

THE HIGH COURT

[2021] IEHC 195
[2020 No. 030 EXT.]

BETWEEN

MINISTER FOR JUSTICE AND EQUALITY

APPLICANT

AND

PRZEMYSŁAW WITEK

RESPONDENT

JUDGMENT of Mr. Justice Paul Burns delivered on the 16th day of March, 2021

1. By this application the applicant seeks an order for the surrender of the respondent to the Republic of Poland ("Poland") pursuant to a European arrest warrant issued on 20th April, 2011 and amended on 21st February, 2020 ("the EAW"). No issue was taken in respect of the amendment.
2. The EAW was issued by Judge Marius Wiązek, of the District Court in Wrocław as the issuing judicial authority. The surrender of the respondent is sought thereby to enforce a sentence of 2 years and 3 months' imprisonment imposed on 24th January, 2005, of which 1 year and 3 months remain to be served. The EAW was endorsed by the High Court on 15th June, 2020 and the respondent was arrested and brought before this Court on 21st January, 2021.
3. I am satisfied that the person before the Court is the person in respect of whom the EAW was issued. This was not put in issue by the respondent.
4. I am satisfied that none of the matters referred to in ss. 21A, 22, 23 and 24 of the European Arrest Warrant Act, 2003, as amended ("the Act of 2003"), arise and that the surrender of the respondent is not prohibited for the reasons set forth therein.
5. I am satisfied that the minimum gravity requirements of the Act of 2003 are met. The sentence to be served in respect of the EAW is in excess of 4 months' imprisonment.
6. The sentence to be enforced is an aggregate sentence imposed in respect of four offences, viz:-
 - I. breaking into a motor vehicle and appropriating a radio;
 - II. taking another's identity card and other documents in order to appropriate cash;
 - III. hiding another's school ID; and
 - IV. appropriating another's bicycle which had been entrusted to him.
7. Section 38(1)(b) of the Act of 2003 provides for a procedure whereby it is not necessary for the applicant to establish correspondence, or double criminality as it is sometimes referred to, where the offence in question is an offence to which article 2(2) of the Council Framework Decision dated 13th June, 2002 on the European Arrest Warrant and the Surrender Procedures Between Member States, as amended ("the Framework Decision"),

applies and which carries a maximum penalty of at least 3 years' imprisonment under the law of the issuing state. At part E.I. of the EAW, the issuing judicial authority has invoked the procedure provided for at s. 38(1)(b) of the Act of 2003 in respect of offence IV by certifying that the offences carry a maximum penalty of at least 3 years' imprisonment and ticking the box for "swindling", as the relevant offence to which article 2(2) of the Framework Decision applies. I am satisfied that there is no manifest error or ambiguity about such certification so as to warrant this Court looking beyond same. I am satisfied that, if it was necessary to do so, correspondence could be established between offence IV referred to in the EAW and an offence under the law of this State, viz. an offence contrary to s. 4 and/or s. 6 of the Criminal Justice (Theft and Fraud Offences) Act, 2001 ("the Act of 2001").

8. As regards offences I and II in the EAW, I am satisfied that correspondence can be established between offence I and an offence under the law of this State, viz. an offence contrary to s. 4 of the Act of 2001, and between offence II and an offence contrary to s. 4 and/or s. 6 of said Act.
9. As regards offence III in the EAW, the circumstances in which the offence was committed are set out at part E of the EAW as follows:-

"on August 4, 1999 in Wrocław, he hid a school ID to the detriment of [named person], i.e. for the offence of Art. 276 of the Penal Code."

Later, in part E of the EAW, article 276 of the Polish Criminal Code is set out as follows:-

"Anyone who destroys, damages or renders unfit for use, or hides, or removes a document to which he or she has no exclusive right of possess (sic) is liable to a fine, the restriction of liberty or imprisonment for up to two years."

10. Counsel for the applicant submitted that the corresponding offence under Irish law is theft contrary to s. 4 of the Act of 2001, which provides as follows:-

"4.-(1) Subject to section 5, a person is guilty of theft if he or she dishonestly appropriates property without the consent of its owner and with the intention of depriving its owner of it.

(2) For the purposes of this section a person does not appropriate property without the consent of its owner if-

(a) the person believes that he or she has the owner's consent, or would have the owner's consent if the owner knew of the appropriation of the property and the circumstances in which it was appropriated, or

(b) (except where the property came to the person as trustee or personal representative) he or she appropriates the property in the belief that the owner cannot be discovered by taking reasonable steps,

but consent obtained by deception or intimidation is not consent for those purposes.

(3)(a) This subsection applies to a person who in the course of business holds property in trust for, or on behalf of, more than one owner.

