

# THE HIGH COURT

[2024] IEHC 619

[2023 No.118 EXT]

**BETWEEN**

**MINISTER FOR JUSTICE**

**APPLICANT**

**AND**

**L.J.K.**

**RESPONDENT**

## **JUDGMENT delivered by Mr. Justice Patrick McGrath on 18 October 2024**

1. The applicant seeks an order for the surrender of the respondent to the Republic of Poland pursuant to a European Arrest Warrant dated 3 April 2014 (“the EAW”). This EAW was issued by Marek Stempniak, Judge of the Regional Court in Kielce, as the issuing judicial authority.
2. This is an accusation warrant and the Respondent is sought so that he might be prosecuted for fifteen offences involving the sale and supply of illegal drugs. Five of these offences were allegedly committed in the period between March 2005 and January 2006 in the area of Kielce and involved: -
  - (a) Firstly, with named and unnamed others he was involved in trafficking significant quantities of psychotropic substances and narcotic drugs (being amphetamines, cocaine, ecstasy pills, marijuana and hashish to the extent that he made this a steady source of income and specifically:-
    - He sold 100 grams of amphetamine with a value of PLN 1250 in March 2005.
    - In early 2006, with another named person, he purchased 10kg of marijuana for the purposes of re-sale to other drug dealers.
    - Around the same time, he and another purchased 2kg of amphetamine for resale

- During that time, with another, he sold 20kg of marijuana for the purpose of resale.
  - In November 2006 he sold 10grams of cocaine to another named person for the purposes of resale.
3. Between 22 October and 15 November 2006 he is alleged, in same manner as previously, to have been involved in drug trafficking and there are 10 specific instances as follows:-
- At 1 and 2 he is alleged, on 22 and 28 October respectively, to have purchased 110 and 50 grams of an unspecified drug for resale.
  - At 3 to 9 he is alleged to have purchased various quantities of hashish and marijuana on various dates for the purpose of resale. The amounts involved were either unspecified or between 20 and 200 grammes each time.
  - At 10 he is alleged to have purchased 100 grams of amphetamine for resale.
4. The issuing State has, at paragraph E3, certified that nature and legal classification of the offences and the applicable statutory provisions are:-
- I. *an offence under Article 56 Sub-article 3 of the Act on Counteracting Drug Abuse of 29 July 2006 in connection with Article 91 S 1 of the Criminal Code in connection with Article 65 S 1 of the Criminal Code;*
5. The Respondent was arrested on 19 July 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 24 July 2023.
6. 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.
7. 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 2003 Act”), 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.

8. I am satisfied that the minimum gravity requirements of the Act of 2003 have been met.
9. The respondent objects to surrender on the following grounds:-
  - (i) The EAW lacks sufficient clarity to comply with the requirements of s. 11 of the 2003 Act.
  - (ii) Surrender is precluded by reason of s. 37 of the 2003 Act.
  - (iii) Surrender is precluded by reasons of s. 38 of the 2003 Act.
  - (iv) Surrender is precluded by reason of interference with Article 6 and Article 8 ECHR rights.

### **Correspondence**

10. This is not a case where the ‘tick box’ procedure under Article 2.2 of the Framework Decision was relied upon and it is therefore a case where it is necessary to show correspondence in accordance with s38 of the 2003 Act.
11. Section 5 of the 2003 Act provides:-

*‘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’.*
12. The relevant principles for showing correspondence are well established. In assessing correspondence, the question is whether the acts or omissions that constitute the offence in the requesting state would, if carried out in this jurisdiction, amount to a criminal offence – *Minister for Justice v Dolny* [2009] IESC 48.
13. The Respondent submits that correspondence cannot be made out in respect of two of the offences set out in the EAW, which allege that he was involved in the purchasing of an ‘*unspecified narcotic drug*’. He claims that this conduct does not correspond with any offence under Irish Law as, in order to be liable for an offence under the Misuse of Drugs Acts 1977 – 1984, it is necessary to specify the narcotic drug which is in issue, and this has not been done in the present case.

14. Relying upon *Minister for Justice, Equality and Law Reform v. Altaravicius (No. 2)* [2007] 2 I.R. 265, the Respondent submits that the Court is obliged to examine each offence and focus on the underlying conduct and consider whether this would constitute an offence within this State, and not on the nature or classification of the offence under the law of the issuing State.

15. The Respondent refers to the Judgment of Ms Justice Denham in *Dolny* [2009] IESC that it is appropriate to read the warrant as a whole in so far as to determine whether there is a corresponding offence, where she stated:

*'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.'*

16. The applicant says that in respect of the 15 offences set out in the warrant, there is significant detail provided. The Minister refers to the introductory paragraph to each set of offences (namely the five between March 2005 and January 2006 and the ten between October and November 2006) and says that when the two offences, for which it is claimed there is no correspondence, are read in conjunction with this paragraph it is clear that correspondence is made out with offences under, for example, section 15 of the Misuse of Drugs Acts 1977 to 1984.

