THE HIGH COURT

Record Number: 2008 No. 79 Ext.

BETWEEN

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

APPLICANT

AND
ROMAN SNELA

RESPONDENT

Judgment of Mr Justice Michael Peart delivered on the 20th day of June 2008

1. The surrender of the respondent is sought by a judicial authority in Germany on foot of a European arrest warrant dated 11th February 2008, and which was endorsed for execution by the High Court on the 24th April 2008. The respondent was duly arrested on the 25th April 2008 and as required was brought before the High Court from where he was remanded from time to time pending the hearing of this application for his surrender under s. 16 of the European Arrest Warrant Act, 2003, as amended ("the Act").

2. No issue is raised by the respondent as to his identity, and I am satisfied that he is the person in respect of whom this European arrest warrant has been issued.

3. No undertaking is required in this case under s. 45 of the Act.

4. The respondent's surrender is sought for the purpose of serving the balance of a seven years sentence in Germany following his conviction for offences which have been marked in the warrant as being within the categories of offences set forth in Article 2.2 of the Framework Decision, and as such are offences in respect of which double criminality/correspondence is not required to be verified.

5. There is no reason why the surrender of the respondent should be refused under sections 21A, 22, 23 or 24 of the Act, and I am satisfied also, and in the absence of any objection being raised by the respondent in this regard, that his surrender is not prohibited by Part 3 of the Act or the Framework Decision.

6. There is one issue only raised by the respondent. It is that the circumstances in which he left Germany following his conviction but before the final determination of his appeal against that conviction on a point of law are such that he is not a person who comes within s. 10(d) of the Act which provides:

> "10.—Where a judicial authority in an issuing state duly issues a European arrest warrant in respect of a person—
>
> (a) …
>
> (b) …
>
> (c)…
>
> (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," (my emphasis)

7. The factual basis for that submission is contained in an affidavit sworn by the respondent, and supported by an affidavit which has been sworn by the German lawyer who represented him in relation to the prosecution which led to his conviction and sentence.

8. From the respondent's affidavit it appears that he is a Polish citizen who left Poland and went to Germany in 2000 in search of work as a tiler. He says that while there he married a lady who died in 2005 while the respondent was in pre-trial detention awaiting his trial. He states that his Polish passport was issued to him in September 2002, but that in 2000 when he arrived in Germany he was permitted to reside there having been issued with a residence permit issued, which expired on the 23rd February 2003. The offences for which he was convicted were committed, according to paragraph (e) of the warrant, states that the offences for which he was convicted were committed between May 2002 and Easter 2003. He was arrested and put in pre-trial detention in November 2003. His conviction was on the 31st August 2005, following which he remained in detention. An appeal was lodged. According to German law, it appears that where an appeal is lodged any detention of the accused pending the determination of that appeal is categorised as still being 'pre-trial detention'. There was considerable delay in the hearing of that appeal, and during that period of delay the respondent applied for his release on the ground that his continued delay pending his appeal was disproportionate. A Higher Regional Court in Germany ordered his release by order dated 17th August 2006, and this apparently was an unconditional release in the sense that, as we would be familiar in this country, there was no condition attached to that release such as might equate to bail or conditional release. His German lawyer has confirmed in her affidavit that this was the nature of the order made for his release. She has stated also that the only condition attached to his release was that he should have an address for correspondence to be sent to him in relation to his appeal. It would appear that the address given for correspondence was that of his lawyer since she has also stated that on the 19th March 2007 she received a letter notifying that he was required to go to prison following the determination of his appeal, and that she received a second such notification on the 6th August 2007.

9. The respondent relies on the unconditional nature of this release for his submission that following that release there was no restriction of other prohibition under German law which made it unlawful or otherwise prevented him from being free to leave Germany before his appeal hearing.

