

## THE HIGH COURT

Record No 2011/328 EXT

BETWEEN

THE MINISTER FOR JUSTICE AND EQUALITY

Applicant

-AND-

ARKADIUSZ TOKARSKI

Respondent

## JUDGMENT of Mr Justice Edwards delivered on the 9th day of March 2012

**Introduction:**

The respondent is the subject of a European Arrest Warrant issued by the Republic of Poland on the 11th of January 2011. The warrant was subsequently endorsed by the High Court for execution in this jurisdiction and it was duly executed on the 21st of September 2011. The respondent was arrested by Garda Martin O'Neill on the 14th of December 2011, following which he was brought before the High Court later on the same day pursuant to s. 13 of the European Arrest Warrant Act, 2003 (hereinafter the Act of 2003). In the course of the s. 13 hearing a notional date was fixed for the purposes of s. 16 of the Act of 2003 and the respondent was remanded on bail to the date fixed. Thereafter the matter was adjourned from time to time ultimately coming before the Court on the 28th of February 2012 for the purposes of a surrender hearing.

The respondent does not consent to his surrender to the Republic of Poland. Accordingly, this Court is now being asked by the applicant to make an Order pursuant to s. 16 of the Act of 2003 directing that the respondent be surrendered to such person as is duly authorised by the issuing state to receive him. In the circumstances the Court must enquire whether it is appropriate to do so having regard to the terms of s.16 of the Act of 2003.

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 Martin O'Neill sworn on the 20th of February 2012 and has also received and scrutinised a copy of the European Arrest Warrant in this case. Moreover the Court has also inspected the original European Arrest Warrant which is on the Court's file and which bears this Court's endorsement. In addition, counsel for the respondent has confirmed that no issue arises as to either the arrest or identity. The Court is satisfied following its consideration of these matters that:

- (a) the European arrest warrant was endorsed for execution in this State in accordance with s. 13 of the 2003 Act;
- (b) the warrant was duly executed;
- (c) the person who has been brought before the Court is the person in respect of whom the European arrest warrant was issued;
- (d) the warrant is in the correct form;
- (e) the warrant is a conviction type warrant and the respondent is wanted in Poland to serve outstanding sentences in respect of two offences particularised in Part E of the warrant;
- (f) correspondence can be demonstrated between the first offence particularised in the warrant and the offence in Irish law of assault causing harm contrary to s. 3 of the Non-Fatal Offences Against the Person Act, 1997;
- (g) correspondence can also be demonstrated between the second offence particularised in the warrant and the offences in Irish law of criminal damage, contrary to s. 2 of the Criminal Damage Act, 1991 and assault contrary to s. 2 of the Non-Fatal Offences Against the Person Act, 1997
- (h) as an aggregate penalty was imposed by the court of trial in Poland amounting to one year and two months imprisonment, the requirements as to minimum gravity are met in circumstances where the minimum gravity threshold under s. 38(1)(a)(ii) of the Act of 2003 is a sentence of four months imprisonment or deprivation of liberty.
- (i) the High Court is not required, under s. 21A, 22, 23, or 24 (inserted by ss 79, 80, 81 and 82 of the Criminal Justice (Terrorist Offences) Act 2005) of the Act of 2003, to refuse to surrender the respondent;
- (j) the Court is also unaware of any circumstance which would cause it to consider that the surrender of the respondent for the offences particularised in the warrant is prohibited, either under Part 3 of the Act of 2003, or on foot of the Framework Decision (including the recitals thereto).

In addition the Court is satisfied to note the existence of the European Arrest Warrant Act 2003 (Designated Member States) (No 3) Order 2004, S.I. 206/2004 (hereinafter referred to as "the 2004 Designation Order"), and duly notes that by a combination of s 3(1) of the 2003 Act, and article 2 of, and the Schedule to, the 2004 Designation Order, "Poland" (or more correctly the Republic of Poland) is designated for the purposes of the 2003 Act as being a state that has under its national law given effect to the Framework Decision.

**The point of objection**

The sole point of objection proceeded with at the hearing, and the central issue in the case, is the respondent's contention that he was tried *in absentia*, and that in the absence of an undertaking from the issuing state that he would receive a re-trial the Court is obliged under s. 45 of the Act of 2003 to refuse to surrender him. The applicant does not concede that the respondent was tried *in absentia*. It is necessary in the circumstances for the Court to examine the evidence.

