Neutral Citation Number: [2011] IEHC 329

THE HIGH COURT

2010 203 & 204 EXT

Between/

THE MINISTER FOR JUSTICE AND EQUALITY

Applicant

And

TOMASZ JUSZYNSKI

Respondent

JUDGMENT of Mr Justice Edwards delivered on the 28th day of July 2011

Introduction.
The respondent was initially the subject of two European Arrest Warrants issued by the Republic of Poland on the 27th of November, 2009 and the 15th of March 2010, respectively. The warrant of the 27th of November, 2009 has recently been withdrawn and so the court is now concerned only with the warrant of the 15th of March 2010. This warrant was endorsed by the High Court on the 19th of May 2010 for execution in this jurisdiction. The respondent was arrested by Sgt James Kirwan at 29 Alderwood Green, Tallaght, Dublin 24 at 11.20 am on the 14th of December 2010 and later on the same day was brought before the High Court in accordance with s. 13 of the European Arrest Warrant Act 2003 (hereinafter "the Act of 2003").

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. In the circumstances the Court must enquire whether it is appropriate to do so having regard to the terms of s.16 aforesaid.

The respondent, as is his entitlement, does not concede that any of the requirements of s. 16 of the Act of 2003 are satisfied. As no admissions have been made, the Court is put on inquiry as to whether the requirements of that section, 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. In so far as specific points of objection are concerned, the Court is required to consider a single specific objection to the respondent's surrender, namely that his surrender is prohibited by Part 3 of the Act of 2003, and specifically by s. 37(1)(a) and/or (b) thereof, in circumstances where he was tried, convicted and sentenced for the offences the subject matter of the warrant allegedly without being legally represented and without having been afforded an opportunity of being legally represented.

Uncontroversial s. 16 issues
The Court has before it an affidavit of Sgt James Kirwan sworn on the 29th of June, 2011 and has also received and scrutinised a copy of the European Arrest Warrant in this case. Moreover the Court has also inspected the original European Arrest Warrant which is on the Court's file and notes that it bears this Court's endorsement. The Court is satisfied following its consideration of this evidence and documentation that:

(a) the person before it is the person in respect of whom the relevant European Arrest Warrant was issued;

(b) the European Arrest Warrant has been endorsed for execution in accordance with s. 13 of the Act of 2003;

(c) the European Arrest Warrant is in the correct form;

(d) the respondent was not tried in absentia and in the circumstances no undertaking pursuant to s. 45 of the Act of 2003 is required;

(e) the High Court is not required, under s. 21A, 22, 23, or 24 (inserted by ss 79, 80, 81 and 82 of the Criminal Justice (Terrorist Offences) Act 2005) of the Act of 2003 to refuse to surrender the respondent.

Moreover, the warrant is a conviction type warrant and the respondent is wanted in the Republic of Poland to serve a sentence of 2 years and 6 months imposed upon him following his conviction by the District Court of Katowice of three fraud type offences (covering some 27 separate instances particularised in the warrant.) The issuing judicial authority has sought to invoke paragraph 2 of article 2 of the Framework Decision in respect of all of the offences particularised in the warrant by ticking the box relating to "fraud" in Part E.I of the warrant and leaving Part E.II thereof blank. There is no specific statement in Part C. 1 of the warrant to indicate the potential maximum sentence that might have been imposed upon the respondent, and indeed the words "not applicable" have been entered in Part C. 1. Despite this it has been urged upon the Court by counsel for the applicant, Ms Emily Farrell B.L., that the Court can be satisfied that the minimum gravity requirements for the valid invocation of paragraph 2 of article 2 of the Framework Decision are satisfied in circumstances where a box is ticked in Part E.I., and no specific objection has been raised by the respondent suggesting that minimum gravity requirements are not satisfied. Ms Farrell relies upon Minister for Justice Equality and Law Reform v Ferenca [2008] 4 I.R. 480 in support of her submission, and I am disposed to accept her submission as being correct. In the circumstances the Court is satisfied that paragraph 2 of article 2 of the Framework Decision has been validly invoked and, accordingly, that correspondence does not need to be established.

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. 206/2004 (hereinafter referred to as "the 2004 Designation Order"), and duly notes that by a combination of s 3(1) of the 2003 Act, and article 2 of, and the Schedule to, the 2004 Designation Order, "Poland" (or more correctly the Republic of Poland) is designated for the purposes of the 2003 Act as being a state that has under its national law given effect to the Framework Decision.

Evidence adduced by or on behalf of the respondent

The respondent has filed an affidavit sworn by him on the 14th of April, 2011. The said affidavit contains the following averments as to matters of fact at paragraphs 4 to 9 inclusive:

> "4. I say that, as set out in the European arrest warrant issued in Poland on the 15th day of March 2010, I was sentenced to be two and a half year term of imprisonment in the issuing state on the 6th day of October 2004.
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> 5. I say that I was initially questioned about these allegations at two separate meetings at the State Prosecutor's Office at which I was advised of my right to legal representation. I say, however, then I explained that I worked for the company involved but that at all times I acted on the instructions of my employer and that I did not realise there was any fraud or dishonesty involved in its dealings. I say, therefore, that I never believed I would be charged with any offences arising from this matter.
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> 6. I say that, in about a year later, I received a summons to attend court for trial at which I was tried jointly with my employer. I say that my employer was legally represented at that I could not afford to retain my own legal representation privately and that, for the foregoing reasons, I did not believe I would be found guilty of any offence. I say that I do not remember being asked if I wanted to be legally represented or being advised that it might be in my interests to obtain representation.
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> 7. I say that, following a hearing involving in or about 16 court appearances over a two-year period during which I was not legally represented, I was convicted of the offences set out in the European Arrest Warrant and sentenced to two and half years imprisonment. I say that I lodged my own appeal of this sentence at which I again was not legally represented and the appeal was rejected. I say that I applied to review this sentence in a higher court and that by this stage I did have the means to retain a lawyer privately. I say, however, that the lawyer failed to attend court on my behalf and the sentence was accordingly upheld.
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> 8. I say and I'm advised that the right to legal representation is a constitutionally protected right in this jurisdiction where there is a possibility or likelihood that a term of imprisonment will be imposed. I say that a similar standard does not apply in the issuing state. I say that, while there is a system of legal aid in existence there, the mere risk of imprisonment for a lengthy period does not require mandatory legal representation and I say that this is consistent with my experience where I was sentenced to two and a half years imprisonment without legal representation. I beg to refer in this regard to a report of the Helsinki Foundation for Human Rights in 2003 upon which, marked the letters 'TJ1' I sign my name price is very hereof.
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> 9. I beg to refer in particular to pages 99 -- 100 thereof, which state as follows: -
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> > "As noted above, Polish law provides that a defendant must have a defence counsel (mandatory defence) if, for example, he or she has been charged with a felony. Defendants charged with less serious criminal offences (where the minimum statutory penalty is less than three years of imprisonment) do not have the right to mandatory defence. Polish criminal law, however, set out many less serious criminal offences that involve a maximum statutory penalty of, for example, five, ten or even twelve years of imprisonment. Thus, a person can be lawfully sentenced to a long prison term (of up to twelve years) without defence counsel."

