THE HIGH COURT

Record No.: 2010 / 386 EXT

2010 / 387 EXT

IN THE MATTER OF THE EUROPEAN ARREST WARRANT ACT 2003, AS AMENDED

BETWEEN

THE MINISTER FOR JUSTICE AND EQUALITY

APPLICANT

-AND-

TOMASZ MARJASZ

RESPONDENT

JUDGMENT of Mr. Justice Edwards delivered on the 24th day of April, 2012

Introduction
This case concerns applications by the applicant for orders pursuant to s. 16 of the European Arrest Warrant Act 2003 (hereinafter the Act of 2003) surrendering the respondent to Poland on foot of two European arrest warrants dated the 17th July, 2006, (covering case ref: II K 268/01) and the 7th August, 2006, (covering case ref: II K 217/03) respectively. However, the controversies addressed in this judgment relate only to the first of those warrants in circumstances where the applicant acknowledges that the respondent was tried *in absentia* for the single offence which is the subject of the second warrant. No undertaking pursuant to s.45 of the Act of 2003 is forthcoming from Poland, and there is no evidence that the respondent was duly notified of his trial by means of a document personally served upon him. In the circumstances the Court has had no option but to refuse to surrender the respondent on foot of the warrant dated the 7th August, 2006.

Uncontroversial matters
In so far as the first warrant (i.e. the warrant dated the 17th July, 2006) is concerned, that warrant was endorsed by the High Court for execution in this jurisdiction on the 20th October, 2010. The respondent was arrested in execution of that warrant by Detective Garda Ray Shortall on the 10th January, 2011, at Kells, Co. Meath following which he was brought promptly before the High Court in accordance with s.13 of the Act of 2003. The Court has before it an affidavit of arrest sworn by Detective Garda Ray Shortall and counsel for the respondent, Mr. Kieran Kelly B.L., has confirmed that no issue is being raised either as to arrest or as to identity.

The issuing state seeks the surrender of the respondent for the purpose of having him serve out an aggregate sentence of 5 months imprisonment imposed upon him by the District Court of Wolsztyn on the 18th October, 2001, in respect of his conviction for the two offences mentioned in the warrant. The said sentence of 5 months imprisonment was initially conditionally suspended for a period of 3 years but the suspension was later lifted by the same court following breach by the respondent of the conditions of the suspension.

No issue as to trial *in absentia* arises in the case of this warrant, and so there is no question of an undertaking being required under s.45 of the Act of 2003 in this matter.

The Court is satisfied to note the existence of the European Arrest Warrant Act 2003 (Designated Member States) (No.3) Order 2004 (S.I. No.206 of 2004) (hereinafter referred to as "the 2004 Designation Order"), and duly notes that by a combination of s.3(1) of the Act of 2003, and Article 2 of, and the Schedule to, the 2004 Designation Order, "Poland" (or more correctly the Republic of Poland) is designated for the purposes of the Act of 2003 as being a state that has under its national law given effect to Council Framework Decision 2002/584/J.H.A. of 13th June 2002 on the European arrest warrant and the surrender procedures between Member States, O.J. L190/1 18.7.2002 (hereinafter referred to as "the Framework Decision").

The European arrest warrant in question is in the correct form, and has been issued by a competent judicial authority.

The Court is not required, under s.21A, 22, 23, or 24 (inserted by ss.79, 80, 81 and 82 of the Criminal Justice (Terrorist Offences) Act 2005), to refuse to surrender the respondent under the Act of 2003.

The respondent's Points of Objection
The respondent relies on various points of objection that may be summarised as follows:

> 1. The surrender of the respondent in respect of the matters the subject of the European arrest warrant herein is prohibited by the provisions of part 3 of the European Arrest Warrant Act, 2003, as amended, and in particular his surrender is so prohibited by section 37 thereof on the grounds of the breach of his Constitutional and Convention Rights and is prohibited by section 38 on the grounds of the lack of correspondence.
>
> 2. Without prejudice the foregoing, the offences in respect of which surrender is sought are now almost 10 years old and the three years period of suspension of the five-month sentence has passed.
>
> 3. The European Arrest Warrant Act, 2003, as amended, does not apply to the respondent herein as he is not a person who comes in the ambit of section 10 of the Act.
>
> 4. The surrender of the respondent is also prohibited by section 45 of the European Arrest Warrant Act, 2003, as amended, in circumstances where the offence that triggered the lifting of the suspension of the five-month sentence imposed for the offences which are the subject of this warrant was an offence for which the respondent was tried *in*

absentia and without proper notice and in respect of which no undertaking as to a retrial has been forthcoming from the issuing state.

It is convenient to deal first with the s.37 issues raised. However before doing so it is necessary to review certain evidence put before the Court by the respondent, and certain additional information from the issuing judicial authority proffered by the applicant.

Evidence adduced by the respondent
In his first affidavit sworn on the 25th March, 2011, the respondent deposes to the following:

> "2. I accept that I am the person named in the two European Arrest Warrants that have issued against me but I do not want to be surrendered to Poland and I believe I should not have to be forcibly returned. In that regard I disagree with some matters in the warrants.
>
> 3. I came to Ireland in August 2004. At that stage I was aware that I had been the subject of a suspended five month sentence from 2001 but I was not aware of any other court date and I was not aware of a court date in December 2004 or January 2005. It must be that I was tried in my absence. I came to Ireland to find work, my friend was in Ireland and had recommended it to me. I had no other motive. Within a month of my arrival I found a job as a general labourer in Kells. I had a number of employments up to about one and a half years ago when I had difficulty securing further employments due to the economic recession.
>
> 4. I am 29 years of age and I reside in Carlstown with my partner (A) and our 10 month baby girl (J). My partner came to Ireland in November 2005. I did not know her before but met her in Ireland and we formed a relationship and ten months ago she gave birth to our daughter. We reside together as a family unit and have made our home here. I have other family members residing in Ireland, I want to be near them and if I can stay here I hope to set up business as a car mechanic.
>
> 5. I believe it is very unfair to seek my surrender after such a delay when my life has moved on and I have settled with my family. I believe injustice and have not fled from Poland. I simply want to live and hopefully work in Ireland and look after my family.
>
> 6. I believe that my surrender would be entirely disproportionate and I pray this Court not to send me back to Poland."

In his second affidavit sworn on the 25th March, 2011, the respondent further deposes to the following:

> "4. I remember being dealt with in Wolsztyn District Court in 2001 in relation to the matters the subject of case reference II K 268/01. I came before the court having made a statement to the police admitting to a role in the alleged offences. I remember having a sore arm at the time I was being questioned by the police and they threatened to hurt my other arm. My mission of involvement was not true but was coerced from me. I did not know Marek Martysiak had illegally come into possession of the goods and I did not cause damage. However, when I came before the court I did not have a lawyer, I could not afford one and I was not offered one. I do not have any legal training and when the judge asked me if my statement was correct, I stated it was and I was convicted and I understand I received a suspended sentence and was not required to go into custody.
>
> 5. I do not remember any court hearing in December 2004 in relation to case number II K 217/03 and I did not receive any notice about it. I dispute the allegations against me and if I had been aware of the court date I would have attended to defend my interests and sought legal representation for that purpose.
>
> 6. I have made my life in Ireland and I feel is very unfair to seek to remove me from my family and send me to prison in Poland for what I consider to be relatively minor matters allegedly committed so long ago. My surrender would shatter my personal and family life."