## **The evidence**

### **The respondent's evidence**

The respondent relies upon two affidavits sworn personally by him, on the 30th day of January 2012, and on the 28th day of February 2012, respectively.

The following paragraphs from the affidavit sworn on the 30th day of January 2012 are relevant to the point at issue.

"5. I have been living in Ireland since September 2005 and I am well settled here now. I live with my brother. There are three of us brothers. My younger brother is here too. My dad is deceased and my mother spends most of her time living with us too.

6. In July 2009 I travelled back to Poland for my brother's wedding. That was the only reason I went to Poland as my life is here now and I have no other business there. My brother got married in Poland on 26 July 2009 and we had a big celebration. I drank a lot both the day and on the next day and on 27th of July when I was arrested by the Polish police I was very drunk.

7. I was questioned by the police while I was drunk. The police did not want to give me a chance and I have no recollection of being offered a lawyer. I could have done with one. I was not in any state to freely or voluntarily confess to anything. I did not go to any court and I was not informed about any court hearing. I don't believe there was any court hearing at or around the time of my arrest.

8. I returned to Ireland at the end of July or the start of August 2009 and I have not returned to Poland since. I have no business there now. I was not informed about any court hearing on 1 December 2009 or otherwise and on that basis I did not attend."

The respondent's supplemental affidavit sworn on the 28th day of February 2012 seeks to correct one point in his earlier affidavit. He avers:

"3. Further to my original affidavit I wish to correct an error and say that I returned to Poland in October 2009 where I met the police and I returned to Ireland thereafter and I have not returned to Poland since."

### **The applicant's evidence**

The applicant relies firstly on the terms of the European arrest warrant itself, and in particular the contents of Part D thereof.

Pursuant to s. 11 of the Act of 2003, Part D of a European arrest warrant is required to be completed in the case of a decision rendered *in absentia*. Where it applies the issuing judicial authority must indicate whether item 1 or item 2 as recited within that part applies in the circumstances of the case, and respond appropriately.

Item 1 is in terms that:

*"The person concerned has been summoned in person or otherwise informed of the date and place of the hearing which led to the decision rendered in absentia and has the following legal guarantees after surrender (such guarantees can be given in advance):*

Item 2 is in terms that:

*"The person concerned has not been summoned in person or otherwise informed of the date and place of the hearing which led to the decision rendered in absentia but has the following legal guarantees after surrender (such guarantees can be given in advance):  
....."*

Scrutiny of Part D the European arrest warrant in the present case indicates that both items 1 and 2 respectively are indicated by the issuing judicial authority to be "not applicable".

The applicant also relies upon additional information dated the 2nd of February 2012 provided by the issuing judicial authority in response to queries raised by the applicant arising out of the respondent's affidavit of the 30th of January 2012, and in particular the respondent's assertion that he was never before a Polish Court in connection with the offences the subject matter of the warrant. The additional information furnished is in the following terms:

### **"A**

1/ In order to provide suitable answers to the raised questions several essential problems need to be clarified: that is the differences between the Polish and Irish criminal procedures which will help to understand the procedure of the conviction of Mr Arkadiusz Tokarski.

2/ The Polish criminal procedure involves two stages: preliminary proceedings and a lawsuit. The preliminary proceedings involve collecting evidence. These proceedings are carried out by a state prosecutor or by the police authorities. In the event they are carried out by the police authorities the latter are supervised by a state prosecutor who makes all vital legal decisions thereto. The preliminary proceedings last approximately from several days to several months, depending on the complexity of the case. As long as preliminary proceedings provide sufficient for indictment an indictment is drawn up and only then the case is submitted before court. At this point the case enters the lawsuit stage. Pursuant to the above, an offender is usually appears before court after several days or several months following his committing an offence.

3/ There are obviously cases in which an offender is brought before the court almost instantly (i.e. within 48 hours after

committing an offence). This is when a prosecutor requests for preventive detention or if the case is qualified under a summary procedure. As regards Arkadiusz Tokarski none of the above circumstances were recorded.

