

**THE HIGH COURT**

**[2023] IEHC 733**

**[2023 No. 2 EXT.]**

**BETWEEN**

**MINISTER FOR JUSTICE AND EQUALITY**

**APPLICANT**

**AND**

**LIAM DALY**

**RESPONDENT**

**Judgment of Mr. Justice Kerida Naidoo delivered on the 22nd day of May, 2023.**

1. By this application, the applicant seeks an order for the surrender of the respondent to the Federal Republic of Germany pursuant to a European Arrest Warrant dated 12th January 2020 ("the EAW"). The EAW was issued by a Local Court Judge, as the Issuing Judicial Authority.
2. The EAW seeks the surrender of the respondent in order to prosecute him in respect of an attempted aggravated robbery offence and has certified the relevant provisions of the law of the requesting State.
3. The respondent was arrested on 6th January 2023, on foot of a Schengen Information System II alert, and brought before the High Court on the same date. The EAW was produced to the High Court on 11th January 2023.
4. I am satisfied that the person before the Court, the respondent, 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 section 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 offence in respect of which surrender of the respondent is sought carries a maximum penalty in excess of twelve months' imprisonment.

**Section 11 – Lack of Clarity**

7. The respondent initially raised an objection to surrender under section 11 of the Act of 2003 on the basis that the warrant makes no reference as to when or if any statute of limitations applies and therefore lacks the clarity required under section 11 of the Act. In light of additional information from the IJA that point was not pursued at the hearing.
8. I am satisfied that no issue arises under section 11 of the Act of 2003.
9. The Issuing Judicial Authority has certified that the offences referred to in the EAW are offences to which Article 2.2 of the Framework Decision applies, that same are punishable

by a maximum penalty of at least three years' imprisonment and has indicated the appropriate box for "*organised or armed robbery*". There is no manifest error or ambiguity in respect of the aforesaid certification such as would justify this court in looking beyond same.

10. I am, in any event, satisfied that correspondence can be established between the conduct described in the EAW and an offence under the law of the State, namely: attempted robbery contrary to common law.
11. As surrender is sought to prosecute the respondent, no issue arises under section 45 of the Act of 2003.

**Delay, abuse of process and section 37**

12. The respondent objects to surrender on the basis of a composite argument that encompasses abuse of process, delay and section 37 of the Act of 2003. His argument is that surrender would be in breach of his rights under Article 6(d) of the European Convention on Human Rights, including his family rights under Article 8. The respondent also relies on the submission that the lapse of time between the commission of the alleged offence and the issuing of the warrant in question raises legitimate concerns about his fair trial rights.
13. The date of the alleged offence is the 18th February 1994. The allegation is that the respondent entering a snack bar in Berlin armed with a broken wooden chair leg and tried to strike the person working behind the counter with the intention of stealing money. The attempt failed because the man he tried to hit was able to fend off the attack and take the improvised weapon from the respondent. The respondent was 22 years old at the time.
14. The respondent was brought before an investigating judge in the requesting State on 19th February 1994 and detained, during which he was questioned. In the affidavit sworn by him to ground his objection to surrender the respondent says he was detained for a period of three days.
15. Describing the evidence the IJA says: "*After initially denying it, the accused admitted during his presentation to the investigating judge that he had a mask on his head and a chair leg in his hand when he entered the snack bar. He had only wanted to scare the witness and had not said anything. He had drunk several beers beforehand and had wanted money from the witness. The urgent suspicion therefore results from the accused's confession. The witness [name redacted] is a direct witness to the crime. The former fiancée of the accused was only able to give information about the fringe event. Both witness [name redacted] and witness [the respondent's fiancée] continue to live in Berlin.*"
16. Any prosecution following surrender will therefore substantially rely on the respondent's inculpatory statements and the evidence of the alleged victim.

