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Summary

An Chúirt Uachtarach
The Supreme Court

MacMenamin J
Dunne J
Charleton J
Baker J
[Hogan J](#)

Supreme Court appeal number: S:AP:IE:2019:000222
[2022] IESC 000

High Court Record Number: 2019 195 EXT
[\[2019\] IEHC 803](#) and [\[2021\] IEHC 840](#)

Between

The Minister for Justice and Equality
Applicant/Respondent

- and -

Slawomir Wiktur Palonka
Respondent/Appellant

Judgment of Mr Justice Peter Charleton delivered on 8th February 2022

1. This request for the extradition of Slawomir Palonka under a European Arrest Warrant for drug importation in Poland has followed a twisting path by reason of complex procedural route. The twists and turns happened both here and in the requesting State. As to procedures in Poland, from this jurisdiction it was not clear as to why a series of activations of suspended sentences, on condition of good behaviour, were made and whether these might have occurred in response to an earlier failure of an extradition request. This judgment marks the second appeal from an order of the High Court returning Mr Palonka to Poland. The first order was made by Binchy J on 22 November 2019; [\[2019\]](#)

[IEHC 803](#). On appeal to this Court, [\[2020\] IESC 40](#), it was found that there was insufficient information on which the High Court could make that decision. The application for surrender was reverted to the High Court in order for that court to conduct further fact-finding. On the second High Court hearing, the matter came before Burns J who reached a number of conclusions based on the Polish authorities' responses to inquiries; 8 July 2021 [\[2021\] IEHC 840](#). With these findings of fact now made, the matter returns on this appeal in order for this Court to make a final determination. The two questions on which this Court originally granted leave to appeal remain for decision. These are:

1. whether on the facts of this case the issue of a second European Arrest Warrant, seven years after the issue of a warrant in this jurisdiction in relation to a separate offence, and four years after the refusal of surrender in that case, may be seen as an abuse of process, justifying a refusal of surrender;
2. whether surrender may be ordered in respect of the *in absentia* activation of a suspended sentence if such activation was triggered by an *in absentia* conviction for which surrender has been refused; and to that may be added a third ground which has been argued in the context of the unique circumstances of this case, namely
3. whether, by reason of procedural delay resulting in Mr Palonka establishing family ties in Ireland, Article 8 of the European Convention on Human Rights may result in the refusal of the application for surrender

Procedural history

2. What follows is an attempt to state a complex procedural history as simply as possible. Mr Palonka was convicted of two offences on two completely separate occasions, separated by some 44 months. Both offences involved the illegal importation of cannabis, the first having been in July 1999, 23 years ago, and the second in March 2003, 19 years ago. In 2002, a Polish sentencing court imposed a ten month sentence in respect of the 1999 offence, but the imprisonment was stayed. Ordinarily, judicial thinking might be assumed to be predicated on giving an offender a chance at reform. Mr Palonka was present for those proceedings. Sentencing for the later 2003 similar offence took place in June of that year and a prison sentence was imposed. In 2004, this was the subject of an appeal. Mr Palonka was not present for this hearing but was represented; though authorisation for this representation is disputed. Mr Palonka has been resident in Ireland since 2005. In 2006, the suspended sentence for the 1999 offence was lifted, suspended for 3 years from the date of imposition, thus becoming a jail sentence of 10 months: "In connection with the fact that Slawomir Wiktor Palonka, in the period of trial, committed another offence", the Regional Court in Hrubieszów by decision dated 16 January 2006 ruled that the sentence of 10 months' deprivation of liberty was to be executed. Mr Palonka was not present or represented. Notice of the 2006 hearing in respect of the decision to order execution of the previously suspended sentence was sent to a Polish address. Surrender was sought from Ireland to Poland in November 2012 to enforce a sentence of ten months' imprisonment imposed in June 2003, on the later 2003 offence, by the District Court in Nowy Tomyśl. This request succeeded in the High Court but was rejected on appeal to the Court of Appeal on grounds that are not here relevant; [\[2015\] IECA 69](#). After that happened, surrender on the older 1999 offence was sought by the Polish authorities in January 2019 by a further European Arrest Warrant. That later request forms the subject of this appeal.

3. In the High Court, Binchy J ordered that the EAW on the 1999 offence issued by Poland be enforced. The main issue before the High Court on that occasion were delay and the effect of such a substantial time lag on Mr Palonka's family. Seriousness of offences were asserted to be in the balance here together with delay and family circumstances. Binchy J found that Mr Palonka's family circumstances were not out of the ordinary and that the effects of surrender on himself and his family would be typical of the impact surrender has on any family. Considering the question of proportionality, Binchy J weighed the public interest in surrender against the consequences for Mr Palonka's family and found that surrender was proportionate. On the question of delay, Binchy J held that delay, in and of itself, is not sufficient to refuse surrender. No other factors were present in this case, he held, which justified

refusing surrender on grounds of delay. Further, Binchy J found that because the 2006 decision to revoke the suspension of sentence for the 1999 offence did not change the nature or level of the sentence initially imposed upon the appellant, the appellant's surrender would not be contrary to s 45 of the European Arrest Warrant Act 2003. This states that a person "shall not be surrendered under this Act" if:

(a) he or she was not present when he or she was tried for and convicted of the offence specified in the European arrest warrant, and

(b) (i) he or she was not notified of the time when, and place at which, he or she would be tried for the offence, or

(ii) he or she was not permitted to attend the trial in respect of the offence concerned,

unless the issuing judicial authority gives an undertaking in writing that the person will, upon being surrendered—

(i) be retried for that offence or be given the opportunity of a retrial in respect of that offence,

(ii) be notified of the time when, and place at which any retrial in respect of the offence concerned will take place, and

(iii) be permitted to be present when any such retrial takes place.