Additional information furnished by the issuing judicial authority
As a result of issues arising out of the respondent's evidence, this Court saw fit to make a request to the issuing state pursuant to s.20(1) of the Act of 2003 seeking further information concerning aspects of Polish criminal procedure, including the entitlement to be represented by a lawyer, and in particular whether and, if so, in what circumstances is an accused entitled to free legal aid. The Court formulated a series of 21 questions for the issuing state to address and these were duly transmitted on the 3rd August, 2011. A reply was received dated the 5th October, 2011. It is proposed to set out each of the questions followed by the relevant reply:

> "1. *Is there a criminal legal aid system in place in Poland?*
>
> In Poland, there is a possibility of obtaining free legal aid in criminal matters. The principles of granting such aid are specified by Arts.78-81 of the Polish Penal Proceedings Code.
>
> 2. *If so, to whom is it available and in what circumstances is it available?*
>
> It is available to a suspect/accused at every stage of penal proceedings, unless the suspect/accused submits a motion and duly demonstrates that s/he is unable to cover the costs of defence without prejudice to the needs connected with necessary maintenance of him/her and his/her family.
>
> 3. *In particular, if there is a criminal legal aid system is it means tested?*
>
> See the reply to question 2.
>
> *4. Apart from means testing, does a person's access to criminal legal aid depend on (a) the level of the court before which the accused is to be tried, and/or (b) the seriousness of the crime and/or (c) the potential sentence that he faces, or all of these things?*
>
> The provisions of the Polish penal procedure stipulate that the suspect/accused should have a defence counsel in the following situations (obligatory defence). When they have no defence counsel of their choice, then a defence counsel is

appointed for them *ex officio* if:

• when the court decides this to be necessary due to circumstances hampering the defence,

• when proceedings are pending before a circuit court as the court of the first instance, if they are charged with murder or they are deprived of their freedom,

• in proceedings before an appeal court, when the court does not order the accused deprived of liberty to be brought to a hearing

• if proceedings are resumed as a result of a motion to the benefit of the accused and they are pending after his death.

Apart from the situations described above, legal aid's availability depends on whether a relevant motion is submitted and on the financial situation of the suspect/accused, which does not allow him/her to cover the costs of a defence counsel of his/her choice. It is only in the event that the accused intends to submit a motion for voluntary submission to a penalty during a hearing that the court, upon consideration of the motion, may appoint a defence counsel for him/her *ex officio*, regardless of his/her financial situation.

5. *If there are any other requirements for access to criminal legal aid, please identify what these are?*

There are no other requirements than those listed in the reply to question 4.

6. *If there is a criminal legal aid system does that system allow a person to choose their own lawyer who will be paid for by the State or must they avail of the services of a state appointed lawyer or public defender whom they cannot choose?*

A suspect/accused for whom a defence counsel is appointed *ex officio* has no possibility of choosing a lawyer representing him/her. The defence counsel may only be the lawyer appointed by the President of the court having jurisdiction for consideration of a given matter. However, at a justified request of the suspect/accused, as well as his/her defence counsel, the President of the court may appoint a new defence counsel in place of the current defence counsel appointed *ex officio*.

7. *If a person is allowed to choose their own lawyer who will be paid by the State does the lawyer have to be on a panel of lawyers prepared to accept criminal legal aid work?*

It is not possible to choose a lawyer who will be paid by the State.

8. *If a person is obliged to avail of the services of a State appointed lawyer or public defender how, and by whom, is the lawyer/public defender nominated?*

A State-appointed defence counselor a public defender is appointed by the President of the Court having jurisdiction for consideration of the matter of a judge authorized by him/her. This may also be done by a court considering the matter.

9. *How is a person to know what entitlement, if any, they have to criminal legal aid?*

Before the first interrogation, each suspect is advised of his/her right to take advantage of services of a defence counsel.

10. *Are the police obliged to inform a suspect of his entitlement, if any, to criminal legal aid, and if so, by what means and at what stage of the investigation or proceedings? Similarly is a judge, or court official, obliged to inform him of it, and if so, by what means and at what stage of the proceedings?*

An instruction regarding all rights, including a right to use the services of a defence counsel, is give to the suspect in writing. The suspect confirms the receipt of the instruction with his/her signature. The instruction is provided and handed over by the person who carries out the first interrogation, i.e. the prosecutor or a police officer.

11. *If criminal legal aid is means tested, is any discretion left to the judge, or other relevant authority, regarding the provision of legal aid?*

In addition to the cases in which the provisions of law stipulate obligatory defence, consideration of a motion of an accused is at the discretion of a judge or the court which evaluates whether the financial situation of the accused authorizes him to use the services of a defence counsel appointed *ex officio*.

12. *If so, what is the standard? Are there clear guidelines as to the information that must be provided by the applicant in order to prove his inability to afford a private lawyer?*

The accused/suspect submitting a motion for *ex officio* appointment of a defence counsel is obliged to demonstrate that his/her financial situation entitles him/her to use the services of a State-appointed defence counselor public defender. That is why, if the motion does not contain the documents and statements concerning the life and financial situation of the suspect/accused, such person is required to supplement the motion in such regard. The documents and statements submitted as attachments to the motion are subject to the same evaluation as every other piece of evidence in penal proceedings.

13. *Does a person who wishes to have criminal legal aid have to ask for it, or will it automatically be offered to him?*

See the reply to question 4.

14. *If legal aid is automatically offered, when will this occur? Upon arrest? At pre-trial stage? or in Court?*

In the situation that defence is obligatory, the appointment of a defence counsel *ex officio* takes place immediately upon presentation of circumstances justifying such appointment.

15. *If it is automatically or routinely offered, by whom is it offered? The judge? The police? A court official?*

In the event of obligatory defence in preliminary proceedings, the prosecutor conducting such proceedings applies to the president of the court having jurisdiction to consider the case with a motion for appointment of a defence counsel *ex officio*. In court proceedings, a State- appointed defence counsel or public defender is appointed by the President of the court or a judge authorized by the President, by means of a regulation. Motions submitted during a hearing are considered by the court which issues a decision on appointment of a defence counsel *ex officio*. Execution of such decision of the court consists of indication of a specific lawyer and is at the discretion of the President of the court.

16. *Is any particular official obliged by law to inform a person charged with a criminal offence of his right to seek criminal legal aid?*

See replies to questions 9 and 10.

17. *If criminal legal aid is offered, is the accused provided with a list of lawyers?*

The suspect/accused is unable to choose an *ex officio* defence counsel from the list of lawyers.

18. *If an accused is refused criminal legal aid, can he appeal that refusal to a higher court or some review body?*

No complaint may be lodged against the decision of the President and a judge authorized by him on refusal to appoint a defence counsel *ex officio*. No such complaint may be lodged against a decision of the court on refusal to appoint a defence counsel *ex officio*. Issues connected with refusal to appoint a defence counsel *ex officio* may be raised as an appeal against the judgement of the court of the first instance.

