THE HIGH COURT

Record No. [2011/No. 281 EXT.]

IN THE MATTER OF THE EUROPEAN ARREST WARRANT ACT 2003 AS AMENDED

BETWEEN/

THE MINISTER FOR JUSTICE AND EQUALITY

Applicant

AND

PATRYK STEFANIAK

Respondent

JUDGMENT of Mr. Justice Edwards delivered on the 25th day of July, 2012

Introduction
The respondent is the subject of a European arrest warrant issued by the Republic of Poland on the 27th June, 2011, in order that he might be required to serve a two year aggregate sentence of imprisonment imposed upon him by the District Court in Poznan for the two offences particularised in the warrant. The warrant was endorsed for execution by the High Court in this jurisdiction in the normal way. The respondent was then arrested in Cork on the 5th December, 2011, by Garda Darren Reid and on the following day was brought before the High Court, again in the normal way, pursuant to s.13 of the European Arrest Warrant Act 2003 (hereinafter referred to as "the Act of 2003"). At the s.13 hearing the respondent was represented by solicitor and counsel. The Court (Sheehan J.) heard evidence of arrest and identity from Garda Reid. Garda Reid was not cross examined and no point was raised as to the validity of the arrest. In the circumstances, the Court fixed a date for the purposes of s.16 of the Act of 2003 and, as bail was opposed, the respondent was remanded in custody pending the s. 16 hearing taking place. The matter was then adjourned from time to time until coming before the Court on yesterday's date, the 24th July, 2012, for the hearing of the s.16 application. At the commencement of the proceedings on yesterday's date counsel for the respondent raised a preliminary issue purportedly going to the jurisdiction of the Court to deal with the matter. The Court has determined the preliminary issue against the respondent and has indicated it would give its reasons in a written judgment on today's date.

Having ruled against the respondent on the preliminary issue, the Court then proceeded to deal with the substantive surrender application. At the end of that hearing, the Court was not disposed to uphold the substantive objections raised by the respondent and in the circumstances made an order pursuant to s.16(1) of the Act of 2003 surrendering the respondent to the issuing state.

Background to the Raising of the Preliminary Issue
It is not ideal that the respondent should have been in custody from the 6th December, 2011 until the 24th July, 2012 awaiting a s.16 hearing. However, the respondent himself was mainly responsible for that delay in that he changed his solicitors at the end of February, 2012, at the point where the Court was about to fix a date for the hearing, and instructed his present solicitors, D'Arcy Horan. His new legal team sought time to familiarize themselves with the case, which was granted, and it was only relatively recently that it was indicated to the Court that they were ready to accept a date, and that the 24th July, 2012 was fixed as the hearing date.

In the normal course of events the Court would attach little significance to this. A person is entitled to change their legal team if there is a crisis of confidence or for some other good reason. Regrettably, however, such a step can sometimes be strategic. It can be used to put off the evil day when a person has to face up to their situation, and deal with the fact that their surrender is being sought. One of the reasons why this sometimes happens is that a convicted person who is remanded in custody in Ireland awaiting a surrender hearing is entitled to claim credit in the issuing state for any time spent in prison in Ireland awaiting their surrender hearing. In many cases a prisoner remanded in custody in an Irish prison is subjected to a less harsh regime, and is accommodated more comfortably, than a person would be in the issuing state. It therefore arises from time to time that a convicted person facing surrender will seek to maximize the time he or she has to spend in an Irish prison awaiting a surrender hearing so that credit can be claimed for that time against the sentence that that person will have to serve in their home state when they are ultimately surrendered. The Court must therefore be vigilant to ensure that its process is not being abused, and that applications for adjournments based upon a change of legal team, or on some other basis, are bona fide and not made for strategic reasons.

