Neutral Citation [2015] IEHC 374

THE HIGH COURT

[2009 No 334 EXT]

BETWEEN

THE MINISTER FOR JUSTICE EQUALITY AND LAW REFORM

APPLICANT

AND

ROBERT SZALL

RESPONDENT

JUDGMENT of Mr. Justice McDermott delivered on the 3rd day of June, 2015.

1. On the 17th December, 2009 the High Court endorsed a European Arrest Warrant for the arrest of the respondent which had been received from the Polish authorities and issued by Judge Miroslaw Brzozowski, Provincial Court Judge of the Lublin Provincial Court in respect of file number IV Kop 34/09 on the 27th April, 2009.

2. The Polish authorities seek the respondent's surrender to serve a sentence of three years imprisonment imposed by the Lublin District Court on the 4th September, 2008 in respect of six offences set out at para. E2 of the warrant.

3. On the 25th April, 2011 the respondent was arrested by Garda Matt Lennon and evidence was given in relation to his identification as the person named in the warrant. No issue now arises in respect of that identification. The court is satisfied that the respondent is the same person as the Robert Szall named in the warrant.

4. Following his arrest the respondent was conveyed to the High Court pursuant to s. 13 of the European Arrest Warrant Act 2003 (the 2003 Act). At the s. 13 hearing the court fixed a date for the purpose of s. 16 and the respondent was admitted to bail pending his surrender hearing. This initially proceeded on the 14th February, 2011. The Court (Edwards J.) in a judgment delivered on the 17th February, 2012 declined to make an order under s. 16(1) surrendering the respondent to the issuing state. The Court was not satisfied that the sixth offence nominated in the warrant at para. E2 in respect of which the respondent was convicted of failing to return to a nominated prison without justification following a period of temporary release, corresponded with the offence of being unlawfully at large contrary to s. 6(2) of the Criminal Justice Act 1960. The Court found that because a composite sentence was imposed in respect of all six offences to which the European Arrest Warrant related the non-corresponding offence could not be severed. In those circumstances the court was obliged to refuse the respondent's surrender as requested in the warrant.

5. On the 9th March, 2012, the learned judge certified that his order of the 17th February involved two points of law of exceptional public importance in respect of which it was desirable in the public interest that an appeal should be taken to the Supreme Court. These concerned the correspondence of the offence of not returning to a place of detention with the provisions in s. 6(2) of the Criminal Justice Act 1960. The Supreme Court was satisfied that correspondence was established between the two offences [2013] IESC 7 and allowed the applicant's appeal. The court then remitted the case to the High Court for the determination of the remaining issue of whether the applicant had fled Poland within the meaning of s. 10 of the 2003 Act.

6. Section 10 of the 2003 Act as substituted by s. 71 of the Criminal Justice (Terrorist) Offences Act 2005 provides:-

> *" 10.—Where a judicial authority in an issuing state duly issues a European arrest warrant in respect of a person—*
>
> *(a) against whom that state intends to bring proceedings for an offence to which the European arrest warrant relates,*
>
> *(b) who is the subject of proceedings in that state for an offence to which the European arrest warrant relates,*
>
> *(c) who has been convicted of, but not yet sentenced in respect of, an offence to which the European arrest warrant relates, or*
>
> *(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."*

The requirement of "flight" was removed by s. 6 of the Criminal Justice (Miscellaneous) Provisions Act 2009. However, the parties accept that having regard to the history of this case, the provisions of s. 10 must be complied with and the applicant must establish that the respondent "fled" Poland.

7. The first point made by the respondent is that the applicant must establish that flight occurred following the imposition of sentence. Though this was the interpretation adopted by Peart J. in the High Court judgment in *The Minister for Justice Equality and Law Reform v. Tobin* [2008] 4 I.R. 42 (para. 33), the Supreme Court, though not expressing a final opinion on the matter, considered that s. 10(d) might equally apply where the sentence has not been imposed at the time the warrant issued (per Fennelly J. at para. 27).