17. This introductory paragraph, so far as the second 10 offences are concerned, have the following introductory paragraph:-

*'in the period from 22 October 2006 to 15 November 2006, in Kielce, acting in a similar manner, within short intervals of time, jointly and in concert with Michat Beza, in contravention of provisions of the Act on Counteracting Drug Abuse of 29 July 2005, he was involved in trafficking quantities of psychotropic substances and narcotic drugs, and namely amphetamine, cocaine, ecstasy pills, marijuana and hashish, to the effect that he purchased the psychotropic substances and narcotic drugs from Michat Beza and subsequently sold them to unspecified persons for the purpose of their resale'*

18. The ten specific charges which follow from this period, including the ones at 1 and 2, are ten examples of this conduct. Although the first and second such offences refer to an ‘unspecified drug’, it is one of the drugs set out in the introductory paragraph – all of which are illegal drugs and indeed all of which are illegal drugs in this state. That being the case, I do not accept the Respondents argument that correspondence is not made out. How the Polish authorities might go about proving that these two charges, relating to an ‘unspecified drug’, concern dealing in one of the named drugs in the introductory paragraph is a matter for trial but that is clearly what they say the charge is i.e. trafficking in one of those illegal drugs.

### **Section 11 and Sufficient Detail**

19. Section 11(A) of the 2003 Act requires that sufficient details of the grounding offences which comprise an EAW are to be included, to enable the Respondent to know what their surrender is sought, and to provide for matters to which this Court is to decide.

20. The Supreme Court in *Min. v Connolly* [2014] IESC 34, stated that it is:

*“...an imperative duty of a court asked to order the compulsory delivery of a person for trial outside the State to ensure that it is affirmatively and unambiguously aware of the nature of the offences for which it is asked to have him forcibly delivered, and for which he may be tried abroad, and of the number of such offences.”*

21. It is no part of the Court’s function in cases where surrender is sought, as here, to look to the strength of the case against the Respondent, to consider how the prosecution might prove the case in the issuing state or indeed to see if there is a prima facie case against the Respondent. There must however be sufficient detail in the EAW to enable the court to carry out its functions under the 2003 Act, including whether correspondence is made out. The matter was put as follows by Denham J in *Minister for Justice v Stafford* [2012] IESC 83:-

*’15. It is required that there be a description of the acts upon which the warrant is based. This is similar to the situation under the Extradition Act, 1965, as amended, and indeed classically in extradition law. A description of the acts, or*

*the acts alleged, are the facts upon which the executing judicial authority may apply the law. By describing the acts the facts are before the court and so a decision may be made as to whether there is, for example, double criminality. I am satisfied [on the facts of that case] that the facts on the warrant in this case are sufficient to describe the circumstances in which alleged offences were committed'.*

22. In this case the information provided is sufficient for the purposes of s11 and indeed to allow this court to perform its functions under the Act. There is detail of the alleged involvement of the Respondent in drug trafficking in a certain part of Poland within two defined periods of time, the type of drugs involved are described, in many instances the quantities are described and furthermore many of the other the persons with whom he is engaged in this illegal business are named. The Respondent could be in no doubt as to the nature of the charges he will face if surrendered.

23. I therefore dismiss this objection to surrender.

### **Section 11 & Retrospective Criminalisation**

24. In his notice of objection, the respondent objects to his surrender under section 11 of the 2003 Act on the basis of ambiguity concerning the penalties imposed.

25. At Part C the EAW, it is stated that the maximum sentence which may be imposed for the offences alleged is 12 years imprisonment. The Respondent raises the issue of retrospective criminalisation or penalisation as the nature and legal classification of the offences describe them as being contrary to *'Article 56, subarticle 3 of the Act on Counteracting Drug Abuse of 29 July 2005.....'* and one of the offences, namely the offence listed at paragraph E.2 (I)(1.) is alleged to have been committed in March 2005. and some of the offending alleged occurred before that date. It was submitted that this would appear to give rise to the retrospective criminalisation of behaviour or the retrospective increase in punishment for criminal behaviour contrary to Article 7 of the European Convention on Human Rights and Article 15.5.1 of the Constitution.

