

## THE HIGH COURT

2008 No. 43 Ext

BETWEEN

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

APPLICANT

AND  
DAMIEN DOLNY

RESPONDENT

**Judgment of Mr. Justice Michael Peart delivered on the 23rd day of October, 2008**

1. The surrender of the respondent is sought by a judicial authority in the Republic of Poland so that he can serve a sentence of imprisonment imposed upon him there on 44th December, 2004, following his conviction for an offence of what can be loosely described as an assault. That sentence was originally suspended for a period of four years, but because the respondent was later convicted of another offence, the suspension was lifted by court decision dated 13th November 2006, duly confirmed by order of the Circuit Court in Poznan dated 14th December 2006.
2. A warrant for the arrest of the respondent was made on 14th March 2007, which, in turn, led to the issue of the European arrest warrant, the subject of the present application.
3. That warrant is dated 13th August, 2007, and following its transmission to the Central Authority here, was endorsed by the High Court on 27th February 2008. The respondent was duly arrested here on 23rd April 2008, and, as required by s. 13 of the European Arrest Warrant Act 2003, as amended ("the Act"), was immediately thereafter brought before the High Court and remanded on bail from time to time thereafter, pending the hearing of the present application for his surrender pursuant to section 16 of that Act.
4. There is no issue raised on this application as to the identity of the respondent, and I am satisfied, in any event in that regard, from the affidavit evidence of the arresting Garda, Sgt. Martin O'Neill, that the respondent is the person in respect of whom this European arrest warrant has been issued.
5. The warrant states that the respondent was present for his trial, conviction and sentence, and accordingly, no undertaking is required pursuant to the provisions of section 45 of the Act. No submission to the contrary has been raised by the respondent.
6. There is no reason why, under sections 21A, 22, 23 and 24 of the Act, surrender should be refused, and subject to reaching a conclusion in relation to the issues raised by the respondent in his Points of Objection, I am satisfied that surrender is not prohibited by Part III of the Act or the Framework Decision.
7. Two points of objection are pursued on this application. Firstly, the respondent submits that the warrant fails to adequately specify the offence to which the warrant relates, or the nature and classification of the offence under the law of the issuing state; and secondly, that the offence for which he was convicted on 14th March 2004, does not correspond to any offence under Irish law, under the provisions of section 5 of the Act.

**Inadequate specification of the offence**

8. The warrant describes the offence for which the respondent was convicted as follows:

*"On 20th June 2004 in ....., acting together and in collaboration with ..., he beat ... by hitting him on the face and head with his fists, thereby causing injury to his body in the form of a contused wound in the left suborbital area and a contused wound in the area of the right superciliary ridge – thus exposing him to the direct danger of sustaining grievous detriment to his health."*

9. Under a heading in the warrant at Paragraph E thereof: "Category and legal classification of the crime (crimes), it is stated, "article 158 paragraph 1 of the penal code (beating)". That paragraph then sets out the provisions of that article, as well as the provisions of article 156, paragraph 1, and article 157, paragraph 1, which are themselves referred to in article 158 of the Code.

10. Damien Kelly BL has argued that the description of the offence is confusing, as set forth in Paragraph E of the warrant, and insofar as it is unclear, has submitted that the warrant does not comply with the requirements of section 11 (1A) (d) of the Act which provides:

*"(1A) Subject to subsection (2A), a European arrest warrant shall specify-*

*(a) ...*

*(b) ...*

*(c) ...*

*(d) the offence to which the European arrest warrant relates, including the nature and classification under the law of the issuing state of the offence concerned."*

11. In my view, it is perfectly clear what offence was committed by the respondent for which he was convicted. The facts are clear, as is the classification of the offence by reference to the word "beating". The text of article 158 of the Polish Penal Code, as translated in the warrant, refers also to "beating or battery ...", so I fail to see how the issuing judicial authority has failed to give an adequate description of the offence under that Code. In addition, of course, it must be borne in mind that the respondent was present for his trial, and can be taken to be aware of precisely what offence he was charged. The purpose of setting out these details in the warrant is so that, firstly, the person arrested knows to what offence the warrant relates. That may be more important in a case where surrender is sought for the purpose of a prosecution as opposed to a conviction case. Secondly, it is important that such details be included so that this Court, when required to do so, can reach a conclusion on the question of correspondence under section 5 of the Act.