8. In *The Minister for Justice Equality and Law Reform v. Gheorghe* (Unreported, Supreme Court, 18th November 2009) Fennelly J. noted that Peart J. had reconsidered his view that it was necessary for the application of s.10 that the sentences should have been imposed before the proposed extraditee left the applicant country:-

> *"20… It …appear(s) to me …that it suffices for the sentence to have been imposed at the time when the surrender of the person is sought. Section 10 … applies… to a person 'on whom a sentence of imprisonment…… has been imposed…… and who fled from the issuing state before he or she…… commenced serving that sentence…'…Nothing in the section requires that the sentence (has) been imposed prior to the person leaving the issuing state. Such an interpretation would not be in accordance either with common sense or with the purpose of the European arrest warrant system. Subparagraph (a) applies where the state 'intends to bring proceedings' against a person; subparagraph (b) applies where the person is 'the subject of proceedings;' subparagraph (c) applies where a person 'has been convicted… but not yet sentenced…' The interpretation advanced by the appellants would leave an obvious and pointless gap."*

9. The respondent left Poland prior to the imposition of sentence. However, s. 10(d) does not require the sentence to be imposed before he left the country if he is to be surrendered. It would also appear that the respondent was a person to whom subsection (c) applied as a person who had been convicted but not yet sentenced by the Lublin Court. This point fails.

10. The court must also consider whether in fact and in law the respondent "fled" Poland within the meaning of s. 10. The court must be satisfied that the requirements of the 2003 Act (as amended) and where specified, the Framework Decision, have been complied with but if the court is so satisfied it is bound to make the order for surrender.

11. The evidence before the court consisted of an affidavit of Garda Matt Lennon, and affidavits of the respondent sworn on the 1st June 2011, the 3rd November 2014 and 30th April 2015. Further information from the Circuit Court Lublin was received by the applicant on the 13th November and 4th December 2009, the 5th May and 6th July 2011 and January 2012. The court sought further information from the issuing judicial authority pursuant to s. 20(1) of the Act and received answers to specific questions raised on the 18th March and 3rd April 2015.

12. Additional information received pursuant to s. 20(1) or (2) of the 2003 Act may be taken into account for the purpose of deciding whether an order for surrender should be made. Once the High Court is satisfied that the information communicated emanates from the Judicial Authority of the requesting state it is entitled to rely upon it and to decide what weight to attach to it. The court is entitled to treat that information as *prima facie* evidence of the facts asserted. *In The Minister for Justice Equality and Law Reform v. Piotr Sliczynski* [2008] IESC 73, Macken J. described the evidential status of this additional information:-

> *"In the relationship which may exist between the High Court and/or the respondent pursuant to s.20 of the Act of 2003 and the issuing judicial authority, exchanges such as those in the present case are, in my view, to be considered as operating on the same high level of confidence and mutual trust since these exchanges between the judicial authorities constitute an integral part of the overall scheme of the European Arrest Warrant. This must have as a consequence that when an issuing judicial authority is asked for additional information pursuant to either of the aforesaid subsections of s. 20, the exchanges must be accorded the appropriate mutual respect. In consequence, it may be assumed that a reply furnished by the judicial authority of the requesting Member State has been fully and properly prepared by an appropriate responsible person, and will include true and accurate responses to the information or documentation sought." (P.9)*

The learned Judge also stated that the additional information was properly admitted *"and the content of that information must be accepted at face value, there being no challenge to its veracity"*. (See also Murray C.J. at ps. 9, 11-13).

13. Macken J. also stated that all the factors germane to whether a person could be said to have fled must be taken into account. This includes the person's subjective motivation for leaving the requesting Member State. However the other material factors relating to the respondent's dealings and engagement with the criminal proceedings referred to in the Warrant must also be considered. Macken J stated:-

> *"The court then must determine whether, objectively speaking, bearing in mind all of these factors, it can be reasonably concluded that the appellant "fled" within the meaning of the sub-section. If it were the case that the subjective motivation, as averred to on affidavit, had to be accepted as being conclusive of the question whether a person fled within the meaning of the section, it seems to me that this would always or almost always 'trump' any information or material factor presented to the Court and upon which it could be objectively found that a person had fled the requesting state."*

The learned judge stated that if it were objectively established that there was a deliberate decision to leave Poland in breach of terms as to residence and notification imposed in respect of a suspended sentence which were known to the appellant, it was reasonable for a trial judge to conclude that the appellant left in circumstances which made it impossible for him to serve the sentence imposed, even if his subjective motivation for leaving was for some other personal reason. The appellant was found to have left the requesting state in circumstances in which he breached the terms and conditions of his suspended sentence. Therefore, it followed that the appellant on an objective assessment of the evidence had "fled" the issuing Member State because he left in circumstances which made it impossible for the sentence to be executed (see also Fennelly J. in *Gheorge* to the same effect).

14. The court must therefore consider the evidence relating to the circumstances in which the respondent left Poland. The core of the information furnished by the issuing judicial authority is contained in the European Arrest Warrant which, as already noted, was supplemented on a number of occasions with additional information.

