Neutral Citation [2013] IEHC 101

THE HIGH COURT

Record No.: 2011/317 EXT

BETWEEN/

THE MINISTER FOR JUSTICE AND EQUALITY

Applicant

- AND -

MARIUSZ CZESLAW CIESIELSKI

Respondent

JUDGMENT of Mr Justice Edwards delivered on the 15th day of February, 2013

Introduction:
The respondent is the subject of a European arrest warrant issued by the Republic of Poland on the 4th August, 2008. The warrant was endorsed by the High Court for execution in this jurisdiction on the 21st September, 2011 and it was duly executed on the 10th of May, 2012. The respondent was arrested by Garda Declan Conlon on that date, following which he was brought before the High Court on the following day pursuant to s. 13 of the European Arrest Warrant Act 2003 (hereinafter "the Act of 2003"). In the course of the s. 13 hearing a notional date was fixed for the purposes of s. 16 of the Act of 2003 and the respondent was remanded on bail to the date fixed. Thereafter the matter was adjourned from time to time ultimately coming before the Court on the 19th December, 2012, for the purposes of a surrender hearing.

The respondent does not consent to his surrender to the Republic of Poland. Accordingly, this Court is now being asked by the applicant to make an order pursuant to s. 16 of the Act of 2003 directing that the respondent be surrendered to such person as is duly authorised by the issuing state to receive him. The Court must consider whether the requirements of s. 16 of the Act of 2003, both controversial and uncontroversial, have been satisfied and this Court's jurisdiction to make an order directing that the respondent be surrendered is dependant upon a judicial finding that they have been so satisfied.

Uncontroversial s. 16 issues:
The Court has received and has scrutinised a true copy of the European arrest warrant in this case. The Court has of its own initiative taken the opportunity to inspect the original European arrest warrant which is on the Court's file and which bears this Court's endorsement. Counsel for the respondent has confirmed that no issue arises as to either the arrest or identity.

The Court is satisfied following its consideration of these matters that:

(a) the European arrest warrant was endorsed for execution in this State in accordance with s. 13 of the 2003 Act;

(b) the warrant was duly executed;

(c) the person who has been brought before the Court is the person in respect of whom the European arrest warrant was issued;

(d) the warrant is in the correct form;

(e) the warrant is a conviction type warrant and the respondent, having been sentenced to "1 year's deprivation of freedom" by the District Court in Poznañ on 13th July 2005, and which sentence was initially conditionally suspended for a three year probationary period but was subsequently ordered to be executed by the District Court in Poznañ on 15th September 2006, in case reference no. VK625/05, in respect of the single offence particularised in Part E of the warrant, is wanted in Poland to serve the said sentence of 1 year's deprivation of freedom.

(f) Both correspondence and minimum gravity require to be demonstrated in the circumstances of this case;

(g) The threshold for the purposes of minimum gravity is that the respondent should have received a sentence of at least four months imprisonment or detention in the issuing state. The sentence imposed in this case was one of 1 year's deprivation of freedom and so the minimum gravity requirement is satisfied;

(h) There are no circumstances that would cause the Court to refuse to surrender the respondent under ss. 21A, 23 or 24 of the Act of 2003 as amended.

In addition, the Court is satisfied to note the existence of the European Arrest Warrant Act 2003 (Designated Member States) (No. 3) Order 2004 (S.I. No. 206/2004) (hereinafter "the 2004 Designation Order"), and duly notes that by a combination of s. 3(1) of the Act of 2003, and Article 2 and the Schedule to the 2004 Designation Order, "Poland" (or more correctly the Republic of Poland) is designated for the purposes of the Act of 2003 as being a State that has under its national law given effect to Council Framework Decision 2002/584/J.H.A. of 13th June 2002 on the European arrest warrant and the surrender procedures between Member States, O.J. L190/1 18.7.2002 (hereinafter referred to as "the Framework Decision")..

The Offence as described in the Warrant
The offence to which the warrant relates is described in the following terms in Part E of the warrant:

On March 8th in Poznañ he drove a Renault motor vehicle, registration number PO 7S92P while under the influence of alcohol – Tests showed the amount of alcohol in his exhaled breath to be : 1,39 mg/l and 1,31 mg/l

This is an offence under Art 178 - § 1 of the Penal Code.

The Points of Objection:
The respondent filed a Notice of Objection on the 29th June, 2012. This document contains twelve points of objection set out in numbered paragraphs. No objections were formally withdrawn at any stage. However, only some of them were addressed in oral argument.

The relevant points were

1. The Respondent's surrender is prohibited as:

(a) he was not present when he was tried for and convicted of the offences and each of them specified in the European Arrest Warrant and/or

(b) he was not notified of the time when, or the place at which, he would be tried for the said offences and each of them and/or

(c) he was not permitted to attend the trial in rcspect of the said offcnccs and each of them and/or

(d) the Issuing Judicial Authority has failed to give an undertaking in writing for the purposes of Section 45 of the European Arrest Warrant Act, 2003 (as amended) that the Respondent will, upon being surrendered:

(i) be retried of the said offences and each of them and/or be given an opportunity of a retrial of the said offences and each of them;

(ii) be notified of the time when, and the place at which any retrial or retrials in respect of the said offences and each of them will take place, and

(iii) be permitted to be present when any such retrial or retrials of the said offences and each of them takes place.

2. Further, or in the alternative and without prejudice to the foregoing, the

Respondent's surrender is prohibited as:

(a) he was not present when the suspended sentence dated the 13th July 2005 was reactivated/revoked; and/or

(b) he was not notified of the time when, or the place at which, the hearing to reactivate/revoke the suspended sentence would take place and/or

(c) it was represented to him by the Republic of Poland, its servants or agents that on the commission of a second offence during the currency of the suspended sentence same would not be reactivated/revoked and/or

(d) it was represented to him that the suspended sentence would not be reactivated/revoked until such time as he committed a further offence and/or

(e) the Respondent relied upon this representation and the Republic of Poland, its servants or agents, was aware that the Respondent relied thereon and in the circumstances he had a reasonably held belief, or a legitimate expectation that the suspended sentence would not be reactivated/revoked and the Republic of Poland is now bound by the said representations and is estopped from seeking his return.