4. When the matter came before the Supreme Court, it was found that a decision could not be reached due to the facts being insufficiently clear, especially as to how the second request for the 1999 offence followed refusal of surrender for the later offence committed in 2003. As the Supreme Court cannot ordinarily hear evidence and does not normally have the responsibility of finding facts, the case was reverted to the High Court to make the appropriate inquiries. Among the factors which were unclear was whether the 2002 sentence for the 1999 offence was revoked on 16 January 2006 because Mr Palonka had committed another offence during the three years of suspension. Further matters lacked clarity, including whether Mr Palonka had been present for, or had notice of, the hearings held in 2003 and 2004 or for the hearing in 2006 after which his suspended sentence for the 1999 offence was lifted and a prison term was imposed.

High Court findings

5. After a number of requests for additional information were made in 2021 by the High Court, and responded to by courts in Poland, Burns J answered the questions set out in the Supreme Court judgment querying certain relevant facts. The sentence of 10 months' imprisonment for the 1999 offence became operative on 16 January 2006 because Mr Palonka had committed another offence in March 2003, during the three year period of suspension from 2002. The 2003 offence consisted of the importation of narcotics and the possession of narcotics, for which two 6 month prison sentences were imposed. These sentences in relation to the 2003 offence were aggregated into a sentence of 10 months' imprisonment and, on appeal on 29 January 2004, it was determined that the two offences, importation and possession for the 2003 offences, in fact constituted one offence. The order on appeal of January 2004 is the basis for ordering the execution of the 1999 sentence. In other words, it may be assumed that because the chance proffered judicially on the 1999 offence had not been taken, that the suspension of imprisonment had been revived and became an actual prison sentence.

6. At the hearing at first instance in 2003, on the second offence, Mr Palonka appeared at the trial in the Regional Court in Nowy Tomyśl and he was represented by his defence counsel. He pleaded guilty to

the two offences. Mr Palonka did not appear for the sentencing judgment but his defence counsel was present. Mr Palonka appealed his sentence and the appeal was heard in 2004 by the District Court in Poznań. He did not appear at the appeal despite receiving a summons by post which he collected and signed for. Mr Palonka contends that he has no memory of authorising the appeal but does not challenge that he did so.

7. On 16 January 2006, the suspended sentence for the 1999 offence was lifted, the jail sentence becoming operative. By this stage Mr Palonka was not present but was in Ireland and was not represented at this hearing. Notice of the hearing was sent by post to him in Poland but this was not collected. In response to a question relating to why the Polish authorities had only issued an EAW in respect of the 1999 offence after the EAW in respect of the 2003 offence had been rejected by the Court of Appeal, Burns J indicated that the authorities in Poland do not accept that they waited until after the failure of the first EAW request before issuing the surrender request in respect of the 1999 offence. In Poland, unlike in Ireland, there is not a single judicial authority which can issue an EAW. Therefore, multiple requests may be made in respect of multiple offences committed by the same person.

Representation

8. Among the questions asked by this Court, on reverting the matter back to the High Court, was one related to the issue of representation. Mr Palonka had claimed that the lifting of the suspension of the sentence in January 2006 was done not only in his absence, since he was by then residing in Ireland, but proceeded without notice to him. In the High Court, Burns J disposed of that argument by reference to the information received from Poland and made findings on that information. Burns J first of all made a careful analysis of the background circumstances which led to the imposition thus:

On June 26th, 2003, the respondent appeared at the trial in the Regional Court in Nowy Tomyśl and he was represented by his defence counsel. Thus, he was aware of the fact that he was legally represented and either expressly or implicitly accepted that representation. He does not contend that the lawyer at first instance was not mandated by him. He pleaded guilty in respect of two offences which occurred on 23rd March, 2003. On 30th June, 2003, a judgment was pronounced. The respondent did not appear for the sentencing judgment but his counsel was present. The respondent appealed that sentence and, on 29th January, 2004, the appeal was heard by the District Court in Poznań. The appeal had been lodged on behalf of the respondent. The respondent did not appear at the appeal hearing although he had been duly advised of it by receiving the summons by post which the respondent collected, and signed for, on 13th January, 2004. The respondent has averred that he has no recollection of authorising the appeal but does not contend that he did not do so. By additional information dated 16th April, 2021, the District Court in Zamość indicates that in the initial hearing before the Regional Court in Nowy Tomyśl, the respondent was represented by an attorney named Rafał Jujka who had been authorised to act by the respondent's mother (it should also be borne in mind that the respondent attended that court in person with that lawyer). For the appeal before the District Court in Poznań, the respondent was represented by Monika Urbańska who was given a substitute power of attorney by Rafał Jujka. Copies of the relevant authorisations are enclosed with the additional information, as is the receipt for notice/summons for the appeal hearing signed for by the respondent on 13th January, 2004.

