

THE HIGH COURT

2007 191 Ext

BETWEEN:

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

APPLICANT

AND

WOJCIECH CIEPLY (NO.1)

RESPONDENT

THE HIGH COURT

2008 161 Ext

BETWEEN:

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

APPLICANT

AND

WOJCIECH CIEPLY (NO.2)

RESPONDENT

Judgment of Mr Justice Michael Peart delivered on the 24th day of April 2009:

The surrender of the respondent is sought on foot of two separate European arrest warrants each of which has been issued in Poland by a different judge in two distinct District Courts. Each application for surrender must be addressed separately.

Warrant No. 1 dated 23rd October 2007:

This warrant dated 23rd October, 2007 was endorsed for execution by the High Court on the 12th December, 2007, and the respondent was arrested on foot of same on the 1st February, 2008, and was thereafter brought before the High Court and remanded thereafter from time to time pending the hearing of the present application for his surrender.

I am satisfied that the respondent is the person in respect of whom this warrant has been issued, and no issue to the contrary has been raised on his behalf.

His surrender is sought so that he can serve a sentence of two years' imprisonment which was imposed upon him following his conviction in respect of an offence described in paragraph E.3 of the warrant as "material forgery of a document" and "fraud". That sentence was first of all conditionally suspended for a period of four years. The verdict of the court was pronounced in his presence on the 10th November, 2000, and according to additional information provided in a letter dated 16th June, 2008 this verdict became valid on 20th December, 2001.

The sentence imposed satisfies the minimum gravity requirement, and no undertaking as regards a retrial upon surrender is required as the respondent was present for his trial and conviction.

Following the failure by the respondent to fulfil the conditions of the suspension, the suspension was lifted and he was ordered to serve the sentence by order dated 23rd January 2004. The respondent was present in court when this order was made. It appears that thereafter the respondent unsuccessfully sought to have the sentence deferred. In his own affidavit he states that he has lived in Ireland since October 2004.

The offence for which he was convicted and sentenced is one in respect of which correspondence must be established, and is described in the warrant as follows:

"In March 1999 in Zabagnie, Poland, [the respondent] falsified a car purchase agreement for a Mitsubishi car (plate no. BOC 5436) dated 23 Mar. 1999 made between Malgorzata Zwierz as seller and Stanislaw and Tomasz Bielach as buyers, by forging the seller's signature. Acting for financial gain, he fraudulently deprived Stanislaw and Tomasz Bielach, under false pretences, of their property by swindling them of cash and a Polonez passenger car (plate no. KCL 5649), on the pretext of selling the Mitsubishi car. The losses totalled PLN 18,000."

Additional information provided by letter dated 1st December, 2008 provides some additional information about the case against the respondent, but it is unnecessary to set that out in detail.

Correspondence:

No issue is pursued in relation to correspondence for this offence by the respondent. It has been submitted by Anne-Marie Lawlor BL for the applicant that the acts of the respondent giving rise to this offence would if done in this State give rise to an offence of making a gain by deception contrary to s. 6 of the Criminal Justice (Theft and Fraud Offences) Act, 2001, and/or an offence of forgery contrary to s. 25 of the same Act. I am satisfied that this is correct.

A number of points of objection were set forth in Points of Objection, but only one is pursued in relation to the first warrant, namely that the respondent did not 'flee' Poland and is therefore not a person who comes within s. 10 (d) of the European Arrest Warrant Act, 2003 as amended, and that his surrender on this warrant cannot be ordered. I will address that issue when considering the same issue in relation to the second warrant as the facts supporting it are the same in respect of each warrant.

Subject to reaching a conclusion in relation to the fleeing point, I am satisfied that there is no reason under sections 21A, 22, 23 or 24 of the Act why his surrender must be refused, and also that his surrender is not prohibited by any provision of Part III of the act or the Framework Decision.

Accordingly the Court is required to make the order for surrender sought on this application and I will so order.

Warrant No. 2 dated 27th May 2008:

This warrant was endorsed for execution here by the High Court on the 19th September, 2008, and the respondent was duly arrested on foot of it on the 22nd October, 2008 and was brought before the Court as required by s. 13 of the Act.

No issue arises as to his identity, and I am satisfied that he is the person in respect of whom this warrant has been issued.

This warrant seeks the surrender of the respondent in respect of a total of eleven offences. The first four offences set forth in the warrant are ones for which his surrender is sought for the purpose of prosecution, and are offences which have been marked in the warrant as being offences within the categories of offence in Article 2.2 of the Framework Decision, and as such are offences for which correspondence does not require verification. Each such offence satisfies the minimum gravity requirement.

