Neutral Citation [2013] IEHC 254

THE HIGH COURT

Record No 2010/108 EXT

Record No 2010/109 EXT

Record No 2010/392 EXT

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

BETWEEN/

THE MINISTER FOR JUSTICE AND EQUALITY

Applicant

- AND -

DANIEL MAKUCH

Respondent

JUDGMENT of Mr Justice Edwards delivered on the 10th day of May, 2013

Introduction:
In this case the respondent is the subject of three separate European arrest warrants, dated the 18th June, 2009, the 4th February, 2010 and the 7th October, 2010, respectively, and on foot of which the Republic of Poland ("Poland") seeks his rendition for the purposes of having him serve sentences, or the balance(s) thereof remaining to be served, as the case may be, imposed upon him by courts in Myszków, Poland in respect of the various offences that are the subject of the three warrants in question.

For convenience, the warrant dated the 18th June, 2009 will hereinafter be referred to as "warrant No 1" ; the warrant dated the 4th February, 2010 will hereinafter be referred to as "warrant No 2" ; and the warrant dated the 7th October, 2010 will hereinafter be referred to as "warrant No 3".

The warrants were indorsed for execution by this Honourable Court and were executed together on the 12th August, 2011 when the respondent was arrested by Garda Ray Moloney. Following execution of the warrants the respondent was brought before the High Court as required by s. 13 of the European Arrest Warrant Act 2003 (hereinafter "the Act of 2003"). This took place on the on the 13th August, 2011, and oral evidence was received as to arrest and identity which was not challenged. In each case the Court, being satisfied at the s. 13 hearing as to execution of the warrant, and also as to identity, fixed a date for the purposes of s. 16 of the Act of 2003, such date being a date falling not more than 21 days from the date of arrest. Thereafter each case was adjourned from time to time until ultimately a date was fixed for a substantive surrender hearing.

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

Uncontroversial s. 16 Issues:
The Court has received an affidavit of Garda Ray Moloney sworn on the 19th December, 2011 testifying as to his arrest of the respondent and as to the respondent's identity. In addition, counsel for the respondent has confirmed that no issue arises as to either the arrest or identity.

The Court has also received and has scrutinised a true copy of each of the European arrest warrants in this case. Further, it has of its own initiative taken the opportunity to inspect the original of each of the European arrest warrants which are on the Court's file and which bear this Court's endorsement.

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

(a) all three European arrest warrants were endorsed for execution in this State in accordance with s. 13 of the 2003 Act;

(b) the warrants were all duly executed;

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

(d) the warrants are in the correct form;

(e) In the case of warrant No 1, and warrant No 3, respectively, no issue arises as to trial *in absentia* and so no undertaking under s. 45 of the Act of 2003 is required in either of those cases;

(f) There are no circumstances, relating to any of the warrants, which would cause the Court to refuse to surrender the respondent under s. 21A, s. 22, s. 23 or s. 24 of the Act of 2003 as amended.

In addition the Court is satisfied to note the existence of the European Arrest Warrant Act 2003 (Designated Member States) (No. 3)

Order 2004, S.I. 206/2004 (hereinafter referred to as "the 2004 Designation Order"), and duly notes that by a combination of s. 3(1) of the Act of 2003, 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 Act of 2003 as being a state that has under its national law given effect to the Framework Decision (Council Framework Decision of 13th June, 2002 on the European Arrest Warrant and the Surrender Procedures between Member States (2002/584/JHA)).

Objections to Surrender:

The respondent filed separate points of objection to his surrender in each set of proceedings on the 18th June, 2009, the 4th February, 2010 and the 7th October, 2010, respectively. Then, on the 20th February, 2012, with the leave of this Court, he filed additional points of objection in each set of proceedings. Not all of the points of objection pleaded were proceeded with.

Points of Objection: Warrant No 1

In summary, the points of objection proceeded with in relation to warrant No 1 consisted of:

(a) an alleged lack of correspondence in respect of the offence to which the warrant relates;

(b) a contention that the respondent did not flee the issuing state;

(c) an alleged failure by the issuing judicial authority to accurately specify all of the particulars required by s. 11(1A) of the Act of 2003 and, in particular, the nature and duration of the sentence or detention order imposed by the issuing state; what length of sentence, if any, remains to be served; and on what basis the sentence or detention order concerned is claimed to be immediately enforceable;

(d) a contention that the original composite sentence or detention order relied upon in the warrant (*i.e.* a sentence of one year and two months that had initially been suspended upon conditions for a period of three years, but in respect of which the suspension was later lifted) was superseded by the order of an "Internal Court of the Prison at Herb, Woj, Slaskie" which is said to have substituted a sentence of four months imprisonment, suspended on conditions different to those relating to the original sentence, for the original sentence.

Points of Objection: Warrant No 2

The sole point of objection proceeded with in relation to warrant No 2 consisted of an objection by the respondent to his surrender on the basis that he was tried in absentia in circumstances where he was not actually notified of the time and place at which he would be tried, and in circumstances where there is no sufficient undertaking as to a retrial as required by s. 45 of the Act of 2003.

Points of Objection: Warrant No 3

None of the points of objection pleaded in either the original points of objection or in the additional points of objection were in fact proceeded with in relation to this warrant. Indeed, it was initially indicated by counsel for the respondent at an early stage of the hearing that surrender was no longer being opposed in the case of warrant No 3. At a later stage of the proceedings counsel asked to be allowed to resile from that position in the light of additional information received from the issuing judicial authority and served upon the respondent. Notwithstanding that the points he now wished to raise were not pleaded, he was permitted to argue that his client ought not to be surrendered on the basis of an alleged failure by the issuing judicial authority to accurately specify all of the particulars required by s. 11(1A) of the Act of 2003 and, in particular, the nature and duration of the sentence or detention order imposed by the issuing state; what length of sentence, if any, remains to be served; and the basis the sentence or detention order concerned was claimed to be immediately enforceable.

