Neutral Citation Number: [2009] IEHC 3

THE HIGH COURT

Record Number: 2007 No. 156 Ext

Between:

Minister for Justice, Equality and Law Reform

Applicant

And

Tomasz Laks

Respondent

Judgment of Mr. Justice Michael Peart delivered on the 14th day of January 2009:

The surrender of the respondent is sought by a judicial authority in Poland so that he can be returned to that state in order to serve a sentence of 10 months imprisonment which has been imposed upon him there.

The European Arrest Warrant on foot of which surrender is sought is dated 10th May 2007. Having been transmitted to this jurisdiction it was endorsed here by the High Court on 26th September 2007. The respondent was duly arrested on foot of same on the 28th September 2007 and, as required, was brought before the Court immediately thereafter. He has been remanded from time to time thereafter pending the hearing of the present application.

There is no issue raised by the respondent as to his identity, and the court is satisfied in any event from the affidavit of Sergeant Martin O'Neill, the arresting officer, that the person who is before the court on this application following arrest is the person in respect of whom this European Arrest Warrant has been issued.

On this application, the respondent raises a number of objections to an order for surrender being made in this case.

Section 10 - 'fleeing':
Firstly, he submits that he is not a person to whom section 10 of the European Arrest Warrant Act, 2003 applies since he did not "flee" Poland, but left in order to obtain employment, firstly in the Netherlands, and later in this jurisdiction, where he arrived on the 2nd November 2004. He has lived and worked here since that date.

It appears from the warrant that on the occasion on which the respondent was convicted and sentenced on the 29th June 2001 to a period of 10 months imprisonment, this sentence of imprisonment was suspended on certain conditions. Paragraph F of the warrant states the following:

> *"By its decision of the 25th June 2004, the court ordered the execution of the convict's sentence which had been conditionally suspended. [The respondent] did not report voluntarily to serve the penalty of deprivation of liberty. The order to bring him to the penitentiary by the police also turned out to be inefficient. As the convict was hiding away, his search by a decision of the 8th November 2004 was ordered and by the decision of 8th December 2004, the executory proceedings were suspended..."*

A letter dated 8th January 2000 which has been sent to the Central Authority here by the judicial authority in Poland provides further information as to the sentence which was imposed, and the background to the lifting of the suspended sentence. This letter states that following the imposition of the conditional suspension of 10 months imprisonment for a period of three years on the 29th June 2001, the respondent was "*obliged to redress the damage caused by his misconduct as an amount of 2189.32 PLN within a time frame of one year from the day the judgment became on force of the law. He was also obliged to undertake a job and a probation officer was to supervise him*." These conditions were not fulfilled by the respondent. This letter goes on to say that this judgment became enforceable on the 1st February 2002 so that the probation period of three years lasted until the 1st February 2005. The letter goes on:

> *"During the probation period, the convict did not fulfil that duty to redress the damage in spite of the fact he was earning money except for a short period between December 2002 February 2003. The effect of having the money was evidenced by the convict's supporting his mother, however, he did not transfer the money to the injured subject. This resulted in issuing on the 25th of June 2004 an order to resume the conditionally stayed penalty. The order became of force of law on the 29th July 2004."*

In an affidavit the respondent says that since coming to Ireland he has lived openly here. He states also that following the conviction on the 29th June 2001 in Poland, he resided there until his departure on the 22nd July 2004 and did not at any time conceal, or attempt to conceal, his whereabouts, and he says that he did not flee that state. He says that in the period between the 29th June 2001 and his departure from Poland he received no communication from either the bank referred to in the offence, or the court which convicted him, regarding these proceedings against him. He also says that he was not notified of any hearing relating to the decision on the 25th June 2004 by which his suspension was lifted. These are the facts upon which he relies to say that by leaving Poland when he did in July 2004, he did not "flee".

Section 10 (d) of the Act is the relevant provision to this case. It provides:

> *"Where a judicial authority in an issuing state duly issues a European arrest warrant in respect of a person --*
>
> *....*
>
> *(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."

