

THE HIGH COURT

[2021] IEHC 441
[2021 No. 93 EXT.]

BETWEEN

MINISTER FOR JUSTICE

APPLICANT

AND

RADOSŁAW SZEFER

RESPONDENT

JUDGMENT of Mr. Justice Paul Burns delivered on the 23rd day of June, 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 7th August, 2020 ("the EAW"). The EAW was issued by Tomasz Borowczak, Judge of the Regional Court in Poznań, as the issuing judicial authority.
2. The EAW seeks the surrender of the respondent in order to enforce a sentence of 212 days' imprisonment imposed upon the respondent on 25th February, 2019, all of which remains to be served.
3. The respondent was arrested on 18th April, 2021 on foot of a Schengen Information System II alert and brought before the High Court on 19th April, 2021. The EAW was produced to the High Court on 26th April, 2021.
4. 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 that regard.
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 for consideration in this application and surrender of the respondent is not precluded for any of the reasons set forth in any of those sections.
6. I am satisfied that the minimum gravity requirements of the Act of 2003 have been met. The sentence in respect of which the surrender is sought is in excess of four months' imprisonment.
7. It appears from part B of the EAW that on 20th October, 2017, the District Court in Stargard Gdańskie originally sentenced the respondent to a penalty of one year and two months' restriction of liberty but this was changed by a decision of the District Court in Śrem on 21st February, 2019 to a replacement penalty of 212 days' imprisonment.
8. At part D of the EAW, it is indicated that the respondent did not appear in person at the trial resulting in the decision but that he was served with the decision on 13th November, 2017. It is further indicated that he 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 he did not request a retrial or appeal within the applicable timeframe. At part D.2. of the EAW, it is indicated that, pursuant to Article 500 (1) and

(4) of the Polish Criminal Code, the Court may consider that a trial is not necessary and impose a penalty of restriction of liberty or a fine without the presence of the parties and issue a penal order. Such penal order was issued with regard to the respondent. In the course of the preparatory proceedings, the respondent had provided his domicile address (Lubiatówko 55, 63-140 Lubiatówko) and was cautioned of his obligation to inform the prosecutor of any change of his address. It was also indicated that he was informed that if he changed his residence without notifying of the new address, any letters sent to the last address would be deemed to be duly delivered. A copy of the penal order was sent to the address provided by the respondent but he did not collect it. After an advice notice was left twice, the letter was returned to the court. Pursuant to Article 133 (2) of the Polish Criminal Code, such delivery was deemed to be effective.

9. Part E of the EAW indicates that it relates to one offence and the circumstances in which the offence was committed are set out as follows:-

"In May 2011, in Ireland, Radosław Szefer used a certificate of insurance of a non-existent vehicle Volkswagen Golf, registration number PZ 56080, and presented it to an employee of the insurance company Quinn Insurance Limited, Dublin Road, Cavan, Co. Cavan, to use it as authentic although he was aware that it was forged."

10. The respondent objects to surrender on a number of grounds, including that surrender is precluded by virtue of s. 45 of the Act of 2003 as the respondent was not present at the hearing and the requirements of that section have not been met. It was agreed between the parties that if the applicant was unable to satisfy the Court as regards compliance with s. 45 of the Act of 2003, then surrender would have to be refused and that it was appropriate to deal with that issue first.

Section 45 of the Act of 2003

11. Section 45 of the Act of 2003 transposes 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"), into Irish law 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 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..." [Table (d) set out thereafter]

12. At part D of the EAW, it is indicated that the respondent did not appear in person at the trial resulting in the decision and the issuing judicial authority has indicated reliance upon the equivalent of point 3.2. of table (d) in s. 45 of the Act of 2003 as follows:-

"d. the person was served with the decision on 13 November 2017 (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 did not request a retrial or appeal within the applicable time frame."

13. The issuing judicial authority goes on at part D to set out the following:-

"Pursuant to Article 500 (1) and (4) of the code of criminal proceedings, in cases subject to examination under summary proceedings, the court, taking into account the material gathered in the preliminary proceedings, may consider that conducting a trial is not necessary and, in cases in which imposing a penalty of restriction of liberty or a fine is permitted without the presence of the parties, the court may issue a penal order. Such penal order was issued with regard to Radosław Szefer. In the course of the preparatory proceedings Radosław Szefer provided his domicile address (Lubiatówko 55, 63-140 Lubiatówko) and was cautioned of the obligation to inform of any change of his address and that in case he changes the place of residence without notifying of the new address, any letters sent to the last address shall be deemed to be duly delivered. A copy of the penal order was sent to the address provided by Radosław Szefer, however he did not collect it – after an advice note was left twice the letter was returned to the court. Pursuant to Article 133 (2) of the code of criminal procedure, such delivery is deemed to be effective."