The respondent has also filed an affidavit sworn on the 5th of July, 2011 by a Dr Adam Bodnar, Associate Professor of Human Rights in the Faculty of Law and Administration at the University of Warsaw. The said affidavit contains the following relevant averments at paragraphs 4 to 13 inclusive, and also at paragraph 15 thereof:

> "Legal representation at the pre-trial stage
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> > 4. I say that every person accused of a crime in the issuing state is informed at the time of his arrest of his rights to a defence attorney during all phases of the proceedings. I say, however, that there are no specific obligations on the police to explain this right to him or to provide the suspect with a list of attorneys who might act for him. I say that the police are not obliged to assist the suspect in finding an attorney, nor are there are lists of lawyers available at the police station. I say, therefore, that the possibility of contacting a lawyer is in practice limited and a person can be questioned without seeing a lawyer on less they are able to retain a lawyer privately.
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> > 5. In any event, I say that even if a suspect is able to contact a lawyer, there is no guarantee that the lawyer contacted will be able to come to the station on short notice, and that there is no system of guaranteeing that the lawyer will be available on weekends or evenings. I further say that, where a lawyer does attend, the confidentiality of any such consultation with the suspect detained at a police station is not guaranteed, as the arresting officer may reserve the right to be present during the consultation. Where, however, a person is remanded in custody prior to trial, communication between an accused and his attorney is, as a rule, confidential.
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> > 6. I say that in practice, therefore, it rarely happens that lawyers are involved at the pre-trial stage unless the accused person can afford to retain a lawyer privately. I say and believe further that the suspect is rarely properly informed about his right to be legally represented, and that the evidence obtained without such legal representation in a police station can be used against him at his trial.
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> Legal Representation at Trial
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> > 7. I say that legal aid in the Republic of Poland is governed by the Code of Criminal Procedure of 1997, and that pursuant to article 79 thereof, legal aid is mandatory in criminal cases only when the accused is a juvenile, is blind, deaf or mute or when there are reasonable doubts as to the mental condition of the accused at the time the crime was committed. I say that is also mandatory where the court decides ex officio that the accused needs an attorney due to exceptional circumstances hampering the defence (e.g. the possibilities to communicate and understand the courts proceedings are hampered due to awkwardness of the accused). The circumstances hampering the defence should relate to the person of the accused and not the case itself, the complicated character of the case or the

large number of accusations. I say that, even if these circumstances are present, legal aid is not mandatory during the initial stages of a criminal investigation, but only after the accused is charged and brought to court.

8. I say further that legal aid is also mandatory where an accused person has been charged before a Regional Court (s¹d Okrêgowy) of first instance with an offence for which the minimum statutory penalty of imprisonment is three or more years. I say that in this regard there is a distinction under Polish law between a felony (zbrodnia) and a misdemeanour (wystêpek). I say that felonies are punishable with a minimum term of imprisonment of three years, while misdemeanours are punishable with a fine, or a term of imprisonment of more than one month up to a maximum of five years. I say, therefore, that it is possible under Polish law that person could be sentenced to a term of imprisonment for on any one misdemeanour for up to 5 years without being legally represented. I say that legal aid is also required when the accused person is deprived of his liberty during the trial (e.g. as a result of pre-trial detention).

9. I say therefore that when an accused person is charged with misdemeanour, and he is not in custody pending trial, he does not have a right to legal aid under Polish law. During first instance proceedings the presence of the accused, even if deprived of liberty (in custody or serving a prison sentence) is mandatory. During the appellate proceedings the court decides on the accused motion, whether a person which is deprived of liberty, would be brought to the hearing. If the accused, on the decision of the court, is not present during the hearing, the presence of his defence lawyer is mandatory.

10. I say further that it often happens in practice an accused person is charged with numerous misdemeanours, for which the maximum statutory penalties of imprisonment are set at five, ten or twelve years, and that in such a case the Code of Criminal Procedure does not provide for mandatory legal aid, even if the overall penalty might be over three years. I say it is possible then that a person theoretically could be sentenced to a prison term of more than three years (and theoretically even up to 12 years) without the benefit of legal representation. It is the result of the above-mentioned Criminal Code's definition of misdemeanour and felony. Misdemeanour is an offence where the minimal penalty is a fine, restriction of liberty or prison term of more than one month. I am aware of cases in which persons were convicted to 5-6 years of imprisonment for misdemeanours without having legal aid in court proceedings.

11. I say also that there is no unified system of legal aid for different proceedings, nor any separate group of lawyers who act in legal aid cases. I say that a judge appoints a legal aid lawyer from a list of attorneys provided by the local bar association and that specialisation and fields of practice are not taken into account when deciding on the appointment, with the result that a lawyer with little or no experience in criminal cases may be appointed as a defendant's counsel. I say therefore that the quality of legal assistance is sometimes lower in cases of free Legal Aid than when a defence attorney is chosen and funded through private means, and I say that I am aware of many complaints from clients whose cases have been conducted in an unreliable manner.