I have set out the only averments by the respondent as to the circumstances in which she left Poland towards the end of 2004. Sean Guerin B.L. submits on his behalf that he has established sufficient to indicate that his reason for leaving Poland was unconnected to the criminal proceedings on foot of which he had been convicted and sentenced and that he left for purely economic reasons. Mr. Guerin submits that the circumstances in which the respondent left Poland do not constitute' fleeing' as defined in the judgment of Fennelly J. in the Tobin case. There is no need to set out the details of that judgment in this regard. By now the judgment is well known. But it has to be said again that the facts in the Tobin decision were unique to that case, and completely different to the present case and many others in which respondents have sought to rely on that decision. What happened in this case is perfectly clear. The respondent received a suspended sentence in June 2001, that suspension being conditional upon a number of conditions none of which the respondent complied with. The suspension was for a period of three years and at the conclusion of that period, and in the light of the non-compliance with the conditions of suspension, the court lifted the suspension in June 2004, the sentence thereafter becoming effective and enforceable.

In this first affidavit, the respondent says he left Poland on the 22nd July 2004 and went to the Netherlands where his cousin was living. As I have said, he goes on to say that not having obtained work in that country, he came to Ireland on 2nd November 2004 and has worked here since that time. The only basis on which he contends that he did not flee in the sense of avoiding justice (i.e. the service of the sentence imposed) is that he received no communication from either the bank or the court, and was not notified of any hearing in relation to the lifting of the suspension on the 25th June 2004. That is not sufficient in any manner whatsoever to escape the ambit of section 10 (d) of the Act. He had failed to comply with the conditions of the suspension of his sentence. There is a clear presumption to be made that he was aware that these conditions had been imposed and that he was in breach of them. The court can presume also that he was aware that a failure to comply with these conditions would result in the suspension being lifted, and the sentence of imprisonment becoming enforceable. He left Poland with that knowledge, and it is quite impossible to successfully submit in those circumstances that he was not evading justice by departing when he did, without beforehand making contact in any way with the authorities in order to ensure that he was free to leave, as happened in Tobin. This ground of objection fails.

Breach of Constitutional/Convention rights:
Secondly, even though the respondent accepts that he was present in court at his trial and at his conviction on the 25th June 2001, he says that he was never informed of the hearing on the 25th June 2004 which resulted in the lifting of the suspension of sentence following his failure to comply with the conditions of that suspension, and in the circumstances, where he had no opportunity of being heard, his constitutional justice rights/fair hearing rights have been infringed. By letter dated the 18th January 2008 the judicial authority in Poland has provided information to the Central Authority here. It is stated in that letter that "*during the probation period, the convict did not fulfil the duty to redress the damage in spite of the fact he was earning money (except for a short period between December 2002 and February 2003). The fact of having the money was evidenced by the convict's supporting his mother, however, he did not transfer the money to the injured subject*." Mr. Guerin submits that this statement indicates that on the 25th June 2004 there was an evidence-based hearing at which respondent had a right to be heard, since that hearing had the capacity to result in the deprivation of the respondent's liberty, following the lifting of the suspension element of the sentence. It is to be noted that the respondent is not submitting that the 'in absentia' provisions of section 45 of the Act apply, so that absent an undertaking as to a rehearing of what occurred on the 25th June 2004 his surrender is prohibited. There is no mention of s. 45 in the Points of Objection. The submission is based purely on an alleged breach of constitutional/Convention rights. It is submitted that the hearing which took place on the 25th June 2004 was a significant hearing since it was only thereafter that it became possible to issue a European arrest warrant. This is because up to that point the sentence was not "immediately enforceable" against the respondent. Mr. Guerin submits that it was this hearing that meant that the respondent could be deprived of his liberty, and that constitutional justice requires therefore that he be heard at that hearing in order to put forward any submissions or evidence which might affect the decision being made. It is not however clear what if any submissions would have been made. This has not been averred to.

Mr. McGillicuddy submits for the applicant that the respondent's fair trial rights were accorded to him when he was convicted on the 29th June 2001 following his trial at which he was present, and when he was sentenced to 10 months imprisonment, suspended for three years on certain conditions. It is submitted that thereafter a procedure was simply followed by the court in Poland following the breach of these conditions by the respondent himself, and by which the suspension was lifted thereby rendering the sentence of imprisonment enforceable. It is submitted by Mr. McGillicuddy that the fact that the respondent was not present in on the 25th June 2004 when the suspension was lifted is not a breach of any fair trial rights either under the Constitution or the Convention, and as such, the surrender of the respondent is not prohibited by section 37 of the Act.