17. According to the IJA, having been detained, the respondent "*was initially released because he had named [the respondent's fiancée] as his agent for service.*" The respondent therefore knew that service of documents about the case would be on his fiancée and that service of any documents relevant to that prosecution on her would be treated as service on him. He was not charged with any offence prior to being released but in the circumstances, given the nature of the offending and the fact he had been arrested and detained for three days, during which time he made material admissions in relation to the offence, I am satisfied that the respondent could not reasonable have believed the authorities were not going to pursue a prosecution against him.
18. It is not contested that the preconditions to surrender pursuant to section 16 of the Act of 2003 have been met by the contents of the EAW and the additional information provided by letter dated 21st February 2023. In accordance with section 10 of the Act of 2003 the court is therefore obliged to order the respondent's surrender unless he can establish that the combination of factors he relies upon amounts to an abuse of process.
19. The respondent says that having been released following his detention there is nothing before the court to suggest that he was obliged to reside at a particular address or to remain in the requesting State. That is correct. He also says he lived openly in Germany until 1995 and that on one occasion he was stopped by the German police for non-payment of a train ticket and detained. He says he produced his passport before being released and had his passport returned to him.
20. What he does not address in his affidavit is that he had only been released in relation to the offences to which the EAW relates because he provided his fiancée as a means by which service could be affected upon him. Neither does he say what, if any, enquiries he with his fiancée about whether she had received service on his behalf of any documentation about the case.
21. The IJA says an attempt was made by the relevant authorities to serve an indictment on the respondent on 10th March 1994, which was unsuccessful because the respondent had left his residence address. A domestic arrest warrant was issued on 22nd August 1994. On 11th August 1995 the proceedings against the respondent were provisionally discontinued due to his absence. On 28th March 1996 an international search was initiated.
22. The respondent was subsequently arrested in the UK on 20th February 2003 on foot of an application by the German authorities for extradition in respect of the offence to which the warrant before this Court relates, which at that stage included an assault charge. That extradition request was governed by the UK Extradition Act 1989.
23. The case was ultimately heard in the UK by their Court of Appeal. The hearing took the form of an application for Habeas Corpus brought by the respondent. In a judgment dated 25th June 2003, the court found in the respondent's favour, which effectively amounted to a refusal of extradition. Although obviously not bound by it, it is instructive to consider the reasoning of the English court because the factors it relied on echo some of the

arguments being advanced before me by the respondent. A number of those factors also featured in several of the abuse of process cases upon which the respondent relies that have been decided under the Act of 2003, but the emphasis is, in important respects, different.

24. The reasoning of the English court centred on what was then a period of nine years since the alleged offending. Ultimately, the English court concluded: "*Having regard to the chronology which I have set out, it would manifestly be unfair to return this applicant to Germany, in face of the inability, as it seems to me, to have a fair trial, and the impression on the applicant's mind resulting from delay.*" The court was aware of the circumstances of the alleged offending and that, to quote the judgment: "*The applicant made certain admissions to those investigating this matter, which included an admission that he was present at the snack bar, but that he was drunk at the time.*" The court also emphasised the fact that when his passport was examined by the police in Germany in 1995, he was not informed that he was required to answer the charges and the fact that the respondent continued to live in Germany for a year or so after the events of February 1994. The court accepted the submission made on behalf of the respondent that he "*has been lulled into a sense of believing that there would be no proceedings against him, having regard to the events which occurred in Germany as long ago as 1995, and the events which have failed to occur, so far as he is concerned, since then.*"
25. The UK court accepted the argument that to return the respondent would have been unjust or oppressive. In that regard the English court was applying section 11(3) of the UK Extradition Act 1989 which explicitly provided that: "*Without prejudice to any jurisdiction of the High Court apart from the section, the court shall order the applicants discharge if it appears to the court in relation to the offence, or each of the offences, in respect of which the applicant's return is sought, that... By reason of the passage of time since he is alleged to have committed it... it would, having regard to all the circumstances, be unjust or oppressive to return him.*"
26. In *Minister for Justice v. Tobin* (No. 2) [2012] 4 IR 147 Hardiman J. addressed the concept of oppression in the context of an abuse of process argument and concluded that: "*there should be finality in litigation and that a party should not be vexed twice in the same matter; that it is an abuse to subject a party to unjust harassment; that the appellant must therefore be protected from oppression; that it is important in the public interest, as well as that of the parties, that litigation should not drag on for ever; and that a defendant should not be oppressed by successive suits where one would do. Similarly, I agree that these rules are rules of justice.*"
27. Oppression of the kind relied on in the respondent's case in the UK is therefore a factor for this Court to take into account as part of the overall circumstances of the case. However, I note, although do not consider it determinative, that the respondent does not say he was legally advised that the ruling of the UK court meant the German authorities were barred from seeking his return to prosecute the offence. Nor does he aver that he believed the ruling in the UK meant the prosecution was effectively at an end. More

