus, if the respondent did not appear in person, then the table set out therein should be completed. Part D of the EAW contains a completed table which indicates that the respondent did not appear in person but was summoned in person on 16th August, 2004, and that being aware of the scheduled trial, he conferred a power of attorney to a barrister appointed by himself or the state to defend him at the trial and was actually so defended at the trial. At part D of the EAW, further information is provided as follows:-

"The sentenced, Krzysztof Sławomir Ziółkowski, was notified of the scheduled trial date on 16 August 2004 and did not request bringing him to the trial. He appeared at the trial on 27 August 2004, participating therein too was the court-appointed defence counsel of the concerned. The Court ordered the service on the sentenced of the cumulative judgment appended with the instruction on the available appeal measures. The sentenced received the judgment and the appeal measure instruction on 1 September 2004 but did not contest the cumulative judgment. The same cumulative judgment became valid and final on 9 September 2004."

12. Additional information from the issuing judicial authority dated 9th January, 2020 confirms that the respondent was absent from the hearing on 27th August, 2004 and court-appointed defence counsel appeared. It also confirms that as regards the original sentence in case reference IV K 312/03, the respondent appeared in person. Further information was awaited in respect of the original sentence in case reference II K 91/03.
13. By way of further additional information dated 29th January, 2020 and 19th November, 2020, the issuing judicial authority confirms that the file in relation to the original sentence in case reference II K 91/03 cannot be sufficiently re-constituted to indicate whether the respondent appeared in person, or to complete a part D table in respect thereof.
14. Additional information dated 2nd February, 2021 indicates that the early conditional release was revoked on 25th March, 2011 due to the respondent engaging to only a limited degree with the probation officer. He had failed to inform the probation officer of his change of residence despite being obliged to do so and the probation officer was unable to establish where he was staying. It is stated that the probation officer had informed the respondent of his obligations when probation had been imposed upon him. It is confirmed that the respondent had been informed of the terms and conditions of the release and the consequences of failing to satisfy them at his release from the detention centre. As regards the revocation hearing on 25th March, 2011, the additional information indicates that the respondent was notified of the hearing date by sending notifications to all addresses for him known to the court. It is further indicated that the respondent had been instructed and was aware that should he fail to notify the court of the change of address, then letters sent to the address he had indicated would be deemed served. As far as appealing the revocation of the early release, it is indicated that there was no

ordinary appeal open to the respondent but that he could apply to extend the time for an appeal.

15. It was agreed that the Court must be satisfied that the absence of the respondent from the hearing on 27th August, 2004, which led to the cumulative sentence, does not preclude his surrender by virtue of s. 45 of the Act of 2003. The issuing judicial authority has indicated that the respondent had been notified of the hearing, had not requested being brought to same, was represented by a court-appointed defence lawyer, had been served with the decision together with instructions on bringing an appeal and had not brought an appeal. The respondent has not adduced any evidence to contradict or put in doubt the information provided as regards the cumulative hearing. In his affidavit, the respondent avers that he was unaware of the subsequent hearing in respect of revocation of early release, but he does not claim to have been unaware of the cumulative hearing. I am satisfied that the requirements of s. 45 of the Act of 2003 have been met as regards the hearing on 27th August, 2004 leading to the cumulative sentence. In particular, I am satisfied that the requirement at point 3.3 of the table set out in s. 45 of the Act of 2003 has been met. Furthermore, I am satisfied that taking into account all relevant circumstances, the defence rights of the respondent were adequately protected and were not breached as regards that hearing.
16. There was no agreement between the parties as to whether the Court had to be satisfied that the requirements of s. 45 of the Act of 2003 had been met as regards the revocation hearing or the original convictions. Counsel for the applicant submitted that the hearing on 25th March, 2011 leading to the revocation of early release fell within the ambit of *Samet Ardic* (Case C-571/17 PPU) in which the Court of Justice of the European Union ("the CJEU") had determined that a hearing to activate a suspended sentence for breach of conditions of suspension was not a 'trial resulting in the decision' for the purposes of article 4a of the Framework Decision, provided the nature and level of the sentence initially imposed was not changed. In such circumstances, s. 45 was simply not engaged in relation to the revocation hearing. Counsel for the respondent submitted that the Court could not be satisfied that the revocation came squarely within the parameters of *Ardic*.
17. The ruling of the CJEU in *Ardic* was in the following terms:-

"Where a party has appeared in person in criminal proceedings that result in a judicial decision which definitively finds him guilty of an offence and, as a consequence, imposes a custodial sentence the execution of which is subsequently suspended in part, subject to certain conditions, the concept of 'trial resulting in the decision', as referred to in article 4a(1) of Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, as amended by Council Framework Decision 2009/299/JHA of 26 February 2009, must be interpreted as not including subsequent proceedings in which that suspension is revoked on grounds of infringement of those conditions during the probationary period, provided that the revocation decision adopted at

the end of those proceedings does not change the nature or the level of the sentence initially imposed.”

