Neutral Citation Number: [2011] IEHC 221

THE HIGH COURT

2010 104 EXT

IN THE MATTER OF THE EUROPEAN ARREST WARRANT ACT, 2003

AS AMENDED

BETWEEN/

THE MINISTER FOR JUSTICE AND EQUALITY

APPLICANT

- AND -

PAWEL DABSKI

RESPONDENT

JUDGMENT of Mr Justice Edwards delivered on the 1st day of June 2011

Introduction:

The respondent is the subject of a European Arrest Warrant issued by the Republic of Poland on the 29th of January, 2009. That warrant was endorsed for execution by the High Court in this jurisdiction on the 10th of March, 2010. The respondent was arrested on the 20th of June 2010 by Det Garda John Butler and identity is not in issue. The warrant is a conviction type warrant on foot of which the respondent's surrender is sought in order to have him serve out a sentence of one year and two months imposed upon him by the District Court in Gdynia on the 31st of May 2004 for an offence in respect of which the box relating to "racketeering and extortion" is ticked in Part E. I. of the warrant.

The matter came before the Court on Friday the 27th of May last on which date the Court was asked by the applicant to make an Order pursuant to s. 16 of the European Arrest Warrant Act, 2003 as amended (hereinafter referred to as "the 2003 Act") directing that the respondent be surrendered to such person as is duly authorised by the issuing state to receive him. The Court duly enquired whether it was appropriate to do so having regard to the terms of the 2003 Act, and in particular and arising from specific objections raised by the respondent, having regard to s.10 and s.22 thereof. Arising out of the Court's enquiries the Court concluded that it would not be lawful for it to surrender the respondent to the issuing state and accordingly it declined to make an Order surrendering him.

In circumstances where the Court has decided not to make an Order under s. 16 of the 2003 Act it is obliged pursuant s.16(8) of the 2003 Act to give reasons for its decision and I now do so.

The s. 10(d) argument – the suggestion that the respondent did not flee

This is a case to which s.10 of the 2003 Act it was prior to the amendment effected by s. 6 of the Criminal Justice (Miscellaneous Provisions) Act, 2009 applies. Prior to the relevant amendment s. 10 of the 2003 Act (as substituted by s.71 of the Criminal Justice (Terrorist Offences) Act, 2005) provided (to the extent relevant):

> "10.—Where a judicial authority in an issuing state issues a European arrest warrant in respect of a person—
>
> (a) ….
>
> (b) ….
>
> (c) …. 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.".

Accordingly, before this Court could surrender the respondent it would have to be satisfied that the respondent "fled" Poland before commencing, alternatively before completing, the sentence imposed upon him for the offence to which the warrant relates. The respondent contends that he did not flee. The Court interprets the word "fled" in accordance with the Supreme Court in *Minister for Justice, Equality & Law Reform v Tobin* [2008] 4 I.R. 42 as importing more than the word "left" and as connoting an escape from justice.

In *Minister for Justice, Equality & Law Reform v Sliczynski* [2008] IESC 73. Macken J stated:

> "All of the factors germane to whether a person can be said to have fled must be taken into account. That includes the

> motivation of the person sought to be returned to the requesting Member State, which is almost inevitably likely to be a subjective motivation. So also the court must take into account other material factors, such as whether the sentence was suspended, and where the suspension of the sentence was subject to terms, whether those terms were known to the convicted person and whether those terms were complied with. It is telling to recall that the appellant admits he was convicted and sentenced on the first three charges in his presence, and has not challenged the content of the letters exhibited in Mr. Doyle's affidavit. He must therefore be understood to have known and appreciated the significance of the terms attaching to the suspension of those sentences.
>
> 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 subjection. 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. In the present case, it was a term of the suspension – not denied by the appellant – that he would reside at a particular place, would notify the probation officers or responsible authority of his whereabouts and, in particular, would notify it of any intention to leave Poland. It is axiomatic that if the terms and conditions of a suspended sentence are not met, there is a likelihood of the suspensions being lifted and the sentences having to be served."

In the present case the sentence imposed upon the respondent by the District Court in Gdynia on the 31st of May 2004 was conditionally suspended, initially, for a period of four years. Neither the warrant, nor the additional information furnished subsequently by the issuing judicial authority, expressly sets out the conditions of suspension. However, this Court has been told in a letter from the issuing judicial authority dated the 8th of November, 2010 that during the probation period the respondent committed two other offences (namely attempted fraud and fraudulent notification of an offence), of which he was convicted on the 14th of September 2005, and that, on account of this, enforcement of the penalty imposed but conditionally suspended on the 30th of May 2004 "is obligatory." Accordingly, on the 10th of February 2006 the District Court in Gdynia lifted the suspension of the respondent's sentence as a result of which he was in due course required to report to serve the sentence, which he failed to do.

In the circumstances outlined it was reasonable in the Court's view to infer that one of the conditions of the suspension of the respondent's sentence was that during the probation period he should "keep the peace and be of good behaviour", as we would say in Ireland. The judgment of the 30th of May 2004 was not rendered in absentia. In circumstances where he was present for his trial and sentencing it was also clearly to be inferred that he knew the conditions on foot of which his sentence was to be suspended. There is clear evidence, which he has not sought to controvert, that he was not in fact of good behaviour during the period of his probation and was subsequently convicted of committing two offences during that period. The evidence further establishes beyond any doubt that it was for this reason that the suspension of his sentence was lifted.