(b) Where a person to whom this subsection applies appropriates some of the property so held to his or her own use or benefit, the person shall, for the purposes of subsection (1) but subject to subsection (2), be deemed to have appropriated the property or, as the case may be, a sum representing it without the consent of its owner or owners.

(c) If in any proceedings against a person to whom this subsection applies for theft of some or all of the property so held by him or her it is proved that—

(i) there is a deficiency in the property or the sum representing it, and

(ii) the person has failed to provide a satisfactory explanation for the whole or any part of the deficiency,

it shall be presumed, until the contrary is proved, for the purposes of subsection (1) but subject to subsection (2), that the person appropriated, without the consent of its owner or owners, the whole or that part of the deficiency.

(4) If at the trial of a person for theft the court or jury, as the case may be has to consider whether the person believed—

(a) that he or she had not acted dishonestly, or

(b) that the owner of the property concerned had consented or would have consented to its appropriation, or

(c) that the owner could not be discovered by taking reasonable steps,

the presence or absence of reasonable grounds for such a belief is a matter to which the court or jury shall have regard, in conjunction with any other relevant matters, in considering whether the person so believed.

(5) In this section—

'appropriates', in relation to property, means usurps or adversely interferes with the proprietary rights of the owner of the property;

'depriving' means temporarily or permanently depriving.

(6) A person guilty of theft is liable on conviction on indictment to a fine or imprisonment for a term not exceeding 10 years or both."

11. It was submitted on behalf of the applicant that while the EAW did not expressly refer to the respondent dishonestly appropriating property without the consent of its owner and with the intention of depriving its owner thereof, the Court could infer that such matters were inherent in the acts as set out in therein.
12. Counsel for the respondent vigorously contested the proposed correspondence and referred the Court to its judgment in *Minister for Justice and Equality v. Żyłka* [2020] IEHC 357, in which the Court had rejected a proposed correspondence between an offence contrary to article 276 of the Polish Criminal Code and an offence contrary to s. 4 of the Act of 2001.
13. It is not the case that because the Court in the past has not found correspondence between acts said to contravene a particular provision of the law of an issuing state and a particular provision of Irish law, that such correspondence cannot be established in a subsequent case. The matter is not determined by the particular provision of the law in the issuing state, but rather the Court must look at the acts said to constitute the offence alleged in the issuing state. It is quite conceivable that a particular set of circumstances alleged to contravene article 276 of the Polish Criminal Code could be found to correspond with an offence contrary to s. 4 of the Act of 2001, while other circumstances may not. The Court looks to the acts alleged to have been committed by the respondent.
14. In *Minister for Justice v. Dolny* [2009] IESC 48, Denham J., as she then was, stated at para. 38:-

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

15. Denham J. referred to the well-established jurisprudence on the approach to be taken to the words and warrants under the Extradition Act, 1965, as amended, at para. 41:-

"Thus in Wilson v. Sheehan [1979] I.R. 423 at p. 429 Henchy J. stated:-

'When it comes to the words in the warrant by which the factual content of the specified offence is identified, the correct rule is that those words should prima facie be given their ordinary or popular meaning unless they are used in a context which suggests that they have a special signification.'

Denham J. held that a similar approach may be taken to the words on a warrant issued under the Act of 2003.

16. I approach the issue of correspondence on the basis indicated by Denham J. in *Dolny*. The respondent is said to have hidden a school ID to the detriment of [named person]. It is not an offence under s. 4 of the Act of 2001 to simply hide an ID or other document belonging to another unless there is a dishonest appropriation of same within the meaning of 'dishonest' and 'appropriation' as defined in the Act of 2001 and an intention to permanently deprive the owner thereof. The respondent is said to have simply hid the ID. I am not satisfied that the drawing of the inferences proposed by the applicant would be fair or reasonable in the circumstances of this matter. I note the respondent is not said to have appropriated the ID, whereas he is alleged to have appropriated items in relation to the other three offences set out in the EAW. The facts as set out do not indicate any intention to permanently deprive the owner. I decline to draw the inferences proposed by the applicant.
17. I am not satisfied that correspondence has been established between offence III in the EAW an offence under the law of the State. I must therefore refuse surrender in respect of that offence.
18. The sentence imposed was an aggregate sentence in respect of all the offences referred to in the EAW and it is not possible to attribute any particular term of imprisonment to any particular offence, so that unless correspondence is made out in respect of all the offences referred to in the EAW, then surrender should be refused in accordance with the reasoning of the Supreme Court in *Minister for Justice, Equality and Law Reform v. Ferenca* [2008] IESC 52, [2008] 4 I.R. 480.
19. It follows that this Court will make an order refusing surrender.