Correspondence and Minimum Gravity:

Warrant No 1

Warrant No 1 is a conviction type warrant on foot of which the respondent is sought to serve the balance outstanding of a composite sentence of one year and two months imposed upon him by the Provincial Court of Myszków on the 9th June, 2003 in respect of three offences particularised in part E of warrant as follows:

"1. On 17th February 2002 in Myszków, district of Silesia during performed breath test he twice hit with his head the police officer Pawel Rok on the face and in this way he infringed the bodily inviolability of the officer whereas when he was committing the alleged offence he had considerably limited ability to control his behaviour.

This is an offence under Article 222 § 1 Penal Code in connection with Article 31 § 2 Penal Code

2. On 17th February 2002 in Myszków, district of Silesia during the breath test performed by police officer PaweJ Rok, he insulted him with vulgar and generally known as abusive words, whereas when he was committing the alleged offence he had considerably limited ability of its meaning and to control his behaviour

This is an offence under Article 226 § 1 Penal Code in connection with Article 31 § 2 Penal Code

3. On 17th February 2002 in Myszków, district of Silesia he was driving a passenger car Polonez with registration number SMY H008 while being intoxicated with 2,3 alcohol per mil in exhaled air, whereas when he was committing the alleged offence he had considerably limited ability of its meaning and to control his behaviour

This is an offence under Article 178a § 1 Penal Code in connection with Article 31 § 1 Penal Code."

In relation to offence No 1, counsel for the applicant has invited the Court to find correspondence with the offence in Irish law of assault contrary to s. 2 of the Non Fatal Offences Against the Person Act 1997. The respondent has not sought to contest the appropriateness of this suggestion, and the Court is satisfied to find correspondence with the suggested s. 2 offence.

In relation to Offence No 2, counsel for the applicant has invited the Court to find correspondence with the offence in Irish law of using threatening, abusive or insulting behaviour in a public place, contrary to s. 6 of the Criminal Justice (Public Order) Act 1994 (hereinafter referred to as "the Act of 1994"). The respondent has sought to contest the suggested correspondence on the grounds

that the offence was not committed in a public place, a fact confirmed in additional information dated 12th March, 2012 where it is it expressly stated:-

> "The offence number 2 relating to the case No.. II Kop 39/09 was not committed in a public place. The blood sample was taken in a hospital room. The person present in the room apart from police officers was a nurse."

It is accepted by both sides that the reference to "blood" is erroneous and that it should be read as "breath". Despite the unequivocal nature of this statement, counsel for the applicant contends that it is a matter for this Court as to whether a hospital room is or is not a public place. She has argued that hospitals are public buildings and places to which the public have resort. It is urged that even where a person is being treated in a treatment room to which there is restricted access, or in a curtained off cubicle, or in an operating theatre, or in a private accommodation room, it does not change the public nature of the place.

Counsel for the respondent pointed out that s. 3(d) of the Act of 1994 states that a public place is:-

> "any premises or other place to which at the material time members of the public have or are permitted to have access, whether as of right or by express or implied permission or whether on payment or otherwise."

In written submissions filed on this issue, counsel for the respondent argued that the "place" must be public by its very nature, and that a hospital room is not public by its very nature. The Court was referred to *Bogdal v. R.* [2008] E.W.C.A. Crim. 1 in support of this proposition. In *Bogdal* the defendant was charged with three offences under s. 3(1) of the Dangerous Dogs Act, 1991. The facts disclosed that the offending dog was tied to a stake in the ground of a common driveway for the defendant's mother's home and a care home for the elderly. The defendant pleaded guilty without prejudice and later appealed his conviction. In response to a submission to the effect that as the property was a care home, *ipso facto* it was "on the face of it public", the Court of Appeal (Criminal Division) of England and Wales said:-

> "His second submission was that the fact that Sycamore House was a care home meant, or in any event might mean, that the driveway giving access to it was — again using Sedley LJ's phrase — "on the face of it public". We do not accept this. There are of course many kinds of commercial or institutional premises to which members of the public, or a class of members of the public, have access as such — examples from the decided cases include football grounds, public car-parks, shops, and places of entertainment — but not every institution is of that character. The borderline between public and private places may not always be easy to define, and there will be some doubtful cases. But we cannot see that it is arguable that the public as such has access to a private care home — or, still less, to a driveway leading to such a home through a private garden."

It was further argued that to come within the definition of "public" a substantial proportion of the public must have access to the place. In *R. v. Waters* (1963) 47 Cr. App. R. 149 at 154 the Court of Appeal (Criminal Division) of England and Wales defined it thus:-

> "It seems to this court that the question is largely a matter of degree and fact. If only a restricted class of person is permitted to have access or invited to have access, then clearly the case would fall on the side of the line of it being a private place. If, on the other hand, only a restricted class is excluded, then it would fall on the other side of the line and be a public place."

In *Stanbridge v. Healy* [1985] I.L.R.M. 290, a case concerning a car accident on the grounds of a country house, Hamilton J. found that the public at large did not have access to the place in question, the grounds of Corduff House, and that it was therefore not a public place. The Court found that the definition of "public place" means the public at large and not a particular class of public. The definition in question was that contained in s. 3(1) of the Road Traffic Act 1961 (which is in identical terms to s. 3 of the Road Traffic Act 1933; s. 64 of the Finance Act 1976; s. 4 of the Animals Act 1985; the Dangerous Substances (Conveyance of Petroleum by Road Regulations 1979; the European Communities (Vehicle Testing) Regulations 1981 & 1991; Road Traffic (Licensing of Trailers and Semi-trailers) Regulations 1982) which, as originally enacted, states that a:-

> " 'public place' means any street, road or other place to which the public have access with vehicles whether as of right or by permission and whether subject to or free of charge."