15. On the 13th November, 2009 the Lublin Circuit Court furnished additional information to the applicant. Though the translation of the Polish documentation is somewhat stilted and imperfect, it provided evidence of the course of the proceedings in Poland and what is said to be the respondent's state of knowledge in respect of same. The following information was provided concerning the commencement of criminal proceedings against the respondent:-

> *"Robert Szall was brought from his place of detention where he was serving a sentence of imprisonment in respect of another case, for the first hearing fixed in the District Court in Lublin in respect of file case number IV Kop 34/09. On his appearance on the 13th February, 2008, the court proceedings were closed and "the judgment announcement was postponed". There was a "necessity to resume the court proceedings" as a result of which it was necessary to fix another hearing date. The accused did not appear on the adjourned date because he was released from the Detention Centre having completed his sentence and did not receive the summons sent to him by post. As a result a further hearing date was fixed for the 4th September, 2008 in respect of which he did not appear. The summonses for that date were considered properly delivered and judgment issued on the 4th September, 2008."*

16. Further information was requested on the 18th November, 2009 and a reply was received on the 25th November from the Circuit

Court in Lublin which set out the articles of the criminal code which defined the offences of which the respondent was convicted and sentenced. Article 376 of the code provides:-

> "1. If the accused who has already filed statements (signed statements) left the hearing room without the consent of the presiding judge, the court can continue the hearing in spite of the absence of the accused, and the judgment issued in such a case is not considered one rendered in absentia. The court orders the arrest and forced bringing of the accused if the court finds his/her presence necessary. One can appeal from this decision to another equal panel of this court.
>
> 2. This provision is applied accordingly if the accused, after having filed the statements, was notified (of) the term of the adjourned or interrupted hearing and did not appear for the hearing without justification".

17. A letter providing further information issued from the Circuit Court Lublin on the 25th November, 2009 which stated:-

> "The convict was not present during the hearing prior to the issue of the judgment on 4th September, 2009 (sic). The court on the basis of Article 404.2 of the code of criminal procedure decided to hold the adjourned hearing continued and on the basis of Article 376.1 and 2 of the code of criminal procedure with absence of the accused. In such a situation in Polish law the judgment rendered this way is not considered the judgment rendered in absence, as the convict was brought from a detention institution for the first fixed date of the hearing on 13th February, 2008 and when he had been released from the penitentiary institution he did not appear at the subsequent dates of the hearings."

18. The court resumed the proceedings on the 4th September, 2008 when it was informed of the necessity to assume the convict's acts as charged were committed "in the conditions of the continuity of offences" and issued the judgment imposing sentence. Under Polish law the court was entitled to consider that the offences were committed within a short period when determining the appropriate custodial sentence.

19. Further additional information was sought and obtained on the 5th July, 2011 from the Circuit Court in Lublin. It described the history of events and contained details of the second hearing which had taken place on the 9th April 2008 but at which the respondent did not appear:-

> "1. On 13th February, 2008 the court did not announce the judgment, it resumed the court proceedings and postponed the hearing to 9th April, 2008. The reason for resumption of the proceedings was the necessity to assume that the offences he was charged with in the indictment were committed in the circumstances of continuity of offences.
>
> 2. The convict admitted he was guilty in the scope of all the offences he was charged with during the hearing before the court on 13th February, 2008.
>
> 3. After the resumption of the proceedings the convict was properly notified of the next date. He was not brought from pre-trial detention for the next hearing as having served the sentence in the other case he was released from pre-trial detention. Being at large he did not appear in court in spite of the fact he knew both of the proceedings which were held and the date of the hearing.
>
> 4. The convict – even during the investigation – was instructed on duties he was charged with, which he confirmed with his own signature on the instruction of the rights and duties. He was notified that, staying at large:
>
> - He is obliged to appear for every summons during the criminal proceedings and to notify the authority which holds the proceedings on each change of residence which lasted for more than 7 days;
>
> - If he stays abroad he is obliged to indicate an address for deliveries in the country, and if he does not do so, then the letter sent at the last known address is considered delivered;
>
> - If he does not provide his new address, changes his place of stay, the letters sent at this address are considered delivered.
>
> It must be stressed that the convict did not fulfil any of the described duties.
>
> 5. Therefore the convict knew well he should not have left Poland until the case is completed – without information to the court. He was instructed on legal consequences of departing aboard and was not providing a new address."

20. In the course of this application the Court, pursuant to s. 20 of the European Arrest Warrant Act 2003, as amended, requested that the issuing state provide additional information which was supplied on the 19th March, 2015.

21. It was made clear that the respondent was not in pre-trial detention in respect of the offences that were the subject matter of case file IV Kop 34/09 but was imprisoned prior and subsequent to the 13th February, 2008 while serving a sentence of imprisonment in respect of a different offence. He was never in pre-trial detention in respect of the charges the subject matter of this extradition application.