9. While an issue arose as to the level of sentence, what occurred in January 2006 was that by reason of the hearing at which Mr Palonka had been represented in January 2004, the affirmed sentence on the 2003 offence was the basis for the lifting of the suspension in January 2006 on the 1999 offence. In Case C-571/17 PPU, request for a preliminary ruling under Article 267 TFEU from the Rechtbank Amsterdam (District Court, Amsterdam, Netherlands), made by decision of 28 September 2017, received at the Court on the same date, in the proceedings relating to the execution of a European arrest warrant issued against *Samet Ardic*, the issue of representation arose as to the imposition of a penalty. In that

case the accused man had imposed on him, in Germany, two suspended sentences, the conditions being to keep the peace and to remain, in that regard, under the supervision of a probation officer. The accused absented himself from several meetings with his probation officer and, in consequence, the authorities brought the matter before the courts in his absence and the suspension was then lifted. He went to the Netherlands, where a request was made for his return under a European Arrest Warrant. In citing this authority, nothing is said contrary to the procedure operating in this jurisdiction whereby such circumstances lead to an application to the courts for an arrest warrant, followed by a hearing with the accused present but in custody. Effectively, the ruling of the Court of Justice of the European Union was as to the inevitability of the result and the requirement of representation applying to the hearing at which a sentence was set; that is the earlier sentencing decision and not its revocation due to breach of condition:

69 In that regard, it should be pointed out that Framework Decision 2002/584 seeks, by the establishment of a simplified and effective system for the surrender of persons convicted or accused of having infringed criminal law, to facilitate and accelerate judicial cooperation with a view to contributing to the objective set for the European Union to become an area of freedom, security and justice, founded on the high level of trust which should exist between the Member States in accordance with the principle of mutual recognition (see, to that effect, judgments of 26 February 2013, *Melloni*, C-399/11, [EU:C:2013:107](#), paragraphs 36 and 37, and of 5 April 2016, *Aranyosi and Căldăraru*, C-404/15 and C-659/15 PPU, [EU:C:2016:198](#), paragraphs 75 and 76).

70 To that end, Article 1(2) of the Framework Decision lays down the rule that Member States are required to execute any European arrest warrant on the basis of the principle of mutual recognition and in accordance with the provisions of that Framework Decision. Except in exceptional circumstances, the executing judicial authorities may therefore refuse to execute such a warrant only in the exhaustively listed cases of non-execution provided for by Framework Decision 2002/584 and the execution of the European arrest warrant may be made subject only to one of the conditions listed exhaustively therein. Accordingly, while the execution of the European arrest warrant constitutes the rule, the refusal to execute is intended to be an exception which must be interpreted strictly (see judgment of 10 August 2017, *Tupikas*, C-270/17 PPU, [EU:C:2017:628](#), paragraph 50 and the case-law cited).

71 As regards, more particularly, Article 4a of Framework Decision 2002/584, inserted by Article 2 of Framework Decision 2009/299, this seeks to restrict the possibility of refusing to execute the European arrest warrant by listing, in a precise and uniform manner, the conditions under which the recognition and enforcement of a decision given following a trial in which the person concerned did not appear in person may not be refused (judgment of 10 August 2017, *Tupikas*, C-270/17 PPU, [EU:C:2017:628](#), paragraph 53 and the case-law cited).

72 Under that provision, the executing judicial authority is obliged to execute a European arrest warrant, notwithstanding the absence of the person concerned at the trial resulting in the decision, where one of the situations referred to in Article 4a(1)(a), (b), (c) or (d) of that Framework Decision is established (judgment of 10 August 2017, *Tupikas*, C-270/17 PPU, [EU:C:2017:628](#), paragraph 55).

73 Accordingly, that provision seeks to improve judicial cooperation in criminal matters by harmonising the conditions of execution of European arrest warrants issued for the purposes of executing decisions rendered in absentia, which is likely to facilitate mutual recognition of judicial decisions between Member States. At the same time, that provision strengthens the procedural rights of persons subject to criminal proceedings, guaranteeing them a high level of protection by ensuring full observance of their rights of defence, flowing from the right to a fair trial, enshrined in Article 6 of the ECHR (see, to that effect, judgments of 26 February 2013,

Melloni, C-399/11, [EU:C:2013:107](#), paragraph 51, and of 10 August 2017, *Tupikas*, C-270/17 PPU, [EU:C:2017:628](#), paragraphs 58 to 60).

