

THE HIGH COURT

[2021] IEHC 160
[2019 No. 334 EXT.]

BETWEEN

MINISTER FOR JUSTICE AND EQUALITY

APPLICANT

AND

ROBERT ORŁOWSKI

RESPONDENT

JUDGMENT of Mr. Justice Paul Burns delivered on the 2nd 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 1st August, 2019 ("the warrant"), issued by Judge Jarosław Leszczyński, Judge of the Circuit Court in Łódź, as the issuing judicial authority. The surrender of the respondent is sought to serve the remaining 6 months of a sentence of 3 years' imprisonment imposed on the respondent in 2001 in respect of four offences committed in 1992, when the respondent was 17 years old.
2. The offences referred to in the warrant may be briefly set out as follows:-
 - I. violent assault on a police officer;
 - II. insulting a public officer in the performance of his official duties;
 - III. burglary; and
 - IV. unlawful taking of a vehicle.
3. The warrant was endorsed by the High Court on 11th November, 2019 and the respondent was arrested and brought before this Court on 21st June, 2020.
4. I am satisfied that the person before the Court is the person in respect of whom the warrant was issued. This was not put in issue by the respondent.
5. 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.
6. I am satisfied that the minimum gravity requirements of the Act of 2003 are met. The remaining sentence to be served is 6 months' imprisonment.
7. The respondent delivered points of objection, dated 29th June, 2020, including that surrender should be refused due to the following:-
 - (i) a lack of correspondence in respect of offence II;
 - (ii) non-compliance with s. 45 of the Act of 2003: and
 - (iii) abuse of process.

Lack of Correspondence/Issue Estoppel

8. As regards the objection based on a lack of correspondence, in addition to arguing there was no correspondence made out on the facts, counsel for the respondent argued that the Court was bound by an earlier decision of the High Court between the same parties which held that no such correspondence existed.
9. It was agreed between the parties, and confirmed by the issuing Member State, that the sentence in question was a composite/aggregate sentence in respect of all of the offences in question so that it was not possible to allocate a particular amount of the sentence to a particular offence. In such circumstances, it was agreed between the parties, in line with the decision of the Supreme Court in *Minister for Justice, Equality and Law Reform v. Ferenca* [2008] IESC 52, [2008] 4 I.R. 480, that unless correspondence could be made out in respect of all of the offences, then the Court should refuse surrender.
10. It was further agreed between the parties and the Court that the Court should first rule upon the issue of correspondence, as this could dispose of the matter.
11. The requirement of correspondence between offences in the EAW and offences under the law of the State, or double criminality as it is sometimes referred to, is set out at s. 38(1) of the Act of 2003:-

"38. (1) Subject to subsection (2), a person shall not be surrendered to an issuing state under this Act in respect of an offence unless—

(a) the offence corresponds to an offence under the law of the State, and—

(i) under the law of the issuing state the offence is punishable by imprisonment or detention for a maximum period of not less than 12 months, or

(ii) a term of imprisonment or detention of not less than 4 months has been imposed on the person in respect of the offence in the issuing state, and the person is required under the law of the issuing state to serve all or part of that term of imprisonment,

or

(b) the offence is an offence to which paragraph 2 of Article 2 of the Framework Decision applies, and under the law of the issuing state the offence is punishable by imprisonment for a maximum period of not less than 3 years."

12. The concept of correspondence is set out at s. 5 of the Act of 2003:-

"5. For the purposes of this Act, an offence specified in a European arrest warrant corresponds to an offence under the law of the State, where the act or omission that constitutes the offence so specified would, if committed in the State on the date on which the European arrest warrant is issued, constitute an offence under the law of the State."

13. In *Minister for Justice v. Dolny* [2009] IESC 48, Denham J., as she then was, explained how the Court should approach the issue of correspondence at para. 38 as follows:-

"In addressing the issue of correspondence it is necessary to consider the particulars on the warrant, the acts, to decide if they would constitute an offence in the State. In considering the issue it is appropriate to read the warrant as a whole. In so reading the particulars it is a question of determining whether there is a corresponding offence. It is a question of determining if the acts alleged were such that if committed in this jurisdiction they would constitute an offence. It is not a helpful analogy to consider whether the words would equate with the terms of an indictment in this jurisdiction. Rather it is a matter of considering the acts described and deciding whether they would constitute an offence if committed in this jurisdiction."

14. Part E of the warrant sets out the circumstances of the commission of offence II as follows:-

"[reference to 4th May, 1992 and the circumstances of the commission of offence I] At the same time, using abusive words, the convict verbally insulted the victim and the other attending police officers."