## B

Accordingly the Regional Court in Tarnow kindly informs as follows:

1/ At the time of his apprehension in the said case-- on 27th of July 2009-- Arkadiusz Tokarski was intoxicated. On 27th of July 2009 at 5:56 a.m. his recorded breath alcohol level was 1.29 milligrams per one litre. On 27th of July 2009 at 6:08 a.m. the recorded breath alcohol level was 1.44 milligrams per one litre. On that day no trial of facts was carried out against Mr Tokarski.

2/ The first interrogation of Arkadiusz Tokarski was conducted on the following day-- 28th of July 2009. It commenced at 12:50 p.m. At the time the offender was sober. According to the Polish criminal law no interrogation can be carried out with intoxicated persons. If any doubt about sobriety of the interrogated arises, a special alcohol detection device is used. **Prior to his interrogation Arkadiusz Tokarski had been informed of his right to be assisted by defence counsel. He did not use right thereof.** He pled guilty to the charges levelled against him. The interrogation was carried out by the police.

3/ The second interrogation was conducted on 12 October 2009. **Prior to his interrogation Arkadiusz Tokarski had been informed of his right to be assisted by a defence counsel. He did not use the right thereof.** He was also familiarised with the content of article 138 of the code of criminal code to be as follows:

*"The party or a person who is not a party in case, the rights of whom are violated, who was residing abroad, shall be obligated to designate an addressee for the service of documents in Poland. If he fails to do so, a document sent to his last known address in Poland, or with no such address, is filled with the record of the case, and deemed to have been served".* Arkadiusz Tokarski designated the address for delivery is to be- Tarnow, ulica Lwowska 61/1 (Poland). He provided the same address as his place of regular residence and legal domicile.

During this interrogation, conducted by the police as well, Arkadiusz Tokarski pled guilty again to the charges levelled against him and expressed his readiness to voluntarily submit to penalty. After consulting the state prosecutor, who was contacted during the interrogation, Arkadiusz Tokarski agreed to the penalty which he was ready to suffer, namely:

- 1 (one) year imprisonment for the first offence,
- 4 (four) months imprisonment for the second offence,

the concurrent sentence combining the above to be 1 (one) year and 2 (two) months imprisonment.

It was an unconditional penalty, and therefore Arkadiusz Tokarski agreed himself to serve it in a penal institution.

4/ The indictment act was then drawn up, enclosed with a prosecutor's request for inflicting upon Arkadiusz Tokarski the agreed and settled penalty. **It entails that Arkadiusz Tokarski knew the circumstances of his conviction and that his conviction would be judged by court.** The more so, in the Polish law it is exclusively the court which is in power to convict and sentence for committing offences.

5/ The sentence was adjudged by court on 1st December 2009 (it was the very first legal action taken by court in this case). Due to the fact that Arkadiusz Tokarski did not receive the summons to appear in court as required, the aforementioned article 138 of the code of criminal procedure was applied. As we learn from the statement of the wanted made before your court, Arkadiusz Tokarski was staying on the territory of Ireland at the time.

6/ Arkadiusz Tokarski was not obligated to appear before court, for the court adjudged the sentence which the wanted had agreed upon during the preliminary proceedings. That is Mr Tokarski knew the circumstances of his conviction and his absence from the court hearing was the consequence of his deliberate decision according to his own will. For the record, I would like to emphasise that the presence of the convicted would only be required if the court did not approve of the conditions of conviction to have been agreed upon by him before. However, in the said case all the circumstances of the conviction were accepted by court. Accordingly, the judgement issued in the above circumstances is not the judgement passed in default. Arkadiusz Tokarski knew the wording of the charges levelled against him, he was given a chance to answer them, he knew the case will be presented to court, and finally, he knew that only the penalty to which he had agreed would be imposed on him (if the court wished to impose another penalty it would be obligated to order another hearing). Therefore, whereas the above sentence was not passed in default, it is not feasible to review the case. There is, however, a possibility to apply an extraordinary measure of appeal, provided, the convict fulfils certain legal conditions."

(emphasis as in original)

(The additional information then outlines in some detail the provisions of the Polish Criminal code dealing with the conditions that must be fulfilled in order for a defendant to initiate and prosecute an "extraordinary measure of appeal". As they are not relevant to the matter at issue it is not proposed to recite this.)