74 To that end, the Court ensures that Article 4a(1) of Framework Decision 2002/584 is interpreted and applied in accordance with the requirements of Article 6 of the ECHR and the relevant case-law of the European Court of Human Rights (see, to that effect, judgments of 10 August 2017, *Tupikas*, C-270/17 PPU, [EU:C:2017:628](#), paragraphs 78 to 80, and of 10 August 2017, *Zdziaszek*, C-271/17 PPU, [EU:C:2017:629](#), paragraphs 87 to 89).

75 While the final judicial decision convicting the person concerned, including the decision determining the custodial sentence to be served, falls fully within Article 6 of the ECHR, it is apparent from the case-law of the European Court of Human Rights that that provision does not apply, however, to questions relating to the detailed rules for the execution or application of such a custodial sentence (see, to that effect, ECtHR, 3 April 2012, *Boulois v. Luxembourg*, CE:ECHR:2012:0403JUD003757504, § 87; 25 November 2014, *Vasilescu v. Belgium*, CE:ECHR:2014:1125JUD006468212, § 121, and 2 June 2015, *Pacula v. Belgium*, CE:ECHR:2015:0602DEC006849512, § 47).

76 The position is different only where, following a finding of guilt of the person concerned and having imposed a custodial sentence on him, a new judicial decision modifies either the nature or the quantum of sentence previously imposed, as is the case when a prison sentence is replaced by an expulsion measure (ECtHR, 15 December 2009, *Gurguchiani v. Spain*, CE:ECHR:2009:1215JUD001601206, §§ 40, 47 and 48) or where the duration of the detention previously imposed is increased (ECtHR, 9 October 2003, *Ezzeb and Connors v. United Kingdom*, CE:ECHR:2003:1009JUD003966598).

77 In the light of the foregoing, it must therefore be considered that, for the purposes of Article 4a(1) of Framework Decision 2002/584, the concept of ‘decision’ referred to therein does not cover a decision relating to the execution or application of a custodial sentence previously imposed, except where the purpose or effect of that decision is to modify either the nature or quantum of that sentence and the authority which adopted it enjoyed some discretion in that regard (see, to that effect, judgments of 10 August 2017, *Tupikas*, C-270/17 PPU, [EU:C:2017:628](#), paragraphs 78 to 80, and of 10 August 2017, *Zdziaszek*, C-271/17 PPU, [EU:C:2017:629](#), paragraphs 85, 90 and 96).

78 As regards, in particular, decisions to revoke the suspension of the execution of previously imposed custodial sentences, such as those at issue in the main proceedings, it is apparent from the case file before the Court that, in the present case, those decisions did not affect the nature or the quantum of custodial sentences imposed by final conviction judgments of the person concerned, which form the basis of the European arrest warrant which the German authorities are seeking to execute in the Netherlands.

10. Consequently, the focus of Burns J was on the hearing whereby the appeal of Mr Palonka on the second offence did not result in any change to the sentence imposed at trial. In consequence of the failure of that appeal in January 2004, the lifting of the suspension of the sentence for the 1999 offence became consequent in January 2006. Burns J made the following findings of fact:

I am satisfied that the respondent personally received notice of the date of the appeal hearing, having signed for receipt of same. Although the precise contents of the notice cannot be established, as a copy of same is not available, the respondent has not averred that the notice did not tell him of the scheduled date and that a decision might be given in his absence. There is nothing before this Court to indicate that the respondent withdrew his instructions between the

hearing at first instance and the lodging of the appeal. I am satisfied as a matter of probability that the lawyer was continuing to act on the authority of the respondent in lodging the appeal. A copy of the judgment was not served on the respondent because the rules of Polish criminal procedure did not require it. The judgment became final on January 29th, 2004 and there are no means of further appeal. In short, I am satisfied that the respondent appeared in person at first instance, an appeal was lodged on his behalf by his mandated lawyer, he was notified of the date scheduled for the appeal hearing and signed for receipt of such notice.

There is no evidence before this Court as to the specific instructions given by the respondent to his lawyer and it is not for this Court to speculate in respect of same. The respondent was personally notified of the date set for the appeal. The respondent's mother gave an authorisation to act to Mr. Jujka in respect of the matter. Mr. Jujka acted at first instance at which the respondent was present and Mr. Jujka gave a substitute authorisation to Ms. Urbańska on the date of the appeal hearing.

11. Mr Palonka's submissions acknowledge the *Ardic* judgment but contend that this case should be distinguished from *Ardic*, as well as from *X v Federal Republic of Germany* (10565/83), on the basis that both cases revoked suspended sentences for non-criminal breaches of probation conditions. This, it is claimed, is a vital distinction, as the criminal offence of Mr Palonka in 2003 invoked his fair trial rights, which were not engaged in *Ardic* or *X*. Counsel for Mr Palonka also cites *Minister for Justice v Szamota* [2021] IECA 209, in which *Ardic* was similarly distinguished on the basis of fact in the Court of Appeal. Collins J stated that Article 4a(1) of the Framework Decision requires that the final decision trial should include subsequent criminal proceedings resulting in a conviction where that conviction has played a decisive role in the enforcement of a previously suspended sentence.

