

THE HIGH COURT

Record Number: 2009 289 EXT

Between:

Minister for Justice, Equality and Law Reform

Applicant

And

Dawid Piskunowicz

Respondent

Judgment of Mr Justice Michael Peart delivered on the 24th day of November 2010:

The surrender of the respondent is sought on foot of a European arrest warrant which issued in Poland on the 28th April 2009. That warrant was endorsed for execution here on the 11th November 2009, and the respondent was arrested here on foot of same on the 3rd May 2010, and, as required, was brought before the High Court on that date.

No issue arises as to the respondent's identity, and I am satisfied from the affidavit of Garda Paul McHugh that the person who he arrested on that date and brought before the Court is the person in respect of whom this warrant has been issued.

Surrender is sought so that he can serve a sentence of 10 months imprisonment which was imposed following his conviction for an offence of driving a motor vehicle on the 3rd January 2006 while under a disqualification from driving.

I am satisfied that this offence corresponds to the offence in the State of driving while not holding a valid driving licence contrary to section 38 of the Road Traffic Act, 1961, as amended. No issue has been raised to the contrary by the respondent.

Minimum gravity is met by the length of sentence imposed on the respondent.

There is no reason under sections 21A, 22, 23 or 24 of the Act of 2003 to refuse to order his surrender.

Points of Objection pursued on this application are firstly that the respondent did not flee Poland within the meaning of that phrase in section 10 of the European Arrest Warrant Act, 2003, as amended ("the Act of 2003"), and that an undertaking is required under section 45 of that Act as, according to the respondent, he was convicted and sentenced in his absence.

Section 10 – 'fleeing':

In paragraph D of the warrant headed "Decision rendered in absentia", the issuing judicial authority has deleted both paragraphs which enable the issuing judicial authority to indicate whether the decision was rendered in absentia, and if so what guarantees exist for a retrial after surrender, or alternatively stating that the respondent was summoned in person or otherwise informed of the date, and place of the hearing which led to the decision rendered in absentia.

In his first affidavit to ground his points of Objection the respondent sets out various matters relevant to the issues raised. He accepts that he was driving a motor car on the 3rd January 2006 in Poland as stated in the warrant and that having been apprehended by the police he immediately signed a statement admitting the offence, after which he was released and told that he would hear further about the matter. He states that he was not charged with any offence, and that he was not released on any bail. He states that he was cautioned that he could not drive. He goes on to state that at that time he was unemployed and needed to get a job as his wife was expecting their third child, and their second child was suffering from a severe illness, and he needed to get a job in order to pay for that child as there is no free medication available in Poland. He states that having been offered a job in Germany he travelled there *"some two to three weeks after the date of the alleged offence"*, and that he returned home on a few occasions to his wife and children at weekends. He states that while his wife went to live with her parents at this time she returned to their home on a regular basis to collect personal belongings and any correspondence, and that they returned permanently to their home in May 2006. He states also that at no time was any documentation forwarded to his address and that he was never notified of any court hearing date and was never summoned to appear in court in relation to this offence. He states that having gone to Germany for work in January 2006 he worked there illegally, but that from September 2006 he worked legally, until he returned to Poland in late January 2007 where he remained until April 2007 when he himself left Poland. His wife and children, according to his affidavit, left Poland later in the year, namely in October 2007. He states that at no time while he was living at his address in Poland was he served with any documents in relation to this offence.

Following the filing of this affidavit, further information was obtained by the Central Authority from the issuing judicial authority. A letter dated 14th July 2010 contains information in relation to the circumstances in which the sentence was imposed and the notification of the sentence to the respondent. According to the information provided in this letter, the respondent was interrogated by the Polish police on the 27th January 2006 and he pleaded guilty to the offence *"and agreed to be sentenced under Article 335.1 of the Penal Code to a sentence agreed with the prosecutor of 10 months of prison sentence with a temporary suspension of the execution of the punishment for a 3 year trial period and a fine of 30 daily rates of 10 PLN each."*

This letter goes on to state that *"the notification about the date of the proceedings in order to make a sentence without a trial was picked up by the accused's wife Ewa Piskunowicz on 3 March 2006"*.

