

THE HIGH COURT

Record Number: 2008 No. 25 Ext

BETWEEN

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

APPLICANT

AND
KRZYSZTOF WROBLEWSKI

RESPONDENT

Judgment of Mr Justice Michael Peart delivered on the 9th day of July 2008

1. The surrender of the respondent is sought to the Republic of Poland pursuant to a European arrest warrant dated 3rd May 2007, which was endorsed here by order of the High Court on the 6th February 2008. The respondent was duly arrested on the 12th February 2008 and, as required by s. 13 of the European Arrest Warrant Act, 2003, as amended, was immediately brought before the High Court and remanded thereafter from time to time until the present application for his surrender pursuant to s. 16(1) of the Act was ready to proceed.
2. There is no issue raised as to the respondent's identity, and the Court is satisfied from the affidavit sworn by Sgt. Martin O'Neill, the arresting Garda Officer, that the person who he has arrested and brought before the Court is the person in respect of whom this European arrest warrant has been issued.
3. The respondent's surrender is sought so that firstly he can be prosecuted for two offences, namely of theft and obtaining credit by false pretences; and secondly, so that he can serve a sentence of six months' imprisonment imposed upon him on the 17th January 2002 in respect of two other offences, namely one of theft and one which can be loosely described as unlawful fishing in a river with nets. It will be necessary to address the issue of correspondence under s. 5 of the Act in respect of the theft and unlawful fishing offences, and I will come to that. But it is not required to have double criminality verified in respect of the offence of obtaining credit by false pretences, as the issuing judicial authority has marked that offence in the warrant as being one within the categories of offences specified in Article 2.2 of the Framework Decision.
4. The respondent was convicted in absentia in respect of the offences for which he has already been convicted, but in the circumstances set forth in paragraph D of the warrant as to notification and the provisions as to re-hearing following surrender render an undertaking pursuant to s. 45 of the Act unnecessary, and in any event, the respondent does not pursue the objection raised at the end of paragraph 2 in his Points of Objection under s. 45 of the Act.
5. In respect of the offences for which he is sought for prosecution the minimum gravity requirement under the Act is met since each offence is one which carries a maximum punishment of imprisonment which exceeds twelve months. In respect of the two offences for which he has been sentenced to one period of six months' imprisonment, minimum gravity, *prima facie*, is met since a sentence in excess of four months has been imposed and which remains to be served. I say '*prima facie* met' because Kieran Kelly BL has raised an issue on correspondence in relation to one of the offences for which this sentence of imprisonment was imposed, and if he is successful in that objection, then a question arises from the fact that the warrant does not say how much of the six months' sentence was applicable to each such offence, and therefore if his surrender is to be ordered only in respect of one of the sentenced offences, Mr Kelly submits that in respect of the other offence this Court cannot be satisfied that it on its own satisfies the minimum gravity requirements of four months. I will return to the issue of correspondence and its potential impact on minimum gravity in due course.
6. Essentially three issues have been raised by the respondent.

Firstly, the respondent submits that in the circumstances in which he came to this State he has not fled the issuing state and therefore in respect of the offences for which he has been convicted and sentenced he is not a person who comes within the meaning of s. 10 (d) of the Act; and in respect of the offences for which his surrender is sought for the purposes of prosecution, it is submitted that the information contained in the warrant is insufficient to establish that he is a person who comes within s. 10 (a) or (b) of the Act.

Secondly, it is submitted that the form of the warrant is deficient to the extent that there has been a failure to comply with the provisions of s. 11 of the Act, in so far as it is not evident from the warrant what length of sentence was imposed for each of the offences for which he has already been convicted and sentenced.

Thirdly, the issue of correspondence has been raised in respect of the theft and unlawful fishing offences, which, if successful in respect of one of the sentenced offences, has the capacity to affect the question of surrender in respect of the other, as I have just outlined.

The s. 10 objection

7. This issue is raised in two parts, as I have already stated. Firstly in respect of the offences for which he was convicted and sentenced but has not yet served, the respondent states in his affidavit that he came to this country on the 28th January 2005 as he was not earning enough money in Poland to support his wife and family. Having heard that there were employment opportunities here he came by land as he does not like flying. He says that he was joined in July 2005 by his son, and later by the remainder of his family. He states that he left Poland "*in an open, orderly and legitimate fashion*". He then goes on to say that he was disappointed to find that these matters are being proceeded with after such a long time. That is the entire of his averment as to his reason for coming to this country. He has not given any evidence that he was unaware before he left that he had been convicted and sentenced of two of these offences in January 2002. In that regard it is worth noting that in his grounding affidavit, the respondent avers that he resided prior to his departure at the same address as that which the issuing judicial authority specifies for him in the warrant.