12. Mr Palonka's submissions rely heavily on case law from the European Court of Human Rights, with a particular emphasis on *Bobmer v. Germany* (37568/97) and *El Kaada v. Germany* (2130/10), both of which were not considered in the *Ardic* judgment. Counsel view these cases as illustrating that, were the Court to apply *Ardic* in this instance, the baseline protection for fair trial rights under the European Convention of Human Rights cannot be met. It is therefore claimed by Mr Palonka that, if the Court accepts that the trial resulting in the decision encompasses both the trial in 2003 and the appellate hearing in 2004, and the Court determines that the appeal was the result of a breach of his Article 6 rights, as asserted by these submissions, then the activation of Mr Palonka's suspended sentence is a direct consequence of this breach, and surrender should be refused. The submissions also note that it may be appropriate to make an Article 267 reference if the Court determines that this case is not entirely aligned with the reference made in *Minister for Justice v Szamota*.

13. The Minister asserts that the series of facts disclosed through the s 20 inquiries effectively show that Mr Palonka's fair trial rights were vindicated in the triggering conviction and sentencing process. The Minister's submissions highlight the potential for "confusion, if not chaos" were the Court to apply a national interpretation of fair trial rights in the EAW scheme. This would, it is claimed, undermine the essence of uniform and autonomous interpretation. The presumption that states will comply with the requirements of the Framework Decision without contrary evidence being produced, per Article 4a, is referred to by the Minister with regards to the findings that the appellant had received notice of the time and date of the appeal hearing in 2004 in particular.

14. Taking into account these submissions, the following must be said. Even if the Court of Justice of the European Union were to expand the definition of a trial, following *Minister for Justice v Szamota*, to include the appellate hearing and the hearing for the lifting of any suspended sentence, in consequence of the proved commission of another offence at a time when an accused was given a chance to behave by reason of an earlier judicial decision showing a merciful disposition of a criminal charge, Mr Palonka's entitlement to notice are vindicated. The reality is that what cannot be ignored is the attendance of legal counsel at the January 2004 hearing, and that in the context of the undoubted

commission of the 2003 offence. This is established through his pleading guilty to the 2003 offence at first instance.

15. There is thus no basis for any contention that Mr Palonka was unrepresented at the crucial hearing whereby his appeal on the 2003 offence was dismissed in January 2004 and by reason of which the three years of suspension as to the 1999 offence were held violate in 2006.

Delay and abuse of process

16. On behalf of Mr Palonka it is contended that the 20-year delay between the conviction for the offence and the issuing of the European Arrest Warrant is egregious. While Burns J placed emphasis on the public interest in surrender in this case, Mr Palonka submits that, considering he was just 18 years of age when the offence was committed in 1999, and considering the nature of the offence, the public interest in surrender is significantly diluted. Mr Palonka, it is pointed out, was before the Irish courts in 2013-15 in respect of a different offence and no satisfactory explanation has been given by the Polish authorities for the delay in seeking surrender for the earlier 1999 offence. Therefore, Mr Palonka submits that his case is exceptional. It is his contention that there is a sufficient basis upon which the Court may find an abuse of process. He avers that the court must take account of his family and personal circumstances, as well as the inherently oppressive effect that two sets of requests for surrender, one following the failure of the other, the request for the earlier offence arising only on the surrender request being rejected for the latter, have on a person.

17. In that regard, Mr Palonka calls in aid *Minister for Justice v Tobin (No 2)* [2012] 4 IR 147, where ten years had elapsed since the incident to which the European Arrest Warrant related and where, following a change in the Irish law, Hungary issued a second request in respect of the same offence. Both Hardiman and Fennelly JJ, dissenting in the result, considered that this was prohibited as an abuse of process. *Minister for Justice v JAT (No 2)* [2016] IESC 17 is also relied upon. The alleged offences concerned a loss to British Revenue of more than £10 million and the execution of the second European Arrest Warrant occurred 6 years and 6 months after the commission of the last offence. In the argument on behalf of Mr Palonka, this should be compared to the allegedly less grave nature of the offence, as well as the twenty-year delay, in the present case. Mr Palonka references the reasoning of MacMenamin J, delivering the judgment of the court, in *Minister for Justice v Vestartas* [2020] IESC 12, where he noted that unless truly exceptional or egregious, delay will not alter the public interest. There may, however, it is suggested, come a point where delay is so lengthy and unexplained that it may amount to an abuse of process. This is a matter of balance.