14. The respondent swore an affidavit dated 13th May, 2021 in which he avers that on 22nd October, 2012, he was interrogated by a Polish prosecutor in relation to an alleged offence of producing a forged certificate of insurance to Quinn Insurance. He avers that he did not indicate his guilt at any time and maintained his innocence of the charge. He avers that he was not represented by a lawyer at that time. He avers that on or about 27th December, 2012, he received a letter from the District Public Prosecutor's Office informing him of a decision to suspend the investigation and he exhibits a copy of the said letter together with a translation thereof. He avers that, during the interrogation in October 2012, he provided an address to the prosecutor of Lubiatówko 55, 63-140 Lubiatówko, his former home. He avers that his ex-partner lived there during December 2012 to March 2019 when he transferred ownership of the house to her. He avers that he had no contact with her from December 2012 to March 2019. He avers that he was not made aware of any post that had been delivered to him at that address. He avers that, to his knowledge, he was never charged with an offence and was not personally served with, or made aware of, any hearing in relation to any offence. He denies having been served with the order of the District Court dated 13th November, 2017, by which, according to the EAW, he was informed of his conviction and his right to a retrial or appeal. He avers that, had he received that order, he would have appealed the decision. He also denies ever having been served with the probation officer's summons on 27th February, 2018 or with any notice regarding the imposition of the replacement sentence by the District Court on 21st February, 2019. He avers that he was not made aware of any ongoing obligation

to notify the prosecutor of a change of address, of any stay outside of Poland or to provide an address for correspondence in Poland. He avers that he thought the investigation into the offence had been finalised. He avers that he left Poland for Ireland in or about May 2013, returned to Poland briefly to collect his passport and came back to Ireland. He denies travelling to Ireland to evade prosecution. He denies being served with the decision of the District Court of 20th October, 2017 or having been informed about the right to a retrial or appeal.

15. The notice of suspension of investigation exhibited in the respondent's affidavit is dated 27th December, 2012 and headed "*Decision to suspend investigation*". The document indicates that the investigation is merely being suspended and not terminated. It states:-

"... it is necessary to wait for the implementation of legal aid by Irish law enforcement authorities in the scope of identifying the suspect as a person using forged documents for insurance purposes. Having in mind that the waiting time for the response from Irish authorities may last approx. 3-4 months, so in this circumstances, that this is a long-term obstacle preventing the investigation to be continued, therefore it has been decided as aforementioned herein."

The notice indicates that the decision can be appealed within seven days from the date of delivery.

16. By additional information dated 29th April, 2021, it was indicated at point C.1.2.3. that on 20th October, 2017, a penal order was issued on the basis of which the respondent was found guilty of an offence under Article 270 § 1 of the Polish Criminal Code and was sentenced to one year and two months' restriction of liberty, which consisted in performing unpaid supervised community service in the amount of 30 hours a month. A copy of the order was posted to the address provided by the respondent. Despite two delivery notices being issued concerning that letter, the respondent did not collect it. It is indicated that during the preparatory proceedings, the respondent was questioned and charged so he was aware of the pending criminal proceedings against him in Poland. He was informed of the obligation to inform the prosecuting authority of any change in his place of residence lasting longer than seven days and that, if he was abroad, he was to appoint a process agent in Poland, failing which a letter sent to his last known address in Poland would be deemed served.
17. The additional information dated 29th April, 2021 also indicates that the respondent will not have an automatic right to a re-trial. It is indicated that he was interrogated on 22nd October, 2012 and understood the charges against him but did not plead guilty. He refused to give further explanations. He was charged on 19th September, 2016 with an offence under Article 270 § 1 of the Polish Criminal Code. During the preparatory proceedings on 22nd October, 2012, the respondent was questioned by the public prosecutor and informed about the rights and obligations of a suspect, including the content of Article 75 of the Polish Code of Criminal Procedure. He was not legally represented. The additional information encloses a copy of the instructions on the rights

and obligations of the suspect signed by the respondent on 22nd October, 2012, which he collected on the same day. This notice expressly states:-

"3. *A suspect remaining at large:*

- *is obligated to appear at each and every demand in the course of criminal proceedings and notify the body in charge of the proceedings of any change of his/her place of residence or stay in excess of seven days. In case of unexcused failure to appear, the suspect may be detained and brought by force (Article 75 Paragraph 1 and 2 of the Code of Criminal Procedure);*
- *while abroad, he/she shall be obligated to provide an address for correspondence in Poland; should he/she fail to do so, any letter sent to the last known address in Poland or, in case of absence of such address, attached to the files of the case, shall be deemed validly delivered (Article 138 of the Code of Criminal Procedure);*
- *if the suspect changes his/her place of residence without providing his/her new address or does not stay at the address indicated thereby, any letters sent to that address shall be deemed validly delivered (Article 139 of the Code of Criminal Procedure)."*

The respondent signed the said notice.

