

THE HIGH COURT

Record Number: 2007 No. 73 Ext.

BETWEEN

MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

APPLICANT

AND
PIOTR PACANOWSKI

RESPONDENT

Judgment of Mr Justice Michael Peart delivered on the 5th day of December 2007:

1. The surrender of the respondent is sought on foot of a European arrest warrant which issued from a judicial authority in Poland on the 2nd February 2007. That warrant was endorsed by the High Court for execution by order dated 24th April 2007, and the respondent was arrested here on the 3rd September 2007 on foot of same. He was brought before the High Court on the following day, the 4th September 2007.

2. His surrender is sought so that he can serve four sentence of imprisonment imposed on him in respect of four offences for which he convicted and sentenced in Poland on the dates referred to in the warrant.

3. No Points of objection have been filed against this application. Nevertheless a matter arose on the application in relation to whether or not an undertaking pursuant to s. 45 of the European Arrest Warrant Act, 2003, as amended ("the Act") is necessary before this Court can make the order sought. This point relates to a perceived ambiguity or lack of clarity as to whether the respondent was sentenced in absentia. I shall return to that point in due course.

4. The respondent raises no issue as to his identity, and the Court is satisfied that the person arrested and who is before the Court is the person in respect of whom this warrant has been issued.

5. I am also satisfied that the offences in respect of which he has been convicted in Poland and which are not among the offences to which Article 2.2 of the Framework Decision applies are offences which correspond to offences in this jurisdiction. Again, no issue is raised in that regard. Without going into full detail of these offences, they correspond respectively to offences under s. 3 of the Non-Fatal Offences Against the Person Act, 1997 (assault), and s. 14 of the Criminal Justice (Theft and Fraud Offences) Act, 2001 (robbery). The remaining offences have been marked in the warrant as being Article 2.2 offences, namely 'fraud' and 'falsification of official documents and circulation of falsified documents'. No verification as to double criminality is therefore required in relation to same.

6. In respect of minimum gravity, that is met in this case since more than four months imprisonment remains to be served by the respondent upon surrender.

7. I am satisfied in the absence of anything being urged to the contrary by way of objection that the Court is not required by virtue of sections 21A, 22, 23 or 24 of the act to refuse to order surrender, and also that his surrender is not prohibited by Part III of the Act or the Framework Decision itself.

8. Subject to addressing the point in relation to s. 45 undertaking, the Court is satisfied that the order sought for his surrender under s. 16(1) of the Act must be made.

9. Section 45 of the Act provides;

"45.— A person shall not be surrendered under this Act if—

(a) he or she was not present when he or she was tried for and convicted of the offence specified in the European arrest warrant, and

(a) (i) he or she was not notified of the time when, and place at which, he or she would be tried for the offence,

or

(i) he or she was not permitted to attend the trial in respect of the offence concerned, unless the issuing judicial authority gives an undertaking in writing that the person will, upon being surrendered—
(i) be retried for that offence or be given the opportunity of a retrial in respect of that offence,

(ii) be notified of the time when, and place at which any retrial in respect of the offence concerned will take place, and

(iii) be permitted to be present when any such retrial takes place."

10. It seems to me that even though no Points of Objection were filed raising an issue in relation to whether or not the respondent was dealt with in absentia, the Court must nevertheless be satisfied that no undertaking is required. This exercise in the present case must be conducted from the contents of the warrant itself.

11. Section 45 of the Act gives effect to Article 5 of the Framework Decision. That article speaks of certain guarantees which must be given by the issuing Member State in particular cases. Paragraph 1 of that Article relates to trials in *absentia*.

12. Article 5.1 states:

"Guarantees to be given by the issuing Member State in particular cases:

The execution of the European arrest warrant by the executing judicial authority may, by the law of the executing Member State, be subject to the following conditions:

1. where the European arrest warrant has been issued for the purposes of executing a sentence or a detention order imposed by a decision rendered and if the person concerned *has not been summoned in*

person or otherwise informed of the date and place of the hearing which led to the decision rendered in *absentia*, surrender may be subject to the condition that the issuing judicial authority gives an assurance deemed adequate to guarantee the person who is the subject of the European arrest warrant that he or she will have an opportunity to apply for a retrial of the case in the issuing Member State and to be present at the judgment."

13. The Oireachtas has clearly deemed the undertaking referred to in s. 45 as an adequate assurance in this regard. The question arising is really whether this respondent is a person who "has not been summoned in person or otherwise informed of the date and place of the hearing which led to the decision rendered in *absentia*".

14. Mr Reilly on the respondent's behalf has suggested that the situation is far from clear from what is stated in the warrant and that the Court may not be satisfied that no undertaking is required in these circumstances. If necessary, he submits that this Court might consider that it was desirable that this Court exercise its power under s. 20 of the Act to seek further information from the issuing authority in order to clarify the situation regarding the notification of the respondent of the date of the sentencing hearings.