18. The Minister's submissions highlight lack of binding authority in *Tobin* since, there, it was a minority of the Supreme Court that found an abuse of process. Their so finding, it is submitted, was based on the unusual facts of that case. Hardiman J's judgment focused on principles derived from *Henderson v Henderson* (1843) 3 Hare 100, namely the importance of having finality in litigation and in protecting people from a multiplicity of litigation. The finding of an abuse of process by Hardiman J centred on the fact that the second EAW related to the same offence as the first and that there was an element of blameworthiness on behalf of the State. In *JAT*, Denham CJ largely adopted the finding of abuse of process made by Edwards J in the High Court. The Minister submits that the finality of litigation was a consideration for Edwards J, similarly as in *Tobin*. Further, Edwards J indicated that the request for surrender had to be unconscionable, thus effectively importing a requirement of blameworthiness. No blameworthiness is present in the case at hand. A difference highlighted by the Minister between the present case and that of *Tobin* and *JAT* is that those cases had both concerned the same warrant. This present case is in relation to a separate warrant for a separate offence. While that is so, the eventual outcome of the 1999 offence was directly dependent upon the 2003 charge and its disposal.

19. One of the questions reverted to the High Court by this Court was as to the motivation or cause of apparently waiting until the failure of the request for surrender on the 2003 offence before the Polish

authorities then sought a second extradition on the 1999 offence. This was analysed by Burns J who felt that that on enquiry “no simple or straightforward answer has been provided in respect of this question” by the Polish authorities. Burns J noted the significant lapse of time as between the requests for the second 2003 offence, which resulted in the first EAW, and the second EAW which related to the 1999 offence. As Burns J held: “There undoubtedly was a significant lapse of time between the 2006 activation of the sentence in respect of the July 1999 offence and the issue of the EAW in respect of same.” He summarised the documentation as indicating a breakdown of communications as opposed to any deliberate scheme:

a. After the suspended sentence was activated on 16th January, 2006, an order issued on 17th February, 2006 against the respondent to report to the penal institution in Hrubieszów. When he did not appear, a warrant for compulsory appearance issued and an additional search was initiated. As he could not be located, enforcement proceedings were suspended by the Regional Court in Hrubieszów on 17th July, 2006. A wanted notice issued on 18th July, 2006.

b. The Regional Court in Hrubieszów requested the District Prosecutor’s Office in Zamość to issue a European arrest warrant against the respondent. By letter dated 21st September, 2006, the District Prosecutor in Zamość refused to apply for a European arrest warrant, stating that the case files did not provide information about the place the respondent was staying at and that there was no evidence that the wanted person was staying abroad.

c. The District Court in Poznań had issued a European arrest warrant (III Kop 31/06) seeking surrender of the respondent on 6th March, 2006 (“the 2006 warrant”). This warrant was never executed. The 2006 warrant was sent to Ireland but, by letter dated 17th October, 2012, the Irish authorities asked the issuing judicial authority to provide an amended warrant incorporating the changes to the form of the warrant brought about by European Council Framework Decision 2009/299/JHA. The Polish authorities sent a fresh warrant which issued on 6th November, 2012 (“the 2012 warrant”). In the 2012 warrant, it was indicated that the respondent may be residing in the Netherlands.

d. After the decision of the District Prosecutor in Zamość to refuse to issue a European arrest warrant (see point b. above), the respondent was still being sought by way of wanted notice. In 2012, the Regional Court in Hrubieszów started requesting documents that were necessary to apply for a European arrest warrant. At the same time, the County Police Headquarters in Hrubieszów were trying to establish where the respondent was staying. The Regional Court in Hrubieszów was advised that the respondent was being sought on the basis of the European arrest warrant issued by the District Court in Poznań on 6th March, 2006 reference III Kop 31/06.

e. On 12th October, 2012, Police Headquarters in Hrubieszów received information via Interpol that the respondent was staying in Ireland at apartment 19 Preston Mills, Drogheda. Having received this information, the Regional Court in Hrubieszów decided not to issue a European arrest warrant in respect of the convicted person because on the same day, the Court was advised that a European arrest warrant had already been issued in respect of the respondent by the District Court in Poznań. The reason given for the Regional Court in Hrubieszów not issuing or seeking to issue a European arrest warrant in respect of the sentence activated by order of 16th January, 2006 is that if the respondent was surrendered on foot of the 2006 warrant, issued by the District Court in Poznań, it would be possible to execute that activated sentence if the Respondent consented to it, which is provided for in Polish law.

f. On 26th March, 2018, the Regional Court in Hrubieszów received a copy of the 2006 warrant but was not aware of, and did not have a copy of, the 2012 warrant.

g. The Regional Court in Hrubieszów indicates that it was not aware of the arrest of the respondent in Ireland until it was informed by letter dated 27th March, 2018 by the Regional Police that the respondent had been arrested and detained on foot of a European arrest warrant, had lodged an appeal against his surrender and that the extradition procedure had been withheld (in fact, surrender of the respondent on foot of the 2012 EAW was ordered by the High Court but subsequently refused by the Court of Appeal on 18th May, 2015). The Regional Court in Hrubieszów indicates that it was not aware that the respondent's detention in Ireland was on foot of the 2012 EAW (presumably, as opposed to the 2006 warrant).

h. The police were responsible for all searches for the respondent. In the course of the police investigations, it was established that the respondent was probably in the Netherlands and then in Ireland. The Respondent was arrested in Ireland on foot of the 2012 EAW on 28th December, 2013 but the Regional Court in Hrubieszów indicates it was not aware of this fact until 27th March, 2018.