19. *If there a particular procedure that must be followed in order to obtain criminal legal aid?*

In the event of obligatory defence, when the suspect/accused has no defence counsel of his choice, the authorities conducting penal proceedings operate *ex officio*. In other cases, legal aid is provided at the motion of the suspect/accused. If such motion is not accompanied by documents and statements regarding the financial situation, then the suspect/accused is required to supplement the motion by submitting the relevant documents and statements which are there to demonstrate that such person is unable to cover the costs of *ex officio* defence. Such motion, if submitted at the stage of preliminary proceedings, is considered by the President of the court having jurisdiction to consider the matter or a judge authorized by him. This also applies to court proceedings, unless such request is submitted during a hearing. Then the motion is considered by the court. The defence counsel is appointed from among lawyers of the circuit barrister council having territorial jurisdiction over the seat of the court.

20. *Are there any circumstances or situations where a person is obliged to be legally represented, and required to avail of criminal legal aid or the services of a state appointed lawyer/public defender?*

See the reply to question 4.

21. *If so, can a person waive their right to criminal legal aid and employ a lawyer privately?*

In the event that a suspect/accused employs a lawyer privately, this entails revocation of the appointment of an *ex officio* defence counsel."

The Court has also been furnished with the provisions of the Polish Penal Code of 1997 underlying the explanations given. These are:

Article 16.

§ 1. If the agency conducting the proceedings is under obligation to advise the parties to the proceedings of their rights and duties, and fails to do so or mis-instructs them, this shall not result in any adverse consequences during the course of the trial to the participant of the proceedings or other persons concerned.

§ 2. In addition, the agency conducting the proceedings shall, if necessary, inform the parties to the proceedings of their rights and duties even in cases when this not explicitly stipulated by law. If the agency fails to provide such advice, and in light of the circumstances this was deemed indispensable, or if the agency mis-instructs the parties, the provisions of § I shall be applied accordingly.

Article 78.

§ 1. The accused who has not retained the defence counsel, may demand that the defence counsel be appointed to him *ex officio* if he can duly prove that he is unable to pay the defence costs without prejudice to his and his family's necessary support and maintenance.

§ 2. The court may withdraw an appointment of the defence counsel *ex officio* if it comes to light that the circumstances leading to the appointment did not exist.

Article 79.

§ 1. In criminal proceedings the accused must have the defence counsel if:

(i) he is a minor,

(ii) he is deaf, mute, or blind.

(iii) there are justifiable grounds to doubt his sanity,

(iv) (invalidated).

§ 2. The accused must have the defence counsel when the court deems that necessary because of circumstances impeding the defence.

§ 3. In the cases referred to in § I and 2, the participation of the defence counsel in the trial and in the sessions with the obligatory presence of the accused, is mandatory.

§ 4. If, in the course of proceedings, the expert psychiatrists find that there are no grounds to doubt the sanity of the accused both at the moment of perpetrating the act he is charged with and during the proceedings, participation of the defence counsel in the further course of proceedings is not mandatory. The President of the court, and the court during the trial, may in such a case withdraw the appointment of the defence counsel.

Article 80.

The accused must have the defence counsel in proceedings before a Provincial Court as a court of first instance if he is charged with a crime or deprived of liberty. In such a case the participation of the defence counsel at the main trial is mandatory; it shall be also mandatory at the appellate and cassation hearing, if the President of the court or the court find it necessary.

Article 81.

§ I. If the accused in cases specified in Article 78 § 1, Article 79 § 1 and 2, and Article 80, has no defence counsel of his own choice. the president of the court having jurisdiction shall appoint a defence counsel *ex officio*.

§ 2. Upon a justifiable motion of the accused or his defence counsel. the president of the court having jurisdiction over the case may appoint a defence counsel in lieu of the acting defence counsel.

Article 300.

Prior to the first examination, the suspect shall be advised of his rights: to provide or refuse to provide explanations, or to refuse to answer questions, to submit motions for actions in inquiry or investigation, to use the assistance of a defence counsel, to get finally acquainted with the documents of the proceedings, as well as of the right specified in Article 301 and on the duties and obligations specified in Articles 74, 75, 138, and 139. These instructions shall be given to the suspect in writing; the suspect shall confirm receipt of instruction with his signature."

S.37 Issues

The relevant provisions of s.37 of the Act of 2003 for the purposes of this case are subsections (1)(a) and (b), respectively, thereof, and these provide:

"37.-(1) A person shall not be surrendered under this Act if-

(a) his or her surrender would be incompatible with the State's obligations under-

(i) the Convention, or

(ii) the Protocols to the Convention,

(b) his or her surrender would constitute a contravention of any provision of the Constitution (other than for the reason that the offence specified in the European arrest warrant is an offence to which section 38 (1)(b) applies);"

S. 37(2) of the Act of 2003 provides that the reference ins. 37(1) to "the Convention" and to "the Protocols to the Convention" are references to the European Convention on Human Rights and Fundamental Freedoms 1950 as amended and the various Protocols to that Convention.

It is also appropriate at this stage to set out the provisions of Article 6 of the Convention, and Article 38 of the Constitution, as reliance is also placed on both of these.

Article 6 of the Convention provides:

"1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgement shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3. Everyone charged with a criminal offence has the following minimum rights:

(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

(b) to have adequate time and the facilities for the preparation of his defence;

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court."

Further, Article 38.1 of the Constitution of Ireland provides:

"No person shall be tried on any criminal charge save in due course of law."

For completeness the Court will also set out Article 47 of the Charter of Fundamental Rights of the European Union (2000/C 364/01) (hereinafter referred to as "the Charter") as the Charter is specifically referred to in recital 12 to the Framework Decision , and therefore also has a relevance to any complaint based upon denial, or apprehended denial, of fundamental rights. Article 47 of the Charter states:

"Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.

Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice."

The respondent's case is that he remembers being dealt with in Wolsztyn District Court in 2001 in relation to the matters the subject of case reference number II K268/01. He made a statement to the police admitting to a role in the alleged offences but claims that he did so under duress. He now disputes criminal liability and avers he did not have a lawyer as he could not afford one and he was not offered one. He contends that as he was forced to confess by the police and he was tried by the Court without the benefit of a lawyer, to surrender him for the purposes of serving a sentence imposed in such circumstances would be in breach of s.37 of the Act of 2003. Accordingly, he submits that any surrender of him to serve that sentence is prohibited. Counsel for the respondent has further submitted in support of this aspect of the case that all relevant investigative and prosecution actions predate the coming into force of the Act of 2003 and accordingly the principles enunciated in *Minister for Justice, Equality and Law Reform v. Brennan* [2007] 3 I.R. 732 and other such cases dealing with fair trial issues have no application. The presumptions spoken of in such cases, which are bound up in the principles of comity and mutual trust and confidence, do not apply in a situation where the all relevant investigative and prosecution actions predate the adoption of the Framework Decision and the setting up of the European arrest warrant system.

The Court has carefully considered the submissions made. The provisions of s.37(1) (a) and (b) are forward looking. The Court must be concerned with the proposed surrender and whether any surrender of the respondent, if carried out, would be incompatible with Ireland's obligations to the respondent under either the Convention or the Constitution. The prospective application of these provisions is readily appreciated. If something is anticipated as being likely to happen in the requesting state, either directly as a consequence of the respondent being surrendered, or because of a proximate connection with the order of surrender, and which would be inimical to the fundamental rights of the respondent as guaranteed under either the Convention or the Constitution, or both, then the Court is prohibited from surrendering the respondent.