22. The Lublin Court also confirmed that the respondent was personally served on the 31st March, 2008 with a notice of the hearing date of the 9th April, 2008. This notice was served by letter, the acknowledgment of which he confirmed by his signature, though earlier information suggested that the summons for that date had not been received by him "by post".

23. On the 21st August, 2007 at an early stage of the Polish criminal proceedings, the respondent was given notice of guidance on the rights and obligations of an accused person, including the obligation to appear upon every summons, to notify the prosecuting authority of any change of address or residence or a stay of longer than seven days at a particular place. The respondent confirmed receipt of this notice by his signature. The note of guidance also stipulated an obligation to give an address at which he might be notified by summons in his native country, if he left Poland to reside in another country. The note also informed him that in the absence of compliance due service at his last known address would be considered good service. The Lublin Court helpfully furnished a copy of the note of the guidance on rights and obligations furnished to the respondent. It was again confirmed that at the hearing on the 9th April 2008 the case was adjourned due to the absence of the respondent.

24. This court requested further clarification in relation to a number of matters from the Lublin Court including the details of the address at which the respondent was notified of the hearing on the 9th April, 2008 and whether he was informed at any times that

the trial could continue in his absence if he failed to attend. The following helpful information was provided by the Lublin Court:-

> "1. On the 31st March, 2008 Robert Szall acknowledged the collection of summons of the date of trial assigned for 9th April, 2008. The convict Robert Szall was released from custody in Lublin on 6th April, 2008 due to the fact that he had served the whole penalty. He should have appeared in person on the trial on 9th April, 2008. However, he did not appear and did not justify his non-appearance.
>
> 2. By obtaining the Court Summons for the trial assigned for the 9th April, 2008 Robert Szall knew of the date of the trial and that it was continued. However, Robert Szall was instructed of the rights and duties of the suspect and was aware that the correspondence sent by the Court to the address that he had indicated was acknowledged as effectively delivered when not collected."

27. According to the guidelines if the accused fails to appear without justification he may be brought to court under duress pursuant to Article 75 para. 1 and 2 of the Penal Procedure Code. There is no evidence that any step was taken to compel his attendance.

28. The respondent in his affidavit of 1st June, 2011 states that in September 2004 he commenced a sentence of eighteen months imprisonment for an offence unrelated to those the subject of the European Arrest Warrant. He was granted temporary release after a period of six months on condition that he return to prison in or around September 2005. He did not do so. He was returned to prison on 21st March, 2007 and remained there until the expiration of his sentence.

29. He states that on 17th September, 2007 his wife Elizabeth Szall travelled to Ireland accompanied by his daughter with the intention of obtaining employment and remaining in Ireland thereafter. His elder daughter Anna had already moved to Ireland in 2006. His son remained in Poland residing with his wife's father and thereafter, moved to Ireland in 2008. The respondent's wife, his two daughters then aged 25 and 8, his son then aged 18 and his sole grandchild then aged 9 now live in Ireland and have done so since moving from Poland.

30. The respondent states that in October 2007 he was in postal communication with his wife. They decided on the basis of her experience in Ireland that once he was released from custody he would join her and his two daughters here and that they would be later joined by his son as soon as he finished the school year. It was intended to start a new life in Ireland.

31. He states that in November 2007 he was taken from his place of detention in Poland by police officers and brought to the office of the prosecuting authorities in Lublin. He was questioned by the state prosecutor about the offences set out in the warrant, the subject of these proceedings. He answered questions which were recorded in writing by the prosecutor and he signed the notes of the interviews. He was then returned to prison.

32. The respondent states that he heard no more about this matter until February 2008 when he received notification in writing that the case against him was to be listed before the court in Lublin on the 13th February, 2008. He was again taken from his place of detention by the police and brought to court. He states that the case against him was heard but that he was not sentenced. He claims that no further date was assigned to his case and he did not enter into a bail bond nor was he told to return to court at a later date. He states that thereafter he was returned to prison and heard no more of the matter until he was arrested on foot of the European Arrest Warrant.

33. He was released from prison on the 6th April, 2008 having completed the sentence of eighteen months imprisonment. He acknowledges that he received a letter from the prison authorities confirming that his custodial sentence was completed. He states that his wife received a similar letter which was retained by her. It is dated 7th January, 2008. He then travelled to Ireland on the 8th April, 2008 the day before the adjourned sentencing hearing. It is not stated on the exhibited letter sent to his wife to which address that letter was sent.