26. This issue was the subject of requests from this Court for further information pursuant to s20 of the 2003 Act. In the last response concerning this question, dated the 3 April 2024, the Polish authorities, having explained that the conduct in question (the selling of 100 grams of amphetamines in March 2005) took place at a time when this was criminalised by Article 43, subarticle 3 of the Act on Counteracting Drug Abuse of 24 April 1997. Critically however, whether or not the sentence has been changed, the Polish authorities said the following in the final paragraph of that response:

*'According to Article 4 Subarticle 1 of the Criminal Code, if at the time of sentence a different piece of legislation is in force than at the time an offence was committed, the new piece of legislation shall be applied, however the old piece of legislation shall be applied if it is more lenient to the perpetrator'*  
[emphasis added]

27. This question had arisen previously, in relation to the same type of offences in Poland, in the case of *Minister for Justice v Orlowski* [2021] IEHC 109. In that case, as here, Binchy J had similarly sought further information from Poland to clarify if there were grounds to fear a breach of Article 7 of the Convention. Having received replies to such requests he stated:

*'The explanation provided by the issuing authority is that the law dated 29<sup>th</sup> July 2005, which did not come into effect until 4<sup>th</sup> October, 2005, replaced the previous law concerning drug addiction. Pursuant to art 4.1 of the penal code, if at the time of adjudication the law in force is other than that in force at the time of the commission of the offence, the new law shall be applied. However, the old law is to apply if it is more lenient to the accused. This explanation satisfactorily disposes of this objection. It is clear that the offences concerned were offences under a different legislative provision at the time that the offences are alleged to have been committed by the respondent.'*

28. In light of that last assurance from the IJA there are no grounds to believe that there might be a breach of Article 7 of the Convention or Article 15.1.1 of the Constitution and this ground of objection is therefore dismissed.

## **Conditions of Detention**

29. In his notice of objection, the respondent objected to his surrender under section 37 of the 2003 Act, specifically in relation to the grounds of prison conditions. The Respondent claimed that, if surrendered, there is a real risk that he would be subjected to inhuman and degrading treatment contrary to Article 3 of the European Convention on Human Rights.
30. At paragraph 37 of his submissions, referring to a precis he had prepared of country-of-origin information, the Respondent submitted that it was clear that the first part of the so called *Araynosi* test had been met and this court should seek assurances from the issuing judicial authority. He claimed the country-of-origin information showed a real risk that:
- (a) He would be detained in conditions of detention of less than 3m<sup>2</sup> for the duration of his sentence. He submitted that, following the decision of the ECHR in *Mursic v Croatia* ECtHR App. No. 7334/13 there is a strong presumption of a breach of Article 3 of the Convention.
  - (b) He may be held in an inappropriate detention facility without sufficient freedom of movement.
  - (c) He may be held in conditions where the space factor is aggravated by other aspects of the physical conditions of detention.
  - (d) He would be exposed to inhuman and degrading treatment at the hands of the prison service.
  - (e) He will be exposed to inter prisoner violence.
  - (f) He will not be medically assessed on arrival and will not be provided with appropriate medical care.
31. A s20 request, drafted by the Respondent, was agreed by the Court and sent to the IJA on 7 February 2024 seeking clarification on these matters and assurances as to conditions of detention. In the response dated 20 February 2024, it was stated that if the Respondent is surrendered to Poland he would be detained in a Remand Prison Centre in Kielece and would receive appropriate medical care whilst in the Remand Centre and would undergo a medical examination within 3 working days of having arrived. The



floor space of the prison cell provided for the Respondent will be at least 3 square metres for the duration of his imprisonment (excluding the designated bathroom space) and is stated to have appropriate accommodation facilities. It is said that in the event of a serious threat or imminent fear of a serious threat to his life or health, special protection protocols would be applied.

32. Following this response, the Respondent submitted a concern that these assurances came from the Prosecutor, rather than the IJA, in line with the decision of the CJEU in *ML*, that it would be more usual for such an assurance to be provided either from the issuing judicial authority or from the prison authorities who would have direct responsibility for the conditions of detention of a Respondent on his surrender. This was addressed in the S20 request dated 21 March 2024. In the response dated 3 April 2024, the IJA endorsed the content of the correspondence arising from the Circuit Prosecutor's Office in Kielece dated 20 February 2024.

33. In *Minister for Justice v Rettinger* [2010] IESC 45, the Supreme Court accepted that prison conditions in the requesting state could give rise to a refusal to surrender under section 37 of the 2003 Act but stressed that where such an objection is raised:

*'the burden rests upon the [respondent] to adduce evidence capable of proving that there are substantial grounds for believing that if he (or she) were returned to the requesting country he, or she, would be exposed to a real risk of being subjected to treatment contrary to Article 3 of the Convention'*

34. A summary of the principles which have emerged from the case law in this regard was provided by Burns J in *Minister for Justice v Angel* [2020] IEHC 699 where the court said as follows:

*'(a) the cornerstone of the Framework Decision is that member states, save in exceptional circumstances, are required to execute any European arrest warrant on the basis of the principles of mutual recognition and trust;*  
*(b) a refusal to execute a European arrest warrant is intended to be an exception;*