Thus, for example, if a respondent is a convicted person and would upon being surrendered face a real risk of having to serve his prison sentence in inhuman or degrading conditions; or, to take another and perhaps more extreme example, would face flogging in addition to imprisonment, his surrender would be prohibited.

Similarly if a respondent's surrender were sought for the purposes of conducting a criminal prosecution and he faced the prospect of inordinate pre-trial detention without any possibility of applying for bail or securing an early trial, an Irish Court might (it would obviously depend on the precise circumstances of the case) regard his surrender as being prohibited.

However, it is much less clear to what extent, if any, s.37(1) may have application in the case of an extant conviction about which there is a fundamental rights based complaint i.e., a complaint that the trial leading to a conviction which is the subject of a European arrest warrant was unfair and breached the respondent's fundamental rights either under the Convention or under the Constitution, or both.

On one view of it since any such issue would not be concerned what might happen in the future, but rather would be concerned with what may have happened in the past, any infirmities in the trial leading to the relevant conviction should be regarded as water under the bridge so to speak, particularly in light of the principle of mutual recognition which envisages that decisions of member state courts will be recognized, and acted upon, effectively without question.

The alternative view, and it is this Court's view, is that at the end of the day the focus must still be on the act of surrender, and any consequences that may flow either directly from, or by virtue of a sufficiently proximate connection to, that surrender. A person has a fundamental right not to be deprived of his/her liberty, save in accordance with law. If it is inevitable that a person will be deprived of their liberty upon surrender, i.e. a final sentence has been imposed and all possibilities of appeal or review have been exhausted in the issuing state, and it has been demonstrated by compelling and cogent evidence that the conviction underpinning that sentence was the result of an unfair trial, then it could be said that the act of surrender would expose the respondent to a breach of his fundamental right not to be deprived of his liberty save in accordance with law notwithstanding the existence of a conviction order that is good on its face. (It is on the basis of similar logic that our High Court in the conduct of an enquiry under Article 40.4.2 of the Constitution will often be prepared to look behind a committal warrant or order of detention that is good on its face and release the applicant where an underlying illegality is patent.) Moreover, as such exposure would arise as a direct consequence of, or by reason of being so proximately connected with the act of surrender, the court might well, depending again on the exact circumstances of the case, consider itself obliged to regard the surrender of the respondent as being prohibited.

Therefore, this Court considers that it is theoretically possible for a Court to refuse surrender on s.37(1) grounds where it is suggested that an extant conviction was the result of an unfair trial. The Court would add, however, that this jurisdiction is likely to be exercised very sparingly indeed, and only in cases where it has been established by the clearest and most cogent evidence that there was a truly egregious unfairness in the circumstances of the underlying trial, and where there is also evidence that all possible remedies I avenues of review I appeals in the issuing state have been tried without success and have been exhausted.

It follows from what the Court has just said that in a conviction case the Court will, in general, be most reluctant to engage in any review of the trial process leading to the conviction on foot of which the warrant is based to determine whether it was fair and lawful. The default and starting position in all cases will be that the Court must proceed upon a presumption that the trial leading to the conviction in question was fair and respected the respondent's fundamental rights, and that in the event of him having some complaint in regard to the fairness of the trial that led to his conviction that it was incumbent upon him, at the material time, to seek an effective remedy in regard to that before the courts of the issuing state. The Court's views on this should perhaps be elaborated on further.

While the statutory presumption provided for in s.4A of the Act of 2003 does not operate to expressly vouchsafe the fairness and validity of any trial that may have resulted in such a conviction, this Court considers that a separate non-statutory and, of course, rebuttable presumption that any such conviction was the result of a fair trial nonetheless arises.

The Court considers that the non-statutory presumption just referred to arises in the following circumstances. It has first of all to be borne in mind that while the statutory presumption arising under s. 4A of the Act of 2003 does not have retrospective effect so as to validate past events, it does nonetheless apply to how an issuing state conducts itself generally in any European arrest warrant proceedings as well as to anything that may happen post surrender if indeed there is to be surrender in the particular case. The statutory presumption therefore has an impact in every case in two ways. First, it is to be presumed that the issuing state and the issuing judicial authority will comply with the requirements of the Framework Decision, which *inter alia* expresses itself in recital 12 as respecting fundamental rights. Secondly, the issuing state and the issuing judicial authority are in this Court's view to be regarded as being subject to a duty of utmost good faith *(uberrimae fidei*), both in terms of any actions taken by them under the Framework Decision (including the issuing of a European arrest warrant) and of any communications to the central authority in the executing state and /or to the executing judicial authority in connection with a European arrest warrant. If their actions and communications are to be accepted at face value and recognized, the authorities in the executing state must be able to have faith in them. So if the principles of mutual trust and confidence, and mutual recognition, respectively, are an aspect of the currency of the European arrest warrant system, and metaphorically speaking represent one side of its coinage, then a requirement that an issuing state I issuing judicial authority be subject to a duty of utmost good faith in terms of any actions taken by it under the Framework Decision, and any communications with the executing state I executing judicial authority, represents the other side of that coinage.

Accordingly, having appropriate regard to the implications of the s.4A presumption for the way in which an issuing state I issuing judicial authority is required to conduct itself; the principles of mutual trust and confidence between member states; the further principle that there should be mutual recognition of judicial decisions and actions; and the aforementioned duty of utmost good faith, this Court considers that it is entitled to expect in respect of any conviction which is the subject of a European arrest warrant that the issuing judicial authority would not knowingly seek a respondent's rendition in circumstances where he had not received a fair trial (as judged against widely accepted norms such as those expressed in provisions such as Article 6 of the European Convention on Human Rights, to which instrument all member states operating the European arrest warrant are signatories; alternatively Article 47 of the Charter of Fundamental Rights which is also binding on such member states post the coming into force of the Lisbon Treaty), and that it is therefore to be presumed that the respondent did in fact receive a fair trial that respected his fundamental rights. Such a presumption is, of course, capable of being rebutted in any particular case but the Court would require to have adduced before it very cogent and compelling evidence tending to rebut that presumption before it would be put upon enquiry and be justified in seeking to look behind the presumption.