10. He states that following his release he no longer had any place to live, that his wife had by this time died, had no source of income, was homeless, and was unable to work in Germany as he had no work permit. By this time of course, Poland had acceded to the European Union in May 2004, and, as a Polish European Union citizen he would not have required a residence permit to reside in Germany provided, according to his German lawyer, he had enough means to support himself, which he did not since he did not have a work permit. He goes on to state that within days of his release he contacted the Immigration Office in Germany to request another residence permit. He says that this was refused and that he was given no reason for that refusal, but suspects that it was because

of his conviction. He then states that he "was told that as Poland had recently acceded to the European Union, I could travel to any other European Union member state" and that he then informed that Immigration Office that he intended to leave Germany for Ireland, and that they did not object to that.

11. Thereafter the respondent contacted his brother who was living in Poland, but who then travelled to Germany and paid for a ticket for him to travel to Ireland. He arrived here on the 25th August 2006, having shown his passport in Berlin Shonefeld airport on leaving. On arrival here he again presented his passport to the Irish authorities on arrival here.

12. He states that the reason why he left Germany and came to Ireland was that he had been told that he could not work in Germany, and had no means to support himself in Germany having been refused a residence permit, and left therefore as an economic necessity. He knew other Polish people living here including two of his brothers, and on arrival here his brothers helped him. He has obtained work here, has obtained a PPS Number, and he has exhibited a copy of his P60 for the year ending 2006. He states that he has never sought to hide the fact that he was in this country, and that his work colleagues have been aware that he has been the subject of prosecution for the offences referred to in the warrant.

13. A significant matter to refer to also is that the evidence has been given to this Court following the arrest of the respondent by Sgt. James Kirwan, that at the time he was arrested the respondent stated that the reason why he had come to this country following his release from custody in Germany in August 2006 was that he felt safe here as this country was not part of the Schengen agreement. In his affidavit, the respondent has referred to this comment and accepts that he said this to Sgt. Kirwan. But he states also that this was not in fact the reason why he came to this country, and that he mentioned it because he believed that a European arrest warrant would not apply in Ireland because Ireland was not a party to the Schengen agreement.

14. Before this application came on for hearing the Central Authority here sought further information from the issuing judicial authority in relation to certain matters, such as how the sentence of seven years for the four offences for which he was convicted was actually divided in respect of each offence, and the circumstances in which the respondent's release was ordered by the Higher Regional Court on 17th August 2006. There is reference also to an application for a 'pardon' by the respondent, but he submits that this application was in fact an appeal. Nothing turns on that distinction for the purposes of this application.

15. Mr Dwyer BL for the respondent has referred to the fact when the Higher Regional Court in Berlin released the respondent from his pre-trial detention pending the hearing of his appeal, there were no conditions attached to that release by way of bail or otherwise such that the respondent was not free to leave Germany and come to this country. He refers also to the averment by the respondent that upon his release and before coming here he contacted the Immigration Office and that he was told that he was free to leave, and that thereupon he was entitled to feel that he was free to leave Germany, and that accordingly he should be considered not to have "fled" as contained in s. 10(d) of the Act, in the same way as in the case of *Minister for Justice, Equality and Law Reform v. Tobin*, that respondent was found not to have broken any Hungarian law by leaving that country when he did. Mr Dwyer seeks to distinguish the present case from that of *Minister for Justice, Equality and Law Reform v. Sliczynski* ex tempore, High Court, 11th October 2007 in as much as in that case the respondent had left having been released on certain conditions, and by leaving he breached the conditions of same.

16. Mr Dwyer seeks to distinguish the present case also from the case of *Minister for Justice, Equality and Law Reform v. Stankiewicz*, unreported, High Court, 6th May 2008. In Mr Dwyer's submission, the respondent in that case had simply made assertions of his own that he had breached no conditions by leaving Poland and coming to this country to seek work. There was no evidence adduced from a Polish lawyer to support his contention that he had not breached any condition of his release. In that case, the Court determined that the onus upon a respondent who raises this point of objection cannot be adequately discharged by mere assertion and in the absence of cogent evidence. Mr Dwyer refers to the supporting evidence from the respondent's German lawyer who conforms that in this case the respondent was released without any conditions pending his appeal.