3. Further, or in the alternative and without prejudice to the foregoing, the warrant fails to comply with Article 8(l)(e) of the Framework Decision and/or Section 11 (lA)(f) of the European Arrest Warrant Act, 2003 as amended by section 72 of the Criminal Justice (Terrorist Offences) Act 2005 in that the warrant fails to specify the circumstances in which the offence was committed or is alleged to have been committed, including the time and place of its commission or alleged commission, and the degree of involvement or alleged degree of involvement of the Respondent in the commission of the offence.

4. Further, or in the alternative and without prejudice to the foregoing, the warrant fails to comply with Article 8(1)(c) of the Framework Decision and/or Section 11 (lA)(e) of the European Arrest Warrant Act, 2003 as amended by section 72 of the Criminal Justice (Terrorist Offences) Act 2005 in that it fails to disclose whether the Decision upon which the warrant is based is the Decision of the 13th July 2005, sentencing the Respondent to one year in prison (conditionally suspended for three years) or the "Wanted Notice" dated the 15lh June 2007 and is therefore uncertain in a material respect.

5. Further, or in the alternative and without prejudice to the foregoing, a "Wanted Notice" does not with comply with Article 8(1)(c) of the Framework Decision and/or Section 11 (lA)(e) of the European Arrest Warrant Act, 2003 as amended by section 72 of the Criminal Justice (Terrorist Offences) Act 2005 in that it is not "*a warrant for his... arrest, or other order of a judicial authority in the issuing state having the same effect*."

6. Further, or in the alternative and without prejudice to the foregoing, surrender of the Respondent should be refused as the warrant fails to disclose an explanation for the delay in transmitting the warrant and the Respondent has changed his position in the legitimate expectation that the matter would not be pursued. In particular the warrant issued on the 4th August 2008 and at paragraph A (11) thereof indicates that the Polish Authorities knew that the Respondent was in Ireland yet the warrant was not transmitted to this jurisdiction until 9th September 2011 (under cover letter dated 6th September 2011).

7. Further, or in the alternative and without prejudice to the foregoing, surrender of the Respondent in respect of the offences described in the warrant is prohibited by Section 5 of the European Arrest Warrant Act, 2003 as amended by section 72 of the Criminal Justice (Terrorist Offences) Act 2005 and/or section 38 of the 2003 Act as amended by section 17 of the Criminal Justice (Miscellaneous Provisions) Act 2009 and/or Article 2(4) and/or Article 4(1) of the Framework

Decision as the offcnces and each of them as described in the Warrant do not correspond in their entirety or at all to an offence or offences under the laws of the State and/or the facts as disclosed in the warrant are insufficient to correspond to an offence or offences under the laws of the State. The Respondent humbly requests that this Honourable Court make enquiry as to correspondence in respect of each offence.

8. Further, or in the alternative and without prejudice to the foregoing, surrender of the Respondent in respect of the offences described in the warrant is prohibited by Section 5 of the European Arrest Warrant Act, 2003 as amended by section 72 of the Criminal Justice (Terrorist Offences) Act 2005 and/or section 38 of the 2003 Act as amended by section 17 of the Criminal Justice (Miscellaneous Provisions) Act 2009 and/or Article 2(4) and/or Article 4(1) of the Framework Decision as the offences and each of them which constituted the basis for the lifting of the suspension in the Warrant do not correspond in their entirety or at all to an offence or offences under the laws of the State and/or the facts as disclosed in the warrant are insufficient to correspond to an offence or offences under the laws of the State. The Respondent humbly requests that this Honourable Court make enquiry as to correspondence in respect of each offence.

9. Further, or in the alternative and without prejudice to the foregoing, surrender of the Respondent in respect of the offences and each of them outlined in the Warrant is prohibited as the Respondent is not a person who '*fled*' the Republic of Poland for the purposes of Section 10 of the 2003 Act (as substituted by Section 71 of the Criminal Justice (Terrorist Offences) Act, 2005 and amended by section 6 of the Criminal Justicc (Miscellaneous Provisions) Act 2009) as the Respondent left the Republic of Poland for the purposes of starting a new life.

10. Further, or in the alternative and without prejudice to the foregoing surrender of the Respondent is prohibited by section 22 of the 2003 Act (as inserted by section 80 of the Criminal Justice (Terrorist Offences) Act 2005) as the Respondent holds a well founded fear that if surrendered to the Republic of Poland he will be proceeded against, sentenced, or detained for the purposes of executing a sentence or detention order, or otherwise restricted in his personal liberty, in respect of an offence or offences which is/are not the stated basis of the warrant the subject matter of these proceedings. In particular the warrant discloses that:

"*During the probation period, that is on 17th December 2005, the convict committed a further intentional similar offence under art. 178a § 2 of the penal code for which the District Court in Nowy Dwór Mazowiecki, dated 6th April 2006, court reference VK 36/06, sentenced him to a penalty of 1 year's deprivation of freedom the execution of which was conditionally suspended for a 3 year probationary period. That judicial decision became legally binding on 5th May 2006 and is executable*. "

11. Further, or in the alternative and without prejudice to the foregoing, the surrender of the Respondent is prohibited pursuant to section 37 (l)(a) and/or section 37 (l)(b) of the European Arrest Warrant Act, 2003 and/or under the Framework Decision as:

i. The Respondent believes that if surrendered to the Republic of Poland that there is a real risk that he would suffer treatment constituting a breach of his family rights under Article 8 of the European Convention on Human Rights;

ii. Further or in the alternative, if the Respondent is surrendered there is a real risk that his family and each or other of them would suffer treatment constituting a breach of family rights under Article 8 of the European Convention on Human Rights;

iii. Further or in the alternative, the surrender of the Respondent would be a disproportionate interference with the Respondent's said rights and the said rights of his family and each or other of them.

12. Further, or in the alternative and without prejudice to the foregoing, to Order the surrender of the Respondent would be a disproportionate interference with his rights and/or his family's rights under Article 8 of the European Convention on Human Rights and Article 7, 14, 15, 24, 33 and 45 of the Charter of Fundamental Rights of the European Union (due to *inter alia* but not limited to delay and/or defects in the warrant and/or the nature of the offence) and as a consequence surrender of the Respondent would be in breach of Section 37 of the European Arrest Warrant Act, 2003."

The Evidence relied upon by the Respondent

The respondent relies upon a number of affidavits in support of his objections. The first, and principal, affidavit on which he relies is an affidavit sworn by him on the 31st July, 2012. In that affidavit he avers:

"3. As appears from the warrant I was sentenced on the 13th July 2005 to 1 year imprisonment, which was suspended for a period of 3 years, for an offence contrary to Article 178a §1 of the Polish Penal Code (Act of 6 June 1997).