There are also very sound practical and logistical reasons why a Court in an executing state should be very reluctant and slow to embark upon any such enquiry. In most cases the court in an executing state would be singularly ill-equipped to judge such an issue, not being intimately familiar with the laws and procedures of the issuing state, and not having access to the evidence or to transcripts of evidence, or to the exhibits, or to the court record, not to mention the very significant language and translation difficulties that would arise in many cases. A very similar point was made by the Supreme Court in *Minister for Justice Equality and Law Reform v Stapleton* [2008] 1 I.R. 669, albeit in the somewhat different context of an attempt by a respondent to resist his surrender for prosecution purposes on the grounds that there had been culpable prosecutorial delay in the case and that the proposed surrender would lead to a breach of his expeditious trial right. In his judgment in that case, Fennelly J. said at p. 692:

> " ....on the facts of the case, it is demonstrably more efficient and more convenient that those matters be debated before the courts of the country where the respondent is to be tried. The prosecuting and police authorities as well as other witnesses are available to and amenable to the jurisdiction of the courts of that country. Documentary evidence, of the type demanded by the respondent, will be more readily available there. If not, its absence may be more readily explained. There may, in addition, be arguments or points of domestic law, whether based on precedents or otherwise, which the respondent can advantageously argue or rely upon which may not be available to him in this jurisdiction and of which an Irish court might not necessarily be aware. I would echo and adapt the words of Simon Brown L.J. in *Woodcock v. Government of New Zealand* [2003] EWHC 2668 (Admin), [2004] 1 W.L.R. 1979 and say that the English courts "will have an altogether clearer picture than we have of precisely what evidence is available and the issues likely to arise."

Turning to the circumstances of the present case, the Court considers that there is an absence of cogent evidence as to the alleged police mistreatment of the respondent. His claims in that regard are mere assertion and are unsupported by any corroborative or supporting evidence. The Court has to maintain a healthy skepticism with regard to claims such as those made by the respondent and have regard to the fact that such assertions are easily made. not easily refuted and may be entirely self serving. Moreover, it is of some significance that the respondent states himself that *"when the judge asked me if my statement was correct I stated it was and I was convicted"*. It therefore seems that he was given the opportunity of repudiating the allegedly coerced statement but he elected not to do so.

There is, however, a second aspect to the respondent's claim that his trial was unfair and breached his fundamental rights and that is that he was tried without the benefit of being legally represented because he could not afford a lawyer and was not offered legal aid by the judge.

The Polish authorities have informed this Court in great detail about the provisions of Polish law, and in particular the Polish Penal Code of 1997, relating to the right of an accused in Poland to have the benefit of legal representation in court, about the right of an accused in Poland to have a state appointed lawyer represent him/her at trial in certain circumstances, and concerning court practice and procedures in such matters. This information, which was furnished by the issuing state in response to this Court's request under s.20(1) of the Act of 2003, indicates that under the Polish Penal Code of 1997 criminal legal aid, or more correctly state appointed and funded legal representation, was potentially available to the respondent if he had sought to avail of it. It makes clear that he was entitled to apply for a state appointed lawyer, and would have been told this, *inter alia*, at the investigative stage of the proceedings. The Polish Penal Code of 1997 was in force during the investigations into the offences which are the subject matter of the present warrant, during the respondent's interrogation, and during the proceedings before the Polish Court which ultimately

recorded the conviction against him. While the issuing state has not commented specifically on what happened in the respondent's case, this Court has been expressly told by the issuing state that under Polish law a suspect must be advised of his rights, and obligations prior to the first examination. Moreover, the Court has been informed that these instructions shall be given to the suspect in writing, and the suspect shall confirm receipt of these instructions with his signature.

There has been no engagement with any of this by the respondent. If he had stated to this Court that he had not been informed of his rights, particularly his right to be represented by a lawyer, and his right to have state appointed counsel appointed to him *ex officio* subject to satisfying the court as to his insufficient means, the Court might have been disposed to request further evidence from the issuing judicial authority, including perhaps requesting sight of any document in which the respondent is said to have acknowledged receiving notice of his rights. However, the respondent does not say that there was a failure to advise him of his rights. Rather his case is carefully crafted and he seeks to side-step this detail. He does not deny having been told at an early stage of the proceedings that he could apply for a state appointed lawyer. Rather, he asserts that he was tried without a lawyer because he couldn't afford one, and he wasn't offered a state appointed lawyer by the Court. It is clear, however, that he could have applied to the Court for a state appointed lawyer, but elected not to do so.

The position appears to be that under Polish law a Polish criminal court is not obliged to offer an accused the facility of a state appointed lawyer, and does not do so as a matter of course. Rather it is up to the accused to apply, in circumstances where it is a legal requirement in that country that a person, who is the subject of a criminal investigation, must be informed during the investigation of his right to apply for state appointed counsel should the matter go to court. If no such application is made, the court is not obliged to, and in practice does not, advise the accused again concerning his rights; nor will it of its own motion invite him to apply for the appointment of a state counsel. However, it is clear that if the respondent in this case had applied for a state appointed lawyer his application would at least have been considered.

In the circumstances, there is an evidential deficit from the respondent and he has not provided the Court with sufficiently cogent evidence to cause it to look behind the representations of the issuing state concerning what is said to be the standard procedure in every criminal case in Poland. That is not the end of the matter, however, because the respondent relies *inter alia* on Article 6 of the Convention and contends (in effect) that whether or not he was told by the prosecutor or by the police about his rights to be legally represented and to apply for state appointed counsel there was still a breach of Article 6(3)(c) in circumstances where no Court sought to appraise him of his rights.

In this context much was made in the course of legal argument of the fact that the respondent was not advised of his right to legal assistance by any judge during any of his court appearances. Reliance was placed on the fact that in Ireland ever since the seminal case of the *State (Healy) v. Donoghue* [1976] I.R. 325 the right to legal representation has been held to be a constitutional right as an aspect of the personal right to trial in due course of law as guaranteed in Article 38 of the Constitution. Moreover, the Irish jurisprudence makes it clear that it is not regarded in Ireland as sufficient in itself that an accused should have the right to legal representation and, in an appropriate case, to apply for free criminal legal aid. It has been held that for these rights to be properly vindicated an accused has to know of his rights. As O'Higgins C.J. reasoned in *Healy* at p. 352:

> "....the Act of 1962 lays down as a condition for the grant of legal aid both in the District Court and on return for trial, that the person seeking it must apply for it. No one can be compelled to accept legal aid, and a person charged is entitled to waive his right in this respect and to defend himself. No objection can be raised if these provisions of the Act operate to cover such cases where a person, knowing of his right, does not choose to exercise it and, therefore, decides not to apply. However, if a person who is ignorant of his right fails to apply and on that account is not given legal aid then, in my view, his constitutional right is violated. For this reason it seems to me that when a person faces a possible prison sentence and has no lawyer, and cannot provide for one, he ought to be informed of his right to legal aid. If the person charged does not know of his right, he cannot exercise it; if he cannot exercise it, his right is violated."
>
> Further, Griffin J. in the same case stated at p.361:
>
> "In my opinion, when the circumstances are such that if, in the event of a conviction or on a plea of guilty, a sentence of imprisonment is likely, a District Justice should inform an indigent defendant of his right to legal aid under the Act. If such defendant indicates that he does not wish to have legal aid, the District Justice should satisfy himself that the defendant intelligently and understandingly waives his right to legal aid."

There is therefore a concomitant right in Irish law to be informed of one's right to legal representation and of the existence and purport of the criminal legal aid scheme, and it is now accepted that a judge who is considering the imposition of a custodial sentence, or any other severe penalty affecting the accused's person's welfare or livelihood, must inform that person of his right to legal representation, and to free legal aid if he qualifies for it under the terms of the Legal Aid Act 1962.- see *Cahill v. Reilly* [1994] 3. I.R. 547; *McSorley v. Governor of Mountjoy Prison* [1996] 2 I.L.R.M. 331; *Clarke v. Kirby* [1998] 2. I.L.R.M. 30; *Leonard v. Garavan* [2003] 4 I.R. 60, amongst other cases.