It states also that a copy of the verdict of the court on the 3rd March 2006 was delivered to the respondent at the address which the respondent had given and that the letter was picked up by his wife Ewa Piskunowicz on the 7th March 2006.

The respondent has stated subsequently that "Ewa" is in fact his mother and not his wife.

The letter from the issuing judicial authority goes on to state that after this verdict became enforceable, in fact the respondent filed

two petitions, on the 21st April 2006 and 16th May 2006 respectively, in which he requested a remittal of the fine and legal costs or alternatively to be permitted to pay them in instalments, and that by a decision made on the 15th October 2007 the Court ordered the execution of the 10 month sentence, and that the respondent *"was sent summons at the address indicated by him but he failed to pick up the summons although two notes were left – therefore the summons is regarded as properly delivered"*.

This letter states in addition that this decision dated 15th October 2007 *"was collected personally by [the respondent] on the 19th October 2007 and he did not make an appeal"*, and that following a further petition filed on the respondent's behalf by a Polish lawyer seeking a suspension of the execution of the prison sentence, this was rejected by the court of second instance.

This letter concludes that as far as any retrial is concerned, this is impossible *"because all notifications and summons about the dates of proceedings and copies of the decisions were delivered correctly in accordance with the regulations of the Polish penal code."*

In addition to that letter, the Polish authority has provided a photocopy and English translation of the document by which the respondent admitted his guilt at the interrogation on the 27th January 2006. It is signed by the respondent. The body of this document contains the following paragraph as translated:

"The suspect explained: Today at the Police Station in Czaplinek, after having been instructed about the rights and duties of a suspect I was presented with a charge, the content of which I fully understood. I admit to having committed the offence presented in the charges and I choose my right to make explanations or answer any questions. At the same time I would like to add that according to art. 335.1 p.c. I agree to being sentenced without a trial and punished as it was agreed in a telephone conversation with the prosecutor Dorota Szykaruk i.e. 10 months of prison sentence with a temporary suspension of the sentence for a trial period, fine of 30 x 10 PLN, according to art. 71.1 p.c. and costs as well as court costs. I would like to add that I have not taken advantage of the right to see into the files after the commencement of the proceedings. That is all I have to explain in this case. After personal reading of this text I sign it as true and correct. The content of the protocol is in accordance with my explanation. I read it in full and confirm its correctness with my signature."

The respondent has sworn a second affidavit on the 1st November 2010 in order to address the matters arising in the said letter from the Polish judicial authority. He has exhibited his marriage certificate which confirms that his mother's forename is "Ewa", and he has exhibited also a copy of a document which shows that he registered with the authorities in Bonn in relation to employment which he commenced there on the 15th September 2006. This is the date from which he has stated that he was working legally in Germany, and he reiterates that from February 2006 to that date in September 2006 he had been working in Germany but illegally. There is therefore no documentary corroboration of his assertion in that regard. He accepts that it was on the 27th January 2006, and not as previously averred the 3rd January 2006, that he admitted his guilt in relation to the offence. He goes on to state that neither he nor his wife Monika were ever served with any summons to appear in court on the 3rd March 2006, and that he was not aware that this hearing was taking place on that date and accordingly that when he left Poland in February 2006 he did not 'flee'.

This affidavit contains an averment that on the 27th May 2007 he travelled from Berlin to Dublin by Ryanair, but that he has been unable to locate a copy of the ticket that he used on that occasion. That averment sits uncomfortably beside averments in his previous affidavit where he stated, firstly, at paragraph 17 thereof: "I returned permanently to my apartment in Czaplinek in late January 2007 and lived there until April 2007", and secondly at paragraph 21 where he stated: "I say that I have been out of Poland since April 2007.....". The clear impression from these averments is that he went back to Poland "permanently" in January 2007 and travelled to Ireland from Poland. But it now appears that he went to Germany again before coming to Dublin from Bonn at the end of May 2007. This second affidavit then goes on to give details of when his wife and children came to Ireland to join him here, and to state that he was working here as a carpenter since December 2007. He has exhibited a letter dated 7th December 2007 from his employer here who states that the respondent *"is currently employed with us as a trainee joiner"*. It does not state on what date this employment commenced, but on the other hand, the respondent has also exhibited a P60 signed by the same employer which notes the date of commencement of employment as "27/08/07".