The category and legal qualification of the offence is given as:-

"Offence II – Article 236 Criminal Code 1969 – insulting a public officer during and in connection with the performance of his official duties."

A further detailed description of the offence is given as follows:-

"Offence II – on 4 May, 1992 in Łęczna, Lubelskie Region, using abusive words verbally insulted police officers Ryszard Gomuła, Mieczysław Orkoń, Waldemar Cur, Piotr Jasielski, Piotr Kostyra, Tadeusz Ławnik, and Robert Jureczko during and in connection with the performance of their official duties."

15. A request for additional information dated 9th October, 2019 was made pursuant to s. 20 of the Act of 2003. In respect of offence II, the following request was made:-

"4. The reason why surrender was refused in 2011 was that correspondence could not be established with Offence II, on the facts as described in the 2009 warrant. The law in Ireland has changed somewhat since then so it is possible that correspondence could, now, be established. To assist the Court in its assessment, you are invited to provide the following additional information:

- (a) When Mr. Orlowski was led out of the flat and taken to the police car, were any members of the public present?*
- (b) Were Jacek Chmielewski, Grzegorz Arciemien, and/or Krystyna Bojarska present when he was led out of the flat and taken to the police car?*

- (c) *Were the police officers identifiable as such at the time of the offence? If not, did they identify themselves to Mr. Orłowski as police officers?*
- (d) *If Mr. Orłowski also engaged in any other form of behaviour at or around that time which could be considered threatening, abusive or insulting, please provide details.*
- (e) *If Mr. Orłowski also engaged in any other form of behaviour which could be described as resisting, obstructing or impeding the police officers in the execution of their duties, at or around that time, please provide details."*

16. A reply was received dated 7th November 2019, which states, inter alia:-

"4. Advises that when Robert Orłowski was led out of the flat and taken to the police car:

- (a) *members of the public were present, i.e. at the time of the incident in the flat present were: Krystyna Bojarska (flat owner) and her daughters Anna and Monika (last names not identified) and Pawel Koskiuk;*
- (b) *Jacek Chmielewski, Grzegorz Arciemen and Krystyna Bojarska were present when Robert Orłowski was led out of the flat and into the police car: Krystyna Bojarska was in the flat, and Jacek Chmielewski and Grzegorz Arciemen were stopped and led out together with Robert Orłowski;*
- (c) *At the time of the offence the attending Police officers were identifiable as Police officers on duty;*
- (d) *Robert Orłowski already prior to 1992 committed acts of cruelty, in particular he killed rabbits with a pair of secateurs, his behaviours entailed police interventions; he was aggressive towards police officers, it happened that in order to avoid arrest he used on policemen: a knife, physical force, and set a dog on them."*

17. Counsel for the respondent relied upon the fact that the requested surrender of the respondent in respect of these same offences and sentence had been the subject of earlier proceedings, *Min for Justice and Equality v. Orłowski* [2011] IEHC 374 (herein referred to as "*Orłowski No. 1*"), in which surrender was refused by Edwards J. on 7th October, 2011, due to a lack of correspondence between offence II and an offence under Irish law.

18. It is not entirely clear from the documentation furnished why the Polish authorities decided to issue a fresh warrant in respect of the same matter in 2019, approximately eight years later, but it appears to have been as a result of the relevant enforcement period being extended.

19. Counsel on behalf of the applicant submitted that a refusal to surrender on foot of a particular warrant did not prevent a fresh warrant being issued seeking the surrender of the requested person in respect of the same offences/sentence. In relation to the issue of correspondence, she submitted that correspondence could now be made out with an offence at Irish law contrary to s. 6 of the Criminal Justice (Public Order) Act, 1994 ("the Act of 1994"), viz. using or engaging in, in a public place, threatening and abusive or insulting words or behaviour with intent to provoke a breach of the peace or being reckless as to whether a breach of the peace may be occasioned. This was the same offence in respect of which Edwards J. in *Orlowski No. 1* had held there to be a lack of correspondence. It was submitted that the reasoning of Edwards J. in *Orlowski No. 1* was based on English authorities to the effect that as the only persons present at the time of the alleged offence were police officers, there was no basis for believing that there was an intention to cause alarm and apprehension to a member of the public, or to believe that the respondent acted recklessly in that regard. She submitted that the law in that regard had been changed by the decision of the Supreme Court in *Clifford v. DPP (Garda McLoughlin)* [2013] IESC 43, [2013] 2 I.R. 396.
20. In *Clifford*, in the Supreme Court Clarke J., as he then was, reviewed the English authorities to the effect that it would be improbable in the extreme that a police officer would be provoked by threatening, abusive or insulting words or behaviour to cause a breach of the peace but felt that same did not represent the position at Irish law, and outlined at para. 25:-