12. This ground of objection must fail.

## Correspondence

13. Section 5 of the Act provides as to correspondence:

*"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."*

14. Counsel for the applicant has submitted that the offence for which the respondent was convicted in Poland corresponds to an offence in this jurisdiction of 'assault causing harm' contrary to s. 3 (1) of the Non-Fatal Offences against the Person Act 1997, ("the 1997 Act") which provides:

*"3. -- (1) A person who assaults another causing him or her harm shall be guilty of an offence."*

15. "Harm" for the purpose of this Act is defined in section 1 thereof as meaning "harm to body or mind and includes pain and unconsciousness".

16. Counsel submits that the act for which the respondent was convicted, according to the description of the offence contained in the warrant, meets all the requirements for this offence under section 3(1) of the 1997 Act, and therefore corresponds.

17. Mr. Kelly, on the other hand, has referred to the provisions of s. 2(1) of the 1997 Act, which creates the offence of "assault" as opposed to "assault causing harm". That section provides:

*"2. --- (1) A person shall be guilty of the offence of assault who, without lawful excuse, intentionally or recklessly –*

*(a) directly or indirectly applies force to or causes an impact on the body of another, or*

*(b) causes another to believe on reasonable grounds that he or she is likely immediately to be subjected to any such force or impact,*

*without the consent of the other." (my emphasis)*

18. Mr. Kelly submits that the references to 'without lawful excuse' and 'intentionally or recklessly' as well as 'without the consent of the person', must be present also for the purpose of the s. 3 offence of assault causing harm, since they are necessary ingredients of the 'assault' referred to in section 2 thereof. He submits that there is nothing contained in the description of the offence in the warrant to indicate that what he did was "without the consent of the victim", and, accordingly, there is no correspondence made out. He accepts that a jury might very well draw an inference of lack of consent, but that when considering the question of correspondence, this Court cannot draw such an inference from the description of the facts contained in the warrant, since the provisions of s. 5 are clear, and that the allegation of such lack of consent must be contained in the warrant itself. He submits that lack of consent is a necessary proof for an offence under s. 3 of the 1997 Act, just as it is for an offence under section 2 thereof.

19. In my view, this submission is wrong. The offences created respectively by s. 2 and s. 3 of the 1997 Act, are distinct and different offences. An assault under s. 2 requires for its commission that the person assaulted did not consent to being assaulted, as well as that the assault be inflicted without lawful excuse and intentionally or recklessly. The section is clear in that regard. But the separate and distinct offence of 'assault causing harm' in s. 3, contains no such requirements. It is a separate offence, and it is not the case that s. 2 is intended to define the concept of "assault" for all purposes of the Act. There is no definition of assault contained in s. 1 of the 1997 Act, or elsewhere therein.

20. Section 3 provides for a freestanding offence of 'assault causing harm', as opposed to a simple assault. In order to be guilty of this offence, a person must have carried out an assault and must have caused 'harm' as defined in section 1 of the 1997 Act. In such an offence, it is not part of the offence that it occurs without the consent of the victim. That is clear from the plain meaning of the words used in the section. In section 3, the word 'assault' is not used as a term of art by reference to the provisions of s. 2, or by reference to any statutory definition of that word. The Concise Oxford Dictionary definition of 'assault' is "a violent physical or verbal attack". That is the meaning to be given to the word 'assault' for the purpose of the section 3 offence.

21. I note in passing that the offence of 'assault causing serious harm' under s. 4 of the 1997 Act, again includes a mental element, namely, that the offence occurs where "a person intentionally or recklessly causes serious harm to another".

22. The requirement that the assault be without the consent of the victim, or that there be any mental element, is distinctly absent from the express provisions of the s. 3 offence of assault causing harm. In my view, the facts as outlined in the warrant and which resulted in the conviction of the respondent in Poland, come within the words used in s. 3 of the 1997 Act, in order to create that offence, and in these circumstances, correspondence in accordance with s. 5 of the Act, and I am satisfied also that the minimum gravity requirement is satisfied also, since the offence is punishable by a fine, or by a sentence of imprisonment of up to five years imprisonment, or both.

23. For these reasons, I am satisfied that this point of objection also fails.

24. I will therefore make the order sought for the surrender of the respondent pursuant to the provisions of section 16 (1) of the Act.