He avers also that he was never notified of the application to activate the 10 year sentence which occurred in October 2007 since he was in Ireland at that time. Referring to the fact that the Polish authorities have stated that he personally collected the copy decision made on the 15th October 2007 by which the sentence was activated, a copy of the signed postal delivery receipt has been produced by the Polish judicial authority who believes that the signature of the person signing for this document as the addressee is the respondent's own signature. If one looks at that signature and compares it to the signature of the respondent on affidavits and exhibits in these proceedings, I have to say that there is an uncanny resemblance to the, admittedly, untrained eye. If that is true, it would certainly damage the overall credibility of the respondent and cause concern as to whether his averments in relation to not receiving other relevant notifications are correct, and whether he can be relied upon in relation to the date on which he allegedly left Poland and worked illegally there up to 15th September 2006 and legally thereafter. If he did not leave Poland until after February 2006 and nearer to September 2006 when he first registered there, it leaves open the question of whether he may have received the notification of his hearing date for the 3rd March 2006 following his agreement to being dealt with without a trial.

Submissions:

Section 10 – fleeing:

Ms. Carey for the respondent submits that the evidence of the respondent should be accepted when he states, as he does, that his reason for leaving Poland for Germany at the end of January/early February 2006 was so that he could seek employment in Germany in order to provide for his family, and points to the fact that as of that time, given his admission of guilt and his acceptance of an agreed penalty on the 27th January 2006 there was no impediment in the form of conditions which prevented him from lawfully leaving Poland as he did. It will be recalled that he agreed to a penalty of 10 months imprisonment suspended for three years and subject to payment of certain monetary sums. However, the respondent states that he returned again to Poland, according to his affidavit, in January 2007 and remained there until April 2007. Ms. Carey submits however that the Court should accept that at the time he departed again in April 2007 he still was not fleeing as by that time the sentence of 10 months had not been activated. That activation did not occur until 15th October 2007. She submits that the evidence put forward that it was the respondent himself who personally signed for the notification of the court's decision dated 15th October 2007 activating the sentence should not be accepted given the respondent's denial that the signature is his signature and given his averment that he was in this country on that date. In this regard I have referred to the respondent's P60 which notes the date of commencement of the respondent's employment here as the 27th August 2007.

The submission by Ms. Cummings for the applicant is that this subjective reason for leaving in February 2006 should not be accepted

at face value, given the temporal proximity between that admission and agreement to penalty on the 27th January 2006 and his departure from Poland immediately thereafter. It is submitted that he must be taken as knowing that if he failed to discharge the monetary sums involved the sentence would be activated and that he would be required to serve that sentence. She submits that the Court should not accept the respondent's denial that he signed for the notification of the activation of the sentence, and that it is more probable that it was after the 19th October 2007 that the respondent came to this country and that he did so in order to avoid that sentence which had by then been activated.

On the balance of probabilities I believe that the respondent's evidence should be accepted as to his reason for leaving for Germany in February 2006. Fleeing implies an intention to avoid justice. This sentence to which the respondent had submitted under the procedures available in that regard by the Polish Penal Code had been suspended for a period of three years. The only conditionality appearing to attach thereto was not to commit any further such offence and to discharge a monetary amount as referred to above. These conditions would not appear to present any bar to leaving the country, and it would not be unreasonable to accept that the respondent, unemployed as he was at that time, left for Germany in early 2006 for economic reasons rather than for the purpose of avoiding the penalties. As to his second departure in 2007, I believe that the evidence from his P60 to the effect that he started in employment here at the end of August 2007 is sufficient objective evidence that he was here at that time, and therefore that he left Poland again prior to his being aware, if he was so aware later, that the sentence had been activated.

In these circumstances, I am prepared to accept that for the purpose of section 10 of the Act of 2003, the respondent is not a person who fled the issuing state in the sense that that word must be construed for the purpose of that provision.

Being of that view, there is no need to consider whether in the unusual circumstances of this case where the respondent admitted his guilt without any need for a trial and agreed to a particular penalty, an undertaking would be required as to a retrial upon surrender, even if the Court was to accept the respondent's evidence that he was not notified of the hearing date for 3rd March 2006, or the later activation hearing for the 15th October 2007.

For these reasons I refuse the application for an order for the surrender of the respondent, and discharge him.