4. I say that at the time of this offence I working as a driver and I was driving a company vehicle. I say that initially after being stopped I was brought to a sobering up station but was not admitted and conveyed to a Police Station, in what I perceived to be the centre of Poznan city, at around 4 a.m. I spent from that time until around midday at which time I was brought from the cells to an interview room. It was my understanding that the Police were in contact with the prosecutor by way of telephone. The police informed the prosecutor of the circumstances and that the prosecutor wished to present me with a 1 year sentence to be suspended for 4 years. The Prosecutor agreed to a sentence of 1 year which was to be suspended for 3 years.

5. I say that while I was in custody I emphasised that I needed legal advice and I explained that I did not have sufficient funds to obtain a lawyer and asked that a lawyer be provided for me.

6. As a result of this matter my employment was terminated by my employer shortly after being stopped and I had no transport of my own. The Police retained the work vehicle and I had to hitchhike back to my home town of Nowy Dwór Mazowiecki. I say that this is not something that I would normally contemplate unless it was an emergency situation but I was stranded and did hitch hike.

7. I say that the European Arrest Warrant is correct in that I was not present in the Poznan Court on the 13th July 2005 when I was convicted and sentenced as aforesaid.

8. During the period of suspension, namely on the 17th December 2005 I was arrested on suspicion of cycling a bicycle (push bike) while intoxicated (Art. 178a § 2 of the penal code).

9. In respect of this offence I say that I had finished work and I was traveling (sic) home on my bicycle. It was my birthday. I went into a shop and purchased two cans of beer. I say that I say that I was stopped by the Police 5 Kilometres from my then home in Nowy Dwór Mazowiecki. I say that the Police were not from the area but from Warsaw and were part of an operation dealing with drink driving. Having indicated that a friend of mine lived nearby I was directed to leave my bicycle in this friend's house and the Police took me home. I say that I was not taken to a Police Station.

10. I was notified after Christmas (around end of January or start of February) to attend at the Police Station in Pomiechowek, which is about 12 kms from my home. I met with someone who appeared to be in charge (the Regional Sergeant or Commissioner). This person asked me to leave the room so that he could contact the prosecutor's office. After the Police Officer had spoken to the Prosecutor I was asked to come back into the room. The Police said that the Prosecutor had been informed of the alleged (as it was at the time) offence of cycling while under the influence and the fact that I had previously convicted of drink driving and that there was a suspended sentence.

11. They said to me that it was a minor matter, that I would not be prosecuted and that no application would be made to re-activate the suspended sentence. I was told by the Police Officer that he had spoken to the Prosecutor who confirmed that the offence was "*nothing to worry about*" and that if I was to commit another offence then an application would be made to re-activate and in respect of the offence I would get a two years sentence (the maximum under Article 198 (1)) I was told not to expect any summons in the post and as far as I was led to believe it was the end of the matter.

12. Contrary to the representations of the Prosecutor made through the Police I was in fact prosecuted and was convicted on the 6th April 2006 at the District Court in Nowy Dwór Mazowiecki. I was sentenced to a penalty of 1 year's imprisonment which again was suspended. I say that according to the warrant the maximum sentence for an offence under Art. 178a § 2 of the penal code is 1 year and in the circumstances I received the maximum (albeit suspended) in my absence. It is as a result of this conviction that the suspended sentence dated 13th July 2005 was reactivated.

13. I say that I was lulled into a false sense of security by the Police as I believed that no further action would be taken. I say that Polish Authorities are now bound by these Representations.

14. I say that I was not given an opportunity to attend the trial (or any part thereof) wherein the Court determined to question of guilt and innocence. I say that I was not served with this summons or any other documentation which would inform me of the time, date or place of the hearing and I was not aware of same. I say that I would have attended the hearing as the Court is in my home town and I would have made the Court aware of the Representations made to me by the Police.

15. I say that I was not personally served with a copy of the Order or decision in respect of this decision or sentence. If I had been given a copy of the decision I would have appealed as I believed that I was not going to be prosecuted for the offence and the implications of a conviction were serious given that I already had a suspended sentence from the 13th July 2005. I say that I am endeavouring to ascertain whether or not I can appeal this decision.

16. I say that following my conviction (in absentia) for the offence of cycling under the influence the Poznan Court sought to reactivate the suspended sentence dated the 13th July 2005 in respect of the drink driving offence on the 15th September 2006. Due to my dire financial circumstances I was not able to travel to Poznan for the hearing of the matter. I say that I wrote to the Poznan Court to inform it of my dire financial situation and lack of transport as a result of losing my job and that I would not be able to travel the 300kms to be there. I say that I lived in Nowy Dwór Mazowiecki which is 300km away from where the Court in Poznan was sitting.

17. I say that the reactivation of the suspended sentence was carried out in my absence. I say that if I could I would have attended and made the Court aware that I was convicted of the cycling under the influence contrary to the representations of the Prosecutor made to me through the Police in Pomiechowek.

18. I say that I felt aggrieved by the fact that I had been convicted of the offence of cycling under the influence as I had an honestly held belief that I was not going to be prosecuted for the offence and that the suspended sentence would not be reactivated due to the representations of the Police.

19.1 say that the Court did not assign free legal representation. I say that I did not make an application as I was not in Court to make such an application due to my financial situation. I was not aware of whether or not an application for free legal representation could be made by way of a letter to the Court or some other method that did not require my attendance. If I was aware that an application for legal assistance could have been made by way of a letter I would have done so as I was writing to the Court in any event to say that I could not attend.

20. I say that I came to Ireland in 2007. I obtained work shortly after coming to this jurisdiction in National Linen, in Fonthill Park, Clondalkin. Since then I worked with Cuisine de France, first through an agency and thereafter on a direct contract.

21. Since arriving in Ireland, I have lived openly and never sought to conceal my identity. The Polish authorities have been aware that I have been in jurisdiction since at the very latest the date of issuing of the European Arrest Warrant the subject matter of these proceedings. I say that the Police made enquires in the Republic of Poland as to my whereabouts some time before the issuing of the warrant and at the date of swearing the Polish Authorities have not explained the delay in transmitting the warrant to this jurisdiction.