It is clear from the information supplied by the issuing state that an accused in Poland also has an entitlement, concomitant to his rights to be legally represented and to be assisted by a state appointed defence counsel where he can establish that he is unable to pay for the costs of his defence without prejudice to his and his family's necessary support and maintenance, to be informed of his said rights. However in Poland they do things differently from how they are done in Ireland. An accused is not informed of his rights by a judge when brought before a court. Rather he is required by law to be informed of his rights at an early stage of the investigation by "the agency conducting the proceedings". This Court understands that that agency is usually either the police or the prosecutor.

In this Court's view the fact that a different procedure is employed in Poland is immaterial in the circumstances of this case. This is because, as was made plain by the former Chief Justice in *Minister for Justice, Equality and Law Reform v. Brennan* [2007] 3 I.R. 732, the mere fact that a trial or sentence may take place in a requesting state according to procedures or principles which differ from those which apply, even if constitutionally guaranteed, in relation to a criminal trial in this country does not of itself mean that an application for surrender should be refused pursuant to s.37 of the Act of 2003. Murray C.J (as he then was) stated in that case at pp 743/744:

> "35 There is no doubt that the operation of the process for surrender as envisaged by the Act of 2003, as amended, is subject to scrutiny as to whether in any particular case it conforms with constitutional norms and in particular due process so that, for example, the respondent in such an application has an opportunity to be duly heard in the proceedings.
>
> 36 However the argument of the respondent goes much further. He has contended that the sentencing provisions of the

issuing state, in this case the United Kingdom, did not conform to the principles of Irish law, as constitutionally guaranteed, governing the sentencing of persons to imprisonment on conviction before our courts for a criminal offence.

37 The effect of such an argument is that an order for surrender under the Act of 2003, and indeed any order for extradition, ought to be refused if the manner in which a trial in the requesting state including the manner in which a penal sanction is imposed, does not conform to the exigencies of our Constitution as if such a trial or sentence were to take place in this country. That can hardly have been the intention of the Oireachtas when it adopted s. 37(1) of the Act of 2003 since it would inevitably have the effect of ensuring that most requests for surrender or extradition would have to be refused. And indeed if that were the intent of the Framework Decision, which the Act of 2003 implements, and other countries applied such a test from their own perspective, few, if any, would extradite to this country.

38 Indeed it may be said that generally extradition has always been subject to a *proviso* that an order for extradition, as with any order, should not be made if it would constitute a contravention of a provision of the Constitution. I am not aware of any authority for the principle that the extradition or surrender of a person to a foreign country would contravene the Constitution simply because their legal system and system of trial differed from ours as envisaged by the Constitution.

39 The manner, procedure and mechanisms according to which fundamental rights are protected in different countries will vary according to national laws and constitutional traditions. The checks and balances in national systems may vary even though they may have the same objective, such as ensuring a fair trial. There may be few, if any, legal systems which wholly comply with the precise exigencies of our Constitution with regard to these matters. Not all for example will provide a right to trial by jury in exactly the same circumstances as our Constitution does in respect of a trial for a non-minor offence. Rules of evidence may differ. The fact that a person would be tried before a judge and jury in this country for a particular offence could not in my view, be a basis for refusing to make an order for surrender solely on the grounds that in the requesting state he or she would not be tried before a jury. The exceptions which we have to the jury requirement, as in trials before the Special Criminal Court, acknowledges that a fair trial can take place without a jury even though it is constitutionally guaranteed for most trials in this country.

40 That is not by any means to say that a court, in considering an application for surrender, has no jurisdiction to consider the circumstances where it is established that surrender would lead to a denial of fundamental or human rights. There may well be egregious circumstances, such as a clearly established and fundamental defect in the system of justice of a requesting state, where a refusal of an application for surrender may be necessary to protect such rights. It would not be appropriate in this case to examine further possible or hypothetical situations where this might arise. The sole matter which I wish to make clear here is that the mere fact that a trial or sentence may take place in a requesting state according to procedures or principles which differ from those which apply, even if constitutionally guaranteed, in relation to a criminal trial in this country does not of itself mean that an application for surrender should be refused….."

Murray C.J.'s views are echoed in the judgment of O'Donnell J. in *Nottinghamshire County Council v. B* [2011] IESC 48 (Unreported, Supreme Court, 15th December, 2011) where the learned judge states (at p 66):

> .....the question also involves the nature and degree of the differences between the law of the requesting state and the law which it is asserted the Irish Constitution would permit or require in this jurisdiction, in a context where it is clear that the Constitution expects the legal systems of friendly nations will differ from that of Ireland. In that regard it is relevant whether what is asserted to be possible, probable or certain in the requesting jurisdiction is something which the Irish Constitution forbids absolutely or permits in certain circumstances, and in any case whether the difference asserted is one of degree, or one of fundamental principle. It is here that I consider that the origin of the Appellants may become relevant. It is fundamental to the structure of the Irish Constitution that its principal focus of application is to persons within its jurisdiction. It follows from the approach of Article 29 that the Constitution expects and recognises the same essential structure in other states. Therefore, the application, for example, of French law to French citizens, or to those who by residence in France have obtained the protection of the French state, is to be expected, and it is only in rare cases that the Constitution would require a court to seek to inhibit the application of such law."

This Court does not regard Article 38 as being intended to have application to trials conducted, or to be conducted, in countries other than Ireland, particularly where at the time of the trial the defendant is neither an Irish citizen nor a person resident in Ireland. Its principal focus of application is to trials of persons subject to Irish jurisdiction or of such other persons to whom Ireland has guaranteed trial in due course of law. Ireland does not by virtue of Article 38 of the Constitution owe any duty or responsibility to a Polish citizen who has been tried in Poland, and who was not resident in Ireland at the time of his trial, to adjudge the circumstances of his trial with reference to every facet our understanding of what it means to be tried in due course of law. That is not to say that if it were established that some truly fundamental and universally accepted minimum norm associated with the right to a fair trial had been breached (such as denial of the right to the presumption of innocence, or the right to be heard at all) that the Irish Courts would stand idly by and fail to act. However it would not be necessary in such circumstances for the Irish Courts to contrive a means of relying on Article 38 of the Constitution of Ireland as the basis for refusing surrender because fair trial rights of such a universally accepted and fundamental nature are invariably also guaranteed under the Convention, and indeed under the Charter of Fundamental Rights.

The following conclusions can be drawn from all of the above.

First, although the respondent had a right under both the Convention and the Charter (a) to have legal representation at his trial and (b) to have such representation provided for him at the Polish state's expense if he could not afford it, there is no cogent evidence tending to suggest that he may have been denied those rights or that he was not made aware of them. In absence of any such evidence it must be presumed that such rights were afforded to him and that in that respect there was no unfairness in his trial.