18. It would appear that contrary to the averments of the respondent, he was, indeed, informed of the obligation to keep the prosecutor informed of any change of address and notified that, should he fail to do so, service at the last address provided would be deemed good service. It is also clear from the additional information that the respondent was notified that the investigation was being suspended pending the receipt of further information from the Irish authorities as opposed to being terminated.
19. The additional information dated 29th April, 2021 further indicates that a sentence of restriction of liberty is served by performing unpaid supervised community service and a sentence of deprivation of liberty is served by imprisonment in a correctional facility. By decision of the District Court in Śrem dated 21st February, 2019 (case reference no. II Ko 668/18), pursuant to Article 65 § 1 of the Polish Criminal Code, 212 days of replacement penalty of imprisonment was ordered to be served for the 425 days of restriction of liberty imposed on the respondent by the sentence of the District Court in Stargard, Gdańsk of 20th October, 2017 in (case reference no. II K 1068/16). The court ordered replacement of the sentence of restriction of liberty because the respondent evaded serving the restriction of liberty. The respondent failed to appear at the probation officer's summons on 27th February, 2018, having been duly summoned at the address at Lubiatówko 55, 63-140 Lubiatówko, Gmina Dolsk, by double delivery notice. The police found out that he was not staying at that address provided by him, and his whereabouts were not known.

20. It should be noted that the additional information dated 29th April, 2021 also indicates that up to May 2015, the respondent was also under probation supervision in a different case and he informed his probation officer that he was staying in Ireland. The respondent regularly contacted this probation officer and gave him his phone number and the phone number of his son who resides in Mosina, Poland. However, when an effort was made to contact the respondent in the present case, he did not answer the phone – his number was unavailable, and on 12th October, 2018, his son stated that he had not been in contact with his father for a year and did not know his father's current telephone number or address in Ireland. It is indicated that during the proceedings concerning the replacement penalty, upon the order of the court, the probation officer repeatedly tried to contact the respondent by telephone, but to no avail. When issuing the order dated 21st February, 2019, the court also referred to Article 75 of the Polish Criminal Code, i.e. the obligation of the convicted person to inform the court about any change of his place of residence lasting longer than seven days of which the respondent was informed during the preparatory proceedings in that case. If the defendant avoids serving the sentence of restriction of liberty, the court has the obligation to order a replacement penalty of imprisonment. The defendant failed to appear at the court hearing on 21st February, 2019 in case reference no. II Ko 668/18, having been duly notified by substituted service to the address he provided in Lubiatówek. In both the initial prosecution and the application for a replacement of penalty, the respondent was not present and was not legally represented.
21. By additional information dated 28th May, 2021, the issuing judicial authority again pointed out that the decision of 27th December, 2012 was not to discontinue the proceedings but to suspend them due to the necessity to await legal assistance from the Irish authorities. The notice of suspension was delivered to the respondent at the detention centre in Poznań as he was detained there in respect of another case. The last piece of information from the Irish authorities was received on 13th August, 2016. The investigation was resumed by decision of 6th September, 2016. Notice of resumption of the investigation was posted to the address given by the respondent in 2012 but it was not collected. As indicated in earlier correspondence, when questioned in 2012, the respondent was furnished with a notice of instruction on the rights and obligations of the suspect, including notice of the obligation to notify the prosecuting authority of any change in his place of residence or stay in excess of seven days and that if he was abroad he was to furnish an address for correspondence in Poland, failing which any letter sent to the last known address would be deemed validly delivered. The respondent signed this notice of his rights and obligations. The issuing judicial authority states that the respondent should have realised that the proceedings against him were still pending. Notice of the indictment against him and the content of the verdict were posted to the same address by way of substituted service.
22. It is clear from the additional information provided that the issuing judicial authority regards the decision of 20th October, 2017 of the District Court in Stargard, Gdańsk, imposing the initial penalty of one year and two months' restriction of liberty, as the relevant decision for the purposes of Article 4a of the Framework Decision and s. 45 of

the Act of 2003. It is indicated that the respondent was served with the decision on 13th November, 2017 but did not request a retrial or appeal despite the notice informing him of a right to do so. However, it would appear that he was not in fact personally served with the notice but, rather, the issuing judicial authority is relying upon his failure to notify of a change of address in that regard.