22. I say that I suffer from back pain and knee pain and I need to have a hernia operation. I say that I am endeavouring to obtain full details of my medical position.

23. I pray this Honourable Court to refuse my surrender."

The respondent also relies upon a supplementary affidavit sworn by him on the 14th December, 2012, for the purpose of exhibiting an e-mailed letter from his Polish lawyer, Solicitor Mariusz Stelmaszczyk, dated the 3rd December, 2012, and sent to his Irish Solicitor stating (*inter alia*):

"4. Plans for the abolition of the punishment for an offence of riding a bicycle while intoxicated have been appearing for quite some time. Currently a proposal was made in the Parliament by the Council of Ministers to abolish the offence of the riding a bicycle while intoxicated. According to the project this type of behavior will stop being a crime. It is to be treated as a misdemeanor. It is not know if the project will be accepted and when this is going to happen. According to my assessment, it is not going to happen earlier than in six months. In addition, the draft of the legislation provides that, after the amendment if adopted, it will be enter in to force only after six months. In my estimation, the adoption of this amendment to the criminal law will not affect the situation of Mr. Mariusz Ciesielski because he is to be imprisoned for driving a car under the influence of alcohol."

The respondent also relies upon a further supplementary affidavit sworn by him on the 19th December, 2012, exhibiting another, but earlier, letter from the same Polish lawyer, i.e., a letter dated the 13th July, 2012, which states (*inter alia*):

"6. Mariusz Ciesielski was sentenced for 1 year of imprisonment by The Court in Poznan on 13.07.2005 for an offence of driving while intoxicated. The Court suspended execution of this sentence for period of 3 years. During this trial period Mariusz Ciesielski wasn't allowed to commit an offence similar to the offence for which he was convicted. However, during his trial period Mariusz Ciesielski committed a similar offence i.e. riding a bicycle while intoxicated. As a consequence, The Court of Nowy Dwór Mazowiecki sentenced him for 1 year of imprisonment for the offence. This sentence was suspended by the court. The subsequent sentence for a similar offence gave grounds for the court to activate previously imposed sentence in relation to Mariusz Ciesielski for driving a car while intoxicated. This was done in accordance with Polish criminal law. The Court ruled to activate this penalty and summoned Mariusz Ciesielski to report himself to prison. Mariusz Ciesielski didn't report himself to prison. As a consequence, the court decided to arrest him and issue a wanted letter. After establishing that Mariusz Ciesielski resides in Ireland, the court issued The European Arrest Warrant.

7. Mariusz Ciesielski is to serve 1 year in prison for an offence of driving a car while intoxicated. This penalty was activated as a result of committing a similar offence i.e. riding a bicycle while intoxicated during his trial period.

8. The judgment announced on 13.07.2005r did not lose its legal force. Initially, the court suspended execution of the sentence imposed in relation to Mariusz Ciesielski. Then the court decided to activate this penalty due to committing a similar offence i.e. riding a bicycle while intoxicated by Mariusz Ciesielski during his trial period. The Court in Poznañ issued a decision to activate the penalty of imprisonment as late as 15.09.2006 because the court had to wait for the judgement given by The Court in Nowy Dwor Mazowiecki to become final. Then courts exchanged documents.

My comments:

1. During the process in The Court of Poznan to activate a sentence, which was imposed by The Court in Poznan on 13.07.2005, two events took place, which in the perspective of a legal code of Ireland could be considered as not compliant with fair process standards :

a) Mariusz Ciesielski was summoned to appear in court on 15.09.2006 for activation of a sentence, which was imposed by The Court of Poznan on 13.07.2005 for driving a car while intoxicated. Mariusz Ciesielski has notified the court that he couldn't attend court because he lived in Nowy Dwor Mazowiecki, which was 300 km away from the court and he couldn't afford a train fair (sic). The court didn't assigned Mariusz Ciesielski free legal representation and took his absence as inexcusable as well as took a decision to execute a sentence in his absence. This decision gave grounds later on to issue a decision of his arrest and a wanted letter.

b) The decision to activate a sentence taken on 15.09.2006 was sent to Mariusz Ciesielski by the court in mail to the address specified by him. Mariusz Ciesielski didn't collect this Court's decision. The court didn't hand in this decision to Mariusz Ciesielski by police or any other means. According to the court, this decision was considered to be delivered as the convict didn't collect it as a result of his own fault.

2. During the process in The Court of Nowy Dwor Mazowiecki in relation to riding a bicycle while intoxicated (VK 36/06), two events took place, which in the perspective of a legal code of Ireland could be considered as not compliant with fair process standards:

a) The Court of Nowy Dwor Mazowiecki sent by mail to Mariusz Ciesielski a notice of his court hearing. Mariusz Ciesielski didn't collect this notice and didn't turn up in court. The court didn't hand in this notice to Mariusz Ciesielski in any other way for example by police or bring him to court by police. The court took a view that Mariusz Ciesielski was informed and decided to sentence him.

b) The Court of Nowy Dwor Mazowiecki sent to Mariusz Ciesielski a decision by mail of his sentencing for riding a bicycle while intoxicated. Mariusz Ciesielski didn't collect it. The court didn't deliver this sentence to him by police or any other way. The court took a view that Mariusz Ciesielski didn't collect it as a result of his own fault. The sentence was considered to be final.

c) The sentence imposed by The Court of Nowy Dwor Mazowiecki in relation to Mariusz Ciesielski for riding a bicycle while intoxicated was the only reason why The Court of Poznan issued a decision to activate a suspended sentence imposed by The Court of Poznan on 13.07.2005. If the sentence of The Court of Nowy Dwor Mazowiecki wasn't imposed, it would be no reason to activate the penalty leading to The Arrest Warrent of Mariusz Ciesielski."

In addition, the respondent also deposes in this short supplemental affidavit to the fact that he has a partner for the last year and a half and he says that if he is surrendered she would not have money to visit him.

Additional Information
The applicant has adduced several pieces of additional information to supplement the information contained in the European arrest warrant itself.

On the 6th September, 2012, the Irish Central Authority wrote to the issuing judicial authority in connection with this case and stated (inter alia):

> "Attached for your attention, please see copy of the respondents Points of Objection and supporting affidavit. I would be obliged if you could please forward any comments you may wish to make in relation to the issues raised, which will then be put before the High Court by this office."