Hamilton J. found that:-

> "It appears to be quite clear from Mr. Lynch's evidence that the people normally using Corduffstown House [sic] and entitled to be present there consisted of the senior citizens who were having a holiday there, the paid staff looking after them and members of the Vincent de Paul who would volunteer to help in their care and amusement or merely come to visit them and relatives of the senior citizens who would be made welcome there but not actively encouraged to come.
>
> It further appears that any other people wandering in off the highway would be challenged and unless they had reason to be there would be told to go.
>
> …….
>
> I am further satisfied that the meaning to be attributed to the words "the public" in the definition of a "public place" contained in s. 3 of the Road Traffic Act 1961 is the public generally and not any particular class. That being so I have no alternative but to hold that the place where the accident occurred was not a public place within the meaning of the Road Traffic Act, 1961 and that the plaintiff is not entitled to succeed in her application for leave to execute against Messrs Ensign Motor Policies at Lloyds in respect of the judgment obtained by her against the defendant."

In *Montgomery v. Loney* [1959] N.I. 171 the respondent was charged with being in charge of a motor vehicle in a public place while under the influence of alcohol. The respondent was in charge of the vehicle in the forecourt of a filling station. The Court found that the owner of the filling station impliedly invited members of the public to the forecourt. Under s. 39(1) of the Road Traffic Act (Northern Ireland) 1955 "road" is defined as "a public road and any street, carriageway, highway or roadway to which the public has access". Lord McDermott, in the context of s. 39(1) said that:-

> "So far, then, my tentative conclusions would be that, in the expression "to which the public has access", the word "public" means those members of the general public or of a substantial section thereof who are accorded access as such rather than for a personal reason, and the word "access" means access by permission, either express or implied, if not as of right."

In *Montgomery* Lord McDermott made reference to the case of *Harrison v. Hill* [1932] J.C. 13 where Lord Clyde stated as follows:-

> "I think that, when the statute speaks of 'the public' in this connexion, what is meant is the public generally, and not the special class of members of the public who have occasion for business or social purposes to go to the farmhouse or to any part of the farm itself; were it otherwise, the definition might just as well have included all private roads as well as all public highways.
>
> I think also that, when the statute speaks of the public having 'access' to the road, what is meant is neither (at one extreme) that the public has a positive right of its own to access, nor (at the other extreme) that there exists no physical obstruction, of greater or less impenetrability, against physical access by the public; but that the public actually and legally enjoys access to it. It is, I think, a certain state of use or possession that is pointed to. There must be, as a matter of fact, walking or driving by the public on the road, and such walking or driving must be lawfully performed – that is to say, must be permitted or allowed, either expressly or implicitly, by the person or persons to whom the road belongs. I include in permission or allowance the state of matter known in right of way cases as the tolerance of a proprietor. The statute cannot be supposed to have intended by public 'access' such unlawful access as may be had by members of the public who trespass on the property of either individuals or corporations."

It was urged that applying these principles to the present case, any person entering a hospital would be deemed to enter even the foyer at "the permission of the owner, occupier or lessee of the premises". This is more so the case with regard to hospital rooms. The warrant and further information are simply silent as to whether there was any barrier (*e.g.* some card entry system) to stop persons from entering the area where the rooms were located, and no inference can be drawn one way or the other. However, it was submitted, it is a reasonable inference that hospital staff would be able to stop a person from entering any part of the hospital that they saw fit. Also, the police would have presumably stopped a person from entering the room while they were in the process of taking evidence. The warrant and further information fails to establish that a person would be able to enter the hospital and walk around unchallenged.

It was further submitted that, while it might be attractive to believe that because a hospital may be classed as a public hospital (as opposed to a private hospital), therefore it is a "public place" for the purposes of the Act of 1994, such an approach would specious and would not withstand critical analysis. It was suggested that this must be so because when a person is brought to the hospital for the purposes of obtaining a breath sample, he is there not in his capacity as a member of the public at large but as a part of a special category or in his capacity as "a lawful visitor". While the term "lawful visitor" might be a benign description of the circumstances under which the respondent found himself in the hospital, the reasoning is the same. He is a "lawful visitor" by virtue of the fact that he was alleged to have committed an offence of drink driving. At the material time a member of the public at large would not have had access to the hospital room. It was submitted that the respondent was therefore not present in the hospital as a member of the public at large but as a member of a restricted class.

Counsel for the respondent also submitted that there is no evidence to suggest that the hospital in question was open to the public at all. For example, the hospital could have been a military hospital or a police hospital. If the hospital was such then it would mean that only a restricted class would have access. Support for the contention that only a restricted class had access can be found in the further information where it is stated that "[t]he offence number 2 relating to the case No II Kop 39/09 was not committed in a public place" (i.e. the public did not have access).

Counsel for the respondent referred the Court to a number of cases in relation to the degree of public access that is necessary to render a particular place a "public" place. In *Elkins v. Cartledge* [1947] 1 All E.R. 829 the Court found that the public must actually have access for a place to be public. Lord Goddard, C.J. at paragraph "H" of the report stated that:-

> "Having regard to the definition of "road," "public place" for the purposes of this section must be read as meaning a place to which the public have access, ie, have access in fact. In this case it is expressly found that cars have access to the enclosure."

In *The People (D.P.P.) v. Yamanoha* [1994] I.R. 565 the applicant's hotel room was searched and a quantity of drugs were found. The Gardaí applied for a search warrant to entitle them to enter the hotel room but the warrant was held to be invalid as it was based on unsworn evidence. The Court quashed the conviction. Importantly, it was held that a search warrant was needed to enter the hotel room. Notwithstanding the fact that there were many other rooms in the hotel, some of a public character, a warrant was needed to enter the specific bedroom in question. Despite the fact that the hotel room was not a dwelling, the licensee was entitled to a constitutional right to privacy.