The remainder of the offences, namely offences 5-11, are offences in respect of which the respondent has been convicted and sentenced, and the sentences imposed satisfy the minimum gravity requirement in that regard. The respondent was present for his trial and conviction, and no undertaking under s. 45 of the Act is required.

All these offences except offences 5 and 6 in the warrant are Article 2.2 offences, and therefore correspondence must be established in respect of offences 5 and 6.

The facts in respect of these offences (Nos. 5 and 6) are set out in this warrant as follows:

"(a) at night on 24th/25th October 1998 in Ustron from the room number 10 of the hotel "Tropicana" he took in order to appropriate a bag together with a purse, the money amounting to 380 zł, three cash cards, student's identity card, car keys and registration card, everything of total value of 520 zł to the detriment of Olga Iwanczuk.

(b) at night on 24th /25th October 1998 in Ustron he took a car for short term use, Fiat Cinquecento (make), registration number KXY 2312 to the detriment of Loga Iwanczuk."

It is submitted on behalf of the applicant that these offences correspond to offences of theft contrary to s. 4 of the Criminal Justice (Theft and Fraud Offences) Act, 2001. Prior to the hearing of this application for surrender the Central Authority here sought information from the issuing judicial authority as to whether in relation to these offences for which the respondent was convicted it was asserted that he had acted dishonestly, without the owner's consent and with the intention of depriving the owner of the property. This was confirmed by letter dated 28th October, 2008.

The relevance of this confirmation arises from the relevant provisions of s. 4 of the Criminal Justice (Theft and Fraud Offences) Act, 2001 which provide 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."

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."

I am satisfied that these offences correspond to offences of s. 4 theft.

The 'fleeing issue' under s. 10 of the Act:

The respondent has sworn three affidavits to support his submission that the circumstances in which he came to this country do not amount to 'fleeing' for the purpose of s. 10 (d) of the Act.

In his first affidavit he has stated that he has lived in Ireland since October 2004, and that prior to that date and since 2002 he lived and worked in the Regensburg area of Germany. However, he states also that he travelled back to Poland from time to time from Germany, including for some court appearances, but that he did so lawfully, and that he was not living in Poland on the date of the court decision the subject of the European arrest warrant. I take that to mean that on the 23rd January, 2004 he was not in Poland, since that is the date upon which the sentence of 2 years' imprisonment imposed on the 10th November, 2000 became enforceable, as it had been suspended for four years. That is the sentence for which the first warrant was issued, and that affidavit is filed in relation to that warrant.

In his supplemental affidavit filed in relation to the first warrant he states in addition that in 2003 he served a 6 month sentence of imprisonment in Poland. That had not been averred to in his first affidavit, and that averment is in reply to information obtained from the issuing judicial authority which includes a statement that "*until 22nd May 2003 [the respondent] was serving the sentence of 6 months of imprisonment imposed for another offence in Polish region of Bydgoszcz...*". He was therefore clearly not living in Regensburg, Germany during the time he was serving that sentence up to May 2003.

But this further information from the issuing judicial authority also states that on the 26th July, 2003 and on the 19th November, 2003 he communicated with the Polish court in writing and that these letters were sent by him from his Polish address in a place called Ustron. It states also that on the 12th December, 2003 a copy of a court decision dated 3rd December, 2003 was sent to him at that address, and that "he personally confirmed obtaining this document and next day he sent the appellation to the court (again from Ustron)". It states further that he was in attendance at the court on the 23rd January, 2004, that being the date, as set forth in the previous paragraph hereto, on which he stated that he was not in Poland. It is yet further stated that on the 26th January, 2004, 10th February, 2004 and the 16th July, 2004 the respondent sent three written requests for deferral of sentence, and that each such letter was sent from that same address in Ustron. By August 2004 the police were unable to trace his whereabouts.

In relation to the conflict of information about whether he was or was not present in court on the 24th January, 2003, the respondent has stated the following in his supplemental affidavit (paragraph 4):

"At the time of the Court decision on 23rd January 2004 I was still residing in Germany. I note from the letter from the Polish authorities that I was present in court at that hearing. Whereas I have no recollection of that, if it is so I note that I must have been free to leave the court and permitted to return to live and work in Germany afterwards. I did not encounter any restriction. I believe that may be because the sentence was not executable at that time. I reiterate again that I travelled freely at all times. Throughout the court process it was known that I resided in Germany. I never fled Poland."

In relation to the address from which the letters to the court are said to have been sent in Poland, he simply states "I say that any letters posted in Poland on my behalf were posted by my brother".