importantly, in my view, the mere fact that the respondent may have thought the efforts of the German authorities to have him returned for prosecution ended with the decision of the English Court of Appeal did not prevent the requesting State seeking his surrender once the EAW regime was implemented. Likewise, absent other compelling grounds, in and of itself, it does not amount to an abuse of process

28. The position in respect of how this Court should approach a delay argument is somewhat different to that which the UK court was obliged to adopt under its 1989 Extradition Act. The fundamental principle is that delay, even a very long delay, is not a ground for refusing surrender under the Act of 2003.
29. In the *Minister for Justice v Vestartas* [2020] IESC 12 the Supreme Court held that:  

*"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."*
30. Furthermore, when considering the question of delay, the Court is entitled to have regard to the extent to which the respondent's conduct contributed to it. In that regard the applicant relies on *Minister for Justice v Stapleton* [2008] 1 IR 669 in which Fennelly J. addressed that issue as follows: *"I would comment, nonetheless, that it has to be a material fact that the Respondent himself has been a significant, if not the major, contributor to the lapse of time of which he complains."* The applicant argues that, notwithstanding the fact the respondent did remain in Germany for a year or so after the alleged offending, his conduct did materially contribute to the fact his case was not dealt with in Germany much closer to the time of the alleged commission of the offence.
31. Had the respondent made any enquiries about the status of the investigation at any time during or after 1994, the case against him could have been dealt with at that time. In the circumstances, I am satisfied that the respondent bears a significant portion of the responsibility for the fact that it was not.
32. The last part of the decision of the English court to address is its ultimate conclusion refusing to return the respondent to the requesting State because the passage of time was such that it would not have been possible for him to receive a fair trial. The law governing the EAW regime calls for a different approach. The Act of 2003 and the Framework Decision are premised on the principle of mutual trust and confidence. That means this Court is to proceed on the basis that, if surrendered, the respondent would receive a fair trial.
33. In that regard the applicant submits that the question of whether or not a fair trial for the respondent is possible can be addressed before the courts of the requesting State. The applicant relies on *Minister for Justice and Equality v Stapleton* [2008] 1 IR 669, which held that the fair trial question could be more efficiently and conveniently decided and debated where the respondent was to be tried as those courts would have a clearer picture of precisely what evidence was available and the issues likely to arise.