In *R v. Bassett* [2009] 1 W.L.R. 1032 the Court of Appeal in England held that it was clearly possible to have a reasonable expectation of privacy without being wholly enclosed or wholly sheltered from the possibility of being seen. The absence of a door to the shower did not conclude the issue.

In *Buchanan v. Motor Insurers' Bureau* [1955] W.L.R. 488, the English High Court (Queen's Bench Division) found that to gain access to the place where an accident had occurred an entrant had to obtain a pass from a Port Authority authorising him to enter. The Court held that the place where the accident occurred was not a road to which the general public had access either as a matter of legal right or by tolerance of the Port Authority, and therefore the defendants were under no liability to the plaintiff.

In *Bogdal v. R.,* previously cited, the Court (at paragraph 34) rejected a submission that a private place became a public place if there was no barrier to stop the public from accessing the land:-

> "That cannot be right. Whatever the precise effect of the formula "have or are permitted to have", it certainly does not mean that any place that a member of the public can physically access, however obviously private it may be, is a public place: otherwise every front drive that was not barred by a gate would be a public place."

The respondent submitted that a hospital room attracts a right to privacy whether that be the right of the police who at the material time were the occupants of same or of the respondent who at the material time still had the presumption of innocence. In the event that someone was to enter such a room, it was submitted that they would do so as a trespasser and as such would not have a right or permission to enter. Any person entering as such would leave themselves open to an action for trespass by the licensee or possibly the licensor at that particular time. Any person entering a hospital room with the permission of the licensee and/or the licensor would not be a member of the public but a member of a specific class. They would be allowed to enter by virtue of the relationship that the entrant had with the licensee or the licensor. It was submitted that if the person is in a special class then they cannot be said to be part of the public at large.

Counsel for the respondent suggested that there is no evidence that the public at large were invited to enter the hospital room or the hospital in general. For example there is no indication of whether or not there was a barrier present to block access to the hospital campus, the hospital grounds, the front door, the ward or the room. There is nothing to say that access to the hospital was the subject of a general invitation.

It was further submitted that the permission to enter a hospital room in a hospital is related to a personal qualification on the part of the person who has taken the room and on the part of the invitees. The person who has taken the room has the right to exclude those who he does not want to enter the room. In this case the police would have been able to exclude any person who had a right to be in the common area from entering the room.

It was also urged upon the court that there is simply no evidence, direct or circumstantial, to support a conclusion that the public were permitted to have access to the place at issue and that the public had access in fact. On the contrary, the additional information states expressly that "[t]he offence number 2 relating to the case No II Kop 39/09 was not committed in a public place."

It was also submitted that whether or not a place was public in character might depend upon "the material time". In *Sandy v. Martin* [1974] Crim L.R. 263 the Court found that a car park beside a public house was not a public place outside of licensing hours. It was held that an otherwise private place was public if and so long as the public had access at the invitation of the land owner, however in that case there was no evidence that the licensee's invitation continued an hour after closing time.

Likewise, in *Marsh v. Arscott* (1982) 75 Cr. App R. 211 the Court found that a shop car park was not a public place in circumstances where the shop was closed at the time of the alleged offence:-

> "This whole incident, as I have said, took place on the defendant's property, on that part of it used by customers for parking. There is no suggestion that it was used by any other section of the public, nor that it was used when the shop was closed, as it was at 11.30 on a Saturday night. It is important to have regard to the words 'at the material time' in the definition of 'public place.' Quite plainly, when the shop was open this was a public place within the meaning of that phrase, but at 11.30 p.m. on a Saturday night there was, in my judgment, no evidence at all that it was then a 'public place.'

Whether or not the officers were acting in the execution of their duty is immaterial; whether they had any right to be on the car park is immaterial; whether they had been told to go is immaterial. None of these questions, however answered, could turn what was not a public place at 11.30 p.m. at night into a public place, and on that basis alone the acquittal of Mr. Arscott was, in my judgment, inevitable."

In The *People (D.P.P.) v. Molloy* [1994] 1 I.R. 583 the Court found that a particular driving offence, alleged to have been committed on Grafton Street at a time when traffic was prohibited from entering upon that street, could not be regarded as having been committed in a public place within the meaning of s. 3 of the Road Traffic Act 1961 i.e. a place to which the public had access with vehicles. The evidence was that the road was closed generally but was open on weekday mornings between 6 a.m. and 11 a.m. The Court found that once access to Grafton Street was prohibited at the material time, the place in question could not comply with the statutory definition of a public place contained in s. 3 of the Road Traffic Act 1961.

In *R v. Collinson* (1931) 23 Cr. App. R. 49 the Court of Criminal Appeal of England and Wales found that a field, which was ordinarily an open field, was a "public place" while there was a point to point race taking place. The Court found that in those circumstances it was a public place for the purposes of the Road Traffic Act 1930 which defined a public place as a "place to which the public have access." The decision shows that a place can be both public and private depending on the user at the particular time. However, the definition in s. 3(d) of the Act of 1994 is substantially narrower.

It was submitted that if the present case is approached with due regard to the jurisprudence just reviewed, the "material time" was when a test was being carried out for the purposes of taking evidence from a person suspected of committing a drink-driving offence. At the material time, members of the public would not have been permitted to enter the hospital room. Furthermore, there is no evidence to suggest that the hospital was in fact open to the public at the time the offence took place as there is no evidence that the public had access to the hospital at any time. Likewise, it may have been the case that the hospital was closed to members of the public and was used simply as a police hospital at the time.

In conclusion, it was submitted on behalf of the respondent that the place referred to in the warrant and the further information i.e. the hospital room in question, could not be construed as a "public place" for the purposes of the Act of 1994.

In reply, counsel for the applicant also referred extensively to case law concerning the meaning of a "public place". She referred to *Collison*, *Montgomery v. Loney* and *Molloy*, cases that had been relied upon by counsel for the respondent. However, the Court's attention was also drawn to additional cases dealing with the issue of what constitutes a public place. Some of these cases consider the issue of public place in the context of road traffic offences, but also within the context of public order legislation and other types of legislation.