Secondly, the respondent cannot rely upon Article 38 of the Irish Constitution in support of his contention that the failure of any judge in Poland to appraise him of his right to legal representation, and/or of his right to apply for a state appointed lawyer, separate from any such appraisal that was given to him by the police or prosecutor, represented an unfairness in his trial and a denial of due process. Moreover, nothing has been drawn to the Court's attention to suggest that, separate from the position under Irish law, a judge is specifically required to appraise him of his rights for there to be compliance with either Article 6(3)(c) of the Convention, or indeed Article 47 of the Charter of Fundamental Rights. Accordingly, in the absence of cogent evidence that he had a specific right under either of those instruments to be informed by a judge concerning his right to legal representation, and/or of his right to apply for a state appointed lawyer, the presumption that his trial was fair is not rebutted on account of that alleged deficit either.

Thirdly, in the absence of cogent evidence tending to suggest either (i) that he was mistreated by the police and made a confession under duress, or (ii) that he was convicted on the basis of a coerced confession in circumstances where he had no, or no adequate, opportunity to challenge it, the presumption that his trial was fair is once again not rebutted, and notwithstanding the issues raised the Court is entitled to proceed on the basis that there was no unfairness in the respondent's trial.

Accordingly, in all the circumstances, the Court is not disposed to uphold the respondent's objections based on s.37(1) of the Act of 2003, and the Court is satisfied that it is not prohibited from surrendering the respondent on account of any of the issues raised above.

Correspondence and Minimum Gravity

> The two offences to which the warrant relates are:
>
> (i) "breach of Article 291(1) of the Polish Penal Code which offence is labelled or characterised under Polish law as "premeditated handling of stolen property";
>
> and
>
> (ii) "breach of Article 288(1) of the Polish Penal Code which offence is labelled or characterised under Polish law as "causing damage to property".

The facts underpinning the two offences to which the warrant relates are set out in Part E thereof. The facts relating to the first offence, and set out at Part E.2.1 of the warrant, are that:

> "On 6th May 2001, in the town of Wolsztyn, he aided Marek Matysiak in selling a Vector computer worth PLN 4,121 a keyboard and a mouse worth PLN 25 and a soundcard worth PLN 65, total value of at least PLN 4,211 , knowing that Marek Matysiak came into their possession through illegal means, i.e. through breaking in and theft, by finding buyers for the above mentioned hardware, i.e., Szymon Grygiel and Pawel Banach, and facilitated contact between the two parties, and furthermore he accepted four CD 's containing a German language course worth PLN 100. "

The facts relating to the second offence, and set out at Part E.2.II of the warrant, are that:

> *"On 7th May in Wolsztyn he destroyed an ISDN IT box and a telephone cable fan-out worth PLN 982, acting to the detriment of Polish Telecommunications Plc. (Telekomunikacja Polska S.A.) OSD Wolsztyn. "*

Although a year in not given in the warrant it was later clarified in additional information that the full date of this offence is the 7th May, 2001.

In relation to the first offence counsel for the applicant, Ms. Lisa Dempsey B.L. invites the Court to find correspondence with the offence in Irish law of handling stolen property contrary to s. 17(1) of the Criminal Justice (Theft and Fraud Offences) Act 2001 (hereinafter the Act of 2001) either on its own or in combination with, and by operation of, s. 7(1) of the Criminal Law Act 1997.

> S. 17(1) of the Act of 2001 provides:
>
> "17.-(1) A person is guilty of handling stolen property if (otherwise than in the course of the stealing) he or she, knowing that the property was stolen or being reckless as to whether it was stolen, dishonestly-
>
> (a) receives or arranges to receive it, or
>
> (b) undertakes, or assists in, its retention, removal, disposal or realisation by or for the benefit of another person, or arranges to do so."
>
> S. 7(1) of the Criminal Law Act 1997 provides:

"7.-(1) Any person who aids, abets, counsels or procures the commission of an indictable offence shall be liable to be indicted, tried and punished as a principal offender."

Counsel for the respondent objects to the Court finding correspondence on the suggested basis because the underlying facts do not indicate that the respondent ever had actual possession of the goods. The Court is not persuaded by this submission for two reasons. It is clear from a detailed consideration of s.17(1) of the Act of 2001 that it does not prima facie require that the handler should have actual possession of the goods at any stage. For example, it is sufficient under s.17(1)(a) if the handler merely "arranges to receive" the goods in question. The offence is committed once such an arrangement is made (assuming the other requirements of the section are satisfied) regardless of whether it is ever carried into effect. Similarly a person can "fence" stolen goods as a middleman without ever personally coming into possession of them, or even arranging to receive them personally. In that situation he or she still commits as. 17(1) offence because s. 17(1)(b) prohibits "assisting" in the retention, removal, disposal or realisation of stolen goods "for the benefit of another person." The latter situation is in fact what is alleged in this case. The warrant states that the respondent found buyers for the goods in question and "facilitated contact between the two parties" i.e. contact between the named person Marek Matysiak who was in actual possession of the stolen goods (it is irrelevant whether he was the burgler who stole the goods, or another intermediate handler) and the potential buyers.

Moreover, even if it were the case that having actual possession of the goods at some point was required for the purposes of a s17(1) offence (and as indicated I don't believe it is) an offence could still be committed of aiding and abetting the handling of stolen property in a "fencing" situation such as I have mentioned above, without the aider or abettor ever personally coming into possession of the goods.

In all the circumstances of this case the Court is satisfied to find correspondence with the offence in Irish law of handling stolen property contrary to s.17(1) of the Act of 2001 as a principal offender, alternatively, as an aider or abettor in the commission of that offence, contrary to s.7(1) of the Criminal Law Act 1997.

In relation to the second offence the Court has been invited to find correspondence with the offence in Irish law of causing criminal damage contrary to s. 2(1) of the Criminal Damage Act, 1991 (hereinafter the Act of 1991).

S.2(1) of the Act of 1991 provides:

> "2.-(1) A person who without lawful excuse damages any property belonging to another intending to damage any such property or being reckless as to whether any such property would be damaged shall be guilty of an offence."

Counsel for the respondent contends that correspondence is not made out in as much as there is no evidence of absence of lawful excuse, intention or recklessness, all of which he contends are essential ingredients of the offence in question under Irish law.

It was urged by counsel for the applicant, Ms. Dempsey B.L., that the requirements in Irish law that the respondent should have acted "without lawful excuse" and "intending to damage any such property or being reckless as to whether any such property would be damaged" are to be inferred from the general circumstances as disclosed in the warrant, and relies in particular on the words "destroyed" and "to the detriment of'. In further support of her position Ms. Dempsey relies upon *Attorney General v. Dyer* [2004] 1 I.R. 40 ; *Minister for Justice, Equality and Law Reform v. Dolny* [2009] I.E.S.C. 48 and *Minister for Justice, Equality and Law Reform v. Sas* [2010] I.E.S.C. 16.

The difficulty with counsel for the applicant's submission is that to destroy something, or to cause its destruction, to the detriment of another does not automatically imply intent or deliberation or absence of excuse. Something can be destroyed by accident and without either intention or recklessness. Thus, the cleaner who knocks a hundred year old vase off a mantelpiece with her feather duster commits no crime. Moreover, even where a destructive act is intentionally or recklessly carried out, it is not always done without lawful excuse. The old saw warns against interfering with a clock that doesn't need fixing, and it does so for very good reason. Unnecessary interference with a clock, particularly by an unqualified person, and notwithstanding that it is done with the well intentioned objective of servicing it, may damage or even destroy the mechanism of the clock. However, the amateur horologist commits no crime because he has a lawful excuse. His objective has been to service the clock not to damage it.