- (c) one of the exceptions arises when there is a real or substantial risk of inhuman or degrading treatment contrary to Article 3 ECHR or Article 4 of the Charter of Fundamental Rights of the European Union ('the Charter');
- (d) the prohibition on surrender where there is a real or substantial risk of inhuman or degrading treatment is mandatory. The objectives of the Framework Decision cannot defeat an established risk of ill-treatment;
- (e) the burden rests upon a respondent to adduce evidence capable of proving that there are substantial / reasonable grounds for believing that if he or she were returned to the requesting country, he or she will be exposed to a real risk of being subjected to treatment contrary to article 3 ECHR;
- (f) the threshold which a respondent must meet in order to prevent extradition is not a low one. There is a default presumption that the requesting country will act in good faith and will respect the requested person's fundamental rights;
- (g) in examining whether there is a real risk, the Court should consider all of the material before it and if necessary, material obtained of its own motion;
- (h) the Court may attach importance to reports of independent international human rights organisations or reports from government sources;
- (i) the relevant time to consider the conditions in the requesting state is at the time of the hearing;
- (j) ...
- (k) a finding that there is a real risk of inhuman or degrading treatment by virtue of general conditions of confinement in the issuing member state cannot lead, in itself, to the refusal to execute a European arrest warrant. Whenever the existence of such a risk is identified, it is then necessary for the executing judicial authority to make a further assessment, specific and precise, of whether there are substantial grounds to believe that the individual concerned will be exposed to that risk;
- (l) an assurance provided by the competent authorities of the issuing state that, irrespective of where he is detained, the person will not suffer inhumane degrading treatment is something which the executing state cannot disregard and the executing judicial authority, in view of the mutual trust which must exist between the members states on which the European arrest warrant is based, must rely on that assurance, at least in the absence of any specific indications

*that the detention conditions in a particular detention centre are in breach of article 3 ECHR or article 4 of the Charter; and*

*(m) It is only in exceptional circumstances, and on the basis of precise information, that the executing judicial authority can find that, notwithstanding such an assurance, there is a real risk of the person concerned being subjected to inhuman or degrading treatment because of the conditions of that person's detention in the issuing member state.*

35. The respondent submits that following from the decision in *Muršić -v- Croatia* ECtHR app. no. 7334/13, where the minimum standard for prison cells falls below 3 m<sup>2</sup> a strong presumption of a breach of Article 3 of ECHR exists.

36. Further it is submitted that wherein this standard is not met there exists a “*strong presumption*” of a breach of Article 3 ECHR, lest certain requirements are cumulatively met.

*(1) the reductions in the required minimum personal space of 3 sq. m are short, occasional and minor (see paragraph 130 above):*

*(2) such reductions are accompanied by sufficient freedom of movement outside the cell and adequate out-of-cell activities (see paragraph 133 above);*

*(3) the applicant is confined in what is, when viewed generally, an appropriate detention facility, and there are no other aggravating aspects of the conditions of his or her detention (see paragraph 134 above).*

37. The respondent provided a précis of the Country-of-Origin material and contends that there is a real risk that he may be held in conditions of less than 3 m<sup>2</sup> for the duration of his sentence, without sufficient freedom of movement outside of the cell.

38. The respondent also submits that he will be exposed to inhuman or degrading treatment at the hands of the prison service, as well as being exposed to inter-prisoner violence and not receiving appropriate medical care nor will be medically assessed upon arrival.

39. In an Affidavit dated 8 March 2024, the respondent detailed his health conditions, namely his diagnosis of diverticulitis, as well as his heart condition which must be

regularly monitored. The respondent submits that there exists a concern that these conditions will not be properly treated within prison should his surrender be ordered.

40. The applicant submits that the two-stage test as set out in *M.L.* (C-220/17 PPU, 25th July 2018) should be applied in this case, where this executing judicial authority is called upon to assess whether or not surrender should be refused because of a risk of inhuman or degrading treatment in the Issuing State.

*“whether, in the particular circumstances of the case, there are substantial grounds for believing that, following the surrender of that person to the issuing Member State, he will run a real risk of being subject in that Member State to inhuman or degrading treatment, within the meaning of Article 4, because of the conditions for his detention envisaged in the issuing Member State.”*

41. The applicant submits that Section 4A of the Act of 2003 provides that it shall be presumed that an issuing state will comply with the requirements of the Framework Decision unless the contrary is shown.
42. There exists a presumption flowing from the principles of mutual recognition and trust arising from the Framework Decision that a requesting state will operate in good faith and uphold the requested persons fundamental rights. Whilst that presumption can be rebutted, it will not be done lightly and where, as here, there is a claim that there is a real and substantial risk of inhuman or degrading treatment, the burden rests on the person making such an assertion to adduce cogent evidence capable of showing such substantial grounds.
43. With the supply of assurances from the IJA, I must presume that he will be afforded a reasonable level of care whilst in custody in Poland. The reports submitted by the Respondent, while highlighting shortcomings in regard to the prison conditions of the issuing state, do not go so far as to negate this presumption. As such this ground of objection is dismissed