8. Neither has the respondent given any evidence of his state of knowledge in relation to the remaining offences for which he is sought to be prosecuted. These two offences relate to alleged actions by him firstly on the 23rd January 2001 in respect of the charge of obtaining credit by false pretences, and between September 2004 and November 2004 in respect of the theft of a pipe. They are therefore alleged to have been committed a short time before his departure from Poland in January 2005. The respondent has confined his averments to his own subjective state of mind as to his reason for leaving Poland. In the absence of any averment

that he was unaware that he had been convicted of the first two offences, and sentenced to a term of imprisonment, this Court must hold that he has not even begun to discharge the onus of proof that is upon him to establish that he is not a person who 'fled' for the purpose of s. 10(d) of the Act, and therefore act on the presumption that he did.

9. The same absence of any averment as to his state of knowledge of the prosecution for the remaining two offences for which his surrender is sought for prosecution disentitles him to make any case that he is not somebody against whom that state intends to bring proceedings for an offence to which the European arrest warrant relates, and I am satisfied that there is sufficient detail in the warrant for the Court to be satisfied that the issuing judicial authority has made a decision to prosecute him, and that he comes within the provisions of s. 10(a) of the Act..

S. 11 objection

10. Under this heading of objection, it is submitted that the form of the warrant is deficient to the extent that there has been a failure to comply with the provisions of s. 11 of the Act, in so far as it is not evident from the warrant what length of sentence was imposed for each of the offences for which he has already been convicted and sentenced. This point needs to be dealt with first of all in isolation to the third issue related to correspondence. Section 11 provides for the form of the warrant, and a number of specific matters which shall be, as far as practicable, contained in a European arrest warrant. Included in that list of matters to be included, is one which states that where a person has been convicted and sentenced, the penalties imposed shall be specified. In that regard, s. 11(1A)(g)(iii) provides:

"(g)(iii) where that person has been convicted of the offence specified in the European arrest warrant and a sentence has been imposed in respect thereof, the penalties of which that sentence consists".

11. The warrant in this case, as relevant to this point of objection, states first of all that the respondent was convicted of two specified offences on under file number 809/01 on the 17th January 2002, and states also in paragraph C (3) that a custodial sentence of six months was imposed in respect of same. That information seems to me to clearly inform the respondent of what the imposed penalties consist, and that he will be required to serve if surrendered. There is no breach of the requirements of s. 11 in such circumstances. The form has been properly completed for the purposes of s. 11 of the Act.

Correspondence

The 'theft' offences

"5.— For the purposes of this Act, an offence specified in a European arrest warrant corresponds to an offence under the law of the State, where the act or omission that constitutes the offence so specified would, if committed in the State on the date on which the European arrest warrant is issued, constitute an offence under the law of the State."

12. The act alleged against the respondent in respect of the offence alleged to have been committed between September 2004 and November 2004 (Case file 1426/05) is described in the warrant is as follows:

" - in the period from September 2004 to November 2004 , acting jointly in accord with other persons.....took for the purpose of unlawful taking a pipe from heavy walled steel of the value of 1000 zloty to the detriment of the Manufacturing and Trading Company Gromatex ..."

13. The act done the respondent in respect of the offence for which he has been convicted and sentenced (Case file 809/01) is described in the warrant as follows:

" - in April 2001 at the water region Otok in Pakosc – Mielna acting jointly and in accord with, took with intent of unlawful taking 7 pieces of fishing nets 'wanton' type and a net for fish 'luzgan' type of the total value of 890 Pln to the detriment of Fishing Farm in Kysinino." (my emphasis)

14. Melanie Greally BL has suggested that the actions thus constituting these offences as described in the warrant correspond to the offence of theft here under s. 4 of the Criminal Justice (Theft and Fraud Offences) Act, 2001. That section provides as follows:

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

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

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

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

But consent obtained by deception or intimidation is not consent for those purposes." (my emphasis)

15. S.4 (5) of that Act provides:

"(5) In this section –

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

"depriving" means temporarily or permanently depriving." (my emphasis)

16. Mr Kelly refers to these provisions and to the paucity of information in the warrant, and submits that correspondence can be assessed only by reference to the actual facts set forth, and without reading others into it. In particular he submits that there is nothing within the description of these offences which fulfils the requirement for the s. 4 offence here that the respondent acted "dishonestly", and "without the consent of the owner" and "with the intention of depriving its owner of it". He submits that these

necessary constituents are absent from the facts contained in the warrant, and that they do not therefore correspond.