Although it was submitted that the ingredients of absence of lawful excuse and intention or recklessness are all capable of being inferred from the general circumstances as disclosed in the warrant, and in particular the use of the word "destroyed" and the phrase "to the detriment of', that simply doesn't follow. There is no basis on the limited facts provided for the drawing of the required inferences. It must be remembered that an inference only arises where two or more facts taken together connote, or suggest the existence of, a further fact or facts. However the facts that the respondent may have destroyed the property described in the charge to the detriment of a named party does not of themselves justify the inference that the destruction was committed intentionally/recklessly and not accidentally, and/or that there was an absence of lawful excuse.

In the Court's view the *Dyer* authority supports the respondent's case more than it supports the applicant's. Moreover, neither *Dolny* nor *Sas* can avail the applicant in the particular circumstances of the present case. While *Dolny* stresses that a Court can read the warrant (including any additional information) as a whole, and have regard to the totality of available information, the unfortunate fact in the present case is that the only information we have concerning the facts underlying the second offence are the three lines contained at Part E.2.11 of the warrant (and quoted above). Equally, while *Sas* allows for words to be given their popular meaning in certain circumstances, it would be to stretch language to its breaking point to suggest that the word "destroy", when used in conjunction with the phrase "to the detriment of', necessarily imports, and/or justifies, an inference that the destruction was without lawful excuse and deliberate, alternatively reckless.

In the circumstances, the Court is unable to find that the second offence corresponds with the suggested offence in Irish law, or with any offence in Irish law.

Although it is now academic, minimum gravity would have been satisfied in respect of the second offence. What is of significance, however, is that in circumstances where a composite or aggregate sentence was imposed for both offences it is not possible to sever the non-corresponding offence from the warrant.

The s.45 Objection
In the light of the Court's finding on correspondence, it is perhaps unnecessary to deal with this, and the remaining objections, put forward by the respondent, but for completeness the Court will do so. The basis of the s.45 objection is not that the respondent was tried *in absentia* for the offence which is the subject matter of the present warrant, but rather that he was tried *in absentia* and convicted of another offence (the offence that was the subject of the warrant of the 7th August, 2006) which had the effect of triggering the lifting of a suspension of the prison sentence imposed upon him for the offence which is the subject of the present warrant. Counsel for the respondent, Mr. Kelly B.L., submits that in those circumstances the two matters are inextricably linked, and in circumstances where it is not possible to surrender the respondent in relation to the offence covered by the warrant of the 7th August, 2006, in the absence of a s.45 undertaking, he ought not to be surrendered in relation to the offence which is the subject of the present warrant either.

The Court disagrees fundamentally with this submission. The mere fact that the respondent cannot be surrendered for the offence the subject of the warrant of the 7th August, 2006, does not mean that his conviction for that offence is invalid. On the contrary, it is a valid conviction and the Courts in Poland were perfectly entitled to have regard to it in considering whether or not to lift the suspension of the sentence for the offence that is the subject of the present warrant.

The Court is not therefore disposed to uphold this ground of objection.

The s.10 objection
This is a case to which s.10 of the Act of 2003 as it was prior to the amendment effected by s. 6 of the Criminal Justice (Miscellaneous Provisions) Act 2009 applies. Prior to the relevant amendment s.10 of the Act of 2003 (as substituted by s.71 of the Criminal Justice (Terrorist Offences) Act, 2005) provided (to the extent relevant):

> "10.-Where a judicial authority in an issuing state duly issues a European arrest warrant in respect of a person-
>
> (a) ……..
>
> (b) ……
>
> (c) ……
>
> (d) on whom a sentence of imprisonment or detention has been imposed in respect of an offence to which the European arrest warrant relates, and who fled from the issuing state before he or she-

(i) commenced serving that sentence, or

(ii) completed serving that sentence,

that person shall, subject to and in accordance with the provisions of this Act and the Framework Decision, be arrested and surrendered to the issuing state.".

Accordingly, this Court must be satisfied that the respondent "fled" Poland before his suspended sentence was re-activated and he was called upon to serve it. The respondent contends that he did not f1ee. The Court interprets the word "fled" in accordance with the Supreme Court in *Minister for Justice, Equality & Law Reform v. Tobin* [2008] 4 I.R. 42 as importing more than the word "left" and as connoting an escape from justice.

Counsel for the applicant invites the Court to infer f1ight from the general circumstances of the case, including a statement in a letter from the issuing judicial authority dated the 29th April, 2011, that *"The case files do not contain any kind of permission of Tomasz Mariasz to leave Poland. The defendant was instructed of his rights and duties during his first questioning during preliminary proceedings. "*

It is clear from the totality of the information provided both in the warrant and in subsequent letters from the issuing judicial authority particularly a letter of the 13th June, 2011, that the basis on which the suspension of the respondent's sentence was lifted was that:

> "... while on probation, the convict committed a premeditated offence with intent to achieve material gain, for which he was sentenced to 1 year and 4 months imprisonment by a final judgment of District Court of Wolsztyn of 1st December 2004. In the opinion of the Court the convict met all the conditions described in article 75(1) of criminal code by committing another premeditated offence while on probation for which he was sentenced to imprisonment by a final court judgment, which obligated the court to order the activation of the suspended sentence, pursuant to the aforementioned provision of criminal code."

The respondent relies upon *Minister for Justice, Equality and Law Reform v. Slonski* [2010] I.E.S.C. 19 (unreported Supreme Court, 25th March, 2010). While the facts in the present case are by no means as clear cut as were the facts in *Slonski*, the Court considers, on balance, that there is an evidential deficit on the applicant's side and that the circumstances do not allow the Court to infer flight. There is no evidence that the respondent was expressly appraised at the time of the suspension of his sentence of the terms and conditions on foot of which it was being suspended, and concerning what might be the consequences of any breach. It is important to recall in that regard that he was unrepresented by a lawyer and in those circumstances the Court should be slow to draw an inference that he was fully informed in the absence of express evidence to that effect. The reference in the letter of the 29th April, 2011, to the fact that the defendant was instructed of his rights and duties during his first questioning during preliminary proceedings is really of no assistance because it clearly refers to the requirements of Article 300 of the Polish Penal Code quoted earlier in this judgment, and such instructions were given before he was even convicted and before any question of suspending a sentence could have arisen in the mind of the court. Moreover, the suspension had not in fact been lifted on the date on which he came to Ireland. The respondent himself says that he came here to find work and had no other motive. In the circumstances the Court is not satisfied that the respondent necessarily fled from Poland in the *Tobin* sense. I would therefore uphold the s.10 objection and also refuse to surrender the respondent on that account.

Proportionality
The Court has considered all of the circumstances of the case and having done so is satisfied that it would not have been appropriate to refuse to surrender the respondent on proportionality grounds alone. However, in circumstances where the Court has upheld objections based on correspondence and absence of evidence of flight the point is academic.

Conclusion
In all the circumstances of the case the Court is not satisfied to make an order pursuant to s.16(1) of the Act of 2003 surrendering the respondent, and declines to do so.