12. I say further, however, that the court retains discretion to grant legal aid where the accused person applies for one. In such a case, the accused person must demonstrate his inability to cover his legal fees, though as there are no clear guidelines as to the information that should be provided by the applicant, the practice of various courts is much divided. The court also has a discretionary power to provide ex officio that the accused needs an attorney in situations when it finds it necessary due to circumstances hampering the defence (e.g. the accused suffers paralysis and stands the trial in a position and needs to be provided with medication regularly).

13. I say that the decision regarding entitlement to free legal assistance is, at all stages of criminal proceedings, made by a judge, who decides whether the request for free should be granted given the financial circumstances of the defendant and, if so, which lawyer should be appointed. I say, however, that as the costs of such legal aid are covered by courts out of their own budgets, it sometimes happens that judges deny free legal aid because of the financial situation of the court in which the proceedings are taking place."

"15. I say in conclusion, therefore, that under the law as it stands in the issuing state, it is perfectly acceptable for a person to stand trial and be imprisoned without legal representation for a misdemeanour (an offence which carries a minimum penalty of a least financial penalty, limitation of liberty, imprisonment of minimum 1 month -- but at the same time it is not a felony endangered with at least three years of imprisonment), unless such person is in pre-trial detention during investigation and trial. I say and believe, therefore, that while I have no personal experience of the respondent's case and therefore obviously I cannot comment on the veracity of those particular allegations, I say that they appear to be consistent with the law and practice of the issuing state. I say and believe further, therefore, that as this standard legal representation is acceptable under the law of the issuing state, that there is no basis under Polish law for the Respondent now to challenge his conviction and sentence there on the basis of the absence of legal representation."

Submissions on behalf of the Respondent

Counsel for the respondent, Mr John Fitzgerald B.L., concedes that there is a system of legal aid in Poland and that his client was advised at the outset in the police station that he was entitled to a lawyer. However, he urges that it is not enough for a person in his client's position to have such a right, and to be told in a formulaic way that he has such a right – he must be able to avail of it in practice. In the present case the respondent was advised in the police station of his right to a lawyer. He didn't think he needed one at the time and he has no recollection of the issue being re-visited at any time thereafter, and particularly by any judge on any of the occasions that he came before a Court in Poland.

Mr Fitzgerald urges that in circumstances where his client potentially faced a lengthy custodial sentence or sentences it was incumbent on the Court of trial to ensure that he was fully aware of his right to a State appointed lawyer in circumstances where he could not afford to pay for one. He says that that is the law in Ireland and he urges that the jurisprudence of the European Court of Human Rights suggests that for the Article 6 rights of a person in the respondent's position to be respected the Polish Courts were under a similar obligation. However, it appears that whatever about obligations under the Convention there appears to be no obligation on a Judge under domestic Polish law to raise the issue with a defendant save in certain limited circumstances, which don't apply to his client, where it is mandatory to do so. There is certainly no evidence that his client was advised by a judge at any point of his right to seek the assistance of a State funded lawyer. Further, he points to the affidavit of Dr Bodnar as providing support for what he says, particularly in paragraph 15 thereof where the deponent avers that "under the law as it stands in the issuing state, it is perfectly acceptable for a person to stand trial and be imprisoned without legal representation for a misdemeanour".

Mr Fitzgerald characterises this as a fundamental defect in the system of criminal justice in the issuing state, and urges upon this

Court that in circumstances where it cannot be satisfied that the respondent's due process rights, and in particular his right to be legally aided, were respected within the trial process leading to his conviction and sentence this Court should refuse to surrender him.

In support of his case Mr Fitzgerald referred the Court to a number of Irish authorities as well as decisions of the European Court of Human Rights.

The first authority to which the Court was referred was the landmark decision of the Supreme court in State (Healy) v Donoghue [1976] I.R. 325, and in particular to the following passages which are self explanatory.

O'Higgins C.J. said at p.350:

> "The requirements of fairness and of justice must be considered in relation to the seriousness of the charge brought against the person and the consequences involved for him. Where a man's liberty is at stake, or where he faces a very severe penalty which may affect his welfare or his livelihood, justice may require more than the application of normal and fair procedures in relation to his trial. Facing, as he does, the power of the State which is his accuser, the person charged may be unable to defend himself adequately because of ignorance, lack of education, youth or other incapacity. In such circumstances his plight may require, if justice is to be done, that he should have legal assistance. In such circumstances, if he cannot provide such assistance by reason of lack of means, does justice under the Constitution also require that he be aided in his defence? In my view it does."

Counsel for the respondent submits that this passage sets out the basic standard and that, judged by any yardstick, the Polish system does not measure up to it.

> The former Chief Justice further said at p.352:
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> "However, the Act of 1962 lays down as a condition for the grant of legal aid both in the District Court and on return for trial, that the person seeking it must apply for it. No one can be compelled to accept legal aid, and a person charged is entitled to waive his right in this respect and to defend himself. No objection can be raised if these provisions of the Act operate to cover such cases where a person, knowing of his right, does not choose to exercise it and, therefore, decides not to apply. However, if a person who is ignorant of his right fails to apply and on that account is not given legal aid then, in my view, his constitutional right is violated. For this reason it seems to me that when a person faces a possible prison sentence and has no lawyer, and cannot provide for one, he ought to be informed of his right to legal aid. If the person charged does not know of his right, he cannot exercise it; if he cannot exercise it, his right is violated."

Counsel for the respondent invites the court to contrast this practical vindication of the right to the assistance of a legally aided lawyer under Irish law with the mostly theoretical right to have such assistance under Polish law. In particular, the Healy case makes it clear that under Irish law the Court owes a duty and responsibility to the respondent to ensure that he is aware of his rights and can exercise them.