## **Article 6 & 8 – Family Rights & Delay**

44. The respondent objects to his surrender on the grounds that his surrender would lead to a breach of his and his children's rights under Article 8 of the *European Convention on Human Rights*, and in this regard cites egregious delay in this case, so as to make the surrender of the respondent disproportionate.
45. The Respondent was born in 1984 and was aged 21/22 at the time of these alleged offences. He is now 40 years old and is a family man who has resided in this jurisdiction since late 2006/early 2007. He lives in Tullow with his partner, and their two children.
46. The Respondent first came to Ireland in December 2006 seeking work. He commenced working in a Green Isle factory in early 2007 and had various jobs between 2007 and 2014, until his son was diagnosed with autism. As a result of this diagnosis, he is a stay-at-home father for his two children. He takes his son to school each day, helps his with his homework, takes him to various therapy sessions and to his various extra-curricular activities. He is the one who was most involved in consulting with various medical professionals and teachers in order to facilitate his transition to secondary school. His wife is the family breadwinner and is the owner of a beauty salon and a shop selling computer parts.
47. The Respondent has had various health problems over the years. He suffered a heart attack in 2021 and spent approximately 14 days in hospital as a result. He continues to have ongoing tests and scans to monitor any possible heart issues. He is on medication for type 2 diabetes. He is awaiting surgery for a hernia. He has also been diagnosed with a form of bowel disease known as diverticulitis, a permanent and incurable condition which can only be managed by a strict diet and antibiotics in the event of inflammation.
48. In her affidavit, filed on the 8 of March 2024, his partner refers to the changes in his son's behaviour and emotions since he became aware in December 2023 that there was a possibility his father would be sent to Poland. She reports starting to make disturbing comments, such as that he will kill or hurt himself if this happens. His partner confirms that the Respondent is the primary day to day carer of the two children and says that,

should he be surrendered, it is likely she would have to close her businesses in order to care for the children. She says that her side of the family, including her elderly parents, live in Ireland and their friends are here too. She doubts her ability to cope with all the demands upon her were the Respondent surrendered.

49. In a supplemental affidavit dated on 25 April 2024 the Respondent avers that he has a genuine fear regarding his son's condition should he be surrendered to Poland. A recent psychological report from Dr Domaracka is exhibited and it is submitted that this report displays a clear risk to his son's right to life should the Respondent's order be surrendered.
50. There are a number of reports exhibited which deal with the Respondent's son. From those reports it is established that his son was diagnosed with Autism Spectrum Disorder by Professor Michael Fitzgerald at the age of 3. Over the following years he was seen by a number of different medical professionals due to ongoing developmental difficulties. Various recommendations were made as far back as 2015, prior to his attending primary school, in order to address social skills, language development and behavioural difficulties. By way of example in her report of 2015, Dr Helen Long (a Senior Clinical Psychologist/Neuropsychologist) made various recommendations in this regard and also stated that he would require a significant level of support if he was to benefit from a mainstream school placement.
51. There are two more recent reports which deal with his son's condition. The first is dated 13 October 2023 and is by Ms Sheila Keane, a Psychologist with the National Educational Psychological Service and this was prepared *'to inform decisions regarding his transition to secondary school and outline supports he may need'*. In her report, Ms Keane refers to his early diagnosis of autism and to the various interventions and therapies he received over the years. She mentions inter alia his history of severe speech and language difficulties and the assistance he received over the years in this regard from both Childrens Disability Services and thereafter private language therapists. She refers to the considerable amount of support he, like many students with autism, will need in order to assist this transition into secondary school.
52. The final report is that prepared by Ms Joanna Domaracka, Psychologist at the Psychological Help Centre, dated the 12 April 2024. In the course of preparing her

report, Dr Domaracka had two interviews with his son and four interviews with the Respondent and his partner. At the start of the report, she refers to the fact that around the 20 of December 2023, the Respondent had made the conscious decision to explain the complexities of the court situation to his son in order to provide him with adequate time to process the information and to prepare for a potential prolonged absence.

53. She was told that, following this conversation there was a noticeable and drastic shift in his son's behaviour. When his mother, who was unaware that the Respondent had had this conversation with his son, spoke to him a few days later he mentioned suicidal ideations in graphic and explicit terms, saying he did not want to continue to live if his father was taken away by the Court. His mental situation thereafter deteriorated rapidly, and this included:

- (a) Self-injurious behaviour such as slapping, headbanging and hitting his head and face using his fists.
- (b) Throwing random objects, crying, not spending time with friends and family.
- (c) Unpredictable and sometimes aggressive behaviour towards his parents.
- (d) Changes in behaviour in school and refusal to co-operate with teachers or participate in class activities.