He has referred to in an English decision of Moses J. in a case involving similar circumstances, namely *Baksy v. The Ministry of Justice of the Republic of Lithuania* [2007] EWHC 2838 (Admin). In that case the appellant had been present at his trial, when he was convicted and when he was sentenced. His sentence was deferred and in due course, the deferral was lifted, but, as in this case, the appellant was not present on the latter occasion. It was submitted before Moses J. that the occasion on which the deferral was lifted constituted a conviction in the form of a decision that the appellant had not complied with the obligations imposed upon him up on sentencing, and that in those circumstances it would be unlawful to extradite him to Lithuania, absent any evidence to suggest that he was going to be able to reopen the question of the cancellation of the deferral upon surrender. In relation to this submission, Moses J. stated as follows:

"I disagree. This is an argument advanced by the appellant which assumes that the ruling on 10 May 2004 is the ruling at which a decision is made to impose the custodial sentence on the basis of breaches of the obligations. But there is no material put forward on the basis of which that submission can be made. It appears that the sentence which the appellant is now being ordered to serve is the sentence originally imposed on 13 March 2002. If it is suggested that there is a fresh hearing at which consideration of the breaches of the obligations are considered and a fresh order that the sentence should be served, then it is incumbent upon the appellant making that contention to provide evidence of Lithuanian law to make those submissions good. Absent such evidence, all that has happened is that the original sentence passed on 13 March 2002 has been enforced. That does not amount to any fresh conviction or fresh order, still less the fresh imposition of a sentence."

Mr. Guerin on the other hand has referred to a passage towards the end of this judgment wherein it is stated:

"…There is simply no material, let alone any evidence, to suggest otherwise than what happened on 10 May 2004 was

merely the consequence of the imposition of the sentence on 13 March 2002. There was no fresh conviction and no fresh imposition of a sentence. The justification for what happened on 10 May 2004 was the conviction and sentence imposed on 13 March 2002, at which the appellant was present in which he had every opportunity to resist."

Mr. Guerin draws a distinction between the circumstances of that case and the present case, by referring to the fact that according to the papers on this application, the Polish court on the 25th June 2004 was provided with evidence that the respondent was earning money but was failing to pay it to the injured party, and instead was paying it to his mother. In his submission, this distinguishes the case from Baksys.

This ground of objection fails in my view. I see no meaningful distinction between this case and Baksys. However, even without in any way relying upon that judgment, my own view is that since the respondent was undoubtedly present during his trial and for his conviction and sentence, and therefore when the sentence was suspended on certain conditions, all his constitutional and Convention rights to a fair trial were afforded to him at that time. What occurred subsequently is simply that he himself had failed to comply with the conditions of the suspended sentence, bringing upon himself by his own lack of action an application for the lifting of that suspension. The fact that the court which lifted the suspension on the 20th June 2004 may have heard evidence that those conditions were breached, including evidence as to the respondent's earnings and his failure to pay money to the bank, does not mean that this particular hearing was anything other than a procedural one in order to activate the sentence which had been imposed on the respondent. The reason for the lifting of the suspension was that the respondent had breached all of the conditions of suspension. A breach of any one of those conditions could have resulted in a lifting of the suspension. The fact that the court may have heard evidence that the respondent was earning money and that he did not pay it into the bank, but rather, used it to support his mother, really cannot constitute a breach of constitutional/Convention rights in circumstances where that evidence was given to the court in the absence of the respondent. The conditions imposed for the purpose of suspending the sentence were simply, as I have already said, to pay back the money within one year, get a job, and be supervised by a probation officer. The respondent has said nothing on affidavit to contradict the fact that he was in breach of each of these conditions. It is a fact that during the course of the present application for his surrender he has made arrangements to have all the money paid back to the bank in question, including interest to date, in the hope that the authorities there might consider withdrawing the European arrest warrant, but no decision has been made to withdraw it. The lifting of the sentence does not constitute any fresh conviction or sentence. It is simply the enforcement of the sentence imposed in the presence of the respondent, and because the respondent himself failed to comply with those conditions.