17. Mr Dwyer also distinguishes the present case from the case of *Minister for Justice, Equality and Law Reform v. Dunkova*, unreported, High Court, 30th May 2008, because, unlike that case, the present respondent received, according to himself, an assurance from the Immigration Office in Germany that he was entitled to leave Germany. Mr Dwyer asks this Court therefore to accept the respondent's averments that he left Germany in order to seek work here since he was homeless following his release, was unable to support himself in Germany as his work permit had expired, and a renewal of his work permit was refused. In such circumstances, it is submitted that he cannot be deemed to have "fled" in the sense of that word as found in case of *Minister for Justice, Equality and Law Reform v. Tobin*, unreported, Supreme Court, 25th February 2008 at paragraph 31 of the unreported judgment.

18. James Dwyer B.L. submits that the evidence that he was permitted to leave having spoken to the Immigration Office is uncontroverted by the Applicant herein. He submits that this Court must have regard to the subjective fact of what was in the respondent's own mind when he left Germany in determining whether in leaving he was doing so in order to "flee", and that he has stated clearly that his intention was simply to gain employment. He submits that there is some objective evidence also which can support that state of mind in the form of the respondent's averment that his work permit had expired and was not renewed, and the fact that he left Germany within days of his release, unlike a situation where a person may have spent some weeks or months in the country before leaving which would contradict the assertion that he left as he had no means of supporting himself.

19. Emily Farrell BL for the applicant responds to these submissions by submitting that there is no evidence adduced by the respondent as to which Immigration Office the respondent contacted and which, according to him, indicated that he was free to leave the country when he did, or what was the rank of the person there who told him this. She points also to the very different facts of the Tobin case where even the Hungarian Court accepted that the respondent breached no Hungarian law by leaving having entered into a financial bond for that very purpose. She refers to the fact that when Mr Tobin entered that bond the Hungarian Court was aware that he was leaving the country, and was also aware that if he did not return there was no extradition arrangement between Hungary and Ireland at that time under which he could be extradited back for the purpose of his prosecution. She submits that the Tobin decision must be seen as confined to the very particular facts of that case, and not extended to cover the circumstances of the present case. By contrast she submits that the respondent in his affidavit has accepted that in the event that his appeal was unsuccessful, he would be sought for surrender and required to serve his sentence. She submits that it would be incorrect for this Court to have regard simply to what the respondent states was in his mind by way of motivation to come to this country, i.e. to seek work, and in any event submits that the respondent's statement to Sgt. Kirwan when he was arrested that he was under the impression that since Ireland was not part of the Schengen Agreement he was "safe" here, and that this statement should be seen as inconsistent with his own assertion now that this was not the real reason why he came here.

20. Ms. Farrell has referred to the judgment of this Court in *Minister for Justice, Equality and Law Reform v. Ciobanica*, unreported, High Court, 5th March 2008. In that case the respondent had left Romania after he had been arrested for an offence, attended court

by arrangement for questioning and was then told that the case would be considered and was postponed to another date to be fixed. He then left Romania with his family. In that case I was satisfied that the respondent 'fled' Romania in the knowledge that a prosecution was under way against him. In so concluding I stated:

> "First of all I am satisfied that the respondent has not established that he did not 'flee' in the sense of evading justice. He must be taken to have been aware prior to his departure from Romania that he faced prosecution in relation to the offence, given that he was stopped by the police in relation to this matter and that he had appeared before a court where he was questioned in relation to it. No affidavit of law has been adduced to the effect that at the stage of his questioning there was no prosecution process in being against him in accordance with the provisions of the Romanian Criminal Code of Procedure."