54. Dr Domaracka says that such behaviours may indeed be manifest in autistic persons when faced with frustration or when having difficulties in communication. At page 4 of her report, she records very disturbing comments by the Respondent's son to her as to what he might do to himself were he to lose his father to Poland. At page 4 of her report, she sets out two statements from the child, made in two different interviews she had with him in March 2023, where he had expressed a wish to end his life if his father had gone away. At page 6 of that report, Ms Domarcka sets out the difficulties children with autism have in particular with changes to routine and says that *'it is evident that the primary factor influencing [son]'s behavioural changes is the ongoing court case involving his father, along with the potential for his father's relocation to Poland'*.

55. In her concluding comments, Ms Domarcka states:

*[son], being a child with autism, experiences difficulties with changes to his routine. Such disruptions can manifest in emotional or physical outbursts. Any alteration, whether significant or seemingly minor, in his life has the potential to significantly impact his behaviour. The absence of his father may precipitate psychological trauma, potentially leading to developmental regression. Children with autism are particularly vulnerable to trauma due to their challenges in social communication and emotional regulation. Symptoms such as anxiety, social withdrawal, self-harm and developmental regression are associated with trauma. In [son]'s case, the separation from his father, his primary care-giver, represents a traumatic experience with potential far reaching consequences.*

*Another crucial aspect that must be addressed in this case is the presence of suicidal ideations and thoughts, which pose a significant risk. Numerous studies have highlighted that individuals with autism spectrum disorder (ASD) are at heightened risk of engaging in self – injurious behaviour and experiencing suicidal thoughts. It is imperative to recognise and address this vulnerability in [son]'s case to ensure appropriate support and intervention are provided.*

*'ASD are more likely to experience perseverative suicidal thoughts and impulsivity attempt suicide without a plan during a crisis' (Dr Sarah Cassidy, Nottingham University, May 2017). [son]'s autism disorder may contribute to cognitive inflexibility, limiting his capacity to effectively problem solve in stressful or challenging situations. This traumatic experience has the potential to further impair his ability to perceive alternative solutions, potentially increasing feelings of entrapment and perceiving suicide as the only viable escape. The increased vulnerability of autistic children to adverse life events heightens their risk of experiencing suicidality'.*

56. A number of requests for further information in relation to delay were sent to the IJA pursuant to s20 of the 2003 Act. In its response dated the 4 of July 2024, the IJA stated that a decision to prosecute the Respondent was taken on 22 August 2007. Various written requests to attend at the Prosecutors Office in Kielce were sent to his registered address but he failed to collect those requests and the police became aware he was no longer living there and his whereabouts were unknown. His mother was interviewed and said he was living abroad since 2006 and was not going to return to Poland but she



did not know exactly where he was living. Despite this it seems that various orders were made for a local domestic search for the Respondent in Poland in 2007 and 2008.

57. In 2014, having received information that he could be in Ireland, an EAW for his arrest was issued in Poland on the 3 of March of that year. The IJA states that after this EAW issued a search for him continued through Interpol. The Polish authorities indicate that until the date of his arrest in Ireland on the 19 of July 2023, they did not have any information as to his whereabouts.

### **Submissions of Respondent**

58. The respondent submits that this present case is analogous with *Minister for Justice - v- TN*, Owens J., 14 October 2019 [2019] IEHC 674, where surrender was refused in circumstances where the court held that the facts brought the case into the category of exceptional cases such as to engage Article 8 and render surrender disproportionate. In that case the respondent had a child with multiple learning disabilities which required substantial care from both parents.

59. In the course of his judgement in *TN* Mr Justice Owens recognised that significant disruption to family life would usually be very significant where surrender is sought on foot of a lawful request. In order to justify a decision in such cases to refuse surrender on the grounds of Article 8 rights he said it was '*necessary to identify the factors which give rise to clear disproportionality in the sense of a significant disproportion between the adverse effects on family life and the public interest in trial and punishment of the respondent in due course of law*'.

60. As is well settled law, Mr Justice Owens emphasised that delay in itself is not a standalone ground on which surrender should be refused and furthermore that a respondent can have no legitimate expectation that he can avoid surrender under extradition or EAW arrangements because of passage of time arising from lack of resources or from the inefficiency of those who should be pursuing the matter. But finding that the facts in that case were exceptional he stated:-

*‘29. Personal circumstances may change with the passage of time in a way which increases potential of disruption to family life as a result of a surrender. In this case the respondent’s family is now facing more difficulty as their eldest son with multiple learning disabilities and autism grows older and becomes more difficult to manage. The problems which the family will face if the respondent is surrendered now would not have been so acute if his return had been sought when his son was younger.*

*30. This case comes within the category of exceptional cases where the interest in enforcement does not outweigh the gravity of the interference with the respondent’s family life and the disruption to the lives of his family members which will result from the surrender to Poland. The weighting to be given to the public interest is minor when set against the likely adverse effects on the respondent’s family and the surrender would result in disproportionate disruption to family life.*