In *Lynch v. Lynch and PMPA* [1996] 1 I.L.R.M. 114 the High Court held that a factory car park was a public place in the circumstances of the case, even though the car park was on private land, on the basis that it was a place to which the public had access.

In *John Anthony Dougal v District Justice Mahon & another* (Unreported, High Court, Gannon J, 2nd December, 1988) a Garda observed the defendant driving in a manner which indicated he was in excess of the permitted alcohol level. The Garda stopped the accused and drove his car into the grounds of a hotel. The Garda returned to where the accused had remained, *i.e*. standing beside a Garda car on the public highway and requested a breath test. The High Court held the Garda was entitled to do so and that there was no sanctuary from such a request simply because the car that was being driven was now in the grounds of the hotel.

In *Roger v. Normand* (1995) S.L.T. 411 a pathway on school grounds was held to be a public place as the school grounds were regularly used by the public.

In *Parkin v. Norman* [1983] 1 Q.B. 92 the Court found toilets to be a public place. In separate incidents, each of the defendants, P. and V., was found masturbating in a public lavatory in a manner which clearly indicated that he wanted his behaviour to be seen only by the one other person present there at the time. Unknown to the defendants, the other person present in each case was a police constable in plain clothes. Both defendants were arrested and charged with using threatening, abusive or insulting words or behaviour in a public place whereby a breach of the peace was likely to be occasioned contrary to s. 5 of the Public Order Act 1936. The justices found the behaviour to have been insulting. Their opinion continues:-

> "In deciding whether a breach of the peace was likely to he occasioned, we took the view that, as the toilets were a public place, we were entitled to take into account the likelihood of a member of the public either entering or being present instead of the police officer in the toilets and his probable response when he encountered the actions of the [defendant]. The mere chance that the actual audience consisted solely of a police officer did not preclude us in our opinion from considering other possibilities. We therefore concluded in view of all the circumstances of the case, that there was a strong probability of a breach of the peace occurring whether by way of a disturbance or out of violence."

It was submitted that the situation of a public toilet is a circumstance where, if a person is in a cubicle then there would not automatically be access for another member of the public within the public area of the building, but clearly the whole of the building, including said cubicles, would constitute a public place within the meaning of the Act.

In *R v. Waters* (1963) 47 Cr. App. R. 149 Lord Parker C.J. stated: -

> "Before a public place can become a private place, there must at some given point of time be some physical obstruction to overcome, for example, when someone entered in defiance of an order not to do so."

In that case it was held that a pub owner ordering a certain person to leave his car park did not constitute an obstruction or a prohibition. It was also stated that whether a place is public or private is a question of fact and sometimes of degree; if only a restricted class is excluded the place would be public.

It was submitted by the applicant that in the case before the Court there is no suggestion of a barrier to overcome, and that the fact that the offence took place within a hospital room does not necessarily impute defiance of a requirement to remain out of that place. There is simply no evidence of any such requirement. It was further submitted that a member of the public who entered into a hospital room that was not expressed to be off-limits would not be amenable to a claim for trespass in the way that they might were it an area expressly stated to be "private" or subject to "no unauthorised entry" or restricted to "authorised personnel only" or "staff only".

In *Cawley v. Frost* [1976] 1 W.L.R. 1207 the defendant was a spectator at a football match. The football pitch was surrounded by a speedway track about seven yards wide, where the public were not allowed. The spectators were separated from the track and the pitch by a fence. At the conclusion of the match the rival spectators climbed over the fence and surged on to the pitch, running across the track, shouting abuse at each other. The defendant was arrested on the speedway track and was charged with using threatening behaviour in a public place, contrary to s. 5 of the Public Order Act 1936. He was convicted before the juvenile court. His appeal to the Crown Court was allowed on the ground that although he was guilty of threatening behaviour the speedway track was not a public place.

On appeal by the prosecutor on the ground that the whole of the football stadium was a "public place" within the definition in s. 9(1) of the Act of 1936 it was held that where the public had access to premises, those premises should be considered in their entirety, and the fact that the public were denied access to certain areas of the premises did not exclude those areas from being part of a "public place" within the meaning of s. 9 of the Act of 1936; that the football ground, including all its appurtenances, formed a public place and, accordingly, the defendant had committed an offence contrary to s. 5 of the Act.

In this case, it was submitted by counsel for the applicant that under s. 3(d) of the Act of 1994 the fact that a hospital is a place to which the public have access cannot be disputed. It was further submitted that the respondent's contention that simply because the offence took place in a hospital room, rather than in an open foyer or public area, would have the effect of changing the character of the place from public to private was untenable. It was accepted that additional information provided by the issuing authority had stated that it was not a public place, but it is submitted that the issuing judicial authority's characterisation was not determinative of the matter. It matters not whether the place would be regarded as public or private under Polish law. Rather, it is a matter for this Court in assessing the underlying facts to determine whether they are sufficient to enable correspondence to be demonstrated with an offence under Irish law.

The Court of its own motion invited further submissions from the parties as to whether, in the light of the Supreme Court's decision in *Minister for Justice, Equality and Law Reform v. Szall* [2013] I.E.S.C. 7 (Unreported, Supreme Court, Clarke J., 15th February, 2013) correspondence could be demonstrated with the offence in Irish law of resisting or wilfully obstructing a peace officer in the execution of his duty, contrary to s. 19(3) of the Act of 1994.

Section 19(3), as it then was when the offence was committed in 2002 (it has since been amended) which is the relevant time for the purposes of s. 5 of the Act of 2003, provides:-

> "Any person who resists or wilfully obstructs a peace officer acting in the execution of his duty or a person assisting a peace officer in the execution of his duty, knowing that he is or being reckless as to whether he is, a peace officer acting in the execution of his duty, shall be guilty of an offence."