34. The respondent contends that he left Poland lawfully and did not flee. He states that at the time he left he was free to do so and had not been notified that proceedings against him were to be listed again. He insists that he was not notified of any date for these proceedings and understood that at that time no such date had been set. He notes in the affidavit that the further information dated 13th November, 2009 received from the Circuit Court in Lublin acknowledged that he had been released from the detention centre and had not received the summons which had been sent to him by post.

35. He states in a further affidavit sworn on the 3rd November, 2014 that on his release from custody in Poland on the 6th April, 2008 he had not been notified that the proceedings against him would be listed again and was not aware that the cases were listed on the 9th April, 2008. However, it is clear that because of his non-appearance on that date the court adjourned the sentence.

36. The respondent states that when leaving Warsaw on the 8th April, he presented his national identification card and the letter from the prison authorities confirming that he had completed a custodial sentence to border police at the airport. They made telephone enquiries about him at that time and in particular "whether I was free to leave Poland". He states that this was to ensure that he had no outstanding criminal matters in Poland. He said that enquiry was made with the prosecutor's office in Lublin as there had been an old bench warrant on the border officer system which was related to his failure to return to prison having been released in early 2005. This warrant had been executed in 2007 which was confirmed by the border police. He was then allowed to leave Poland. He said he was not informed by the authorities at the airport that his presence was required for criminal proceedings or would be required in the future. He said he left with their consent having made enquiries that it was in order for him to leave Poland.

37. The issuing judicial authority in Poland supplied information to the court and clarified that the respondent was personally served with a notice of the hearing of the 9th April, 2008 on the 31st March, 2008 by letter, the receipt of which was acknowledged by his signature. Having acknowledged the collection of the summons, he was released from custody. The respondent does not accept this evidence and states in his affidavits that following his appearance before the court on the 13th February, 2008, no further date was assigned for the sentencing hearing. He maintained in his affidavit of 3rd November, 2014 that he was not notified prior to his release from custody that the matter was re-listed for the 9th April and in his latest affidavit states that he did not receive a summons as outlined by the Polish judicial authorities. The Supreme Court decisions in *Sliczynksi* and *Gheorghe* are clear authority for the proposition that unless there is some reason to believe to the contrary, it is to be assumed that a statement of facts by the issuing judicial authority is a correct statement of facts and that it would require very clear evidence to demonstrate that an issuing judicial authority had acted in a dishonest manner. As Murray C.J. stated in *Sliczynksi* (at p.11) this court may assume that the reply furnished by the issuing judicial authority to a request for information has been fully and properly prepared and will include a true and accurate response to the information or documentation sought. This court must have regard to the principle of mutual recognition, trust and confidence between the issuing judicial authority and the High Court which requested the information set out above.

38. There is no doubt that the respondent pleaded guilty to the offences alleged against him on the 13th February, 2008. It is difficult to understand therefore, how the respondent did not contemplate a sentencing hearing which must inevitably follow. It is clear from the respondent's affidavit that he left Poland for Ireland on the 8th April, the day before the sentencing hearing. His departure had been discussed with his family and planned because they wished to commence a new life in Ireland and there is clear evidence that this is what happened. However, in doing so, I am satisfied that he chose to disregard his obligation to the Polish criminal justice system. I am satisfied that he was served with a notice of the hearing of the 9th April as described by the issuing judicial authority. It follows that his failure to attend on the date was deliberate and that he intended to avoid the sentencing hearing. The evidence of the Polish judicial authority also establishes that, though he was entitled to leave the country during the course of the criminal proceedings, he had an obligation to inform the prosecutor's office of an address for service, failing which service at his last known place of address would be deemed good service. This is what happened. Thus, even if the court did not accept that he was served with a notification for the hearing on the 9th April, he deliberately failed to observe the obligation to engage with the prosecutor's office for the purpose of ensuring that he would be notified of any adjourned date. I am not satisfied that the respondent's evidence concerning his dealings with border guards in Warsaw at the time of his departure from Poland on the 8th April assists his case. He was well aware at that time that he had pleaded guilty to criminal offences in respect of which sentence had yet to be imposed. His personal or subjective intention or motivation was to leave Poland and join his family. However, he could not do so in total disregard of his obligations to face the sentencing hearing and he was well aware of this. I am satisfied that he chose in those circumstances to evade justice in the hope that if he ignored the matter, it would not catch up with him. He had no intention of submitting himself to a sentencing hearing and therefore I am satisfied that the respondent "fled" Poland for the purpose of evading justice on any objective assessment of the entirety of the evidence.

39. The court is therefore satisfied that the respondent's surrender is in accordance with the provisions of s. 16 of the European Arrest Warrant Act 2003 (as amended) and will make an order pursuant to this section.