The relevance of this is that the Court considers that there has been a strategic attempt by the respondent within the last week, to secure a postponement of the surrender hearing in this matter, which attempt was not ultimately proceeded with for unexplained reasons. When the case was called yesterday the Court was made aware that the respondent had recently attempted to change his legal team a second time in as much as he had caused a signed authority to be sent from Cloverhill prison, where he is being held in custody awaiting his surrender hearing, to a Mr. Coen, solicitor, requesting the said Mr. Coen to take over his case. This apparently happened last Friday. It appears that he subsequently changed his mind again (whether he did so of his own initiative, or following persuasion by D'Arcy Horan solicitors, is unclear) and the Court was told that on yesterday's date he had executed yet another signed authority withdrawing instructions from Mr. Coen and reinstating the instructions of D'Arcy Horan, Solicitors. At the end of the day there was in fact no application for an adjournment. However, Mr. Coen, had very properly attended court to appraise the court as to what had occurred and the Court is grateful to him for the courtesy that he has shown it. The Court is nonetheless concerned that there may have been an attempt by the respondent to abuse its process. Had the change of legal team for the second time been persisted with, the Court would have approached any consequential application for an adjournment with suspicion, and with a healthy degree of scepticism, and would have required to have been satisfied by means of cogent and credible evidence that such an application was being made for bona fide reasons and was not being made strategically. In that regard it should be stated that the Court enquired of Mr. Coen as to how the respondent had come by his name, and as to whether he was previously known to Mr. Coen. Mr. Coen indicated that he was not previously known to him and that he had no idea as to why the respondent had attempted to instruct him. No information was forthcoming from the respondent, either through his solicitor or counsel, as to why he had taken steps to change his legal team for the second time at the 11th hour, and then reversed those steps. In the circumstances the Court

directed that the case should proceed.

The Preliminary Issue
Counsel for the respondent then immediately applied for an adjournment of the surrender hearing on the following basis. He informed the Court that his client had only just been served with the affidavit of Garda Darren Reid, sworn on the 18th July, 2012 dealing with the issues of arrest and identity. He stated that there were matters contained in that affidavit that indicated that the requirements of s.13(4) of the Act of 2003 had not been complied with, and that he was provisionally of the view that his client was not properly before the Court and that this Court had no jurisdiction to proceed with the s.16 hearing. He stated that he wished to challenge the jurisdiction of the Court as a preliminary issue and the validity of the arrest as a supplemental point of objection in the event of the Court finding that it had jurisdiction. However, he was seeking an adjournment to enable him to take further instructions from his client, to file amended points of objection and to make more considered submissions to the Court.

Before proceeding further, it may be helpful for the Court to set out the terms of s. 13(4) of the Act of 2003. It states:

> "(4) A person arrested under a European arrest warrant shall, upon his or her arrest, be informed of his or her right to-
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> (a) consent to his or her being surrendered to the issuing state under section 15 ,
>
> (b) obtain, or be provided with, professional legal advice and representation, and
>
> (c) where appropriate, obtain, or be provided with, the services of an interpreter."

The relevant portion of Garda Reid's affidavit is contained between paragraphs 3 and 10 inclusive of his affidavit. It is appropriate to set out what he says:

> "3. I say that on the 5th December, 2011, I was on duty at St. Stephen's Green Shopping Centre with Garda Vicky O'Gara. I observed a male walking in the entrance of the St. Stephen's Green Shopping Centre. I observed this male to be acting in a suspicious manner and I followed him up the escalator and spoke to him on the first floor of the St. Stephen's Green Shopping Centre. I noted there was a smell of cannabis coming from his jacket. I demanded his name and address and production of his Identity Card. The male initially refused stating that he did not have identification on him, I then informed him he would be searched under Section 23 of the Misuse of Drugs Act 1977, the male then produced a Polish National Identity Card. The picture on the Identity Card matched the person I was speaking to and the name on the Identity Card was Patryk Filip Stefaniak D.O.B. 31/2/1987 and the male confirmed these were his details.
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> 4. Having carried out enquiries I became aware there was a European Arrest warrant for the arrest of one Patryk Stefaniak, D.O.B. 31/12/1987. The Warrant had been endorsed by the High Court for execution.
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> 5. I say that I then informed Patryk Stefaniak that there was a European Arrest Warrant in existence for his arrest and I then arrested him on foot of the Warrant. I say that the time of arrest was 4:20p.m. on the 5th December, 2011 and the place of arrest was the St. Stephen's Green Shopping Centre, Dublin 2.
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> 6. I cautioned Patryk Stefaniak as follows, 'You are not obliged to say anything unless you wish to do so, but whatever you do say will be taken down in writing and may be given in evidence' and he made no reply to the caution.
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> 7. Patryk Stefaniak was conveyed to Harcourt Terrace Garda Station where he was processed as an arrested person.
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> 8. At 6: I Opm in Harcourt Terrace Garda Station I spoke to Patryk Stefaniak. I asked him 'What is your father's name?' and he replied 'Dariusz'. I asked him 'What is your mother's name?' and he replied 'Anna, yes it's definitely for me.'
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> 9. At 6:15pm I showed Patryk Stefaniak a copy of the warrant in my possession and brought it to his attention where it had been endorsed by the High Court for execution. I then gave him a copy of the European Arrest Warrant in both the English and Polish languages and a copy of Section 15 of the European Arrest Warrant Act 2003.
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> 10. I informed Patryk Stefaniak in accordance with Section 13 of the European Arrest Warrant Act 2003 that he has a right to consent to his surrender to the issuing state, obtain or be provided with professional legal advice and representation and where appropriate obtain or be provided with the services of an interpreter. I read over a précis of the offences contained in the warrant and asked Patryk Stefaniak 'Do you know what this is about?', to which he replied 'Yeah, I read them, I understand that I do have a warrant.' "