The response received was a letter of the 9th October, 2012, containing the following additional information:

> "In reply to your letter dated 6th September 2012 concerning the European Arrest Warrant in respect of Mariusz Ciesielski (your ref: 191/278/11) we wish to advise of the following;
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> 1) The respondent Mariusz Ciesielski had the right to be present at the hearing held in the course of court case V K 625/05. Notice of the hearing scheduled for 13th July 2005 was sent to his address and served on 10th June 2005 on his brother, Emilian Kucharczyk, who made an undertaking he would pass the notice on into the respondent's hands. However, Mariusz Ciesielski did not appear in court on 13th July 2005. An authenticated copy of the judgment of 13th July 2005 and guidance notes informing the respondent of his right to appeal the judgment and detailing the way of lodging an appeal were served into the requested person's own hands on 29th July 2005, as confirmed by the respondent's own signature. Mariusz Ciesielski did not exercise the right to appeal against the judgment, which consequently became final. The above information can be found in section D. 1 of the EAW.
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> 2) The above proves that the claims made by the respondent's representatives in their points of objection arc baseless, as it is not true that Mariusz Ciesielski was not informed of the time and place of the hearing and that he was not allowed to participate in the hearing.
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> 3) Consequently, no basis exists for the refusal to execute the European Arrest Warrant in respect of Mariusz Ciesielski. The judgment pronounced in his respect is not a judgment in absentia in the understanding of article 4a of the Framework Decision of the Council of 13th June 2002 on the European Arrest Warrant and surrender procedures between Member Stales. As stated above, Mariusz Ciesielski had been notified of the date of the hearing and was served with a copy of the judgment and guidance notes informing him of his right to appeal the judgment and detailing the way of lodging an appeal, but the respondent failed to exercise that right and did not appeal. The conditions set out in article 4a (1) (a) and article 4a (I) (c) (ii) of the Framework Decision of the Council of 13th June 2002 have therefore been met.
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> 4) With regard to the remaining representations made by the respondent and his representative, we wish to advise of the following:
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> - the respondent was served into his own hands with summons to the hearing scheduled for 15th September 2006, reference XXIV Ko 3263/06, where execution of the suspended custodial sentence was ordered. The respondent was therefore aware of the hearing and had the right to be present at that hearing, but did not exercise that right. Any claims to the contrary are untrue and unwarranted.
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> - officers of Polish police could not have made representations to the respondent stating that his suspended sentence would not be activated despite committing another offence while on probation, as only courts are authorised to make decisions concerning the execution of suspended sentences. Claims made by the respondent in this regard arc not only unwarranted, but also have not been in any way proven. Since both the respondent and his representative have been wide of the mark in many of their representations made in this case, we consider the claims made in this regard to be unwarranted and constitute part of the respondent's line of defence against the EAW.
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> - the EAW issued in respect of the respondent meets all the criteria set out in the Framework-Decision of the Council of 13th June 2002 on the European Arrest Warrant and surrender procedures between Member States.
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> - the EAW issued in respect of Mariusz Ciesielski does not infringe on his family rights nor is it oppressive; the warrant was issued due to the fact that the respondent failed to adhere to the terms of his probation and left Poland before his legal situation was resolved. According to enquiries made by officers of local police, Mariusz Ciesielski started hiding from the authorities when he learned of the fact that he would have to serve a custodial sentence. We have therefore every right to believe that Mariusz Ciesielski fled from Poland to evade criminal responsibility.
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> 5) According to the Framework Decision of the Council of 13th June 2002 on the European Arrest Warrant and surrender procedures between Member States, the mechanism of the European Arrest Warrant is based on a high level of confidence between the Member States, therefore a representation made by a judicial authority of Republic of Poland should be sufficient to validate the above information. Nevertheless, in order to provide further proof of the above claims, we attach documents mentioned in the text above in the form of: advices of receipt of the notice of the date of the hearing in court case no. V K 625/05, signed by Emilian Kucharczyk the respondent's brother, and a advice of receipt of an authenticated copy of the judgment pronounced in the above case, signed by Mariusz Ciesielski himself, as well as advice of receipt of the notice of the date of the hearing in the subject of executing the suspended custodial sentence, case reference no. XXIV Ko 3263/06.
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> 6) We hope the above is in order and will assist in executing the European Arrest Warrant in respect of Mariusz Ciesielski"

Additional information dated 27.11.2012

On the 21st November, 2012, the Irish Central Authority wrote to the issuing judicial authority in connection with this case and requested the following additional information:

> "(i) Please clarify whether or not the expedited procedure under the Polish penal code was applied in this case? Please clarify whether or not the respondent decided to plead guilty to the offence on the basis of an agreed sentence of one year imprisonment (suspended) to be suspended reached with the prosecutor and which was subject to approval by the court.
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> (ii) Please confirm whether or not the readings alcohol levels in his breath provided in the warrant equate to 139

micrograms per 100 millilitres and 131 micrograms per 100 millilitres at the time of driving.

(iii) Please confirm whether or not the offence was committed in a public place, that the offence was committed in a public place."

A reply was received dated the 27th November, 2012, which stated as follows:

"1) The expedited procedure under Polish criminal code was not applied in the case. The respondent did plead guilty to the offence and made an agreement with the prosecutor to be convicted and sentenced without holding a full trial. The sentence was then subject to approval by the court.

2) The readings of breath alcohol level tests provided in the warrant (1.39 mg/l and 1.31 mg/l) equate to 1390 micrograms per 1000 millilitres and 1310 micrograms per 1000 millilitres, respectively.

3) The offence was committed in a public place, on a road in the centre of the city of Poznañ (near Roosevelta and Libelta streets)."

Additional information dated 20.12.2012

Yet further, and late, additional information was received from the issuing judicial authority dated the 20th December, 2012. This stated:

"With reference to previous correspondence concerning the European Arrest Warrant in respect of Mariusz Ciesielski, we wish to advise that according to the files of case V K 625/05, the subject was stopped by Police officers on 6lh March 2005 at 03:10 AM, and the breath alcohol level tests were carried out after he was stopped, i.e.:

- 1st test was carried out at 03:26 AM, test result 1.39 mg/l

- 2nd test was carried out at 03:40 AM, test result 1.3 1 mg/l"

Correspondence – Points of Objection 7 & 8.

It is convenient to deal first with the objections to correspondence, and to deal with them in reverse order.