In his Points of Objection, a number of other matters were referred to for the purpose of submitting that his surrender to Poland would breach his constitutional and Convention rights. These related to the hearing in June 2001 which resulted in his conviction and sentence. For example, he said that for the purpose of his hearing he was denied adequate time and facilities for the preparation of his defence, was denied the right to the assistance of counsel, his sentence was imposed in absentia, he was denied a right of appeal, and was denied a fair and public hearing within a reasonable time. In his grounding affidavit he stated that on the date of his conviction he appeared in court "*for the first time in relation to that matter*" and he was "*advised and represented by a government-appointed lawyer*" to whom he spoke for about 10 minutes, and he says that he did not receive adequate legal advice in relation to the charge. That affidavit was sworn on the 19th November 2007.

Following the receipt of that affidavit, further information was sought by the Central Authority here from the judicial authority in Poland, and correspondence was received from the judicial authority in Poland which states that the respondent's file has been inspected and that it has been discovered that he turned up in person for the hearing on the 20th March 2001, and that at that hearing he was granted legal counsel. It goes on to say that on the 10th April 2001 he again turned up in court and on that day the proceedings were started and adjourned until the 15th May 2001. It goes on to state that the respondent turned up in person together with his counsel on that date and that the matter was again adjourned to the 6th June 2001 when the respondent was again informed and summoned by the court to turn up on a subsequent date. It would appear that while he did not himself turn up on that next date, his counsel appeared and the matter was postponed again until the 29th June 2001 when the respondent again appeared personally together with his lawyer. The letter goes on to say that at the hearing, the judicial proceedings were concluded after final arguments of the parties, including the respondent and his lawyer, and that later on the same day the court announced its verdict and its sentence.

All of this information, of course, completely contradicted the rather bald statements in the Point of Objection and the respondent's own averments to support them. In a second affidavit sworn on the 30th April 2008 he states that he has been shown this letter from the Polish court. He now says at paragraph 6 of his supplemental affidavit that he has no recollection of the appearances to which that correspondence refers and had no such recollection when he swore his first affidavit. He refers to the fact that these events occurred nearly 7 years ago, but he accepts that if the court's record confirms that he did appear with a lawyer on the various occasions prior to the 29th June 2001, as it does, he accepts that this is what happened, and he apologises to the court if his earlier affidavit misled the court in any way and he states that it was not his intention to mislead the court and that any inaccuracy was caused by his failure to remember exactly what occurred.

I do not accept for one moment that when the respondent stated what he did state in his first affidavit in relation to his <u>one appearance in court</u> and the other matters to which I have referred, that he did so innocently, and without in any way intending to mislead this court. His lawyers of course cannot be faulted since they act only on his instructions. I have no doubt whatsoever, in spite of the retraction and apology, that the respondent was attempting to pull the wool over the eyes of his lawyers and this Court in the hope of gaining some advantage in his efforts to avoid surrender. As it happens, these particular grounds have been dropped and are not relied upon for the purpose of any objection under section 37, and it is right that they were not pursued in any way in view of the information which was gained from the judicial authority in Poland following the swearing of that affidavit by the respondent. But the fact that the respondent has acted as he has done in this regard speaks to his overall credibility in relation to what else he may have averred in his affidavits, and it has been primarily for this reason that when considering the point of objection in relation to correspondence, which I next address, that I availed of the provisions of s. 20 of the Act so that what the respondent has stated in his affidavit about the existence of overdraft facilities at the bank in question in Poland could be verified or contradicted by information to be obtained through the judicial authority in Poland. It would not have been appropriate to simply rely on the respondent's own averments in that regard given the damage to his overall credibility by the averments in his averments to which I have already referred.

Correspondence:
The respondent submits that the acts by him which gave rise to the offence for which he was convicted in Poland would not correspond to any offence in this jurisdiction and accordingly his surrender is prohibited. The offence for which the respondent was convicted on the 29th June 2001 is described in the warrant as being one whereby he "*swindled money*". While "swindling" is one of the offences referred to in Article 2. 2 of the Framework Decision and, therefore, one in respect of which double criminality does not require to be verified, the issuing judicial authority has chosen not to mark that offence in paragraph E.1 of the warrant. Instead it

has given details of the offence under the heading "full description of offence(s.) not covered by section E.1 above". In other words the judicial authority in Poland has indicated that this is not a swindling offence as such, as we understand that term here, but rather a different type of offence and in respect of which correspondence must be made out or established.