Counsel for the respondent submitted that it is apparent from Garda Reid 's affidavit that the did not comply with s.13(4) of the Act of2003 in that he did not inform the respondent of his rights at the time of his arrest. Counsel's point was that the affidavit makes it clear that the time and place of arrest was 4:20p.m. in the St. Stephen's Green Shopping Centre, whereas the respondent was not informed about his rights etc. until 6:15p.m. in Harcourt Terrace Garda Station. In counsel 's submission this failure to comply in a timely fashion with the formalities required by the legislation, rendered the arrest invalid and everything that has happened subsequently null and void as being so called *'fruits of the poisoned tree'* . His submission extended to a contention that the effects of the alleged deficiency went so far as to undermine the jurisdiction of this Court to conduct a s.l6 hearing, that his client was in unlawful detention, and that the Court should release him forthwith and strike out the proceedings.

Counsel for the applicant indicated that she was in a position to deal with the point raised notwithstanding that it had been raised very late in the day, and had not been pleaded. The Court was referred to the judgment of Walsh J. in the Supreme Court case of *The People (Director of Public Prosecutions) v. Shaw* [1982] IR 1 and in particular:

> "5. A person who is arrested for the purpose of being charged and being brought before a court and who has not been brought before a court within a reasonable time is, from that moment, being subjected to unlawful imprisonment. The reasonable period for bringing him before the court may vary according to the circumstances of each case. Such a supervening of unlawful imprisonment does not render unlawful the imprisonment which endured from the time of the original arrest until the expiration of the time when he ought to have been brought before a court: *Dunne v. Clinton* [1] *; The People v. Walsh* .
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> 6. An arrest which is unlawful initially may become lawful as from the point of time when such arrest complies with the requirements of lawful arrest and may then, if it continues beyond the period permitted by law, again become unlawful.

Neither the initial unlawful imprisonment nor the subsequent unlawful imprisonment renders unlawful or invalid the intervening lawful period of imprisonment: *Dunne v. Clinton* [1] *; The People v. Walsh.*"

Counsel for the applicant submitted that there is nothing in s.13(4) of the Act of 2003 to indicate that the section must be interpreted as though it contained the word "forthwith", but that even if counsel for the respondent was right, and there was an unjustifiable delay in informing the respondent as to his rights under s.13(4), the decision in *Shaw* establishes that once the respondent was informed of his rights at 6:15p.m. on the 5th December, 2012 in Harcourt Terrace Garda Station any illegality that had existed up to that point was cured. In practical terms it meant that while he might have been in unlawful detention from 4:20p.m. until 6:15p.m. on that date, (during which time if he had applied to the High Court for an enquiry under Article 40.4.2; alternatively, for *habeas corpus*, his release might have been ordered) once he was informed of his rights his unlawful detention was rendered lawful and everything that happened thereafter was valid. The only other possible consequence of such a brief period of illegality, if indeed there was illegality, would be that any evidence gathered during the period he was in unlawful detention would not be admissable at any trial. Nothing of that sort is relevant to this case.

In response to this counsel for the respondent contended that the *Shaw* decision was dependent upon its own peculiar facts and that it was distinguishable from the present case. When pressed as to why it was distinguishable, in terms of the principle upon which counsel for the applicant relied, counsel for the respondent stated that there had been an intervening event in the *Shaw* case that had prevented the Gardai from complying with the required formalities, whereas there was no such intervening event in the present case.

Decision on the Adjournment Application and Preliminary Issue
As previously pointed out, oral evidence was given of the circumstances of the arrest before Mr. Justice Sheehan on the 6th December, 2011. That was the appropriate time to raise the issue which is now being raised and it was not raised. Further, Garda Reid was not cross examined on his evidence at that time.