In objection No 8 the respondent complains that *"the offences and each of them which constituted the basis for the lifting of the suspension in the Warrant do not correspond in their entirety or at all to an offence or offences under the laws of the State*". The Court's very brief, and hopefully succinct, response to this is that there is no requirement that they should, either under the Framework Decision, or under the Act of 2003. The respondent's rendition is not being sought in connection with any offence or offences that triggered the lifting of the suspension of a sentence. He is being sought to serve a sentence imposed upon him for a single drunk driving offence, and that is the only offence covered by the warrant. Moreover it is the only offence in respect of which correspondence is required to be demonstrated.

As regards objection No 7, which does concern the offence to which the warrant relates, counsel for the applicant invited the Court to find correspondence with the offence of driving while under the influence of an intoxicant contrary to s. 49(4) of the Road Traffic Act 1961 as substituted by s.10 of the Road Traffic Act, 1994.

S.49(4) as then enacted was in the following terms:

"A person shall not drive or attempt to drive a mechanically propelled vehicle in a public place while there is present in his body a quantity of alcohol such that, within 3 hours after so driving or attempting to drive, the concentration of alcohol in his breath will exceed a concentration of 35 microgrammes of alcohol per 100 millilitres of breath."

The additional information of the 27th November, 2012, establishes that the offence was committed in a public place. Moreover, it further states that the readings of breath alcohol level tests provided in the warrant (1.39 mg/l and 1.31 mg/l) equate to 1390 micrograms per 1000 millilitres and 1310 micrograms per 1000 millilitres, respectively. To bring the latter into line with the units used in the Irish legislation it is simply a matter of dividing each figure by a factor of 10, i.e. take a nought off each. Therefore in our units the readings detected were 139 micrograms per 100 millilitres and 131 micrograms per 100 millilitres, respectively. In simple terms, the level of alcohol in the respondent's breath was measured at more than four times in excess of the legal limit in this country on the applicable date.

When the matter came before the Court initially the applicant was not in a position to demonstrate that it was being alleged that the breath tests were taken with three within three hours after he had been detected driving or attempting to drive while under the influence. Counsel for the applicant suggested that it was not required to be demonstrated as the fact in question could be readily inferred in any case on the basis that it is a widely known fact that once a person stops drinking they gradually excrete alcohol from their system metabolically. However, no authority was opened to the court to support the suggestion that a court would be justified in drawing the inference suggested from the mere fact that levels in excess of those specified in s.49(4) as amended were detected in a measurement taken at some stage after he had been stopped. Counsel for the respondent submitted that there was no evidence to ground such an inference, and that in the absence of evidence that it was being alleged that the levels of alcohol measured in the respondents breath were levels to be found within three hours after he had been detected driving or attempting to drive, correspondence could not be made out.

The controversy was rendered academic when at a late stage of these proceedings the applicant was in a position to adduce the further additional information dated the 20th December, 2012, which established beyond doubt that the samples in question were carried out no more than half an hour after he was stopped.

Counsel for the respondent further attempted to put forward the somewhat fanciful argument that though the additional information stated that the respondent was stopped by police officers at 3.10 am on the date in question, it was not clear at what time it was being alleged he had been driving or attempting to drive. In circumstances where it is stated that he "was stopped by police officers" it can be readily inferred that they stopped him from driving or attempting to drive immediately prior to that. There is nothing to suggest that he was found in charge of a "stopped" i.e. stationery, vehicle.

Returning to the "three hours" controversy, the Court wishes to state that although counsel for the applicant put no authority before the Court in support of the position adopted by her initially, the Court has since become aware that there is in fact a judgment of Peart J. in a case of *Minister for Justice, Equality and Law Reform v. Serdiuk* [2010] IEHC 242 (Unreported, High Court, Peart J., 11th June, 2010) which is directly on point. In the course of his judgment in that case my learned colleague stated:

> "It is of course true that there is nothing in the warrant which indicates at what time after the respondent was stopped by the police he was tested or how he was tested or what level of alcohol there may have been in his body at any particular time up to three hours after the driving. But I cannot agree with Mr. Farrell that a proper interpretation of s. 49(2) RTA results in the offence being committed not by reference to the time of driving but by a period up to three hours after the driving. It is important to have regard to the way the section is worded and I draw attention to the words "*will exceed a concentration of 80 ...*". It seems clear to me that the offence is committed by a person when he/she drives a mechanically propelled vehicle when he/she does so while or at a time when he/she has so much alcohol in his body at that time as will result in there still being in his body up to 3 hours afterwards a level of more than 80mgs. of alcohol per 100mls. of blood. In this way it is clear that since that level still exists up to three hours after driving, it is safe and beyond doubt in fact that at the time of driving there was more than that level. The respondent is convicted of driving while there was at the time of driving 310mgs. of alcohol per 100 mls. of blood in his body, *i.e*. more than 80mgs, of alcohol per 100mls. of blood.
>
> Mr. Farrell's submission is based on what I feel is too contrived or stretched an interpretation of the section. It is counter-intuitive to think that if a person drives in Poland with a level of alcohol in his body which exceeds the permitted level in this country, he would not commit an offence in this State if he did the same here. Apart from being counter-intuitive, it is clear that he would do so, even by reference to the clear meaning of the words used in the section."

The Court is satisfied in all the circumstances of the case that correspondence can indeed be demonstrated with the offence of driving while under the influence of an intoxicant contrary to s. 49(4) of the Road Traffic Act 1961 as substituted by s.10 of the Road Traffic Act, 1994. The Court is not therefore disposed to uphold objections 7 & 8.

