

THE HIGH COURT**2008 70 EXT****BETWEEN:****THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM****APPLICANT****AND****MAREK MALEK****RESPONDENT****Judgment of Mr Justice Michael Peart delivered on the 1st day of April 2009:**

The surrender of the respondent is sought by a judicial authority in Poland under a European arrest warrant which issued there on the 2nd August, 2007. That warrant was endorsed for execution here by the High Court on the 16th April, 2008, and the respondent was duly arrested on foot of same on the 1st December, 2008, and, as required by s. 13 of the European Arrest Warrant Act 2003, as amended, was brought before the High Court from where he was remanded from time to time pending the determination of this application for an order for his surrender.

No issue is raised as to the identity of the respondent and I am satisfied from the affidavit of Sgt. Martin O'Neill who arrested him on the 1st December, 2008 that he is the person in respect of whom this European arrest warrant has been issued.

The respondent's surrender is sought so that he can serve a sentence of imprisonment which was imposed on him following conviction for two offences committed on the 20th December, 2001. The sentence so imposed was for a period of two years and six months imprisonment. Minimum gravity is therefore satisfied. The entire of that sentence remains to be served.

No undertaking under s. 45 of the Act is required as the respondent was present for his trial, conviction and sentence.

The warrant states that "*after having been convicted and sentenced [the respondent] is a fugitive from justice.*"

I am satisfied that there is no reason to refuse to order surrender by reason of any provision of sections 21A, 22, 23 or 24 of the Act, and, subject to reaching a conclusion on the Points of Objection filed his surrender is not prohibited by any provision of Part II of the Act or the Framework Decision.

The offences:**Objections:****Section 11 – insufficient details contained in the warrant:**

Kieran Kelly B.L. for the respondent has submitted that relevant details are not contained in the warrant relating to applications made by the respondent after his sentence was confirmed on the 24th October, 2003, and that the warrant ought to be considered insufficient to base an application for surrender. The respondent has sworn an affidavit in which he has averred, *inter alia*, that on the 10th March, 2004 and again on the 17th January, 2005 he applied to the Polish Court to have his sentence deferred and that these applications were granted. He states that his sentence was as a result of these applications deferred until 10th March, 2005. He has exhibited translations of what purport to be court decisions reflecting these deferrals. The first such decision of the Poznan Circuit Court is dated 10th March, 2004, which appears to have reversed a previous refusal by the Wagrowicz District Court on 22nd January, 2004 to defer the sentence. The deferral granted was for a period of six months. That would appear to mean that without a further order of deferral, the respondent would have been required to serve the sentence from 11th September, 2004. The second order exhibited purports to be an order from the Wagrowicz District Court made on the 17th January, 2005 whereby, as stated in the order as translated, the execution of the sentence was further adjourned until 10th March, 2005. The contents of these orders as translated are not disputed by the applicant. But Caroline Cummings B.L. for the applicant submits that the absence of the details concerning the deferrals of this sentence by the Polish Courts is not such as to render the European arrest warrant invalid for the purpose of the application for the respondent's surrender. I agree. The fact that the sentence may have been deferred as shown does not alter the fact that the respondent was convicted and sentenced and that the sentence imposed is one which satisfies the minimum gravity requirement under the Framework Decision and the Act. An issue may arise for the purpose of an argument being raised under s. 10 of the Act, which I will come to in due course, but as far as the contents of the warrant are concerned, I am satisfied that there is sufficient information contained in the warrant itself in order to satisfy the requirements of s. 11 of the Act.

Section 10 – "fleeing":

The deferrals of execution of the sentence are submitted to have permitted the respondent to have left Poland and come to this State, as he did apparently on the 24th September, 2004, are said to take the respondent outside the scope of s. 10 of the Act, in that he did not "flee", and that accordingly this Court has no power under the Act to order his surrender. In this regard the respondent has averred that the reason he applied for deferral of his sentence was the

difficult situation which would face his family if he was to be in prison, since he was the sole breadwinner for his family. Having been employed by the same company for about 20 years, he left that employment on the 20th December, 2002, and registered himself as unemployed. He does not say why he left that employment, but states in any event that he remained unemployed until he found other employment in January 2004. He states that this new job did not allow him to maintain his three children and his wife who he says was sick at that time. It will be recalled that in January 2004 he had unsuccessfully applied to the District Court for a deferral of sentence, but that on appeal to Poznan Circuit Court on 10th March, 2004 that refusal was reversed. In his affidavit he states that he decided to search for work in Ireland, having been told by some of his friends here that there was work available in Cork. He states that he departed Poland legally on the 29th September, 2004. By that I presume that he means that on that date his sentence was still subject to deferral and that therefore he was free to leave and was not obliged at that time to serve the sentence, and therefore did not "flee". At any rate he says that he came here at that time and found work, that he never concealed his presence here, paid his taxes, and kept in touch with his parents in Poland. He goes on to state that in December 2004 he in fact returned to Poland to see his children and to discuss the reunification of his family, and that he entered and exited Poland lawfully, and that in January 2005 his wife and children joined him in Ireland. His children have been at school here since that date, but, sadly, his wife has died on the 27th August, 2008. He is the sole carer of his children here.

He says also that he never heard anything further about the sentence imposed upon him in Poland until he was contacted by the Gardai in Mallow on the 28th November, 2008. Upon that contact he attended at Mallow Garda Station voluntarily on the 1st December, 2008 when he was arrested on foot of the European arrest warrant and brought before the High Court. He concludes by saying that he did not flee Poland and that he came to this country only so that he could find employment so that he could maintain his family, and that he believes that *"the judgment against me and the operation of my sentence was only finalised whilst I was here in Ireland"*, and he seeks his discharge.

Mr. Kelly has submitted that the facts are such that when the respondent came to this State on the 29th September, 2004 he was not fleeing his sentence since it was at that time not enforceable since it had been deferred by the Poznan Circuit Court on the 10th March, 2004. Ms. Cummings however has adverted to the fact that by that order dated 10th March, 2004 the sentence was deferred for six months and that accordingly that deferral was at an end as of the 10th September, 2004, and that accordingly when the respondent left Poland to come here on the 29th September, 2004 he did so in the face of a sentence of imprisonment which he was on that date required to serve. She points to the fact that it was not until January 2005 that the respondent sought a further deferral (which was granted). That application made in January 2005 seems to coincide with the respondent's return to Poland, as stated by him, in December 2004. It is open to infer that he may have returned in December 2004 in order to make arrangements for that application to be made, but there is no specific evidence about that.

I am satisfied as a matter of fact appearing from the documents exhibited by the respondent himself that on the date on which he left Poland, namely 29th September, 2004, the deferral of sentence granted by order of Poznan Circuit Court dated 10th March, 2004 had come to an end almost three weeks previously. It follows that when he so left Poland he did so in the face of an enforceable sentence of imprisonment. In other words he fled, whatever his stated subjective intention is stated to have been in his affidavit. As a matter of fact he left thereby avoiding an enforceable sentence of imprisonment. The fact that at a later date he returned to Poland and may have made arrangements to have a further deferral application made on his behalf does not retrospectively change that fact. It follows in my view that he is, in the words of s. 10 of the Act "a person ... (d) on whom a sentence of imprisonment or detention has been imposed in respect of an offence to which the European arrest warrant relates, and who fled from the issuing state before he or she (i) commenced serving that sentence, or (ii) completed serving that sentence".

It follows that this Court is therefore required to make the order for the respondent's surrender, and will so order.