The Court was also referred to the judgment of Henchy J in Healy at p.354/355. The learned judge stated:

> "Having regard to the scope and purpose of the Act of 1962 and the solemnly declared duty of each judge to uphold the Constitution and the laws, it is implicit that it is the duty of each District Justice not simply to grant a legal-aid certificate when an application is made for one on satisfactory statutory grounds but also to see that an accused who appears, from the circumstances disclosed by a due hearing of the case, to be qualified for one is informed of his right to apply for it; and, when a legal-aid certificate has been granted to an accused, the duty extends to ensuring that the accused will not be tried against his will without the benefit of that legal aid. The Act would be but a hollow and specious expression of the constitutional guarantee if it is not given at least that degree of judicial implementation. An accused person who has been convicted and deprived of his liberty without the benefit of legal aid in such circumstances may be heard to say that his constitutionally-guaranteed rights have been violated or ignored."

In addition, Griffin J stated at pp 360/361:

> "If Healy had applied for legal aid, he would undoubtedly have been entitled to obtain it under the Act of 1962. By reason of the gravity of the charge, and of his lack of education and virtual illiteracy, it was without question essential in the interests of justice that he should have had legal aid. Can it be said that it was not essential in the interests of justice that he should get it, simply because he did not apply for it? In my opinion it cannot and should not. A right to legal aid would be a very empty right if it depended for its implementation on a young, uneducated, illiterate defendant who may not be aware of his right and of the possible serious consequences to him of a failure to have legal aid."

In my opinion, when the circumstances are such that if, in the event of a conviction or on a plea of guilty, a sentence of imprisonment is likely, a District Justice should inform an indigent defendant of his right to legal aid under the Act. If such defendant indicates that he does not wish to have legal aid, the District Justice should satisfy himself that the defendant intelligently and understandingly waives his right to legal aid."

The Court was also referred to Cahill v Reilly [1994] 3 I.R. 547, a case in which the defendant was before the court on a charge that in and of itself was not likely to attract a term of imprisonment and so legal aid not sought or granted. However, when he was convicted and his previous convictions were read out the landscape charged quite significantly, and an issue then arose as to whether or not legal aid should have be granted, which issue gave rise to a judicial review. Giving judgment in the High Court Denham J said at p.552:

> "In view of the facts of this case it is now appropriate to inform the applicant of his right to be legally represented or to apply for legal aid at the commencement of the case in the District Court. But that arises because of the situation here. We now know it is a potential custodial case. I am not deciding that in all cases where there is a statutory sentence of imprisonment possible that the accused has to be told of his right to be legally represented or to apply for legal aid. But I do hold that when a custodial sentence becomes probable, or likely, after conviction or on a plea of guilty in a situation where it may have not been likely before, then at that stage, at the sentencing, the District Court Judge should inform the accused, if he has not before, of his right to be legally represented or his right to apply for legal aid in relation to the sentence."

In support of his argument counsel for the respondent further referred the Court to the judgment of McMahon J in O'Neill v Butler

[1979] ILRM 243 where he said:

> "S.2 of the Criminal Justice (Legal Aid) Act, 1962 requires the District Justice in considering whether it is essential in the interests of justice that the defendant should have Legal Aid to have regard not merely to the gravity of the charge but also to any exceptional circumstances. It would not be proper to leave the onus of establishing such exceptional circumstances upon a defendant who may be ignorant or inarticulate and the Justice should enquire into the matter himself. The circumstances contemplated by the Act would include the personal circumstances of the defendant such as the nature of his employment which might render a conviction more serious than it would otherwise be and also circumstances which might affect the defendant's ability to understand the charges against him and conduct his defence. Where the interests of justice require that the defendant should have Legal Aid the Constitution requires that he be afforded the opportunity of being legally represented as is the duty of the Justice on behalf of the State to see that this opportunity is afforded. When the justice is considering whether the interests of justice require the granting of Legal Aid it would not be right to base his decision solely upon the ability of a defendant whose need for a Legal Aid is in question to put forward a claim based on special circumstances."

The first judgment of the European Court of Human Rights to which the Court was referred was the judgment in Quaranta v Switzerland (Application no. 12744/87) of the 24th of May 1991. According to counsel for the respondent this case demonstrates that the approach of the Strasbourg Court as to whether or not a person should have the right to legal aid or a state funded lawyer is similar to that adopted by the Courts in Ireland, namely that it depends on the severity of the potential sentence faced by the accused. This Court's attention was drawn, in particular, to paragraph 33 of the judgment:

> "33. In the first place, consideration should be given to the seriousness of the offence of which Mr Quaranta was accused and the severity of the sentence which he risked. He was accused of use of and traffic in narcotics and was liable to "imprisonment or a fine" (section 19 para. 1 of the 1951 Act - see paragraph 19 above)".

According to the Government, there was nothing in the file to indicate that the Criminal Court was likely to impose a sentence exceeding eighteen months, the maximum for a suspended sentence. By sentencing the applicant to six months' imprisonment, the court did not reach this limit, even if the sentence imposed in 1982 is taken into account (see paragraph 8 above).

The Court notes however that this was no more than an estimation; the imposition of a more severe sentence was not a legal impossibility. Under section 19 para. 1 of the Federal Misuse of Drugs Act, in conjunction with Article 36 of the Swiss Criminal Code, the maximum sentence was three years' imprisonment (see paragraph 20 above). In the present case, free legal assistance should have been afforded by reason of the mere fact that so much was at stake."

The Court was also referred to two further judgments of the European Court of Human Rights that deal generally with the right to criminal legal aid and the information that must be given to an accused, and more specifically with the issue of waiver.