Under the heading "*full description of offences not covered by section E.1 above*" the issuing judicial authority has stated the following:

> *"In the period from 20 to October 1997 to 11 November 1997 in Torun, being the holder of a savings account in the [bank], he swindled money at an amount of 2189.32 PLN in such a way that having no cover on the account he cashed 13 cheques, of which he issued four to other people, acting to the detriment of the above-named bank." (my emphasis)*

The underlined words above are of central importance to the issue raised in relation to correspondence.

The offence is classified as being an offence contrary to Article 286 of the Polish Penal Code, which I will set out later.

Apart from that statement, there was some further information provided on this application about the background to the offence, and which is contained in a letter dated the 18th September 2007 from the judicial authority in Poland which states:

> *"The offence for whose commission [the respondent] was sentenced consisted in his acting in the period from 22 October to 11 November 1997 with a premeditated intention to gain material benefit. He misled cashiers as to the balance of his financial resources on his bank account at [bank], making them dispose disadvantageously with the property of this bank, in such a way that he issued to himself and to other p*ersons 13 cheques which were cash*ed* afterwards. By the same, [the *respondent] brought about an illegal debit on his account, and he did not pay back this debit although he had at his disposal financial resources to pay it, under the form of sickness allowance which he was being paid up to April 1998. So as to avoid crediting even with a small part of these financial resources his indebtedness towards the bank, the convict changed his disposition in such a way that the allowance was not paid to his account, as it had been done before, but it was transferred by post to his home address."*

The offence under Article 286 of the Polish criminal code is set out in this further information. It states:

> *"A person who, to gain material benefit, makes another person dispose to his disadvantage with his own or somebody else's property, by misleading this other person or taking advantage of his mistake or incapacity to correctly understand the transaction undertaken, is liable to a penalty of deprivation of freedom, ranging from 6 months to 8 years."*

Mr. McGillicuddy submits that the facts set forth in the warrant giving rise to the offence in Poland would, if committed in this jurisdiction, constitute an offence of making a gain or causing a loss by deception contrary to section 6 of the Criminal Justice (Theft and Fraud Offences) Act, 2001 which provides:

> *"A person who dishonestly, with the intention of making a gain for himself or herself or another, or of causing loss to another, by any deception induces another to do or refrain from doing an act is guilty of an offence." (my emphasis)*

Mr. McGillicuddy submits that this Section 6 offence is very similar to the offence under Article 286 of the Polish code. He submits that the offence is not that the respondent did not pay a debt due to the bank, but rather that he misled bank staff about his banking details so that he was able to obtain credit on a number of cheques and gain a financial benefit by so doing. Mr. McGillicuddy submits that this fulfils the element of dishonesty required under Section 6, and that it is quite clear from the facts contained in the warrant that the respondent did what he did in order to make a financial gain from his conduct, thereby causing a loss of money to the bank. Mr. McGillicuddy refers also to the fact that it is clear from the facts set out in the warrant that while there may, according to the respondent's grounding affidavit, have been some sort of overdraft facility in place, the respondent brought about the loss to the bank by subsequently diverting his social welfare cheques directly to his home, so that they did not get credited to his bank account against the cheques which he had drawn.

Mr. Guerin on the respondent's behalf emphasises what he describes as the "low criminality" of what has given rise to the conviction of the respondent for the offence in question. He submits that it is the case simply that certain cheques were written by the respondent on his bank account, which, when presented for payment or encashment, caused an authorised overdraft to be exceeded. He submits that these facts indicate a borderline situation between a criminal act and a civil act in this jurisdiction and that it could be characterised simply as a failure to pay a debt, rather than dishonest criminality. He has referred to the provisions of section 5 of the European Arrest Warrant Act 2003 which, in relation to correspondence, provides:

> *"For the purposes of this Act, and offence specified in any European arrest warrant corresponds to an offence under the law of the State, where the act or omission that constitutes the offence so specified would, if committed in the State on the date on which the European arrest warrant is issued, constitute an offence under the law of the State."*