*31. The respondent is the family breadwinner. He and his wife are heavily involved in looking after their teenage son who suffers from autism and many other disabilities. He attends a special day school which is located some 45 km from the family home. The respondent’s wife is also involved in looking after their other children and it is clear that she will not be able to cope on her own. Their son has profound behavioural and other problems which are very difficult to manage and require the constant presence of his father. I have no doubt that surrender of the respondent will cause very severe disruption to the members of this family unit. I refer to the content of paragraphs 16-19 of the respondent’s affidavit sworn on 7th October 2019 and to the report from the special day school dated 4th September 2019 which I accept.*

61. The Respondent further refers to the decisions of the Supreme Court in *Minister for Justice v JAT (No. 2)* [2016] IESC 17 and more recently in *Minister for Justice and Equality v Palonka* [2022] IESC 6. In both cases there had been significant delay and, in both cases, the family circumstances of each respondent had altered significantly over those long period of time. In each case surrender was refused on the grounds inter alia of a disproportionate interference with family rights.

## **Submissions of Applicant**

62. The Applicant submits that it is settled law that delay of itself does not amount to a reason to refuse surrender. The lapse of time between the alleged crime and surrender does not dilute the significant public interest in ordering surrender.
63. The Minister further submits that when, as here, a complaint of delay is married to an objection under Article 8 of the Convention, the jurisprudence is clear that evidence of truly exceptional circumstances must exist before surrender could amount to a breach of Article 8 rights such as to justify a refusal to surrender.
64. The Applicant points to a number of judgments of this court where significant delay resulting in significant interference with family life was not considered sufficient to justify a refusal to surrender, for example *Minister for Justice v Tomkowiak* [2021] IEHC 413, *Minister for Justice v Rajz* [2021] IEHC 445, *Minster for Justice & Equality v Langowski* [2021]IEHC 74 (Unreported, Burns J., 1st of February 2021) and *Minister for Justice v Kowalczyk* [2021] IEHC 738. She submits that a disruption to the personal and family life of the respondent is an inherent aspect of the criminal process and extradition system. It is only wherein the personal and family life of the requested is truly exceptional wherein the refusal of a surrender could be justified.
65. The Minister submits that the delay in this case is not so lengthy or unexplained to amount to an abuse of process and that the balance discussed by the Supreme Court in *Palonka* does not tilt in favour of the Respondent and, in this regard, she refers to paragraph 26 of the Judgment of Charlton J in that case where he stated:

*'Firstly, since 2005, a period now of 17 years, Mr Palonka has lived in Ireland and during that time has established himself in a family relationship with progeny. In ordinary course, extradition causes hardship, just as facing a criminal charge does domestically or imprisonment does. This is as nothing in comparison to the entitlement of a country to preserve its peace through its criminal justice system and without which human nature could be predicted to flourish into its most negative aspect.'*

66. In *Palonka* there was a complex procedural history together with a lengthy delay which had not been satisfactorily explained. The Supreme Court there found that, in the particular circumstances of that case, it was one of those rare or exceptional Article 8 cases where surrender ought to be refused.

67. In the course of his Judgment Charleton J in that case stated:

*‘[25] Given the requirement of exceptional circumstances, an analysis of the unique concurrence of the factors of family life, the extreme delay to an unprecedented 7 degree and the trial judge being unable to find direct facts as to the emergence of a warrant on an earlier and 23 year old offence only on the failure of the first EAW to come into play*

*[26] Firstly, since 2005, a period of 17 years, Mr Palonka has lived in Ireland and during that time has established himself in a family relationship with progeny. In ordinary course, extradition causes hardship, just as facing criminal charge does domestically or imprisonment does. That is as nothing in comparison to the entitlement of a country to preserve its peace through its criminal justice system and without which human nature could be predicted to flourish to its most negative aspect’. .....*

*‘[31] This is not a case of potential infringement of fundamental rights. Rather, what is involved is a real, exceptional and oppressive disruption to family life in the most extreme and exceptional circumstances. Of itself, that would not justify a refusal to surrender as delay does not create rights, but delay may enable the growth of circumstances where a new situation has emerged that engages Article 8 of the European Convention in a genuinely exceptional way as set in the context of the individual procedural circumstances of the case’*

68. The decision in *Palonka* follows a line of authority, such as *Minister for Justice v Ostrowski* [2012] IESC 57 and *Minister for Justice v Verstaras* [2020] IESC 12, which have clearly established that to be successful in cases such as the present, where a family/ private rights objection to surrender is raised, the circumstances must be truly exceptional. There must, when considering such objections to surrender, to rebut the presumption in s4A of the Act, be cogent evidence to show the circumstance to be well

outside the norm, that is truly exceptional and, in the words of S37 of the 2003 Act they must be such as to render surrender incompatible with the States obligations under A8(2) of Convention.