The first was the judgment in Shulepov v Russia (Application no:15435/03) of the 26th of June 2008. In that case the accused was legally represented by a court appointed lawyer at first instance before the criminal courts in Russia. However, having been convicted and having appealed he was then not afforded the same facility. The arguments and the ECHR's ruling are more particularly described at paragraph 28 et seq of the judgment

> "28. The applicant argued that while he did not remember if he had made a relevant request for participation of a court-appointed lawyer in appeal proceedings, he had never waived his right to have such a lawyer, whose participation in the applicant's case was obligatory according to Article 51 of the Code of Criminal Procedure (see paragraph 17 above).
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> 29. The applicant thus protested against the Government's finding that the charges against him had not required obligatory legal representation. He pointed out that the most severe sentence for murder was fifteen years' imprisonment and for theft was six years' imprisonment, whereas Article 69 of the Criminal Code provided for cumulative sentencing by way of partial or full accumulation of penalties (see paragraphs 15 -16 above).
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> 30. Furthermore, the appeal proceedings had been conducted by videoconference, which, in the applicant's point of view, limited his capacity to state his case without the assistance of a lawyer who could be present in the courtroom. In sum, the applicant considered that the interests of justice in his case had required the appeal court not to remain passive and to enable him to be represented by counsel.
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> 2. The Court's assessment
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> (a) General principles
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> 31. The Court notes at the outset that the requirements of Article 6 § 3 are to be seen as particular aspects of the right to a fair trial guaranteed by Article 6 § 1, and therefore the applicant's complaints under Article 6 §§ 1 and 3 should be examined together (see Vacher v. France, judgment of 17 December 1996, Reports of Judgments and Decisions 1996-VI, p. 2147, § 22).
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> 32. The Court reiterates that the manner in which paragraph 1, as well as paragraph 3 (c), of Article 6 is to be applied in relation to appellate or cassation courts depends upon the particular features of the proceedings involved; account must be taken of the entirety of the proceedings conducted in the domestic legal order and the role of the appellate or cassation court therein (see Twalib v. Greece, judgment of 9 June 1998, Reports of Judgments and Decisions 1998-IV, § 46, and Granger v. the United Kingdom, judgment of 28 March 1990, Series A no. 174, p. 17, § 44). The Court has already held that the situation in a case involving a heavy penalty where an appellant was left to present his own defence unassisted before the highest instance of appeal was not in conformity with the requirements of Article 6 (see Maxwell v. the United Kingdom, judgment of 28 October 1994, Series A no. 300-C, § 40).
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> 33. Finally, neither the letter nor the spirit of Article 6 of the Convention prevents a person from waiving of his own free will, either expressly or tacitly, the entitlement to the guarantees of a fair trial (see Talat Tunç v. Turkey, no. 32432/96, § 59, 27 March 2007). Such a waiver, however, must be established unequivocally and must not run counter to any important public interest (see Sejdovic v. Italy [GC], no. 56581/00, § 86, ECHR 2006-...).
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> (b) Application of the above principles to the instant case

34. The Court observes that, in Russia, the jurisdiction of appeal courts extends both to legal and factual issues. The Sverdlovsk Regional Court thus had the power to fully review the case and to consider additional arguments which had not been examined in the first-instance proceedings. Given the seriousness of the charges against the applicant and severity of the sentence to which he had been liable, the Court considers that the assistance of a legal-aid lawyer at this stage was essential for the applicant, as the former could effectively draw the appeal court's attention to any substantial argument in the applicant's favour, which might influence the court's decision.

35. Moreover, the applicant appeared before the appeal court by videoconference from the prison facility and the prosecutor appeared in the courtroom in person, hence the applicant's communication with the court without any representation in the courtroom was at a certain disadvantage (see, a contrario, Marcello Viola v. Italy, no. 45106/04, § 75, ECHR 2006-... (extracts), and Golubev v. Russia (dec.), no. 26260/02, 9 November 2006).

36. Therefore, in the Court's point of view, the interests of justice demanded that, in order to receive a fair hearing, the applicant should have benefited from legal representation at the appeal hearing.

37. The Court further notes that according to the Russian Code of Criminal Proceedings, as interpreted by the Russian Constitutional Court, the onus of appointing a legal aid lawyer rested upon the relevant authority at each stage of the proceedings (see paragraphs 17 and 19 above).

38. Thus it was incumbent on the judicial authorities to appoint a lawyer for the applicant to ensure that the latter received the effective benefit of his rights, notwithstanding the fact that he had failed to request this explicitly. In this respect the Court notes that the applicant never unequivocally waived his defence rights. However, no attempt whatsoever had been made to appoint a lawyer or to adjourn the appeal hearing in order to secure the presence of a lawyer later.

39. In view of the above considerations the Court finds that the proceedings before the Sverdlovsk Regional Court did not comply with the requirements of fairness. There has, therefore, been a breach of Article 6 § 1 in conjunction with Article 6 § 3 (c) of the Convention"

The second such judgment was in the case of Plonka v Poland (Application no: 20310/02), a judgment of the 31st of March 2009. According to counsel for the respondent this judgment makes it clear that simply affording a suspect the right to a lawyer in a police station is not enough. The Court said:

"27. The applicant stated that it was true that she had been informed of her right to be assisted by a lawyer. However, she was not offered any help in appointing one, nor was she asked whether she could afford the cost of legal counsel.

28. The Government submitted that the applicant had been informed of her rights and could have requested to be assisted by a lawyer. They stressed that according to Polish law the trial court could decide a case only on the basis of the facts and circumstances that were established during the trial.

29. The Government maintained that the applicant had not been questioned by the police but had merely had "a conversation" with a police officer, and that the conversation had been recorded in a note of 9 April 1999.

30. In the Government's opinion, unlike in the case of Brennan v. the United Kingdom (no. 39846/98, ECHR 2001-X), in the present case the applicant had not been deprived of access to a lawyer and she could have requested his presence. In addition, the applicant had been represented throughout the trial by a lawyer of her choice and her case had been heard at three levels of jurisdiction. The trial court had been free to assess the evidence before it. As it happened, in the present case the explanations given by the accused at the initial stage of the proceedings had merely prevailed over the evidence gathered during the course of the trial.

31. The Government concluded that there was no violation of Article 6 § 1 in conjunction with Article 6 § 3 (c) of the Convention.