17. In my view the necessary facts to ground an offence of theft under s. 4 are absent from the description of these offences contained in the warrant. It simply states that he unlawfully took the property in question. It is of no assistance in this regard that the warrant states that the taking of the property in question was respectively "for the purpose of unlawful taking" and "with intent of unlawful taking" because that unlawfulness is according to Polish law only. Such unlawfulness cannot be called in aid to presume into the facts behind the offences, elements of dishonesty, absence of consent of the owner, and an intention to deprive the owner of the property. It cannot simply be presumed that because what he did or is alleged to have done was contrary to the relevant Polish law that the concept of unlawfulness alone is sufficient to find that what he did on those occasions corresponds to 'theft' contrary to s. 4 of the 2001 Act. If that were to be so, one would expect that the offence of 'theft' would have been included in the categories of offence contained in Article 2.2 of the Framework Decision, given the fact that an aim and objective of that instrument is to remove some of the complexities of previous extradition arrangements, including presumably the difficulties occasionally in making out correspondence. Theft is a common and easily understood offence in all jurisdictions I suspect, and it is the type of offence which every member state will be familiar with, even if there are subtle differences between the matters to be proved in one member state as opposed to another in order to achieve a conviction. I would have thought that robbery or theft, or both, would have been conveniently included within the list of offences in Article 2.2 for which double criminality would not require verification, but be that as it may, it has not been, so correspondence must be established in accordance with the provision of s. 5 of the Act.

18. There are no facts stated in the warrant which suffice to meet the requirements for the s. 4 offence. It may well be that under Polish law the offence is committed in the bare circumstances which appear in the warrant. Alternatively it may simply be that the issuing judicial authority simply did not consider it necessary to include in the warrant more detail that it has done. But when an issuing state is preparing a European arrest warrant for execution in another state, and where under the law of that state correspondence/double criminality must be established, it is essential that the all available relevant facts relating to the offences in question be set forth to enable the judicial authority in the requested state to perform its task. It would be possible for example that there would be communication between the issuing judicial authority and the Central Authority here prior to the transmission of the European arrest warrant in order to ensure that the issuing judicial authority is at least aware of what facts will be necessary to be contained in the warrant in order to meet the requirements for correspondence in this State. It is not simply a question of repeating in the European arrest warrant the statement of the offence from whatever document constitutes the domestic warrant, charge sheet or indictment, as fewer facts may be necessary for stating those facts for the purpose of the domestic offence than are needed here for correspondence. This matter has been adverted to by Fennelly J. in his judgment in the Supreme Court in *The Attorney General v. Dyer* [2004] 1 IR. 40, and I had reason to quote from that judgment in my own judgment in *Minister for Justice, Equality and Law Reform v. Dunkova*, unreported, High Court, 30th May 2008, and it is unnecessary to do so again.

19. This conclusion means that on the facts as currently set forth in the warrant this Court is not in a position to conclude that there is correspondence in respect of these theft offences. That does not mean that a further warrant could not be transmitted which would contain more facts which would enable correspondence to be met.

20. This means that the respondent cannot be surrendered for the purpose of prosecution in respect of the offence in Case file 1426/05, or for the purpose of serving any sentence for the theft offence for which he was sentenced on Case file 809/01 on the 17th January 2002.

21. He must however be surrendered for the purpose of prosecution in respect of the second offence for which he is sought for prosecution, namely obtaining consumer credit by false pretences, because the issuing judicial authority has marked that offence as being an offence within Article 2.2 of the Framework Decision.

The unlawful fishing offence

22. Correspondence must also be established in relation to the unlawful fishing offence. Ms. Greeley has submitted that this offence corresponds to an offence under either s. 95 (1) of the Fisheries Consolidation Act, 1959, or under s. 24 of the Larceny Act, 1861. The facts set forth in the warrant in respect of this offence is that at night on the 11/12 May 2001 "at the broads of the Notec river", he with others "not being authorized to catch fish with the use of fishing nets", harvested fish to the detriment of a fishing farm which is named therein. I think it is also relevant to refer to a part of page 4 of the warrant where it is stated that this offence is under article 27(a) 1.1 of the "Act as of April 18, 1985 on inland fishery" (my emphasis). I have emphasised the word "inland" because Mr Kelly has submitted that the offence in this country contrary to s. 95 of the Fisheries Consolidation Act, 1959 relates only to fish taken from "the freshwater portion of any river" and he submits that there is nothing stated in the warrant to show whether the respondent took fish from the freshwater portion of this river or perhaps from the mouth of the river as it enters the sea i.e. where the freshwater has become mixed with the sea water portion thereof. I agree that this is not clear in spite of the reference to "inland fishery" in Article 27(a) of the Penal Code. Correspondence may be considered from a consideration of the whole of the warrant, but in my view the reference to "inland fishery" in the offence charged does not determine conclusively that the fish were taken from the freshwater portion of the Notec river. Again my earlier comments are relevant to this offence also as to the importance of the warrant containing sufficient information to verify double criminality/correspondence. That will in unusual cases especially require communication between the issuing state and the Central Authority in order to ascertain what facts are necessary to be included in this warrant so that the requirements of s. 5 of the Act can be met.