23. Counsel for the applicant conceded that insofar as the notice of the proceedings was served upon the respondent by way of post which was not collected, such service, while sufficient under Polish law, is not sufficient to meet the requirements of article 4a of the Framework Decision or s. 45 of the Act of 2003. She submitted that in accordance with the principles outlined in *Minister for Justice and Equality v. Zarnescu* [2020] IESC 59, it was nevertheless still possible for surrender to be ordered if the Court could be satisfied that the requirements of Article 4a of the Framework Decision and s. 45 of the Act of 2003 were substantively complied with, even if the circumstances did not fit neatly into one of the scenarios set out in the table at s. 45 of the Act of 2003. In particular, she submitted that if it could be unequivocally established that the respondent had waived his right to have notice of the hearing date and/or his right to attend same, surrender could still be ordered. In fairness to counsel for the applicant, she acknowledged that it is difficult in the circumstances of this case to establish such unequivocal waiver.
24. Applying the principles established by the Court of Justice of the European Union ("the CJEU") in *Dworzek* (Case C-108/16 PPU) at paras. 50-51, in *Tupikas* (Case C-270/17 PPU) at para. 96 and in *Zdziaszek* (Case C-271/17 PPU) at para. 107, surrender may be ordered notwithstanding that the facts of a particular case do not fit neatly into one of the specific scenarios set out in Article 4a of the Framework Decision. In *Zarnescu*, the Supreme Court acknowledged that 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.
25. In essence, the applicant is reduced to relying upon the respondent's failure to notify the Polish authorities of a change of address to establish that, through his own conduct, the respondent effectively waived his entitlement to notice and/or wilfully made it impossible for the Polish authorities to serve him.
26. I am satisfied that when questioned on 22nd October, 2012, the respondent was informed of his obligation to notify the prosecution authorities of any change of address. I am satisfied that in December 2012, the respondent was notified of the fact that the investigation was being suspended and not terminated. Such notice was served upon the respondent while he was in custody in respect of another matter. It was obvious at that stage he was being detained and was not residing at his previous address. It is worth noting that the notice of suspension indicated that the timeframe for such suspension was expected to be three to four months. Moreover, the notice of suspension did not point out or remind the respondent of his obligations as regards informing the prosecution of any

change of address. In fact, the investigation was not resumed until 6th September, 2016, almost four years later. Given such lapse in time, it was not unreasonable for the respondent to have assumed that the matter was no longer being pursued. During the intervening period, the respondent was released in 2013 from his detention for another offence and complied with his probation in respect of that offence by maintaining contact with his probation officer until 2015. He informed the probation services that he was in Ireland and there does not appear to have been a problem with that. During the same period, he returned to Poland to collect his passport. He does not appear to have left Poland and come to Ireland to deliberately evade the Polish authorities. He does not appear to have wilfully put himself beyond the reach of the Polish authorities to avoid prosecution in respect of the offence the subject matter of the EAW. He had informed the Polish probation authorities that he was in Ireland, albeit in respect of a different matter. The investigation did not resume until September 2016, some four years after he received notice indicating the suspension was being suspended, probably for three to four months. He had no personal knowledge of the resumption of the investigation in September 2016. He had no personal knowledge of the proceedings in 2017 or 2019.

27. I am satisfied that, in appropriate circumstances, a failure to inform the prosecution of a change of address could amount to, or provide substantial support for a finding of, unequivocal waiver of the right to be notified of and/or to attend a hearing. However, in the particular circumstances of this case, I am not satisfied to conclude that the respondent unequivocally waived his right to notice and/or to attend the hearing of this matter in 2017 or 2019. Nor am I satisfied that the actions of the respondent were such as would amount to such a lack of diligence on his part as might be regarded as an abandonment of his right to participate in the proceedings or any wilful ignorance on his part of the proceedings.
28. In the particular circumstances of this case, I am not satisfied that the requirements of Article 4a of the Framework Decision or s. 45 of the Act of 2003 have been complied with either formally or substantively. I am not satisfied that the mischief which Article 4a of the Framework Decision and s. 45 of the Act of 2003 seeks to avoid has not arisen in this matter. I am not satisfied that the defence rights of the respondent were adequately and effectively protected.
29. In such circumstances, I am obliged, pursuant to s. 45 of the Act of 2003, to refuse surrender and I do so accordingly.
30. In light of the ruling as regards the requirements of s. 45 of the Act of 2003, it is unnecessary for the Court to deal with the other issues raised on behalf of the respondent.