2. The Court's assessment.

(a) The general principles

32. The Court reiterates that Article 6 § 3 (c) may be relevant at the stage of the preliminary investigation in so far as the fairness of the trial is likely to be seriously prejudiced by an initial failure to comply with its provisions. The manner in which Article 6 § 3 (c) is to be applied during the preliminary investigation depends on the special features of the proceedings involved and on the circumstances of the case (see Imbrioscia v. Switzerland, judgment of 24 November 1993, and John Murray v. the United Kingdom, judgment of 8 February 1996, Reports of Judgments and Decisions 1996-I, § 62).

33. The Court further reiterates that although not absolute, the right of everyone charged with a criminal offence to be effectively defended by a lawyer, assigned officially if need be, is one of the fundamental features of fair trial (Poitrimol v. France, 23 November 1993, § 34, Series A no. 277-A, and Demebukov v. Bulgaria, no. 68020/01, § 50, 28 February 2008). Nevertheless, Article 6 § 3 (c) does not specify the manner of exercising this right. It thus leaves to the Contracting States the choice of the means of ensuring that it is secured in their judicial systems, the Court's task being only to ascertain whether the method they have chosen is consistent with the requirements of a fair trial. In this respect, it must be remembered that the Convention is designed to "guarantee not rights that are theoretical or illusory but rights that are practical and effective" and that assigning counsel does not in itself ensure the effectiveness of the assistance he may afford an accused (Imbrioscia, cited above, § 38).

34. National laws may attach consequences to the attitude of an accused at the initial stages of police interrogation which are decisive for the prospects of the defence in any subsequent criminal proceedings. In such circumstances, Article 6 will normally require that the accused be allowed to benefit from the assistance of a lawyer already at the initial stages of police interrogation.

35. The Grand Chamber has recently stressed that in order for the right to a fair trial to remain sufficiently "practical and effective" Article 6 § 1 requires that, as a rule, access to a lawyer should be provided as from the first interrogation of a

suspect by the police, unless it is demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict this right. Even where compelling reasons may exceptionally justify denial of access to a lawyer, such restriction - whatever its justification - must not unduly prejudice the rights of the accused under Article 6. The rights of the defence will in principle be irretrievably prejudiced when incriminating statements made during police interrogation without access to a lawyer are used for a conviction (see Salduz v. Turkey [GC], no. 36291/02, § 55, 27 November 2008).

(b) Application of the principles to the above case

36. The Court firstly observes that according to the record of the questioning and the relevant form that was signed by the applicant, she was informed of her rights and in particular the right to remain silent or to be assisted by a lawyer throughout the proceedings and during her questioning by the police (see paragraph 7 above). It would further appear that the applicant, a suspect in the present case, did not request to be assisted by a lawyer. However, there is no indication that the applicant expressly waived her right to be represented by a lawyer during her questioning on 8, 9 and 10 April 1999 (see paragraph 7 above).

37. In this respect the Court reiterates that neither the letter nor the spirit of Article 6 of the Convention prevents a person from waiving of his or her own free will, either expressly or tacitly, the entitlement to the guarantees of a fair trial (see Kwiatkowska v. Italy (dec.), no. 52868/99, 30 November 2000). However, if it is to be effective for Convention purposes, a waiver of the right to take part in the trial must be established in an unequivocal manner and be attended by minimum safeguards commensurate to its importance (see Salduz cited above § 59). In the circumstances of the present case, the assertion in the form stating her rights that the applicant had been reminded of her right to remain silent or to be assisted by a lawyer (see paragraph 7 above) cannot be considered reliable. The Court does not find, accordingly, that there was a clear and unequivocal waiver of the applicant's right to the guarantees of a fair trial.

38. The Court stresses in this connection that one of the specific features of the instant case was the applicant's alcoholism. During the first police interview the applicant admitted that she had been suffering from an alcohol problem for many years. She further confessed to having drunk a substantial amount of alcohol the day before her arrest (see paragraphs 6 and 12 above). These circumstances clearly suggest that the applicant was in a vulnerable position at the time of interview, and that the authorities should have taken this into account during questioning and in particular when apprising her of her right to be assisted by a lawyer.

39. It is true that the applicant was represented by a lawyer as from 23 April 1999 and throughout the proceedings before the Katowice Regional Court and the Katowice Court of Appeal (see paragraphs 10 and 16 above). During the criminal proceedings she was also able to call witnesses on her behalf and had the possibility of challenging the prosecution's arguments. The applicant subsequently denied the content of her statement to the police. However, her initial confession made in the absence of a lawyer had a bearing on her conviction. While the statements made by the applicant during police custody and her confession were not the sole basis for her conviction, the Katowice Regional Court nevertheless based its final decision on them, observing that her testimony during the hearings was not credible.

40. In view of the circumstances the guarantee of fairness enshrined in Article 6 required that the applicant had the benefit of the assistance of a lawyer from the very first stage of police questioning. In this regard, it is not for the Court to speculate on what the applicant's reaction or her lawyer's advice would have been had she had access to a lawyer at the initial stage of the proceedings (see Salduz, cited above, § 58).

41. The Court considers that in the present case the applicant was undoubtedly directly affected by the lack of access to a lawyer during her questioning by the police. Neither the assistance provided subsequently by a lawyer or the adversarial nature of the ensuing proceedings could cure the defects which had occurred during the police custody.

42. The foregoing considerations are sufficient to enable the Court to conclude that there has been a breach of Article 6 § 1 of the Convention in conjunction with Article 6 § 3 (c)."

In conclusion, Counsel for the respondent submitted that the defect in the Polish system of criminal justice is of a sufficiently fundamental type, and the denial of rights to his client in the particular circumstances of the case was so egregious, to justify this Court in refusing to surrender the applicant because to do so would compound the existing injustice and give rise to a further breach of his rights.

Submissions on behalf of the Applicant
The Court has had the benefit of both written and oral submissions from Ms Emily Farrell, B.L., on behalf of the applicant.