A "peace officer" is defined in s. 19(6) of the Act of 1994 (as it then was in 2002) as "a member of the Garda Síochána, a prison officer or a member of the Defence Forces".

Although the Court is not concerned with either s. 19(3) or s. 19(6) in their amended forms, it is nevertheless interesting to note that as a result of amendments effected by the Criminal Justice Act 2006, s. 19(3) now states:

"Any person who resists or wilfully obstructs or impedes—

> (a) a person providing medical services at or in a hospital, knowing that he or she is, or being reckless as to whether he or she is, a person providing medical services, or
>
> (b) a person assisting such a person, or
>
> (c) a peace officer acting in the execution of a peace officer's duty, knowing that he or she is or being reckless as to whether he or she is, a peace officer so acting, or
>
> (d) a person assisting a peace officer in the execution of his or her duty, shall be guilty of an offence."

Moreover, the definition of "peace officer" has been expanded to include a member of the fire brigade and ambulance personnel. A

hospital is defined in s. 196(6), as amended by s. 185 of the Act of 2006, as including "the lands, buildings and premises connected with and used wholly or mainly for the purposes of a hospital" and "medical services" means services provided by—

> "(a) doctors, dentists, psychiatrists, nurses, midwives, pharmacists, health and social care professionals (within the meaning of the Health and Social Care Professionals Act 2005) or other persons in the provision of treatment and care for persons at or in a hospital, or
>
> (b) persons acting under direction of those persons".

The Court's invited submissions on *Szall* in the knowledge that s. 19(3) of the Act of 1994 does not contain an express requirement that the offence be committed in a public place. The parties duly provided the Court with further helpful submissions. The respondent did not seriously resist the idea, applying the approach of the Supreme Court in *Szall*, that the reference to "a member of An Garda Siochana" in the definition of a peace officer in s. 19(6) of the Act of 1994 could, for the purposes of determining correspondence, be read as referring generically to "a police officer". It was, however, argued that having regard to the placing of s. 19(3) within Part II of the Act of 1994, and having regard to the long title to, and general scheme of, the Act of 1994 the offence could only be committed in a public place, notwithstanding that the particular provision does not specifically refer to this. This argument was advanced on the basis that the entire scheme of Part II of the Act of 1994 is directed towards the maintenance of "public" order and that public order is the "regime" (to use the Supreme Court's expression in *Szall*) that the legislation is intended to regulate.

It was further argued by the respondent that an essential ingredient of s. 19(3) requires that the accused did "resist" or "obstruct" or "impede". The height of the information and further information regarding the offence is that the respondent "insulted" the police officer. It was submitted that this falls a long way short of showing an intention by the respondent to interfere with a breath or blood sample being taken. In fact it would appear that the police officer was successful in his endeavours as the further information specifically states that the sample was actually taken.

Counsel for the applicant argued that, in the absence of an express requirement that the offence should be committed in a public place, and applying *Szall*, correspondence can indeed be demonstrated with s. 19(3) of the Act of 1994.

Having carefully considered the very helpful submissions of counsel on both sides, I have come to the conclusion that s. 19(3) of the Act of 1994 does not in fact provide a potentially corresponding offence under Irish law. Unlike in Poland, in Ireland it is not, of itself, an offence merely to insult a police officer. There has to be more. If the insult is proffered in a public place, and with intent to provoke a breach of the peace or being reckless as to whether a breach of the peace may be occasioned, then that would be an offence chargeable under s. 6 of the Act of 1994. Section 19(3) might provide a potentially corresponding offence if the insults or insulting behaviour constituted resistance to, or wilful obstruction of, the policeman in the performance of his duty. However, neither the facts set forth in the warrant, nor the additional facts contained in the letter of the additional information of the 12th March, 2012, suggest actual resistance or obstruction. All that is stated to have occurred is that the respondent "insulted him [the police officer] with vulgar and generally known as abusive words". It is regrettably the case that having to endure insults from time to time is part of a police officer's job. Very few people are happy to be arrested, and inevitably a percentage of them are going to be insulting and abusive to the arresting officer. In this country directing insults and abuse to a police officer does not of itself constitute criminal behaviour unless this behaviour constitutes resistance to or wilful obstruction of the police officer in the execution of his/her duty, or it has the potential to provoke a breach of the peace e.g. where the insults are proffered in a public place and in circumstances such that some other person witnessing it might be incited or induced to breach the peace. In the instant case it is not stated that the police officer was obstructed or impeded from taking a sample of the respondent's breath. Moreover, as the respondent has pointed out, a sample was in fact successfully obtained. I am not therefore satisfied that the available circumstantial evidence would justify an inference of resistance or wilful obstruction. On the contrary, the warrant itself states that "when he was committing the alleged offence he had considerably limited ability of its meaning [sic] and to control his behaviour." This suggests the respondent was largely incoherent with drink and that, in colloquial parlance, it was a case of "the drink talking", rather than conscious resistance or wilful obstruction.

One other point should perhaps be made. Under Irish law, refusal to provide a sample is an offence in itself and in this country if a police officer was impeded in, or faced with a wilful obstruction to, the administration of a breath test by reason of verbal abuse from the intended subject of the test, the matter would be dealt with by charging the respondent with failing to provide a sample. While the Court has no evidence as to whether under Polish law it is an offence to fail to provide a breath sample when required by a police officer to do so, it would be surprising if there were not such an offence in Polish law. He does not appear to have been charged with any such offence.

Be all of that as it may, s. 19(3) is rejected as a potential corresponding offence because the Court is not satisfied that resistance, or wilful obstruction of the police officer in the execution of his duty, is in fact being alleged.