18. In *Minister for Justice & Equality v. Lipinski* [2018] IESC 8, the Supreme Court had to consider whether the absence of the respondent at a hearing which led to the revocation of suspension of a sentence of imprisonment engaged the *in absentia* requirements of the Framework Decision. While the Supreme Court initially made a reference to the CJEU on the point, it transpired that such reference was unnecessary by virtue of the decision of the CJEU in *Ardic*. At para. 3.7 of the Supreme Court decision, Clarke C.J. held:-

“3.7. It is clear, therefore, that a hearing at which a suspension of sentence is revoked on grounds of infringement of conditions attaching to that suspension is not considered to be part of a ‘trial resulting in the decision’ for the purposes of the Framework Decision unless the revocation decision changes ‘the nature or the level of the sentence initially imposed’. If the consequence of the revocation is to alter the sentence originally imposed then different considerations may apply.”

19. On the basis of the additional information provided, I am satisfied that the hearing on 25th March, 2011, which led to the revocation of the early release, falls within the ambit of the decision in *Ardic* so that it is not necessary for the applicant to establish compliance with the requirements of s. 45 of the Act of 2003 in respect thereof. The revocation did not alter the nature or level of the sentence initially imposed and was ordered due to the failure of the respondent to abide by the conditions of his early release, which conditions he had been informed of.

20. Counsel on behalf of the respondent submitted that the applicant was obliged to show that the original conviction for each offence met the requirements of s. 45 of the Act of 2003. She conceded that this had been done in respect of case reference IV K 312/03 but submitted that it could not be done as regards case reference II K 91/03 as the file in respect of same could not be re-constituted as confirmed in the additional information. Counsel on behalf of the applicant conceded that compliance with s. 45 of the Act of 2003 was not possible in respect of case reference II K 91/03, but submitted that it was not necessary to do so.

21. In *Tupikas* (Case C-270/17 PPU), the CJEU considered whether the requirements of article 4a of the Framework Decision applied to an appeal hearing where the requested person had appeared at the trial at first instance but not at the appeal. The CJEU ruled:-

“Where the issuing Member State has provided for a criminal procedure involving several degrees of jurisdiction which may thus give rise to successive judicial decisions, at least one of which has been handed down in absentia, the concept of ‘trial resulting in the decision’, within the meaning of Article 4a(1) of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, as amended by Council Framework Decision 2009/299/JHA of 26 February 2009, must be interpreted as relating only to the instance at the end of which the decision is handed down which

finally rules on the guilt of the person concerned and imposes a penalty on him, such as a custodial sentence, following a re-examination, in fact and in law, of the merits of the case.

An appeal proceeding, such as that at issue in the main proceedings, in principle falls within that concept. It is nonetheless up to the referring court to satisfy itself that it has the characteristics set out above.”

22. On the same day upon which it delivered its ruling in *Tupikas*, the CJEU also delivered a ruling in *Zdziaszek* (Case C-271/17 PPU), a case which involved determining whether a hearing imposing a cumulative sentence in respect of a number of individual sentences previously imposed upon the requested person constituted a hearing for the purposes of article 4a of the Framework Decision. In *Zdziaszek*, the CJEU ruled:-

"1. *The concept of 'trial resulting in the decision', within the meaning of Article 4a(1) of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, as amended by Council Framework Decision 2009/299/JHA of 26 February 2009, must be interpreted as referring not only to the proceedings which gave rise to the decision on appeal, where that decision, after a fresh examination of the case on the merits, finally determined the guilt of the person concerned, but also to subsequent proceedings, such as those that led to the judgment handing down the cumulative sentence at issue here, at the end of which the decision that finally amended the level of the initial sentence was handed down, inasmuch as the authority which adopted the latter decision enjoyed a certain discretion in that regard.*

2. *Framework Decision 2002/584, as amended by Framework Decision 2009/299, must be interpreted as meaning that, where the person concerned has not appeared in person in the relevant proceeding or, as the case may be, in the relevant proceedings for the application of Article 4a(1) of that Framework Decision, as amended, and where neither the information contained in the standard form for a European arrest warrant annexed to that Framework Decision nor the information obtained pursuant to Article 15(2) of that Framework Decision, as amended, provide sufficient evidence to establish the existence of one of the situations referred to in Article 4a(1)(a) to (d) of Framework Decision 2002/584, as amended, the executing judicial authority may refuse to execute the European arrest warrant.*

However, that Framework Decision, as amended, does not prevent that authority from taking account of all the circumstances characterising the case brought before it in order to ensure that the rights of the defence of the person concerned are respected during the relevant proceeding or proceedings.”