The evidence of the respondent's expert Dr Bodnar, which is corroborated by the extract from the report of the Helsinki Foundation for Human Rights on Access to Legal Aid in Poland, 2003 exhibited with the respondent's own affidavit, is to the effect that there is a scheme of legal aid in Poland (in the sense of the provision to qualifying persons of State funded legal representation). In certain circumstances, that are not particularly relevant in this case, it is mandatory in Poland for the accused to have legal representation and as a corollary the provision of legal aid to such an accused is also mandatory. In other cases the Court may decide ex officio that an accused requires to be represented and in those circumstances will of its own motion order that the accused be provided with State funded legal representation. In all other cases the Court retains discretion to provide a lawyer if the accused applies for one, subject to the accused satisfying a means test.

Ms Farrell requests the Court to subject the respondent's evidence to close analysis. In her written submissions to the Court she submits that there is no evidence to the effect that the respondent was denied the opportunity to apply for legal aid, or that he was unaware of his entitlement to obtain legal representation and/or his entitlement to apply for legal aid. The respondent does not say that he sought legal aid and that he was refused, nor does he provide any evidence of his means except insofar as he says he could not afford his own legal representation. Moreover it is clear from the respondent's evidence that he believed he did not need a lawyer.

In the course of her oral submissions Ms Farrell B.L. sought to elaborate upon, and to amplify, what was contained in that regard in her written submissions. Commenting first on Dr Bodnar's affidavit, she acknowledged his confirmation that, aside from those cases in which legal aid mandatory or is provided ex officio, the Court retains discretion to provide a lawyer if the accused applies for one. However, she submitted, he does not say an accused is not told of this right. Moreover, Dr Bodnar does not deal with the extent to which an accused is told of his right to legal representation, or what that entails. He does not say that while an accused will be told "you have a right to a lawyer", that he would not be told "and if you can't afford it one will be provided for you, or that you can make

application to me for legal aid." Accordingly Ms Farrell B.L. submitted there are gaps in the evidence before this court and that in the circumstances the presumption that the Polish authorities have acted in accordance with the Convention is not rebutted.

Ms Farrell has further submitted that there is nothing on affidavit from the respondent (who was obviously present) to say "I was never told I had a right to apply for legal aid", or to say "I didn't know I could apply for legal aid" whether he didn't know in any event and then was not told by the Court, or whether he was told by the Court and didn't otherwise know. He merely says "I was advised of my right to legal representation", and he makes no complaint concerning that. He doesn't say that "I wasn't told adequately" or that "I didn't understand what I was told." He says "I was advised my right to legal representation" on the two occasions that he was questioned in the police station. Subsequently he received a summons and, with regard to that, he says in his affidavit "I don't remember being asked if I wanted to be legally represented or being advised that it might be in my interests to obtain representation." In the applicant's submission this falls very far short of being evidence that something that must be presumed to have occurred did not occur. The respondent says he doesn't remember. He was before the Court approximately sixteen times over a two year period before he was convicted and sentenced. And he does not say, for example, that "while I am not sure, I have no memory of being asked and I don't think that I was asked". He merely says "I don't remember being asked". He leaves entirely open the possibility that it is his memory that is faulty and that he may indeed have been asked if he wanted to be legally represented, and told about the possibility of legal aid.

Ms Farrell B.L. contends that, in circumstances in which there is an evidential deficit concerning how the respondent was actually dealt with, the affidavit of Dr Bodnar is not particularly relevant. That is the case even if the Court was to accept his evidence that it frequently happens in Poland that significant sentences are passed on people that have not been represented. Ms Farrell submits that this Court is only concerned with what may have happened in this case, and it must presume that the trial was conducted properly and in accordance with the European Convention on Human Rights (or corresponding constitutional / fundamental rights howsoever guaranteed), unless the respondent puts cogent evidence before this Court to rebut that presumption. He has not done so. Evidence that convictions have sometimes been recorded, and that sentences have sometimes been imposed, in circumstances that may not adhere to the standards of the Convention, or other sources of guaranteed fundamental rights, does not establish that it is always so, and it is of no assistance concerning what occurred in this particular case.

Ms Farrell B.L. has sought to re-iterate and stress that the Court must presume that the Polish authorities respected the respondents fundamental rights in the course of his trial. She suggests that the Court is being asked to treat the presumption that what was required to be done was done properly and in accordance with the Convention as having been rebutted by a statement that in some cases, or even, frequently, it is not done properly. She submitted that evidence of that type cannot rebut the presumption that what was required to be done was done properly and in accordance with the Convention.

In further support of her arguments, counsel for the applicant relies upon the following quotation from Minister for Justice, Equality and Law Reform v. Brennan [2007] 3 IR 732, where Murray C.J. stated (at p. 743-4):

> "The effect of such an argument is that an order for surrender under the Act of 2003, and indeed any order for extradition, ought to be refused if the manner in which a trial in the requesting state including the manner in which a penal sanction is imposed, does not conform to the exigencies of our Constitution as if such a trial or sentence were to take place in this country. That can hardly have been the intention of the Oireachtas when it adopted s. 37(1) of the Act of 2003 since it would inevitably have the effect of ensuring that most requests for surrender or extradition would have to be refused. And indeed if that were the intent of the Framework Decision, which the Act of 2003 implements, and other countries applied such a test from their own perspective, few, if any, would extradite to this country".
>
> Indeed it may be said that generally extradition has always been subject to a proviso that an order for extradition, as with any order, should not be made if it would constitute a contravention of a provision of the Constitution. I am not aware of any authority for the principle that the extradition or surrender of a person to a foreign country would contravene the Constitution simply because their legal system and system of trial differed from ours as envisaged by the Constitution.
>
> The manner, procedure and mechanisms according to which fundamental rights are protected in different countries will vary according to national laws and constitutional traditions. The checks and balances in national systems may vary even though they may have the same objective, such as ensuring a fair trial. There may be few, if any, legal systems which wholly comply with the precise exigencies of our Constitution with regard to these matters. Not all for example will provide a right to trial by jury in exactly the same circumstances as our Constitution does in respect of a trial for a non-minor offence. Rules of evidence may differ. The fact that a person would be tried before a judge and jury in this country for a particular offence could not in my view, be a basis for refusing to make an order for surrender solely on the grounds that in the requesting state he or she would not be tried before a jury. The exceptions which we have to the jury requirement, as in trials before the Special Criminal Court, acknowledges that a fair trial can take place without a jury even though it is constitutionally guaranteed for most trials in this country".