34. Turning to what happened after the decision of the English court, on 18th May 2007 the previous domestic arrest warrant in Germany was revoked and a new warrant issued for the offence of attempted aggravated burglary only. It did not include the assault offence which was included in the earlier warrant that was before the English courts.
35. A European Arrest Warrant was then issued by the Berlin Public Prosecutor's office on 11th June 2007. Following the decision of the European Court of Justice of 27th of May 2019 in case C-508/18 the 2007 warrant was replaced by a warrant issued on 12th January 2020, which is the warrant before this Court.
36. Four years therefore passed between the decision of the UK court and the issuing of a European arrest warrant. During that period the respondent lived in the UK and travelled regularly to Ireland. He points out that the authorities in the requesting State obviously knew that is where he was residing in 2003. In the context of the time that has passed since the alleged offence the respondent says the requesting State was under an obligation to take, and demonstrate it had taken, active steps to establish the whereabouts of the respondent following the decision of the English court in 2003.
37. In a request for additional information dated 20th February 2023, in which the IJA was asked to: *"Please indicate whether any attempts were made to locate Mr Daly following his release from the extradition proceedings in the UK in 2003, and please provide details of how many European Arrest Warrants have been issued in respect of this prosecution."*
38. The reply to that question was: *"The international search launched on 28 March 1996...was not interrupted at any time and continued to be maintained, most recently on the basis of the aforementioned European Arrest Warrant."* The applicant argues that there is no obligation on the requesting State to go further and demonstrate that it had taken any steps beyond the issuing of the warrant in 2007, and its re-issue in 2020.
39. The respondent says that from the reply referred to above, it is apparent the authorities in the requesting State failed to take any active steps to locate him between the issuing of the EAW and his arrest.
40. The import of the requesting State's response is, in effect, that there is no such obligation on them. They say that from when the respondent was arrested shortly after the alleged commission of the offence the position of the requesting State has been to seek to have him tried for that offence.
41. That issue was addressed in *Minister for Justice v TN* [2019] IEHC 674 by Owens J. who stated:

*"If authorities in a requesting Member State appear to take little interest in pursuing enforcement of a minor punishment over a number of years, it may be more difficult to assert that there is an important public interest in enforcing that sentence. However, any failings of administrators and judicial authorities in a requesting Member State should not be equated with an absence of a public*

*interest in prosecution and enforcement in that State or an absence of a European Union interest in the effective operation of criminal law and the Framework Decision throughout the European Union.”*

42. Neither the Act of 2003 nor the Framework Decision contain a provision obliging an IJA to set out what steps they undertook to locate the subject of a validly issued EAW. Failing to comply with an obligation that is not part of the Framework Decision, does not in my view amount to an abuse of process. Furthermore, in the circumstances of this case, it would amount to refusal on grounds of delay under a different guise.
43. Delay is not a ground for refusal of surrender unless accompanied by other factual circumstances falling so far outside the norm as to amount to an abuse of process. The respondent, of course, argues that the facts of his case are truly exceptional, and the delay is so egregious, that his circumstances reach the threshold set out in *Vestartas*. In support of that argument, the respondent relies on *Minister for Justice and Equality v Zbigniew Bednarczyk* [2021] IEHC 316 and *Minister for Justice and Equality v Slawomir Palonka* [2022] IESC 6.
44. In my view, the factual circumstances of this case can be distinguished from those in *Palonka*. It was an abuse of process case in which the court referred to a “*combination nevertheless of a series of errors, confusion, repeated applications, deliberate choices and inordinate delay*” and even then, considered it a marginal case. The conduct of the requesting State cannot, in my view, be said to have involved any significant errors or confusion. When the authorities in the requesting State became aware the respondent’s presence in the UK, an application was made for his surrender, which was unsuccessful.
45. The EAW regime came into effect in or around 2004 and a warrant was issued in 2007 under that new regime, which involved different considerations than those under the UK Extradition Act. The issuing of more than one warrant is not precluded under the Act of 2003 or the Framework Decision and I satisfied that the issuing of the 2020 warrant was not an abuse of process because it was necessitated by a decision of the European Court of Justice.
46. The respondent submits that the offence for which his extradition is sought is at the lower end of the scale for the offence of robbery. That may be so, but the alleged offending could not be characterised as trivial or particularly minor given that during the course of the alleged attempted robbery the complainant had to defend himself and disarm the attacker. I am not therefore persuaded that the seriousness of the offence is a point that weighs significantly in the respondent’s favour.
47. The facts in *Bednarczyk* were, in my view, also materially different to that of the instant case. In *Bednarczyk* the offences dated back to 1995 and the respondent’s surrender had been ordered by the High Court in 2012 in respect of the same offences with which the court was dealing in 2021. The point in *Bednarczyk* was that the respondent’s surrender had actually been ordered by the Irish High Court but through no fault of the respondent he was not surrendered. Seven years elapsed before the issuing of a further warrant. In

that case the court thought the delay demanded an explanation. There is no comparable conduct on the part of the requesting State in the instant case.