23. In the course of its judgment, the CJEU held at paras. 93-94:-

"93. *In the light of the grounds set out above, it must be held that, in a case such as that at issue in the main proceedings, where, following appeal proceedings in which*

the merits of the case were re-examined, a decision finally determined the guilt of the person concerned and also imposed a custodial sentence on him, the level of which was however amended by a subsequent decision taken by the competent authority after it had exercised its discretion in that matter and which finally determined the sentence, both decisions must be taken into account for the purposes of the application of Article 4a(1) of Framework Decision 2002/584.

94. *As is apparent, respectively, from paragraphs 76 to 80 and 90 to 92 of the present judgment, it is necessary to ensure that the rights of the defence are observed in respect of both the finding of guilt and the final determination of the sentence and, where those two aspects, which are in any case closely linked, are dissociated, the final decisions handed down in that regard must, in the same way, be subject to the verifications required by that provision. That provision seeks precisely to strengthen the procedural rights of the persons concerned by ensuring that their fundamental right to a fair trial is guaranteed (see, to that effect, today's judgment, *Tupikas, C 270/17 PPU*, paragraphs 58 and 61 to 63) and, as stated in paragraph 87 of the present judgment, those requirements apply both in respect of the finding of guilt and the determination of the sentence.” (Emphasis added)*
24. It is clear from the foregoing that the purpose of article 4a of the Framework decision, and thus s. 45 of the Act of 2003, is to enable the executing judicial authority to be satisfied that the fair trial rights of the requested person have been respected. This must include fair trial rights as regards both the finding of guilt and the imposition of sentence. Where those two aspects of the domestic criminal process in the requesting state have become dissociated, then it is necessary for the executing state to be satisfied that the fair trial rights of the requested person have been respected as regards the final judicial determination of each of those aspects of the domestic criminal process.
25. I am satisfied that in the present case, the final determination of guilt and sentence became procedurally dissociated in the proceedings in Poland and it is therefore necessary for this Court to be satisfied that the fair trial rights of the requested person have been respected as regards the final judicial determination of each of those aspects of the domestic criminal process. The Court is so satisfied as regards the final judicial determination of sentence and as regards the determination of guilt in case IV K 312/03.
26. As regards the determination of guilt in case II K 91/03, the issuing judicial authority cannot confirm if the respondent appeared at the relevant hearing and, if not, whether it could rely upon one of the scenarios set out in the table of article 4a of the Framework Decision to satisfy the Court that the respondent's defence rights were respected. As is made clear in *Zdziaszek* and in the Supreme Court decision in *Minister for Justice and Equality v. Zarnescu* [2020] IESC 59, the inability to fit the particular facts of an individual case into one of the boxes set out in the table at article 4a of the Framework Decision (and s. 45 of the Act of 2003) does not necessarily mean that the Court must refuse surrender if it is satisfied that the defence rights of the respondent were in fact adequately protected and were not breached.

27. It is of some significance that the respondent in these proceedings has not simply sat back and waited to see if the applicant could satisfy the Court that the necessary requirements to allow surrender have been met and that surrender is not precluded under any provision of the Act of 2003. Instead, the respondent has fully participated in the proceedings and, most importantly, has sworn an affidavit in which he denied appearing at, or receiving, notice of the revocation hearing but has not denied appearing at the conviction hearing for either case. Nor has he made out any positive case that his defence rights were breached as regards the proceedings leading to the original convictions. Counsel on behalf of the applicant submits that in such circumstances, the Court should infer that the respondent's defence rights were not breached. I am satisfied that in an appropriate case and upon proven facts, it is open to the Court to draw inferences as to other facts in order to determine if s. 45 of the Act of 2003 has been complied with in substance and whether the defence rights of the respondent were adequately protected or not. However, on the particular facts of this case and in circumstances where the issuing judicial authority can shed no light on the relevant circumstances surrounding the conviction of the respondent, I am not satisfied that it is appropriate to draw the inference contended for by the applicant.
28. I am not satisfied that the respondent attended at the hearing which resulted in a finding of guilt as regards case II K 91/03 or that the requirements of s. 45 of the Act of 2003 have been met. In line with the decision of the Supreme Court in *Minister for Justice v. Ferenca* [2008] IESC 52, the cumulative sentence in respect of both cases was a single sentence and cannot be unscrambled to apportion a part of same for each case respectively, so as to allow surrender in respect of case IV K 312/03. I therefore refuse the application for an order for the surrender of the respondent.
29. I note the respondent also objected to surrender on the grounds that there is an impermissible lack of clarity concerning the sentence to be served and that surrender is precluded under s. 37 of the Act of 2003. I dismiss both of those objections.