i. On 15th June, 2018, the Regional Police applied to the Regional Court in Hrubieszów for the issue of an European arrest warrant in respect of the sentence activated by order dated 16th January, 2006. The procedure meant requesting information from relevant institutions and sending necessary documents concerning the convicted person. Waiting for the said documents appears to have taken a long time. Not until all the information and documents were collected did the Regional Court in Hrubieszów file a request with the District Court in Zamość to issue the EAW, which issued on 23rd January, 2019.

j. In Poland, the police are responsible for making enquiries as to the whereabouts of wanted persons. A list of wanted persons in connection with European arrest warrants is not publicly available in Poland. In order to find out whether a European arrest warrant has been issued against a particular person, a search is performed, presumably by an authorised person such as a police officer, on the National Criminal Register, to establish if there were domestic warrants or wanted notices in respect of a person. If a warrant or wanted notice is turned up, an inquiry can then be made for information as to whether a European arrest warrant has been issued by the relevant Court.

20. All of this Burns J summarised, at [14] as being indicative of a populous country with multiple judicial centres tending to be unaware of each other and of pursuing individual purposes, as opposed to any collective effort to undermine Mr Palonka's rights. He said that

it is the experience of this Court that, unlike Ireland, there is not a single issuing judicial authority in Poland for the purposes of issuing European arrest warrants. There appear to be a number of issuing judicial authorities in that Member State depending upon which court in Poland is dealing with the prosecution of the offence or enforcement of the sentence. The experience of this Court is that where a requested person is sought in respect of multiple offences to be prosecuted in, or multiple sentences imposed by, courts in different areas in Poland this can lead to a multiplicity of warrants before this Court, necessitating communication with a number of different issuing judicial authorities which appear, to a large extent, to operate independently of one and other.

21. In the Minister's contention, the process followed here has been mandated by Framework Decision 2002/584/JHA and could not amount to an abuse of process. Neither the Irish nor the Polish authorities were aware of any family or personal circumstances which might render the proceedings oppressive. The age of the offence, and indeed the delay in issuing the second EAW, is argued to not, in and of itself, amount to a ground for refusal. The only aspect of this case which is exceptional, the Minister asserts, is the failure by the Polish authorities, when the first EAW was issued in respect of the 2003 offence, to advert to the earlier conviction. Reliance is placed by the Minister on the findings of Burns J

as to the disparate nature of the criminal system in Poland and the lack of cross-referencing.

22. For Mr Palonka, it is asserted that it is the failure of the Polish authorities to issue the EAW in respect of Mr Palonka in 2014 which is oppressive. It is not accepted by the Minister that the two EAWs have oppressive effect. The Minister submits that the Regional Court in Hrubieszów was not awaiting the outcome of the surrender proceedings in Ireland on foot of the 2012 warrant but seems to have decided to ‘piggy-back’ on the Poznań warrant if that warrant were to result in Mr Palonka’s surrender. In that regard, it must be stated that the findings of fact made in the High Court highlight the disconnect between the various issuing authorities in Poland and do not reveal bad faith. The decision by the Regional Court in Hrubieszów not to issue its own warrant in 2012 may have been inefficient, but of itself that does not establish abuse of process.

Mutual trust

23. In *Minister for Justice v Siklosi* [2021] IECA 210, Collins J rightly affirmed “the fundamental principles of mutual trust and confidence that underpin the EAW regime”. Even apart from that authority, it is clear that the purpose of the regime for surrender on criminal offences as between European states is based upon the fundamental regard that each legal system has for each other system. An EAW is a simple mechanism that should not be complicated by layering any form of precedential maze on top of the clear terms of the Framework Decision and resulting legislation. Rather, the High Court should look to the central points. Surrender is warranted upon minimum seriousness. Surrender is possible only where there is correspondence of offences. In that regard, what has always been involved here is the identification of a criminal offence in the warrant from the requesting state as to its constituent elements and the sensible analysis of our own criminal law whereby what is in essence the same as that offence in the requested state. As is well known, where the requesting state, by its definition of the offence demands more in terms of its elements than our criminal law, surrender can still take place. Thus theft with violence as a requested offence can correspond with a theft offence in the requested state. What was once defined here as larceny, now theft, could correspond to theft in other countries. The process involves distilling the occurrence and the charge down to what is essential. What the correspondence requirement rules out is in essence situations where there is a complete absence of criminalisation of an event and charge described in the requested state. As where, to take an extreme example, speaking out against a monarch is in the requesting state the offence of *lèse-majesté*, or injured majesty, is unknown here; or modern forms where speaking against the government is criminal. That requirement goes back to the principle whereby extradition being a quasi-criminal order is not to be made if there is not such offence known to domestic law as that in the warrant from the requesting state.