S. 45 issues – Points of Objection Nos 1 & 2
It may be helpful at the outset to reproduce Part D of the warrant verbatim. It is in the following terms:

> "D. Judicial decision by default
>
> 1. The prosecuted person was personally served the summons or was informed in another manner of the date and place of the court hearing the resutt of which was a judicial judgment passed by default and after surrender the person is entitled to the following legal guarantees (such guarantees can be given earlier): ***NO DECISION BY DEFAULT WAS MADE***
>
> Mariusz Ciesielski was not present at the hearing and when the judicial decision was pronounced on 13th July 2005, court reference V K 625/06. He was properly notified, the correspondence (the criminal sheet along with the notification of the date of the hearing) was collected by the convict's brother. A copy of the judicial decision along with the grounds was also delivered to the convict He collected the correspondence himself.
>
> Mariusz Ciesielski was not present when the decision on the subject of ordering the execution of the penalty was pronounced on 15th September 2006, court reference XXIV Ko 3263/06. He was properly notified of the date of the sitting. Mariusz Ciesielski collected the correspondence himself at the address he himself gave, the correspondence delivered to that address is deemed to be delivered.
>
> or
>
> 2. The prosecuted person was not personally served the summons or was not informed in another manner of the date and place of the court hearing the result of which was a judicial judgment passed by default but after surrender the person is entitled to the following legal guarantees (such guarantees can be given earlier): [blank]"

Counsel for the respondent suggests that the evidence establishes that the respondent was tried *in absentia* for the offence to which the warrant relates. He is correct in this. It is clear from what is contained in Part D, supplemented and amplified by the additional information dated 9th October, 2012, and the respondent's affidavit of the 31st July, 2012, that he pleaded guilty having entered into a plea bargain agreement with the prosecutor which was negotiated while he was in the police station. In return for his plea of guilty the prosecutor agreed to recommend to the court a sentence of one year's imprisonment suspended for three years. He did not attend the subsequent court hearing at which a conviction was recorded against him, and at which the agreed sentence was approved and imposed. It is a factual situation akin to that which was the subject of this Court's decision, and subsequently that of the Supreme Court, in *Minister for Justice and Equality v. Tokarski* [2012] IEHC 148 (Unreported, High Court, Edwards J., 9th March, 2012); [2012] IESC 61 (Unreported, Supreme Court, Murray J. *nem diss*, 6th December, 2012). In the circumstances the provisions of s. 45 of the Act of 2003 are engaged.

> S. 45 (in the form enacted at the time when the warrant was issued) provided:
>
> "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
>
> (b) (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
>
> (ii) 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.",

In circumstances where it is established that the respondent was tried *in absentia* the next enquiry must be as to whether (per s. 45(b) (i)) he was notified of the time when, and place at which, he or she would be tried for the offence; and if so, (per s. 45(b)(ii)) whether he was permitted to attend the trial in respect of the offence concerned. Counsel for the respondent argues that he was not actually notified as of the time when, and place at which, he or she would be tried for the offence as required by s. 45(b) (i). In support of his submission counsel points to information contained in Part D of the warrant which states that "*the correspondence (the criminal sheet along with the notification of the date of the hearing) was collected by the convict's brother*" , and also to the further information dated 9th October, 2012, which states that "*[n]otice of the hearing scheduled for 13th July 2005 was sent to his address and served on 10th June 2005 on his brother, Emilian Kucharczyk who made an undertaking he would pass the notice on into the respondent's hands*." In counsel's submission this is not sufficient notification to satisfy the requirements of s.45 of the Act of 2003, and in that regard relied in particular upon the following passage from the judgment of Murray C.J., as he then was, in *Minister for Justice, Equality and Law Reform v. Sliczynski* [2008] IESC 73 (Unreported, Supreme Court, Murray C.J., 19th December, 2008):

> "…s. 45(b)(i) must be interpreted and applied as a matter of Irish law.
>
> That specifies that the issuing Judicial Authority give an undertaking that the person will at least have an opportunity of being retried, if surrendered, if he was not present for the trial, which is undisputedly the case here, or he was not notified of the "*time when, and place at which, he or she would be tried for the offence*,".
>
> The ordinary meaning of that language is that it is the person to be tried who must be notified. It must be actual notification and not any other notification. I cannot read into s. 45 a meaning that envisaged notification to a person's mother or other person being presumed sufficient, especially when there is no evidence that the person concerned received any notification. If it was intended that any other form of notification or some form of constructive notification, particularly where trial for a criminal offence is concerned, the Oireachtas would have expressly said so."

Counsel made much of a suggested contradiction between what was stated in Part D of the warrant and what was stated in the additional information, but I am not sure they are necessarily contradictory, and in any case it is academic for reasons that will become apparent.

Counsel for the applicant argued that it could be inferred from the statement in the additional information dated the 9th October, 2012, that the respondent's brother had given an undertaking to pass the notice on into the respondent's hands, that the respondent had received actual notification, and that this distinguished the present case from *Sliczynski*. No such undertaking had been given in the *Sliczynski* case. The high water mark of it was that the respondent's mother had "collected" the summons. As it was also stated in Part D of the present warrant that the relevant correspondence was "collected" by the respondent's brother, the Court presumes that this is why counsel was anxious to point to an ostensible contradiction between the original information set out in the warrant and the additional information.

The Court finds itself unable to agree with the submission made by counsel for the applicant. As I have pointed out previously in *Minister for Justice, Equality and Law Reform v. Marjasz* [2012] IEHC 233 (Unreported, High Court, Edwards J., 24th April, 2012):

> "It must be remembered that an inference only arises where two or more facts taken together connote, or suggest the existence of, a further fact or facts."

Put simply, fact A taken with fact B must lead inexorably to fact C. If there is a break in the chain it is not legitimate to fill it by speculation. Applying that to the present case, it does not follow inexorably from the fact that the respondent's brother undertook to pass the notification document on to the respondent that he in fact did so. He may or may not have done. For all we know, while that may indeed have been his expressed intention, he may not have been sincere, or, if he was sincere he may simply have forgotten to do so. The basis for inference is simply not there on the limited facts available to the Court. The Court cannot therefore be satisfied that the respondent received actual notification of his trial.

In those circumstances the Court would require to have an undertaking from the issuing state as to a retrial before it could surrender the respondent. No such undertaking is forthcoming. The Court must therefore uphold point of objection No 1.