In the circumstances it is unnecessary for me to express any view as to whether counsel for the respondent may be right in his contention that a s. 19(3) offence can only be committed in a public place. It is certainly true that the provision is located within Part II of the Act of 1994 which is entitled "Offences relating to Public Order", and it seems clear that the intention of the Oireachtas was that it might be used in the preservation of the peace and maintenance of public order. The reference within the sub-section to a "peace" officer makes that clear. What is not clear, however, is whether it was the intention of the Oireachtas that it should only be available for use in such circumstances. Interesting though the question is, it is a matter for another case on another day.

So we are back, once again, to s. 6 and the s. (3)(d) definition. Having carefully considered all of the case law cited to the Court, the parties' respective submissions, and the facts as disclosed both on the warrant and in the additional information, the Court is of the view the respondent's main submission must be upheld. The Court requires to be satisfied that the conduct complained of occurred in a place that would be a public place within the meaning of s. (3)(d) of the Act of 1994. The characterisation of the place as being other than a public place by the issuing judicial authority, while not determinative of the issue, is problematic. The Court was particularly impressed by the common sense approach taken by the Queens Bench Division of the English High Court in *Cawley v. Frost* cited by the applicant. However, I think that a stadium and a hospital are not readily comparable premises. The Court's view is that in general a hospital is a public place on the basis that members of the public have, or are permitted to have, access to it by express or implied permission. However, public access to parts of the hospital, for example operating theatres, will necessarily be restricted and may not therefore be public places within the s. (3)(d) definition. Accordingly, if a door is clearly marked "private" or "no unauthorised access" or "authorised personnel only" or it is made clear in some other unmistakable fashion that the invitation to the public to be on the premises does not extend to that particular part of the premises (these indications would qualify as an obstacle or barrier in the sense spoken of in some of the judgments cited to the court), then the portion of the premises beyond that point does not have the necessary public character. In the present case, if the issuing judicial authority had not stated that the hospital room was not a public place, and if the warrant and all of the additional information had been silent as to the presence or

absence of a barrier or obstacle restricting public access to that particular room, the Court would have been prepared to infer, in circumstances where in general hospitals are places to which the public do have extensive access, that it was indeed a public place in the absence of any evidence to the contrary being adduced by the respondent, (*e.g.* as to the existence in fact of an obstacle or barrier). However, the Court is faced with an express representation by the issuing judicial authority that it was not a public place, and it seems to the Court that that undermines any basis for the drawing of an inference that the room in question was a public place. The Court must, in the circumstances, be satisfied that it was a place to which the public in fact had unrestricted access. For the Court to be so satisfied it would require to have, in circumstances where the issuing judicial authority has characterised the place as not being a public place, express evidence that access to the place was unrestricted in the sense that there was no barrier or obstacle or other clear indication to suggest that it was off-limits to the general public. There is no such evidence before the Court.

In addition, even if it was something that occurred in a public place, s. 6 requires use of the words in question, or engagement in the behaviour in question, "with intent to provoke a breach of the peace or being reckless as to whether a breach of the peace may be occasioned." It is by no means clear that the allegation extends to a complaint that in so conducting himself the respondent had that intent or was reckless in that way. In its judgment in *Minister for Justice, Equality & Law Reform v. Orlowski* [2011] I.E.H.C. 374 (Unreported, High Court, 7th October, 2011) this Court referred with approval to a decision of the High Court of England and Wales in *Marsh v. Arscott* (1982) 75 Cr. App R. 211 (previously referred to in this judgment as being relied upon by the respondent), and also to *Thorpe v. Director of Public Prosecutions* [2007] 1. I.R. 502. I stated in *Orlowski*:

> "*Marsh v Arscott* concerned the application of s. 5(a) of the UK Public Order Act 1936, as amended, which is in almost identical terms to s. 6 of the Act of 1994. S.5(a) provides:
>
> > 'any person who in any public place ... (a) uses threatening, abusive or insulting words or behaviour ... with intent to provoke a breach of the peace or whereby a breach of the peace is likely to be occasioned, shall be guilty of an offence.'
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> The facts of *Marsh* were that at 11:30 PM one Saturday night, the defendant was found by police officers slumped over the bonnet of a car parked in a shop car park. The police are anxious to establish his identity and asked him questions. The defendant was uncooperative, abusive and insulting. He told them that he was the owner of the property and asked them to leave. A computer check revealed the car was registered in the defendant's wife's name. The police remained despite the defendant's repeated request that they should leave. Eventually, he took off his coat, became extremely aggressive, both in manner and speech, threatened the police and poked and pushed one of them in the chest, whereupon he was arrested and charged with contravening s.5 of the Public Order Act 1936 is amended. The whole incident had taken place on the defendant's property and no member of the general public had been present. The justices were of opinion that the car park was 'a public place for the purposes of the Public Order Act 1936, as amended, but the police duty to preserve the peace prevented an offence from being committed where no member of the public was present.' Accordingly, they upheld a submission of no case to answer and dismissed the charge. The prosecutor appealed and the matter came before the High Court sitting as a two judge Divisional Court. The High Court dismissed the appeal. In doing so it held that regardless of who was acting lawfully and who was acting unlawfully in the circumstances of the case there was, at the time of the incident, a breach of the peace. However that did not mean an offence was committed against s. 5 of the Public Order Act 1936, because the phrase 'whereby a breach of the peace is likely to be occasioned' in that section indicated that Parliament was concerned with cause and effect, i.e. with conduct which is likely to bring about a breach of the peace and not with conduct which is in itself a breach of the peace and no more. In the course of giving the main judgment in the case McCullough J (with whom Donaldson J agreed) stated:
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> > 'Were this the law every common assault occurring in a public place would also be an offence against the section. Many such assaults will in fact be likely to lead very quickly to a breach of the peace, and these will be within the section; but, without more it is not enough that conduct which is threatening, abusive or insulting is of itself a breach of the peace.
> >
> > In the circumstances here, assuming the defendant had been acting unlawfully in using threatening words and behaviour, no breach of the peace was likely to have been occasioned. No other person was likely to have broken the peace, and all that the police were likely to do was arrest him, as they did.'
>
> In *Thorpe v The Director of Public Prosecutions*, the facts of which were very different, Murphy J was concerned with a consultative case stated which sought the opinion of the High Court as to whether breach of the peace contrary to common law was an offence known to the law in this jurisdiction. However, in dealing with this issue he quoted with approval the following passage from a judgment of the Court of Criminal Appeal in 1932 in a case of *Attorney General v Cunningham* [1932] I.R. 28 where O'Byrne J. stated at p. 33 to 34:-
>
> > 'In order to constitute a breach of the peace an act must be such as to cause reasonable alarm and apprehension to members of the public, and it seems to us that this is the substantial element of the offence. There is nothing of the charge as framed to allege, nor is there anything in the finding of the jury to show, that there was any person in the vicinity who could be alarmed by the firing…In the circumstances the Court is of the opinion that count 4 of the indictment does not contain a statement of the offence of having committed a breach of the peace … [W]e must not be taken as deciding that the accused could not have been properly convicted on an indictment aptly framed. On the contrary, having regard to the finding of the jury that the accused did fire a shot into the house, and to the clear and uncontradicted evidence that there were persons in the house at the time, we consider that a jury not only might but must, unless it acted perversely, find the accused guilty of having committed a breach of the peace.'"