"25.Insofar, therefore, as it might be suggested that the English authorities to which reference has been made, go so far as to suggest that an offence involving the provocation of a breach of the peace could not be committed where the only persons present were members of the police force, I would not find such authority persuasive as to the proper interpretation of the law in this jurisdiction. It seems to me that a case where the only persons present were members of An Garda Síochána is one where that fact needs to be taken into account by the decider of fact but is not one where, necessarily, the evidence must lead to a conclusion that the offence could not, nonetheless, be made out."

He held that while the District Judge was not necessarily constrained to find against Mr. Clifford on the evidence, it was, nevertheless, open to a court reach such a conclusion.

21. Counsel on behalf of the respondent submitted that, as a matter of fact, the circumstances disclosed in the warrant and additional information still did not amount to the proposed corresponding offence at Irish law. More importantly, he submitted as a matter of law that this Court was bound by the earlier decision in *Orlowski No. 1*, in which Edwards J. stated at para. 13:-

"The Court was therefore not satisfied in the circumstances that the offence described in the European arrest warrant, and in the additional information, corresponds with the offence in Irish law created by s. 6 of the 1994 Act."

22. I am satisfied that the facts as set out in the current warrant and additional information would be capable of establishing correspondence with the proposed offence at Irish law of using or engaging in, in a public place, threatening and abusive or insulting words or behaviour with intent to provoke a breach of the peace or being reckless as to whether a breach of the peace may be occasioned, contrary to s. 6 of the Act of 1994. However, the question arises as to what is the significance, if any, of the earlier decision of Edwards J. on the matter.
23. It should be noted that while the decision of the Supreme Court in *Clifford* was delivered on 25th October, 2013, the High Court decision therein, which the Supreme Court upheld, was delivered on 29th October 2008, three years prior to the decision of Edwards J. in *Orlowski No. 1* on the first warrant seeking the surrender of the respondent. In the High Court in *Clifford (appellant accused) v. DPP (respondent prosecutor)* [2008] IEHC 322, Charlton J. held at para. 15:-
- "15. The reason why an acquittal was argued for in this case is that all of the members of An Garda Síochána giving evidence had stated that they were unlikely to have responded to abuse from the accused by a breach of the peace. That, it seems to me, is beside the point. The issue was: what did the accused intend by his conduct? Members of An Garda Síochána are not in a special category. It may be that some of them received training in behaviour in riot situations and it may be speculated, as well, that they are screened before entry on the basis of exceptional fortitude. I do not believe, however, that a court could ever be safe in imagining that any particular category of persons, whether nuns, judges, or members of An Garda Síochána, could not be provoked by abuse, by being threatened with death, or by having a prized possession smashed up in front of them."*
24. The Supreme Court upheld the High Court decision in *Clifford*. It would seem therefore that the decision of the Supreme Court in *Clifford* did not represent a change in the law. In *Clifford* in 2013, the Supreme Court merely re-affirmed the law as set out by Charlton J. in the High Court decision in *Clifford* in 2008. Thus, there has been no change in the law since the decision in *Orlowski No. 1* was delivered. The High Court decision in *Clifford* was not opened to Edwards J. and he did not refer to it. It should also be noted that the issue of the second warrant herein was not based on any perceived change in Irish law on the part of the Polish authorities but rather appears to have taken place simply because the statutory limitation period in Poland to enforce the sentence had been extended.
25. The issue which now arises is whether the applicant, having been refused surrender on foot of a warrant, has an unfettered right to simply apply on foot of a fresh warrant and re-argue the same case on the same substantive issue on which surrender was refused. I deliberately use the phrase "substantive issue" as it is clear that where relief is refused on foot of a warrant, whether it be a European arrest warrant or a domestic warrant such as a search warrant, and that refusal is based on a technical defect in the warrant itself or the supporting documentation, there can be no bar to another warrant being issued and put before the Court. In such circumstances, the Court has not determined a substantive

issue as between the parties but has merely declined to give effect to a warrant which is inherently defective.