First of all, Mr. Guerin submits that before this court can complete its task of considering if the acts for which the respondent was convicted in Poland constitute an offence in this State, it must first of all be satisfied as to exactly what those facts are, and in that regard, he submits that the facts are not clear from the warrant as to what he did. Notwithstanding, Mr. Guerin refers to the fact the respondent has averred that that he had an overdraft facility with the bank in the sum of 2000 PLN (€549 according to the respondents grounding affidavit). Insofar as the warrant in this case indicates that 13 cheques were cashed, four having been issued to other people (which must lead to the conclusion that nine cheques were made out to himself), and which totalled in value in 2189.32 PLN (€600 according to the respondents grounding affidavit), Mr. Guerin submits that it is completely unclear, given the absence of a relevant information in this regard, as to which or how many of these cheques caused the overdraft facility to be exceeded. He submits that in such circumstances there can be no question but that the warrant fails to disclose any dishonesty, and that since dishonesty is an essential ingredient to the offence under section 6 referred to, correspondence cannot be made out.

In addition, Mr. Guerin submits that even though the letter dated the 18th September 2007 from the Polish judicial authority to the Central Authority describes the respondent's actions as a premeditated intention to gain material benefit, and that he misled cashiers as to the balance of his financial resources in his bank account, this is insufficient by way of allegation to cover the ingredients of dishonesty and deception, since any misrepresentation can be either innocent, negligent or mistaken, and is not necessarily dishonest and therefore not necessarily criminal in nature. He refers also to the fact that the overdraft facility, which the respondent says he had, was exceeded by only 189.32PLN. According to the respondent's grounding affidavit, the amount by which his alleged overdraft was exceeded was, when converted from the Polish currency, merely €51. Mr. Guerin refers to this very small sum of money in the context of his submission that it is unclear which of the 13 cheques referred to in the warrant caused the overdraft to be exceeded,

and, in the context of the question of dishonesty and deception, he submits that the respondent could not be seen to have acted dishonestly and by deception if the overdraft was exceeded by such a small amount, and that his doing so could not amount to an offence in this jurisdiction under section 6 of the Criminal Justice (Theft and Fraud Offences) Act, 2001.

Before dealing with the question finally as to whether the offence for which he was convicted corresponds to an offence in this jurisdiction, I want to say again that I was not at all satisfied to accept at face value the respondent's averment that he had an overdraft facility of 2000 PLN. There is nothing in the warrant or the supplementary information which states this, and the respondent has not produced any evidence of such a facility being in place, even though his Polish lawyer on his behalf has engaged with the bank in question in order to pay off the debt, including interest. It is not up to the applicant to produce evidence that he did not have any such an authorised bank overdraft. Given what I have said about the respondent's averments in relation to the fairness of his trial hearing in June 2001, I am not prepared to take his averment in this regard at face value in the absence of any corroborating evidence being produced.

Since the existence of an overdraft is so central to the issue raised as to correspondence I re-listed this matter so that I could make my views, and so that the applicant could be given an opportunity to obtain from the Polish bank some evidence as to whether or not the respondent had an overdraft facility at the bank, or whether there was no overdraft at all. In the latter event, clearly all the cheques might be seen as being ones which the respondent was not entitled to write.

The information contained in the letter dated 18th September 2007 indicating that the respondent had acted with a premeditated intention to gain any material benefit and that he misled cashiers, making them "dispose disadvantageously with the property of this bank" is information which can be added to the information contained in the warrant, for the purpose of seeing what acts constituted the offence in Poland. It is important to draw attention to the fact that what the respondent was convicted of in Poland was not an offence of swindling/theft/stealing money, but rather that in order to gain a material benefit he, with premeditation, misled cashiers at the bank, leading to the bank acting to its detriment. But it does not clarify if the respondent had an overdraft facility at the bank.

In order to correspond with an offence under section 6 of the 2001 Act, the offence must contain a number of ingredients namely, acting dishonestly, an intention of making a gain for himself or another person (or of causing a loss to another person), and deception which induced another person to do or not to do something.