In his third affidavit (filed in relation to the second warrant) the respondent again states that any letters and appeals posted in Poland were posted on his behalf by his brother, and he disagrees with the assertion by the Polish authorities that his signature on these letters and documents reflects the fact that he was in or residing in Poland, and he states again that he was not.

These facts form the basis for the submissions made on the respondent's behalf by Kieran Kelly BL. The essential basis on which it is being submitted that the respondent does not come within the ambit of s. 10(d) of the Act is that the respondent did not flee "from the issuing state", but rather that when he came to Ireland he did so from Germany. He submits that by going to reside in Germany and work there he was free to do so, and at a time when he was not required to serve any period of imprisonment. This is on the basis that all sentences were suspended at the relevant time. I will examine the evidence in that regard, but before doing so will set out the provisions of s. 10(d) of the Act for ease of reference.

Section 10 (d) provides:

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)

(iii) completed serving that sentence,

(iv)

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 sentences:

1. A sentence of imprisonment of 2 years imposed on 11th November, 2000 but suspended for 4 years. However by order dated 23rd January, 2004 this sentence was ordered to be executed.

Subsequently the respondent made a number of unsuccessful applications for a further deferral (1st EAW – file 722/99)

2. A sentence of 1 year and 6 months imposed on 22nd March, 1999, but suspended for 3 years. However, by order dated 11th October, 2001 this sentence was ordered to be executed (File II K 159/99)

3. A sentence of 1 year and 6 months imposed on 6th December, 2000, but suspended for 4 years. However, by order dated 19th April, 2004 this sentence was ordered to be executed (File 728/00)

4. A sentence of 1 year imposed on 14th May, 2002, but suspended for 3 years. However, by order dated 5th July, 2005 this sentence was ordered to be executed (File 1153/01)

5. A sentence of 1 year and 3 months imposed on 26th September, 2003, but suspended for 4 years. However, by order dated 15th March, 2007 this sentence was ordered to be executed (File 736/03)

6. A sentence of 1 year imposed on 22nd January, 2004, but suspended for 4 years. However by order dated 15th March, 2005 this sentence was ordered to be executed (File 396/03)

7. A sentence of 1 year and 6 months, but suspended for 3 years. However, by order dated 22nd July, 2004 this sentence was ordered to be executed (File 40/01)

The respondent has stated that he lived in Germany "from 2002". He is unspecific as to from what month in 2002 he was living there, but the letter dated 4th July 2008 from the Polish court states on page two that the respondent's probation officer/supervisor (referred to as "curator") reported to the court on 2nd August 2002 that he was working in Germany for "two months" and would be back in Poland in September 2002. That is not contested on affidavit by the respondent. That must mean that he left Poland and went to Germany in July 2002. If one then looks at 2. above one can see that the sentence imposed on 22nd March, 1999, but was suspended for 3 years, but that by order dated 11th October, 2001 it was ordered to be executed (File II K 159/99). That means that even if one gives the respondent the benefit of the doubt about leaving Poland in perhaps January 2002 rather than July 2002, it was still at a time when that particular sentence was enforceable and had not been served by him.

If one takes the sentence at 1. above which became enforceable on the 23rd January, 2004, the respondent was present in Court on that date when it became enforceable, and was therefore in Poland on that date. In fact he applied on a number of occasions unsuccessfully to have it further deferred. It is clear that in so far as he may have gone back to Germany after that date, he did so in the face of an enforceable sentence.

In respect of each of these two sentences he must be regarded as having fled the issuing state. After October 2001 (i.e. sometime in 2002 on his own evidence) he left Poland to go to reside and work in Germany even on his own. By doing so he 'fled' thereby avoiding that executable sentence. After 23rd January 2004 he must have again left Poland in the face of another executable sentence, and went either to Germany or to Ireland, and by doing so 'fled' also to avoid that sentence (as well as the previous one which had not yet been served by him).

The later sentences appear to have been the subject of orders made after he had fled Poland, but that does not alter the fact that he is a person within the ambit of s. 10(d) of the Act, namely a person *"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 ... commenced serving that sentence..."*

I am of the view that he is such a person for the reasons stated and I am satisfied that his surrender may be ordered for the offences which are the subject of both warrants.

I am satisfied therefore that there is no reason why the surrender of the respondent is prohibited by any provision of sections 21A, 22, 23 or 24 of the Act, and I am satisfied also that his surrender is not prohibited by any provision of Part III of the Act or the Framework Decision.

Accordingly the Court is required to make the order sought in respect of each warrant before the Court, and I will so order.