24. While constitutional rights may be prayed in aid, and European Convention rights, because of the mutual respect in which Member States hold the legal systems of each other, it will be an exceptional case indeed where any such argument can be found to overcome the high threshold for refusing surrender. An example is the judgment highlighted on behalf of Mr Palonka, that of *JAT (No 2)*, which was indeed a rare case, one where the appellant’s son had particular medical needs and where the effect of surrender would have been exceptional. In the case of *Siklosi*, on the other hand, no evidence as to his familial situation in Ireland or his personal ties here was provided. This affirms definitively that the facts must be rare and exceptional to give rise to a refusal of surrender on the basis of an abuse of process. Can the facts in the present case be characterised as such?

Exceptional circumstances

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 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 come into play.

26. 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. 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 into its most negative aspect.

27. Recital 10 of Framework Decision 2002/584/JHA, declares compliance with European Union law and “particularly with the fundamental rights recognised by EU law,” as recognised in *Aranyosi and Caldaranu* C-404/15 and C-659/15 PPU. Such presumption of compliance may only be dislodged on establishing that the execution of a EAW may give rise to an infringement on the fundamental human rights of the requested person. Recital 12 of the Framework Decision recognises that the EAW regime respects fundamental rights and observes the principles recognised by Article 6 of the Treaty of the European Union and Article 1(3) of the Framework Decision expressly declares no modification of the obligation to respect fundamental rights and fundamental legal principles. Indeed in *Ardic* the Court of Justice of the European Union, at 90, reasoned that such an obligation “reinforces the high level of trust that must exist between Member States and, consequently, the principle of mutual recognition on which the mechanism of the European arrest warrant is based”.

28. The boundary of what may be regarded as a sufficient potential infringement of fundamental rights as to warrant refusal of surrender has been considered in *Aranyosi and Caldaranu*, as well as domestically, resulting in the requirement for this Court to restate the principle that “exceptional circumstances” would be the sole grounds for departing from the principle that Member States are assumed to comply with the fundamental rights obligations. The exceptional circumstances requirement emerges also from *Norris v US (No 2)* [2010] UKSC 9 where the UK Supreme Court held that, for any argument as to respect for family rights to succeed under Article 8 of the European Convention on Human Rights to succeed, the facts would have to be genuinely characterised as exceptional. While in case C-237/15 *Lanigan*, related to delay while the appellant was detained, it was held that the executing judicial authority is bound to consider the risk of infringement of fundamental rights, namely the right to liberty and security, as protected by Article 6 of the Charter of Fundamental Rights of the European Union, where a real risk arises. Hence, an assessment of compatibility of surrender with fundamental rights is necessary in some circumstances, despite the principle of mutual recognition and respect and the obligation of surrender once the basic and fundamental proofs are met.

29. What emerges for decision here is not such as is exemplified in *Ignatova & Others v UK* 46706/08, in which the Strasbourg court rejected the argument that, upon surrender to Italy, the Tunisian nationals faced a real risk of being sent to Tunisia where their Article 3 rights may be infringed. Furthermore, in *Minister for Justice v Balmer* [2016] IESC 25, this Court proceeded on the basis that fundamental rights considerations may be less significant in the case of EAWs in comparison to other extradition cases on the basis that all of the countries are Contracting States, meaning that they are “obliged to enforce the rights under the ECHR, and *prima facie* are best placed to do so.”

30. Family rights, in particular the potential impact on children as a result of extradition, have been considered by the English courts in *H (H) v Deputy Prosecutor of the Italian Republic (Genoa)* [2012] UKSC 25, in which the subjects of the EAW were a married couple with three children. There, Lady Hale dissented from the majority decision to allow surrender of both parents, stating that surrender should be not be permitted in relation to the father on the basis of the grave impact on the children of the couple, who were sought in relation to drug trafficking offences. This minority position was reaffirmed with more certainty in the case of *FK v Polish Judicial Authority* [2012] UKSC 25, in which the UK Supreme Court unanimously upheld the non-surrender of a mother of five children, who was sought to be placed on trial for fraud. This was based on the fact that the offences were over ten years old and that the alleged offences were on a particularly small scale. It cannot, however, be said that a balancing approach based upon seriousness outweighing family rights has emerged; to the contrary see *Gingell and Foster, Family Rights and Extradition: A New Approach?* (2012) 17(2) *Cov LJ* 93. No, rather, the

primary obligation is to surrender and, whatever about the approach elsewhere, in Europe the Framework Decision sets out that there is a minimum standard of seriousness. This is applicable to all circumstances where correspondence is found.

Result

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 of 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. Burns J could not definitively state as to why on the failure of the EAW for the 2003 offence, it was to the 1999 offence, after the exceptional delay described by him, that the authorities looked. While there is no requirement in European law which would support any argument that a requesting state should trawl up and centralise every potential offence for which a person might be requested, it was the answer to that question which this Court saw as central in seeking further information through the High Court.

32. It follows that the absence of information on that crucial matter brings into focus the 23-year delay involved, the long stasis through failing to revert to the earlier 1999 offence, the presence of the person sought in this jurisdiction since 2005, the establishment of roots and family life in this country, and, while balance is not in issue, this delay underlines the exceptional nature of what has been sought in the context of these cannabis offences. Surrender will therefore be refused.

Result: ALLOW (see Judgment Summary)

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