26. It is, by now, well established law in this jurisdiction that the principle of *res judicata* does not apply to proceedings seeking surrender or extradition. The refusal of a court to surrender on foot of a warrant is not of itself a bar to a subsequent request for surrender on a fresh warrant and this is particularly so where the earlier refusal was based on some technical defect or inadequacy in the warrant before the court. It is equally well established that this does not mean that an issue estoppel may not arise in the context of such proceedings. In *Minister for Justice v. Tobin* [2012] IESC 37, [2012] 4 I.R. 147, Murray J., explained at para. 145:-

"[145] On the question of res judicata I would observe that no issue concerning the application of that doctrine arises in this case, the parties having acknowledged the established principle that the doctrine does not apply to extradition cases (the general application of the doctrine of res judicata should not be confused with the subsidiary principle of issue estoppel, which would apply, or with other issues)."

27. In *Tobin*, the respondent had been the subject of earlier proceedings seeking his surrender to Hungary and surrender was refused on the ground that he had not "fled" as was then required under the Act of 2003. The Act of 2003 was subsequently amended so as to remove the "fled" requirement and his surrender was then sought a second time on foot of a new warrant. By virtue of the Interpretation Act, 2005, there was a rebuttable presumption that such a repeal or amendment was not intended to divest a person of a right accrued under the previous law. O'Donnell J. rejected a plea of abuse of process but held that the respondent had accrued a right which the Oireachtas had not intended to deprive him of, at paras. 443-444:-

"[443] These considerations lead me to the conclusion that it is not only desirable, but also perhaps particularly appropriate, to consider the narrow argument advanced in relation to s. 27 of the Act of 2005. The fundamental issue here is whether the outcome of Minister for Justice v. Tobin [2007] IEHC 15 & [2008] IESC 3, [2008] 4 I.R. 42 is a 'right' and more importantly a 'vested right' so that it is proper to presume that the Oireachtas did not intend to interfere with that right unless the contrary intention clearly appears either from the text of amending legislation, or its context, or both. On this argument, it is not necessary to go so far as to hold that the decision in Minister for Justice v. Tobin [2007] IEHC 15 and [2008] IESC 3 could not lawfully have been interfered with by subsequent legislation, or indeed that there had been conduct which amounted to an abuse of the process: it is sufficient that the appellant should be in a particular class of person who was entitled to have his case the subject of specific consideration by any amending legislation. As the quotation from Craies indicates, the question is whether something had happened which means that the appellant's entitlement was something more than to take advantage of the repealed legislation. In this regard, his case can usefully be contrasted with the decisions in Sloan v. Culligan [1992] 1

I.R. 223 and in the recent case of Minister for Justice v. Bailey [2012] IESC 16, [2012] 4 I.R. 1. In each of those cases, it was determined in effect, that nothing had happened during the currency of the repealed legislation to give the individuals concerned any vested right which required to be specifically addressed to any subsequent repealing legislation. Here however something has happened. There was an application for a surrender hearing and a determination both by the High Court and this court on appeal. The question therefore is whether that can be said to be 'something' for the purpose of the law so as to trigger the provisions of s. 27 of the Act of 2005.

[444] It is here that the discussion on abuse of the process and separation of powers becomes helpful. I have no doubt that a full hearing and determination of a request for surrender is certainly something. I think it can also be properly said that the outcome of Minister for Justice v. Tobin [2007] IEHC 15 and [2008] IESC 3, [2008] 4 I.R. 42 was to confer or create a right. In the aftermath of Minister for Justice v. Tobin the appellant could not have been extradited or surrendered to Hungary in respect of this sentence, so long as Irish law retained the fleeing requirement. That was a right, and not a privilege..... His entitlement not to be surrendered having been conclusively determined by the existing law, then I think it could be said he would have a right to be released, and certainly a right to resist surrender, which once established a court would be bound to uphold. Indeed, as the discussion in A v. Governor of Arbour Hill Prison [2006] IESC 45, [2006] 4 IR 88 shows, such a final determination would be proof against even a change in the common law in the shape perhaps of the subsequent Supreme Court determination which overturned the holding in Minister for Justice v. Tobin [2007] IEHC 15 & [2008] IESC 3 and determined that a person leaving in similar circumstances would be held to have fled. Such a determination might overturn the law established in Minister for Justice v. Tobin but would not affect the outcome of the appellant's own case. The final determination of his case, even if subsequently considered erroneous in law, would still be a bar to further proceedings. Indeed, it seems that even if the fleeing requirement was held to be repugnant to the Constitution of Ireland 1937 and therefore was prima facie never part of the legislation, the final determination of the appellant's case would, as I apprehended it, still act to prevent surrender just as surely as the conviction in the case of Mr. A in Mr. A v. Governor of Arbour Hill Prison [2006] IESC 45 prevented his release from imprisonment notwithstanding the finding that the Criminal Law (Amendment) Act 1935 creating the offence of which he was convicted was, at least in one respect, inconsistent with the Constitution and deemed not to have survived the coming into force of the Constitution." (emphasis added)