Although it strictly speaking unnecessary to do so in light of the above, it can also be stated that the Court would not have been disposed to uphold objection No 2. S.45 only applies to a trial conducted *in absentia* for an offence which is the subject of a request for surrender on foot of a European arrest warrant. It has no application to an offence which may have triggered the lifting of a suspended sentence if that triggering offence is not itself the subject of the European arrest warrant. That this is so was clearly stated in my decision in *Minister for Justice, Equality and Law Reform v Petràšek* [2012] IEHC 212 (Unreported, High Court, Edwards J., 16th May, 2012) :

> "The respondent is not in a position to rely upon s. 45 of the Act of 2003 in respect of the lifting of the suspension of his sentence. Accordingly, actual notification does not require to be demonstrated. It is sufficient if he was notified in accordance with Czech law. As was made plain by the former Chief Justice in *Minister for Justice, Equality and Law Reform v. Brennan* [2007] 3 I.R. 732 at p. 744:
>
> > "the mere fact that a trial or sentence may take place in a requesting state according to procedures or principles which differ from those which apply, even if constitutionally guaranteed, in relation to a criminal trial in this country does not of itself mean that an application for surrender should be refused pursuant to s. 37 (2) (sic) of the Act"
>
> Secondly, although the respondent may have been tried *in absentia* for the triggering offence there is nothing in either the Framework Decision, or in the Act of 2003, that says that such a conviction must be regarded as bad or invalid. While it is true to say that the Oireachtas has provided in s.45 of the Act of 2003 that a person who has been tried *in absentia* and who was not notified of the time when, and place at which, he or she would be tried, shall not be surrendered in the absence of an undertaking as to a re-trial, neither that provision, nor anything else in the legislation, or in the underlying Framework Decision, suggests that such a conviction is to be regarded as bad or invalid. On the contrary, this Court is obliged pursuant to the principle of mutual recognition to have due regard to it as an ostensibly legitimate basis for the lifting of the suspension of the respondent's earlier sentence."

Objections as to Form and Particularity – Points of Objection Nos 3, 4, & 5.

It is unnecessary to deal with these in great detail in circumstances where the Court is upholding Point of Objection No 1. It is sufficient to remark that, although not withdrawn, they were not pursued in oral argument. The Court has considered the warrant and the additional information as a whole and is satisfied that the objections as to form and particularity are not made out, and cannot be upheld.

Proportionality – Points of Objection Nos 6, 11, and 12
Once again, it is unnecessary to deal with these in great detail in circumstances where the Court is upholding Point of Objection No 1. Suffice it to say that the Court is satisfied that it would not constitute a disproportionate interference with the rights of the respondent to surrender him to the issuing state in the circumstances of this case. The offence to which the warrant relates is not a minor offence (albeit not the most serious offence in the calendar of offences either). Moreover, unlike in *Minister for Justice, Equality and Law Reform v Ostrowski* [2012] IEHC 57, (Unreported, High Court, Edwards J., 8th February, 2012) this respondent has already been sentenced and he did receive a custodial sentence, albeit a suspended one. Although the sentence if it had not been suspended would have meant that the respondent was receiving the maximum penalty for a first offence in circumstances where he was pleading guilty, the suspension of the sentence ameliorated that and overall could not be said to be perverse or excessive. The fact that the suspension has now been lifted is nobody's fault but his own. Polish law provides that if a person who is the beneficiary of a suspended sentence commits a similar intentional offence during the period of the suspension that suspension may be lifted and the person required to serve the original sentence. That is what happened in this case. He cycled his bicycle while intoxicated, and was charged and convicted of an offence in connection therewith. Under Polish law that offence is considered to be a similar intention offence and accordingly the suspension of the original offence was lifted.

The Court has taken into account that the warrant issued in 2008, and that it is now 2013 and there is no ostensible explanation of the delay. While the case is made that the present case, occurring as it does after the passage of some time, is causing anxiety, worry and distress to the respondent, there is medical evidence that he is suffering from any physical or mental pathology.

It would require to be established by very strong evidence that the proposed surrender of the respondent would interfere with his rights so fundamentally as to be disproportionate measure, notwithstanding (i) the strong public interest in extradition and ensuring as a general objective that fugitives from justice are denied safe havens and are returned to the state that seeks them for the purpose of prosecution or to serve a sentence, and (ii) the legitimate aim of the issuing state of ensuring that this fugitive in particular is returned to face the criminal process in his state of origin. In the Court's view the evidence is this case is simply insufficient to sustain the objections raised.

Flight – Point of Objection No 9
Although it is now largely academic, the Court was also not disposed to uphold this objection, in circumstances that it was satisfied that flight can be inferred from all the circumstances of the case. It is clear that the respondent was aware of the proceedings to have the suspension of his sentence lifted. He states himself in his affidavit sworn on the 31st July, 2012, that wrote to the Poznan Court to inform it of his dire financial situation and lack of transport as a result of losing his job and to state that he would not be able to travel the 300kms to be there. That was in September, 2006. It is not credible to suggest that he was disinterested as to the outcome or that he did not seek to ascertain or inform himself of the outcome. According to the additional information of the 9th October, 2012, officers of the local police ascertained that the respondent started hiding from the authorities when he learned of the fact that he would have to serve a custodial sentence. He came to Ireland shortly afterwards in 2007. While the respondent denies flight, that denial amounts to no more than his unsupported assertion and there is no engagement with the circumstantial evidence tending to suggest flight. Following a weighing of the evidence the Court considers that flight can indeed be inferred from all the circumstances of the case.

Specialty – Point of Objection No 10.
Although not withdrawn, this objection was not advanced or argued in the course of counsel for the respondent's oral submissions. The sole basis for it is the reference in Part F of the warrant to the following:

> "During the probation period, that is on 17th December 2005, the convict committed a further intentional similar offence under art. 178a § 2 of the penal code for which the District Court in Nowy Dwór Mazowiecki, dated 6th April 2006, court reference V K 36/06, sentenced him to a penalty of 1 year's deprivation of freedom the execution of which was conditionally suspended for a 3 year probationary period. That judicial decision became legally binding on 5th May 2006 and is executable."

In the Court's view, this comes nowhere near approaching evidence of sufficient cogency to rebut that which is presumed in s.22(3) of the Act of 2003, namely:

> "(3) It shall be presumed that, in relation to a person to whom a European arrest warrant applies, the issuing state does not intend to—
>
> (a) proceed against him or her,
>
> (b) sentence or detain him or her for a purpose referred to in subsection (2)(a), or
>
> (c) otherwise restrict him or her in his or her personal liberty, in respect of an offence, unless the contrary is proved."

In the circumstances, the Court is satisfied that were it otherwise in a position to surrender the respondent, it would not be required to refuse to do so under s. 22 of the Act of 2003, the objection based on specialty not being made out.

Conclusion
In circumstances where the Court has seen fit to uphold Point of Objection No 1 in the absence of an undertaking for the purposes of s. 45 of the Act of 2003, where such an undertaking is required, the Court must regard the surrender of the respondent as being prohibited under Part 3 of the Act of 2003.

The Court therefore refuses the application for an order under s. 16(1) of the Act of 2003.