Following my request for further information from the issuing judicial authority under s. 20 of the Act, I have been provided with a copy of a letter from that authority which appears to be undated, but which was faxed to the Central Authority here on the 10th December 2008. Part of that information states as follows:

> *"As to the information required by you on the text of the contract between [the respondent] and the wronged bank related to the amount of the credit limit, be advised that in the file of case IIK 218/01, there is a copy of the contract concluded by [the respondent] which defined the amount of credit limit as 1500 PLN…"*

The letter goes on to explain that at an earlier stage of the case in Poland, the respondent had tried to assert that he had arranged an additional facility up to 3000 PLN but that there was no such contract concluded, and the respondent was not believed in that regard. The judicial authority goes on to explain that under the Polish offence charged against the respondent, it is not the fact that he exceeded his credit limit that gave rise to the offence, but rather that it arose through "*damage at the amount which he received from the bank, without cover in the resources he transferred to the bank account*". By way of further explanation it is stated:

> *"During the proceedings, it was established, among others, that the accused was aware of the amount of his credit limit/overdraft and intentionally overdrew it, by the same taking advantage of the imperfection of the banking system. Furthermore, although he was in a position to do so [the respondent] did not pay back his credit overdraft in determined deadlines, giving to his employer a disposition not to pay the remuneration for work to the account of his bank, but to transfer the money directly to him. In consequence, it was recognised that having no intention to reimburse the money owed and misleading the bank's employees as to the balance of his resources on the account and the aforementioned intention to reimburse the amount borrowed, he brought the Bank to the payment of an amount of 2993 PLN(sic)"*

This letter concludes by stating in effect that even though the 'fraud' box has not been marked as such in the warrant, the offence comes within that category of offence and that therefore correspondence need not be verified under the Framework Decision.

Just taking this last assertion first, I am of the view that this Court must deal with the European arrest warrant on the basis of what it actually contains, and not on the basis of what it might have contained if it had been prepared differently. Fraud has not been marked. No offence has been marked, and accordingly correspondence must be made out, otherwise the respondent's surrender is prohibited under the terms of s. 37 of the Act, and no order may be made under s. 16 of the Act for his surrender.

The latest information has made it clear that the respondent had an overdraft facility, albeit one which is somewhat lower than that which he himself asserted in his affidavit. If there had been no permitted overdraft at all, it would be possible to conclude that what the respondent did by drawing 13 cheques was sufficient to give rise to an offence here under s. 6 of the 2001 Act. But in circumstances where there was an overdraft, it is impossible to conclude such correspondence where a single offence was charged covering all 13 cheques. I cannot be satisfied that the ingredients of the s. 6 offence are met. That offence is, as already set forth:

> *"A person who dishonestly, with the intention of making a gain for himself or herself or another, or of causing loss to another, by any deception, induces another to do or refrain from doing an act is guilty of an offence."*

It is not clear from the warrant, even as amplified by the clarifying information, that by writing these 13 cheques in the way he did, that in respect of all of them he deceived the bank and "dishonestly with the intention of making a gain for himself … or causing loss to another" induced the bank to sustain a loss. In fact the information suggests that it was an imperfection in the banking system which permitted this to happen. The offence under Polish law is significantly different to the offence created by s. 6.

I am not satisfied that the ingredients of the s. 6 offence are sufficiently made out for the purpose of s. 5 of the Act by the facts of the offence as given.

It should be borne in mind by all issuing judicial authorities that, as far as Irish law is concerned, the Framework Decision does not enjoy direct effect, and that it is the domestic legislation by which the Framework Decision is given effect which provides this Court with its jurisdiction to order or refuse to order surrender, albeit that the Act must be interpreted as far as possible in conformity with the aims and objectives of the Framework Decision.

The establishment of correspondence, in particular, is a technical matter which can only be properly addressed by the issuing judicial authority if they are aware or are made aware of the fact that under section 5 of the Act in this jurisdiction correspondence will be established only where the acts of the respondent, as contained in the warrant and/or possibly contained in additional information, "*would, if committed in the State on the date on which the European arrest warrant is issued, constitute an offence under the law of the State*." It seems to me that unless an issuing judicial authority is aware of the nature of this provision, there is a high risk that, unintentionally, insufficient detail of exactly what acts of the respondent gave rise to the offence in the issuing state, will be contained in the European arrest warrant transmitted to this jurisdiction, for correspondence to be established, or, as in this case, that a box which might reasonably be marked for the purpose of Article 2.2 of the Framework Decision, remains unmarked.

I therefore refuse to the application for an order for surrender of the respondent.