## **DECISION**

69. From the above case law, the following are the principles of particular significance to the objection made pursuant to Article 8 of the Convention on the facts in this case:-

- a. There is a strong public interest in the surrender of persons accused or convicted of criminal offences to countries with which this State has extradition or surrender agreements;
- b. Delay in itself cannot ever operate as a bar to surrender. A person can have no legitimate expectation that he or she will avoid surrender under extradition or surrender arrangements because of the passage of time arising from a lack of resources or inefficiency on the part of the requesting state;
- c. Disruption, indeed, significant disruption, of family and private life is the norm where surrender is ordered, and this cannot ordinarily justify a refusal to surrender on foot of an otherwise lawful request;
- d. Where the evidence shows a real, exceptional and oppressive disruption to family life in the most extreme and exceptional circumstances, delay may enable the growth of circumstances where a new situation has emerged that engages Article 8 of the European Convention;
- e. The ultimate question in a case such as this is whether this is one of those truly exceptional cases (though of course exceptionality is not the test) where, due to the emergence of particular family or personal circumstances in the time since the alleged offences, Article 8 of the Convention is engaged, and it would be disproportionate to order surrender in the particular circumstances of this case.

70. This is a finely balanced case. The offences for which the Respondent is sought are not minor and are indeed relatively serious. He is alleged at the time in question to have been involved in a criminal gang in Kielce in Poland that was involved in the trafficking of significant quantities of illegal drugs. This is a factor of significance in this particular

case. There is clearly a strong public interest in the conviction of those involved in such activity.

71. On the other hand there are the following matters:-

- a. These offences were alleged to have been committed nearly 20 years ago when the Respondent was 21/22 years of age and clearly at a very different stage of his life;
- b. The Polish authorities do not appear to have shown any particular vigour in their pursuit of the Respondent since 2006/2007. For two years they had evidence from his mother that he was out of Poland but simply continued a domestic search. Nothing thereafter seems to have been done until 2014 when, information having come to their attention that he could be in Ireland, an EAW was issued. Thereafter the Court was told that, until 2023 a search through Interpol continued but there is no indication of any other active steps being taken by the Polish authorities. It is indicated that they became aware of his location in Ireland in 2023 and then issued a SIS alert leading to his arrest;
- c. Since he came to Ireland in 2006, he has lived a productive and law-abiding existence. He has established a family in Ireland and has deep ties in this jurisdiction. He does not seem to have come to the adverse attention of the authorities in Ireland;
- d. He has had some health difficulties in the recent number of years as outlines in the various medical reports attached to affidavits filed by him in this case;
- e. He is the father and primary carer of his son who has been diagnosed with autism since a very early age. From the reports exhibited it is clear that he and his partner have been extremely conscientious and active in their efforts to get all available assistance for the Respondent's son in order to help him deal with the difficult challenges he has had, and continues to have, in his life. They have not only engaged fully with all available public services but seem to have obtained private therapies and assistance;
- f. The Respondent's partner is the primary breadwinner, and this enables the Respondent, as primary carer for his son, to take him to the various therapies and extra-curricular activities which are designed to assist the child to cope with normal life;

- g. The Respondent's son is now at a difficult and particularly vulnerable age of his young life. He is or just has transferred from primary to secondary school and, as is clear from a report from the National Education Psychology Service, this is a significant event in his life, and he requires considerable support at this point;
- h. Recognising the difficulties which a child with the described condition might have with change and disruption, the Respondent broached with him the possibility of having to go to Poland in relation to this case. It is clear that this had led to a significant and very worrying change and decline in the Respondent's son and, as attested to by Ms Domarckana, had led to suicidal ideation and significant deterioration in his behaviour at home and in school.

72. In my view this is a case where the passage of time, a very significant passage of time, has led to the development of exceptional and extreme family circumstances such as to engage Article 8 of the Convention. The particular and specific family circumstances arise from the autism of the Respondent's son and the various difficulties and challenges which this has created for not only the son but also for the family unit. This is not an ordinary case where surrender will result in the inevitable separation of a Respondent from his or her partner and children with the consequent damage to family relationships. Not is it in my view one of those cases where severe disruption to a family or even to the interests of a particular family member could be met by a change of arrangements within the family unit.

73. This is a case where not only has the Respondent's son been diagnosed with autism from a young age and received ongoing supports and therapies and care, but it is a case where his father (for understandable reason) has become the primary carer in his life. In addition, he is at a particularly vulnerable time in his life faced with significant changes which are particularly challenging and require continuing ongoing supports for him to cope with these matters. And at this difficult time, he is now faced with the primary carer being removed from his life and this has led to a marked and worrying deterioration in his behaviour and threats of self-harm and suicide should he lose his father.

74. In my opinion, due to the passage of time in this case, wholly exceptional family circumstances – and I am here referring to the evidence in relation to the Respondent’s son and his current situation and needs - have developed, such as to engage Article 8 of the Convention.

75. As already noted, this is a finely balanced case but, though conscious of the high public interest in the prosecution of crime and though the alleged offences are relatively serious, this is a case where I conclude that it would be disproportionate to surrender the Respondent on foot of this EAW.