15. The warrant refers to four different offences for which the respondent was on different dates convicted and sentenced. These are referred to under headings A, B, C, and D. I will deal with offence A by way of example. There is no need to look at the details for the other offences individually.

Offence A

16. According to paragraph B of the warrant the respondent was convicted on the 1st April 2001, and sentenced on 9th April 2004 to 1 year and 6 months' imprisonment, and that "the judicial decision became legally effective on 29th July 2001. Both original warrant in the Polish language and the translation contain the reference to "2004".

17. The warrant in paragraph D states in respect of A that:

"[the respondent] and his lawyer were present at the hearing on *5th April 2001* and took note of the date of the announcement of the judicial decision. They were not present when the judicial decision was announced. A copy of the judicial decision along with the grounds for the decision was served on [the respondent]'s lawyer. The convict failed to show up for the hearing relating to the ordering of the execution of the penalty even though he was *duly informed* about the date." (my emphasis)

18. I note that this paragraph refers to 5th April 2001 being the date of the hearing and not, as in paragraph B the 1st April 2001". One of these dates must be incorrectly stated.

19. The case file reference for Offence A is stated in paragraph B.2 of the warrant as "II K. 311/00", whereas in a letter dated 16th July 2007 received from the Polish authority in response to a letter from the Central Authority here this file is referred to as "case No. II Ko 242/04".

20. Leaving aside these apparent discrepancies, that response states:

"the a/m was not present at the hearing on 1st April 2004 – case No. II Ko 242/04 on the subject of ordering execution of penalty of 1 year and 6 months' deprivation of freedom meted out by the Provincial Court in Pila dated 9th April 2001 – case No. II K 310/00. A letter of notification of the date of the hearing had been sent twice to the address given by the convict. However the mail was not collected. Also two attempts at serving him the court's decision also failed."

21. This letter then goes on to give details from the Polish Code of Criminal Procedure as to how service may be effected. It is stated that under Article 133.1 of the Code "if service cannot be effectuated in the manner indicated in Article 132 (in person, through an adult who lives at the same place, the housekeeper), the mail sent through the post is left at the nearest post office building of the provider of postal services and the mail sent in another manner – at the nearest police station or a competent local authorities office".

22. Article 133.2 provides:

"The postman leaves an information note stating that the given person has been sent mail – as stated in paragraph I –so the person can collect it. He places the note in the person's letter box or on the door of the flat of the addressee's apartment or in another noticeable place. The information note states the place where the mail is left and when and also states that the mail is to be collected from that place within 7 days; if there is no response – that is if the mail is not collected within 7 days, then the whole procedure of notification is repeated. The same applies to a situation where the mail is delivered to the manager of the building, the caretaker of the building or the head of a village."

23. Article 139 of the Code states:

"If the person does not notify the court of his forwarding address and changes his place of residence or does not live at the address he himself gave, any mail sent to that address is deemed delivered."

24. This response letter goes on to state that "the notification of the date of the hearing and service of the court's decision on the subject of the penalty were therefore deemed correct. The decision is legally binding and cannot be appealed".

25. The letter goes on to provide certain other information about the circumstances in which the various other matters were dealt with in the absence of the respondent but in respect of all matters that he was duly notified in accordance with the procedures set forth in the Code as set forth above.

26. A further letter sent to the Central Authority here by the Polish Authority dated 8th November 2007 refers to the provisions of Article 5 of the Framework decision, and states that in the case of the respondent he was properly notified of the dates of the various court hearings and of the decisions made and that no guarantee as provided for in Article 5 is therefore required.

27. First of all, while I can see that there is some discrepancy regarding the file reference number and a date, these are not matters which materially confuse the issue to be determined, namely whether the respondent was duly notified for the purpose of s. 45 of the act and Article 5 of the Framework Decision. The respondent has filed no affidavit either of his own or any Polish lawyer to state that the provisions of the Polish Code as to service of notification have not been complied with. There is a positive assertion contained in

the correspondence received and in the warrant that the respondent was duly notified in accordance with the applicable rules under the Code. This Court must accept that this is so in these circumstances. This Court must respect what it is told by the Polish judicial authority especially on account of the high level of confidence between Member States which underpins the surrender arrangements put in place by the Framework Decision adopted by Member States, and given effect to here by the Act.

28. The fact that the respondent procured a situation, by absconding or changing his address without notifying the Polish authorities, could not give rise to a reason under s. 45 why his surrender cannot be ordered, provided that he was duly notified under the rules of procedure regarding service under the Polish Code of Procedure.

29. I will therefore make the order sought for his surrender to the issuing state.