Conclusion

21. The only issue remaining to be decided in this case is whether the respondent is somebody who 'fled' Germany after he had been released from pre-trial custody on the 17th August 2006 pending the determination of his appeal. The affidavit from his German lawyer confirms that there were no conditions attached to his release which precluded him from leaving that country, and that if he wished to work in Germany at that time he would have needed a work permit. This latter averment supports to an extent the respondent's own averment that his purpose in leaving was to seek work as without a German work permit he had no way of supporting himself. The respondent seeks support for his subjective state of mind in that regard from the fact that he spoke to somebody in some Immigration Office before he left and that he was told that as Poland had acceded to the European Union he could travel to any other EU member state, and that when he told this person that he intended to leave Germany he/she did to object to this. Against credibility in this regard, there is the undisputed fact that when he was arrested here by Sgt. Kirwan, he stated that he though he was safe here since Ireland was not part of the Schengen Agreement.

22. In my view the resolution of this issue cannot be achieved by reliance on the respondent's assertion as to his intention to seek work, albeit that it is clear that he was unable to work in Germany without a work permit which had, according to him, been refused. The Court must also in this case have cause for doubting the credibility of even this subjective assertion in the light of his statement to Sgt. Linehan at the time of his arrest. That cannot be overlooked. But even without that statement, the Court must have regard to the overall circumstances of this case where the respondent has been convicted of an offence, sentenced to a period of imprisonment portion of which remains to be served, and to the fact that even though he was released from pre-trial detention on the basis that it was disproportionate to keep him in detention until his appeal was determined given the delay which had occurred, he was still aware that if his appeal was unsuccessful he would be required to serve that sentence. In such circumstances, even though there were no conditions attached to his release which specifically precluded him from leaving Germany, that fact alone does not mean that he was not evading justice by so leaving. There may well have been no reason why if he wished to do so he could not have left the country, for example even for a holiday, but that is not to be then taken as meaning that if he goes on holiday, and while there chooses not to return for his trial or an appeal, the making of such a choice does not turn his departure for a holiday into a flight from justice. To find otherwise would make a nonsense of the Framework Decision and its objective of securing the surrender of persons who are evading justice by fleeing the issuing state so that he is no longer amenable there to the judicial authorities.

23. There is a very strong presumption existing that where a person leaves the issuing state in the face of such a conviction and sentence and within days of his release from pre-trial detention, that he did so in order to avoid having to serve that sentence. This Court cannot in cases such as this simply take an averment at face value that when leaving, supposedly to seek work and make a better life for himself against a backdrop of either a conviction or conviction and sentence, he was not intending to flee in the sense of avoiding the consequences of such conviction/sentence. Respondents who are in such circumstances and who seek to rely on the judgment of this Court and that of Fennelly J. in the Supreme Court in *Tobin* are ignoring the existence of the so far, unique facts and circumstances of that case where the issuing judicial authority had specifically allowed the respondent to avail of a particular statutory provision of Hungarian law which enabled a person such as that respondent to enter into a financial bond involving a lodgement of cash which would be forfeited in the event that he did not return. The judicial authority was well aware that the respondent was intending to leave Hungary when he did, and facilitated that by returning his passport to him and allowing him enter that bond. The Court was also on record in that application as accepting that the respondent was free to leave when he did and that he breached no legal provision when he did. Added to that is the fact that at that stage Hungary had not acceded to the European Union, and since there were no extradition treaty arrangements in place between Hungary and Ireland, it was clear that the Hungarian Court was aware that his extradition could not be sought.

24. Those, as I have said, are, thus far, a unique set of circumstances which led a conclusion that the respondent had not 'fled' and was not therefore someone to whom s. 10 of the Act applied. The present case is very different indeed. None of the facts, such as they are, have discharged the onus of proof on the respondent to establish, and not simply assert in a vague, general and unspecific manner, that his intention when leaving was not to avoid or evade the prospect of serving his sentence should his appeal fail. Even without his own statement to Sgt Kirwan, which he accepts he made, that he felt safe here because Ireland was not part of the Schengen Agreement this Court would not, in all probability, have reached a different conclusion. With it, there can be no room for doubt. None of what has been proffered by way of evidence and submissions have any real persuasive value.

25. I am satisfied that all the relevant provisions of the Act and the Framework Decision are satisfied, and the Court is required to make the order for surrender.