23. However, the duty of this Court is to conduct its own inquiry to see if correspondence is made out. From those inquiries I can say that as a matter of geographical fact, the Notec river in Poland does not flow directly into the sea. It consists of a stretch of water which with another river, the Warta, connects the river Oder in the north-west of Poland to the River Vistula, the latter flowing into the sea in the north. At no point is the river Notec nearer than about 75-100 kms from the sea to the north. In such circumstances, it is axiomatic that all the water in the River Notec is freshwater. Accordingly it is impossible to conclude otherwise than that if the respondent did in this jurisdiction what he is alleged to have done in Poland the offence would correspond to the offence under s. 95 (1) of the Fisheries Consolidation Act, 1959.

24. The other candidate offence for correspondence put forward by Ms. Greeley is under s. 24 of the Larceny Act, 1861. That provision is very lengthy and I will not set it out in full but it appears from the commencement of same that it relates to an offence committed by "whosoever shall unlawfully and wilfully take or wilfully take or destroy fish in any water which shall run through or be in any land adjoining or belonging to the dwelling house of any person being the owner of such water, or having the right of fishery therein" or "from any water not being such as hereinbefore mentioned, but which shall be private property or in respect of which there shall be any private right of fishery". (my emphasis)

25. There are no facts contained in the warrant from which it is possible to conclude that this offence corresponds to the Polish offence. There is nothing to indicate that the portion of the Notec river from which the respondent is alleged to have taken fish from such water as described in this section.

The composition of the sentence imposed

26. The position reached therefore is that of the two offences for which the respondent was convicted and sentenced to a composite sentence of six months, one of those offences only corresponds. In my view where a composite sentence has been imposed, as in this case, it is not possible, in the absence of specific information as to how, if at all, the sentence is divided between the two offences, for this Court to be satisfied in relation to the surviving offence that minimum gravity is met i.e. at least four months' imprisonment.

27. Surrender is prohibited if this minimum gravity is not met, in view of the provisions of s. 38 of the Act which provides as relevant:

"s. 38.—(1) Subject to subsection (2), a person shall not be surrendered to an issuing state under this Act in respect of an offence unless—

(a) the offence corresponds to an offence under the law of the State, and —

(i)

(ii) a term of imprisonment or detention of not less than 4 months has been imposed on the person in respect of the offence in the issuing state, and the person is required under the law of the issuing state to serve all or part of that term of imprisonment." (my emphasis)

28. This provision gives effect to Article 2.2 of the Framework Decision which provides:

"2.1. A European arrest warrant may be issued for acts punishable by the law of the issuing Member State by a custodial sentence or a detention order for a maximum period of at least 12 months or, where a sentence has been passed or a detention order has been made, for sentences of at least four months."

29. If I was to be satisfied that at least four months of this six months sentence was applicable to the unlawful fishing offence, then there would be no problem. The words *"in respect of the offence"* contained in s. 39(1)(a)(ii) of the Act suggest clearly that minimum gravity must exist in respect of the offence for which surrender is otherwise being ordered – in other words, in this case, the unlawful fishing offence.

30. I have ascertained from my own inquiries that the offence under Polish law in respect of which the respondent was convicted for unlawful fishing is characterised under Polish law as a misdemeanour or minor offence only, and further that under Polish law *any* misdemeanour/minor offence is punishable only by a fine and/or a period of *detention* of not more than thirty days – detention being different to imprisonment, namely that while the person suffers a loss of liberty it is under a regime which is much more benign than if it was imprisonment.

31. It follows therefore that whatever portion of the six months "custodial sentence" which was imposed in respect of the latter offence could not in any circumstances exceed thirty days detention, and could not on its own meet the minimum gravity requirement were that offence the only offence contained in the warrant. This information seems very relevant, and should be set forth, as it can be presumed from it that at best only thirty days' detention was imposed in respect of the minor offence of unlawful fishing with nets. That does not meet the minimum gravity requirement under s. 38 of the Act and the Framework Decision.

32. In all of these circumstances I am satisfied that an order for the respondent's surrender can be made only so that the respondent can be prosecuted upon surrender in respect of the offence of obtaining consumer credit by false pretences, and I will so order.

33. As an aside I should add that this Court is required by virtue of s. 4A of the Act to presume that the issuing state will comply with its obligations under the Framework Decision, and that when the respondent's surrender is implemented, the issuing judicial authority will do no more than prosecute him for the offence in respect of which his surrender has been ordered.