However, the respondent has filed two affidavits sworn on the 29th of October 2010, and on the 19th of May 2011, respectively, in which he states that he left Poland on the 14th of September 2005 and came to Ireland, and in which he puts forward his subjective motivation for doing so. He has stated that his reason for leaving Poland was in order to seek employment. He has two children and an estranged wife in Poland for whom he provides financial support. He states that prior to leaving the issuing State he notified his probation officer of his intention to do so, and also notified the District Court in Gdynia. As regards the latter, he claims to have notified them both by calling in person to the Gdynia Prosecutor's Office in late August 2005 (about a week after receiving notification of a Court hearing to be held on the 14th of September 2005) and also, subsequently, in writing (his affidavit exhibits a copy of the relevant letter in which, inter alia, he states that he is moving abroad and provides a contact address, namely that of his father. He also stated in this letter that he had had drawn up, and had duly signed, and was attaching, a notarised power of attorney authorising his father to represent him). The applicant does not dispute, and it would appear to be accepted by the issuing judicial authority, that the respondent did notify his intention to travel abroad and did provide an address for correspondence.

With respect to the alleged call to the Gdynia Prosecutor's Office the respondent has specifically averred to the following:

> "I accept that I was sentenced for the offences mentioned ….on the 14th September 2005 and that I had been notified of this court date (17th August 2005). I had already purchased flight tickets to Ireland, where I intended to seek employment. My flight was booked for the 14th of September 2005, and so, approximately one week after receiving the notification of the court date, I went to the Gdynia Prosecutor's office and asked if I needed to be present at the court hearing on that date. I explained that I intended travelling to Ireland on that date. I was informed that I did not have to be present in court and that the matter would be dealt with in my absence, because I had already admitted to committing the offences in preliminary hearings at the police station and at an Attorney's office. Under Polish law, one may admit an offence at these preliminary stages and then is not under an obligation to be present at the court hearing".

In fairness to the respondent, the applicant does seek to take issue with any of this and nothing has been put forward from the issuing judicial authority to suggest that the respondent was under an obligation to be present in court on the 14th of September 2005.

The applicant goes further and suggests that when the Polish Court decided to reactivate his sentence, or more correctly to lift the suspension of it, his father made an application on his behalf to have the sentence then "postponed". Although this is a relief unknown to the Irish Courts this Court is aware from numerous other EAW cases involving Polish respondents, and on that basis is prepared for the purposes of this case to take judicial notice of it, that such applications are regularly made before the Polish courts. The respondent says that in his case he was successful and that, notwithstanding the lifting of the suspension of the sentence of the 30th of May 2004, the requirement that he should report to serve that sentence was postponed (although it is not clear whether this was for a finite period or indefinitely). However he claims that the postponement was subsequently revoked as a result of a complaint made to the prosecutor's office in Poland by two other Polish persons resident in Ireland with whom he was in dispute over non-payment of rent.

Unfortunately, from his perspective, this must be regarded by this Court as unsupported assertion. He exhibits no documents, or adduces no other form of evidence, to support it. It appears, however, that his reason for adducing this evidence is to suggest that, notwithstanding his conviction on the 14th of September, 2005, and notwithstanding that that rendered the lifting of the suspension of his sentence "obligatory", it was still by no means certain that he would ultimately have to serve the sentence imposed upon him on the 30th of May 2004. As against that, the Court is mindful of the remark of Macken J in the *Sliczynski* case (cited above) that:

> "It is axiomatic that if the terms and conditions of a suspended sentence are not met, there is a likelihood of the suspensions being lifted and the sentences having to be served."

I considered that, while aspects of the respondent's evidence lacked sufficient cogency, overall the respondent had adduced sufficiently cogent evidence to preclude the Court from dismissing his objection *in limine*. The Court then, having carefully considered all of the evidence adduced on this issue, concluded , on balance, and acknowledging the borderline nature of the case, that it could not be "satisfied" that respondent did in fact leave Poland for the purpose of evading justice as opposed to leaving to find employment to enable him to provide financial support for his estranged wife and children as he contends. The Court has been impressed in particular with the fact that has produced cogent evidence that he did advise the authorities in Poland of his plans, and as to how he might be contacted. Further, there is in this case no evidence, direct or inferential, that he was under any restriction in terms of going abroad. Indeed, the evidence tends the other way. Moreover, while he must have been aware that there was a likelihood of the suspension being lifted and of the sentence of the 30th of May 2004 ultimately having to be served, the Court is prepared in the particular circumstances of this case to give him the benefit of the doubt that he may not have expected to have to do so imminently, that he may genuinely have harboured some hope of securing a postponement (either finite or indefinite), and that at the time he came to Ireland he may indeed have been prepared to return to Poland to face his fate when or if the need to do so arose.

The fact that there was ultimately a failure by the respondent to return to Poland to serve his sentence, necessitating the issuance of a European Arrest Warrant, is not really relevant to what his state of mind was at the time that he came to Ireland.

In all the circumstances the Court has not been satisfied as to flight. Accordingly, as complete fulfilment of the preconditions to surrender set out in of s.10 of the 2003 Act has not been demonstrated, the Court has decided not to surrender the respondent.

The s. 22 point – anticipated breach of the rule of specialty
The respondent had also raised a further objection to his surrender based upon s. 22 of the 2003 Act. The respondent's case in that regard was that, in all the circumstances of this case, it would be reasonable for the Court to apprehend an intention on the part of the issuing state to also require him, upon, or subsequent to, being surrendered, to serve the sentences imposed upon him on the 14th of September 2005 in breach of the rule of specialty.

As the Court has already decided on foot of the s. 10(d) objection that it is inappropriate to surrender the respondent it is not necessary for it to consider, or render a decision upon, this secondary objection and it does propose to do so.