The effect of the judgment in *Attorney General v. Cunningham* [1932] I.R. 28 was that firing into a dwelling house, while not an indictable offence at common law, was unquestionably a breach of the peace which was indictable at common law. O'Byrne J. considered that a jury not only might but must, unless it acted perversely, find the accused guilty of having committed a breach of the peace (given that there were persons in the house at the time into which the accused had fired a shot). The Court held that such an offence existed, as well as holding at p. 32 that "the criminal law must be certain and specific, and that no person is to be punished unless and until he has been convicted of an offence recognised by law as a crime and punishable as such." The important point about *Marsh*, *Thorpe* and *Cunningham* in the context of the present case, is that this jurisprudence provides support for this Court's belief that it is an essential ingredient of breach of the peace type offences, and public order offences generally, that there be a threat to the peace.

In all the circumstances of the case, the Court not being satisfied, either as to the public character of the hospital room, or that the facts justify the inference of a threat to the peace, is unable to find correspondence with s. 6 of the Act of 1994.

It is not necessary for the Court to proceed to consider correspondence in respect of the third offence to which the warrant relates in circumstances where a single aggregate sentence was imposed in respect of all three offences. The second offence, in respect of which correspondence cannot be demonstrated, is not capable of being severed from the warrant in such circumstances and therefore the Court cannot surrender the respondent for any of the offences to which this warrant relates.

Moreover, it is unnecessary in the circumstances for the court to address the other objections to the respondent's surrender on foot of this warrant.

Warrant No 2

As previously stated, the sole ground of objection to surrender on foot of warrant No 2 is to the effect that the respondent was tried *in absentia* in circumstances where he had not been notified in an acceptable manner as to the date and place at which his trial would take place, and where there is no undertaking as to a re-trial. It emerged in the course of the hearing that the facts are as asserted by the respondent. The Court stated in the course of the hearing that in those circumstances it could not surrender the respondent on this warrant. Accordingly, the Court hereby refuses surrender on this warrant under s. 45 of the Act of 2003 on the basis that the respondent was tried in absentia, did not receive notification as to the date and place of his trial in a form sufficient for the purposes of s. 45, and the Court is not in receipt of undertaking as to a retrial from the issuing state.

Warrant No 3

It is now conceded by counsel for the respondent that for the most part the concerns that led to the outstanding objections to the respondent's surrender on foot of this warrant as described earlier in this judgment have been addressed in additional information. There is in the Court's view no longer any uncertainty as to the nature and duration of the sentence/ detention order imposed by the issuing state; or as to the immediate enforceability of the sentence/detention order in question.

With regard to the length of sentence that remains to be served some small degree of ambiguity does remain. While counsel for the respondent very fairly states that on his calculations his client has 16 months and 16 days left to serve, additional information of the 20th November, 2012 states that he has just 16 months to serve. As the discrepancy is in the respondent's favour the Court does not consider it necessary to revert yet again to the issuing judicial authority. The issuing judicial authority has said that he is wanted to serve an outstanding balance of 16 months and on the basis of the principle of mutual recognition, particularly in circumstances where the issuing judicial authority has been afforded several opportunities to provide clarity on the issue, the Court is entitled to assume that the last word it has received represents the definitive and correct position, particularly in circumstances where any ostensible possible discrepancy is small and rather than prejudicing the respondent it in fact enures to his benefit.

This warrant is a conviction type warrant, and it relates to a single offence. The offence as particularised in Part E clearly describes circumstances that would correspond with an offence in this jurisdiction of robbery contrary to s. 14 of the Criminal Justice (Theft and Fraud Offences) Act 2001, and I find correspondence on that basis.

In so far as minimum gravity is concerned, the threshold set out in s. 38(1)(a)(ii) of the Act of 2003 requires that a sentence of at least four months should have been imposed in the issuing state. The sentence actually imposed was one of two years and four months deprivation of liberty and so minimum gravity is comfortably met. The additional information referred to above, culminating with very late additional information dated the 31st December, 2013, has made it clear that the balance of the sentence that remains to be served is a period of 16 months, and that the respondent has received all credits to which he is entitled.

The Court is unaware of any circumstance that would cause it to consider that the surrender of Mr Makuch ought to be regarded as being prohibited under Part 3 of the Act of 2003.

Therefore, in all the circumstances of the case the Court is disposed to make an order under s. 16(1) of the Act of 2003 surrendering Mr Makuch for the single offence that is the subject of this warrant so that he may serve the balance of 16 months which it has been stated remains to be served, less any further credit that he may be entitled to for time spent in custody in Ireland in connection with these European arrest warrant proceedings.