Confronted with this, counsel for the respondent makes the point that the respondent was represented by a different legal team at the arrest hearing and that he and his solicitors only began to act for the respondent in late February, 2012. However, that begs the question as to what has happened between the present team coming on record and the matter coming on for hearing on yesterday's date. It has to be presumed that as one of the first steps in taking over the respondent's file the new legal team interviewed him and took comprehensive instructions for the purposes of addressing what possible objections to his surrender might be open to him. This would have included, or should have included, taking detailed instructions from him concerning the circumstances of his arrest. No reasonable explanation has been put forward as to why the circumstances which it is contended were only discovered when the respsondent's legal team were recently served with the affidavit of Garda Reid were not discovered by the respondent 's own legal team in the course of taking instructions from him. The inexorable logic of counsel for the respondent's argument, if he is right, is that the respondent has been in unlawful custody since the 6th December of last year. If that is so it is fair to ask the question as to why nobody on his present legal team has sought to inititate an enquiry under Article 40.4.2 of the Constitution in relation to his detention since they became involved last February.

A further point that requires to be made is that the objection now being raised is not pleaded. In fairness to counsel for the respondent, he recognized that and one of the grounds on foot of which he was seeking an adjournment was to enable him to amend his pleadings. The Court always has a discretion to allow an amendment of pleadings where the interests of justice require it. Of course, where an applicant is not prepared to consent to an amendment it requires the bringing of a formal motion grounded upon an affidavit. In this particular case, however, counsel for the applicant had indicated that she was prepared and able to deal with the point raised notwithstanding that it was not pleaded. She was maintaining an objection that the point was not pleaded, but leaving it in the hands of the Court as to whether or not the respondent could proceed with it. She was not insisting on the bringing of a formal motion to amend and was leaving the matter in the hands of the Court.

In seeking his adjournment, counsel for the respondent did not even have a draft notice of motion or grounding affidavit seeking to amend the pleadings, nor did he have draft amended points of objection. That would not necessarily inhibit the Court from granting an adjournment to allow all of that to be done; alternatively granting an amendment to the existing points of objection without the bringing of a formal motion, but where the request was made as late in the day as it was made in this case the Court was entitled to examine whether the new point which the respondent was seeking to ventilate had any ostensible merit to it, and any reasonable prospect of success.

The *Shaw* case upon which counsel for the applicant relies is not some obscure authority that a practitioner could reasonably be forgiven for not being familiar with. It is one of the leading cases in Irish Constitutional law. It is one encountered by every student of Irish law and it is one with which every practitioner can be expected to be familiar. It is a decision of the highest court in the land and it has represented good law for the last thirty years. Moreover, it is not a decision peculiar to its own facts. On the contrary, it establishes a number of important principles of Constitutional law of general application, one of which is that an arrest which is unlawful initially may become lawful as and from the point in time when such arrest complies with the requirements of lawful arrest. That principle has been reiterated time and again by the Supreme Court, e.g. *The People (Director of Public Prosecutions) v. Buck* [2002] 2 I.R. 268 and *The People (D.P.P.) v. O'Brien* [2005] I.R. 206 and has been applied many times by the High Court. Counsel for the respondent has been unable to point to any authority tending to contradict the *Shaw* principle relied upon or that is even suggestive that it is not correct, or only of limited application. In circumstances where the law is abundantly clear, and should be well known to the respondent's legal team, it seems to this Court that the proposition currently being advanced is all but unstateable.

If the Court were to have granted the adjournment sought it would have served no useful purpose. It would however have delayed the proceedings further while the necessary motion was brought and adjudicated upon. The trial date fixed for yesterday would have to have been vacated and it would have been too late to slot in another case with the result that valuable court time would have been wasted. There were no useful further instructions that could have been taken from the respondent. Counsel for the respondent admitted in the course of his submissions that he was not seeking to challenge Garda Reid's affidavit as to what occurred. On the contrary he was seeking to rely upon it. Moreover, as the point was readily capable of being dealt with on the basis of existing evidence, and on the basis of well established authority the Court is at a loss to know for what purpose an adjournment was really being sought. Solicitors and counsel have a duty to the Court as well as to their client. It is not appropriate that adjournments should be sought without good grounds. It is apparent from the submissions made that the respondent's side had no good reason to believe that the *Shaw* authority was not apposite. It seemed to this Court that it was being sought for the purposes of engaging in a fishing expedition, more in hope than in expectation, to see if some authority might be dredged up to support a proposition that was on the face of it untenable. It was not a situation where counsel believed that such an authority actually existed, but simply did not have it to hand.

Taking all of the above into account, the Court was satisfied that the interests of justice did not require the granting of the

adjournment sought. The Court was content to rule upon the preliminary issue on the basis of the evidence and submissions before it. Having considered the matter it was satisfied to dismiss the preliminary objection, both as to Court's jurisdiction and otherwise as a basis for resisting surrender, on the grounds that the principle relied upon by the applicant in the *Shaw* decision is directly in point and is dispositive of the issue