28. In *The Minister for Justice and Equality v. Leopold* [2020] IEHC 84, Donnelly J. considered a similar issue where Edwards J. had held in an earlier application between the same parties that no correspondence existed between offences. She stated at para. 30:-

"30. *In respect of the question of whether an issue estoppel arises in the present case, it's important to note that the earlier decision of Edwards J. was a reasoned decision of the High Court in respect of the issue of correspondence of offences. His judgment, although ex tempore, had been given the following day after it appears, significant legal argument which spanned over two days. The judge made the decision within jurisdiction and while he may or may not have been correct or incorrect in that decision, it was one which affected the parties. The Minister never appealed that decision. It should also be noted that the decision was one made between the same parties i.e. the Minister and the respondent, and both parties had the opportunity to deal with this matter in terms of the facts and the law. I should also note that it has not been opened to me that the law on correspondence of offences has changed in the intervening time, although even if it had that would have invoked a different argument based upon the reasoning of two of the five Supreme Court judges in Tobin. I should also say that the issue of whether offences correspond to offences in this jurisdiction are matters which require deep consideration of the ingredients of criminal offences in this jurisdiction when compared with the facts that are set out in the warrant requesting surrender. A decision on correspondence goes to the heart of the issue of whether surrender/extradition is permitted. It is not a technical issue of the type which had resulted in the District Court refusing the extradition in Bolger, by way of example. It is also important in that respect, that EAW 7 (the present EAW) does not 'correct' any defect in the original warrant. There is no new information provided to this Court. It is the same request being repeated in exactly the same manner. This Court is being asked to decide exactly the same issue on the same facts, i.e. is there correspondence of offences? The Minister seeks to argue that at least another offence should be considered for the purpose of making a decision on whether there is actually correspondence of an offence. In so far as we are considering whether there is an issue estoppel, the situation is therefore, that all factors and all parties are the same, save that the Minister wants to put forward a new offence for consideration by the High Court, that is, a new legal argument for consideration. The Minister also makes the request, but the Minister also makes a request to this Court to carry out its own assessment of correspondence with regard to the full panoply of offences which could be covered, including those considered by Edwards J. but rejected by him."*

29. Ultimately, Donnelly J. concluded that she was bound by the previous decision by way of issue estoppel at para. 33:-

"[33] In those circumstances, I am of the view that I am bound by the decision of Edwards J. in so far as there was an issue estoppel involved as regards the correspondence of offences."

30. The decision of Donnelly J. in *Leopold* was upheld on appeal by the Court of Appeal in *Minister for Justice and Equality v. Leopold* [2021] IECA 37. Delivering the judgment of the Court of Appeal, Binchy J. emphasised that the concept of issue estoppel was

applicable to surrender proceedings under the Act of 2003, that Donnelly J. was bound by the earlier determination and was not entitled to enquire again into the issue of correspondence.

31. In *Orlowski No. 1*, the surrender of the respondent was sought on behalf of Poland in respect of the same sentence which is the subject matter of the current warrant before this Court. In the course of those proceedings in the High Court, Edwards J. delivered a judgment on a substantive but specific issue, namely whether correspondence existed between the second of four offences to which the sentence related and an offence in Irish law. After hearing full argument in respect of the matter, Edwards J. concluded that there was no such correspondence and refused an order for surrender. The decision was not appealed and thereby became binding upon the parties. The parties in those proceedings were the same parties as are before the Court in the current application. The issue which this Court is asked to determine is precisely the same issue.
32. Bearing in mind the decision of Donnelly J. in *Leopold* and on the basis of the Supreme Court decision in *Tobin*, the respondent is entitled to the benefit of the finding as regards correspondence, either by way of an issue estoppel or by way of a right which has accrued to him to enjoy the benefit of that earlier decision. Insofar as the decision of Edwards J. might be regarded as erroneous in light of the High Court decision in *Clifford* or that the Supreme Court decision in *Clifford* changed the law, this cannot operate to deprive the respondent of the benefit of that issue estoppel or that earlier decision on the specific issue of correspondence. There is no suggestion that the decision of the Supreme Court in *Clifford* was intended to apply the law as there determined to cases which had already been finally determined so as to permit a reopening of such cases or a re-litigation by the same parties of the issues determined in such previous cases.
33. In such circumstances, the respondent is entitled to the benefit of the earlier determination as to lack of correspondence in his favour in *Orlowski No. 1*. That being the case, I refuse the application for an order to surrender the respondent.