That is not by any means to say that a court, in considering an application for surrender, has no jurisdiction to consider the circumstances where it is established that surrender would lead to a denial of fundamental or human rights. There may well be egregious circumstances, such as a clearly established and fundamental defect in the system of justice of a requesting state, where a refusal of an application for surrender may be necessary to protect such rights. It would not be appropriate in this case to examine further possible or hypothetical situations where this might arise. The sole matter which I wish to make clear here is that 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) of the Act."

According to counsel for the applicant, Brennan makes it very clear that there must be cogent evidence of an egregious failure. She submits that that is what is required and nothing less than that will do. There is no such evidence here. It is not sufficient to suggest or to show that it would be done differently in Ireland or that it would be done better in Ireland. The Minister was not required to engage with the specifics of the respondent's allegations e.g., by seeking further information from the issuing judicial authority concerning the actual circumstances of the respondent's trial, in the absence of cogent evidence adduced by the respondent tending to rebut the presumption.

Counsel for the respondent also relies upon the judgments of the Supreme court in Minister for Justice, Equality and Law Reform v. Stapleton [2008] 1 IR 669, and in particular the statement in the judgment of Fennelly J (at p. 684) that "the corner stone of the entire [EAW] system is, of course, the principle of mutual recognition of the judicial systems and mutual trust of the legal systems of the other Member States." She has also referred to my judgment in Minister for Justice, Equality and Law Reform v. v. Sliwa,

(unreported, High Court, Edwards J, 1st July 2011), where I concluded that "absent evidence of some fundamental defect in the criminal justice system of the issuing state mere differences in national laws or procedures, or constitutional laws and traditions, will not be sufficient to prevent a respondent from being surrendered." Relying on Brennan, Stapleton and Sliwa the applicant says that the Court's concern must be with whether the surrender of the respondent would amount to a breach of the respondent's rights. It is not for this Court to examine the trial that has occurred to see if there was any difficulty with it or defect in it. According to Ms Farrelly the respondent has not demonstrated, by evidence, "egregious circumstances, such as a clearly established and fundamental defect in the system of justice of a requesting state". While the respondent may have been entitled to legal aid in this State, even if it were established that he was denied legal aid in respect of the same offences in the issuing state, that would not, of itself, be evidence of a fundamental defect in the system of justice of the requesting state. However, the evidence does not even go that far.

Ms Farrell submits that in all the circumstances the respondent has not established that his surrender is prohibited by section 37.

Decision
The Court has little difficulty in accepting the respondent's contention that, as an aspect of his fundamental rights, an accused facing trial, and sentencing if convicted, in circumstances where a significant term of imprisonment may potentially be imposed upon him, is entitled to be legally represented at his trial and sentencing, and that if he cannot afford such representation that he should be able to avail of some form of state funded legal aid. The court also has no difficulty in accepting the proposition that there must be realistic access to such legal aid, and in particular that an accused must be informed of his rights and have the practical means of availing of those rights. The Court does not consider it necessary for the purposes of this case to go further and determine definitively whether the vindication of such a right requires that in every case, whatever about the police, the trial judge must inform the accused of his right to seek legal aid. It can determine the issues in this case by proceeding upon an assumption that that is the case.

As has been pointed out in Minister for Justice, Equality and Law Reform v. Stapleton and other cases the European Arrest Warrant system is built upon the principle that participating member states should afford mutual recognition of each others judicial systems and that there should be mutual trust of the legal systems of the other Member States. Accordingly, it is well established that whenever this Court is faced with a request on foot of a European Arrest Warrant to surrender a respondent to another member state the Court must proceed upon a presumption that the member state in question will respect the fundamental rights of the respondent if he is surrendered. Moreover, before the Court will engage with a respondent who contends that that presumption can be rebutted in his particular case, the respondent seeking to make that case must put cogent evidence before the Court tending to suggest that that is so.

Mr Fitzgerald B.L. has argued that the Court cannot presume that if the respondent in this case is surrendered his fundamental rights will be respected because he contends that the respondent's fundamental rights have not been respected in the past, in as much as he was tried, convicted and sentenced to a substantial term of imprisonment without having had an opportunity of being legally represented. Moreover, to return him to serve a sentence that was imposed upon him in circumstances where there was a fundamental unfairness in the trial and sentencing processes would quite simply be wrong, and would be contrary to both the Convention and our Constitution.

Unfortunately from the perspective of the respondent, the Court agrees with counsel for the applicant that there is a fatal evidential gap in the respondent's argument. There is evidence that Poland has a system of legal aid, and while it may not be perfect, it was something that the respondent could have sought to avail of in this case. There is also evidence that the respondent was informed twice by the police in the police station of his right to have a lawyer, but that he didn't seek to avail of that right at that time because he felt that he didn't need such assistance. However, despite his confidence that he didn't need legal assistance he was later charged and sent forward for trial. The evidence establishes that the respondent then had the right to apply to the trial judge for legal aid. It appears that he did not do so. There is no evidence that he did not know that he had such a right. Moreover there is no evidence that the judge failed to inform him, or to remind him, of his right to apply for discretionary legal aid. He merely says that he cannot remember if any of that happened. That is not enough to discharge the evidential burden that he bears of adducing cogent evidence tending to suggest that his rights were not respected. In the absence of sufficiently cogent evidence suggesting the contrary, the court must proceed upon the presumption that his rights were respected in the proceedings to date, and that they will be in the future.

In all the circumstances of the case the Court is not disposed to uphold the s. 37 objection in this case, and is disposed to make an order for the surrender of the respondent.