THE HIGH COURT

Record No. 2009/334 EXT.

BETWEEN:

THE MINISTER FOR JUSTICE AND LAW REFORM

APPLICANT

AND

ROBERT SZALL

RESPONDENT

JUDGMENT of Mr Justice Edwards delivered the 17th day of February, 2012.

Introduction:

The respondent is the subject of a European arrest warrant issued by the Republic of Poland on the 21st of April 2009 in order that he might serve a composite or aggregate sentence of three years imprisonment imposed upon him by the District Court of Dublin on the 4th of September 2008 in respect of six offences particularised in the warrant. The warrant was endorsed for execution by the High Court in this jurisdiction (Peart .J.) on the 17th of December, 2009. The respondent was arrested at Aston Quay, Dublin, on the 25th of April 2011 by Garda Matt Lennon and was brought before the High Court in the normal way pursuant to s.13 of the European Arrest Warrant Act, 2003 (hereinafter referred to as "the Act of 2003"). At the s.13 hearing the Court fixed a date for the purposes of s.16 of the Act of 2003, and the respondent was admitted to bail pending his surrender hearing taking place. The matter was then adjourned from time to time until the surrender hearing was ready to proceed and ultimately the matter proceeded and was heard on the 14th of February 2011.

This judgment is written for the purposes of s.16(8)(a) of the European Arrest Warrant Act 2003 (hereinafter the Act of 2003) in circumstances where the Court has decided not to make an order under s.16(1) of the Act of 2003 surrendering the respondent to the issuing state.

The critical issue

Part E of the warrant contained a description of the six offences to which the warrant related and these were numbered I to VI respectively. The issuing judicial authority had not sought to rely upon paragraph 2 of Article 2 of the Framework Decision (Council Framework Decision of 13th June, 2002 on the European Arrest Warrant and the Surrender Procedures between Member States (2002/584/JHA)) and had not ticked a box in Part E.I. of the warrant in respect of any of the offences in question. Accordingly correspondence was required to be demonstrated in respect of all six offences. Correspondence could readily be demonstrated in the case of the offences numbered I to V., respectively, and no objection based upon an alleged lack of correspondence was raised in respect o f those offences. However, an objection based upon an alleged lack of correspondence was raised in respect of offence no VI.

Offence no VI is characterised in the warrant as a misdemeanour against the administration of justice under article 242 § 3 of the Polish Criminal Code. It is particularised in the following way:

> "In the period from 6 March 2006 to 5 April 2007, in Lublin, with no justified reason he did not return to the detention in custody at ulPoludniowa 5 after a break in carrying out a penalty, granted by the Provincial Court I Penitentiary Department in Kosno, file ref no III Kow 81/05/Pr"

Counsel for the applicant has invited this Court to find that offence no VI as described in the warrant corresponds with the Irish offence of being unlawfully at large, contrary to s. 6 of the Criminal Justice Act, 1960 (hereinafter the Act of 1960). Counsel for the respondent contends that in fact offence no VI does not correspond with s. 6 of the Act of 1960, or with any other offence under Irish law.

S. 6 of the Act of 1960.

S. 6 of the Act of 1 960 is in the following terms:

"6.-(1) A person who, by reason of having been temporarily released under section 2 or section 3 of this Act, is at large shall be deemed to be unlawfully a t large if-

(a) the period for which he was temporarily released has expired, or

(b) a condition to which his release was made subject has been broken.

(2) A person who is unlawfully at large shall be guilty of an offence under this section and on summary conviction thereof shall be liable to imprisonment for a term not exceeding six months.

(3) Where, by reason of the breach of a condition to which hi s release under section 2 or section 3 of this Act was made subject, a person is deemed to be unlawfully at large and is arrested under section 7 of this Act, the period for which he was temporarily released shall thereupon be deemed to have expired.

(4) The currency of the sentence of a person who is unlawfully at large for any period shall be suspended in respect of the whole of that period.

The point made by counsel for the respondent is that in so far as s. 6(2) of the Act of 1960 creates an offence of being unlawfully at

large it relates only to persons who were temporarily released under s. 2 or s. 3 of that Act and who, by virtue of s.6(1) of that Act, been deemed to be unlawfully at large. As the Act of 1960 docs not apply in Poland it follows that whatever offence he may have committed there by not returning to his place of detention after a break in the carrying out of his penalty, does not correspond with the Irish offence. This is so because, while he may have been unlawfully at large under Polish law, he was not a person at large who had been temporarily released under s. 2 or s. 3 of the Irish Act of 1960, and therefore was not a person deemed by virtue of s. 6(1) of that Act to have been unlawfully at large for the purposes of s. 6(2) of that Act.

In response, counsel for the applicant has sought to argue that s. 6(1) of the Act of 1960 is a deeming provision only, and that the offence created by s. 6 (2) of that Act covers any circumstance where a person i s unlawfully at large from a prison or place of detention including, but not confined to, persons deemed to be unlawfully at large by virtue of s. 6(1). Counsel for the applicant submitted that the persons potentially covered by s. 6(2) of the Act of 1960 would have to include persons who have broken out of a prison or place of detention, as well as persons who had failed to return from temporary release from a prison or place of detention including, but confined to, persons at large who had been temporarily released under s. 2 or s. 3 of the Act of 1960. It was further submitted that had the Oireachtas intended to confine the application of s. 6(2) to persons at large who had been temporarily released under s. 2 or s. 3 of the Act of 1960 they would have defined the offence with reference to s. 6(1).

Counsel for the respondent argues in rejoinder that this is not so, that the provisions in question are clear and must be strictly construed, and that escapees arc covered by the separate offence of escaping from lawful custody, contrary to common law.

It is a well established principle of statutory interpretation that in doubtful cases a penal provision ought to be given that interpretation which is least unfavourable to the accused, or as in the present case the respondent, concerned. The question for the Court is whether there is in fact any doubt about how s. 6(2) is to be interpreted.

Counsel for the respondent has submitted that this is a statutory offence and that counsel for the applicant is in effect inviting the Court to extend the scope of the offence beyond what comes within the overall scheme of the statute, and that is not permissible and contrary to all principles of interpretation of penal statutes.

It is further submitted that the Act of 1960 sets up a ministerial scheme in relation to temporary release of persons serving a sentence of penal servitude or imprisonment, or of detention in St Patrick's Institution, a district mental hospitals or the Central Mental Hospital. However, if one looks at the particulars of the offence set out in the warrant it is concerned with the temporary release of the respondent by a Court and not pursuant to any ministerial scheme. It would be to do violence to the scheme of the Act of 1960 to interpret s.6 (2) as creating any offence wider than an offence covering persons who, having been temporarily released pursuant to the ministerial scheme established by the Act, are unlawful at large.

The Court has carefully considered the submissions of counsel on both sides, and further has considered s.6 (2) of the Act of 1960 both on its own, and then in the context of the Act of 1960 as a whole. The Court is inclined to the view that the interpretation contended for by counsel for the respondent is probably the correct interpretation. However, be that as it may, in circumstances where the Court has a least some residual doubt about how to correctly interpret s. 6 (2), it is obliged according to long established principles of statutory interpretation to resolve that doubt in favour of the respondent.

In the circumstances the Court is not satisfied to find correspondence with the offence of being unlawfully at large contrary to s. 6(2) of the Act of 1960.

Further, as a composite sentence was imposed in respect of all six offences to which the European arrest war rant relates the non-corresponding offence cannot be severed. In those circumstances this Court has had no option but to refuse to surrender the respondent on foot of this warrant.

APPROVED: Edwards, J