48. In support of his abuse of process and section 37 argument the respondent also relies on his mother's medical condition. In his affidavit he says she was diagnosed with cancer in 2008. At the time of the swearing of the respondent's affidavit his mother was 81 years old. A medical report from a consultant respiratory physician has been made available to the Court which is dated 2nd of March 2023. In summary it sets out that the respondent's mother previously suffered from breast cancer and has now been diagnosed with lung cancer. It appears from the contents of the report that no definitive treatment regime for her has yet been finalised.
49. That feature of the respondent's case also differs significantly from the circumstances of *Bednarczyk*. In that case the respondent's adult son suffered from severe bipolar disorder and relied on the respondent as his sole support and carer. The court is of course sympathetic to the respondent's concerns about his mother's health, but she is not dependent on him for her treatment or care. The EAW regime contemplates that surrender will almost inevitably have an adverse impact on the requested person and their family. Depending on the nature of the facts, genuine humanitarian issues may be dealt with under the section 18 postponement provision.
50. I am not, however, satisfied that the respondent's mother's medical condition means that his surrender would be an abuse of process or is so exceptional a feature of his personal circumstances as to mean surrender should be refused under section 37 of the Act on Article 8 grounds, or otherwise.
51. As regards the delay argument, a lapse of time of 28 years between when the offences are alleged to have been committed and the respondent's arrest is certainly significant. The applicant says, however, that the period from 1994 to 2003 should not be considered a period of delay on the part of the requesting State. I accept that submission.
52. For the reasons pointed out earlier, in my view the conduct of the respondent following his release from detention was a material reason why his surrender was not first sought until 2003 and I do not accept that the respondent could reasonably have believed that the authorities in the requesting State had abandoned any potential prosecution against him during that period. Furthermore, I do not consider the lapse of time itself to be inordinate.
53. I likewise do not consider the period between 2003 and when the first EAW was issued in 2007 to amount to an inexcusable or an inordinate delay. The issuing of that warrant approximately four years after the refusal of extradition in 2003 does not, in my view, in and of itself, amount to an abuse of process. I am also satisfied, based on the information provided by the IJA, that the exact whereabouts of the respondent did not become known to the requesting State prior to his arrest in January 2023.



54. The period of time that the respondent can therefore point to as potentially amounting to delay is the 16 years between the issuing of that warrant and the respondent's arrest in 2023. That is itself a long period of time, but delay, even delay of that magnitude does not necessarily, in and of itself, amount to an abuse of process. In that regard, the applicant points out that in *Minister for Justice and Equality v Stapleton* the Supreme Court dismissed the delay objection where between 24 and 29 years had passed since the alleged commission of the various fraud offences at issue. Similarly, in *Minister for Justice and Equality v Stanislaw Potocki*, a decision of Creedon J, surrender was ordered at a point in time when the offence was 26 years old and there had been an almost 20 year delay between the activation of a custodial sentence in 2001 and the date of arrest in 2021.
55. It is for the respondent to persuade the court that the issuing of the warrant before me amounts to an abuse of the process of this court. It is well established that only where a case involves exceptional circumstances that surrender should be refused on grounds of abuse of process, although exceptionality is not the test. In that regard, he relies on the delay, the failure of the requesting State to set out what steps they took to locate the respondent and his mother's medical condition.
56. Having considered the respondent's submissions and the contents of his affidavit, I am satisfied that the grounds relied on by him, either in isolation or when taken together, do not amount to an abuse of process and are not so truly exceptional or egregious as to provide a basis for refusal of surrender.
57. I am satisfied that surrender of the respondent is not precluded by reason of Part 3 of the Act of 2003 or another provision of that Act.
58. It, therefore, follows that this Court will make an order pursuant to section 16 of the Act of 2003 for the surrender of the respondent to the Federal Republic of Germany.