### The relevant statutory provision.

S. 45 of the Act of 2003 as substituted by s. 20 of the Criminal Justice (Miscellaneous Provisions) Act, 2009 provides:

45.-A person shall not be surrendered under this Act if-

(a) he or she was not present when he or she was tried for and convicted of the offence specified in the European arrest warrant, and

(b) (i) he or she was not notified of the time when, and place at which, he or she would be tried for the offence, or

- (ii) he or she was not permitted to attend the trial in respect of the offence concerned,
- unless the issuing judicial authority gives an undertaking in writing that the person will, upon being surrendered-
- (I) be retried for that offence or be given the opportunity of a retrial in respect of that offence,
- (II) be notified of the time when, and place at which any retrial in respect of the offence concerned will take place, and
- (III) be permitted to be present when any such retrial takes place,"

## Decision

Although counsel for the applicant has sought to argue doughtily that the respondent engaged with the trial process in Poland, and moreover that by agreeing with the state prosecutor that he would plead guilty had participated in the actual trial process, so that he could not be said to have been tried and convicted entirely in his absence, that argument was untenable in this Court's view for two reasons.

First, the Supreme Court has made it clear in *Minister for Justice, Equality and Law Reform v Sliczynski* [2008] IESC 73 that s.45 of the Act of 2003, being a provision in Irish domestic law, must be interpreted and applied as a matter of Irish law. Accordingly, the reference to a respondent being "*tried for and convicted of the offence specified in the European arrest warrant*" must mean trial and conviction as understood in Irish law, i.e., a determination of the issue of guilt or innocence by a court of law. Although in Ireland we have no system of plea bargaining the problem faced by the applicant has nothing *per se* to do with the fact that there was a plea bargain in this case. It is to do with the contention that the respondent pleaded guilty before a state prosecutor (if in fact he did so, which suggestion the Court considers is not supported by the evidence) and that this step amounted to part of the trial process. "Trial" as understood in Irish law imports a determination of guilt or innocence by a properly constituted court of law, i.e., by a judge appointed either under the Constitution of the state in question or otherwise in accordance with its laws: alternatively, where the law of the relevant state permits it, by a jury following a trial in an indictable matter before both judge and jury. Pleas of guilty are, of course, commonplace in Ireland but they are entered before a judge following an arraignment of the accused in court and the judge, assuming he is prepared to accept the plea (in rare circumstances he can refuse to do so and direct the entry of a plea of not guilty on behalf of the accused), then records the conviction. In Ireland there are no circumstances in which either the police, or an official such as a prosecutor, can receive a plea of guilty from an accused and have a conviction recorded on the basis of it. At most, all that can be received is an indication from the accused as to his intentions upon arraignment when he is brought before the Court of trial.

Secondly, the Court believes that the evidence contained in the additional information dated the 22nd of February 2012 establishes that that is also the position in Poland. When the document in question refers to the fact that the respondent "pled guilty" before the police, and again later on before the state prosecutor, it is manifest that he merely agreed that when brought before a court he would plead guilty in return for the authorities recommending to the court the imposition a specific pre-agreed penalty. It is abundantly clear that he was not actually arraigned. This is manifest from the passage:

*"During this interrogation, conducted by the police as well, Arkadiusz Tokarski pled guilty again to the charges levelled against him and expressed his readiness to voluntarily submit to penalty. After consulting the state prosecutor, who was contacted during the interrogation, Arkadiusz Tokarski agreed to the penalty which he was ready to suffer, namely:*

*- 1 (one) year imprisonment for the first offence.*

*- 4 (four) months imprisonment for the second offence,*

*the concurrent sentence combining the above to be 1 (one) year and 2 (two) months imprisonment.*

*It was an unconditional penalty, and therefore Arkadiusz Tokarski agreed himself to serve it in a penal institution.*

*4/ The indictment act was then drawn up, enclosed with a prosecutor's request for inflicting upon Arkadiusz Tokarski the agreed and settled penalty. **It entails that Arkadiusz Tokarski knew the circumstances of his conviction and that his conviction would be judged by court.** The more so, in the Polish law it is exclusively the court which is in power to convict and sentence for committing offences. (emphasis as in original)*

The matter is then put beyond any possible doubt by the statement:

*"5/ The sentence was adjudged by court on 1st December 2009 (it was the very first legal action taken by court in this case)"*

Counsel for the applicant asked the Court at a late stage of the hearing to seek clarification from the issuing judicial authority using its powers under s. 20(1) of the Act of 2003 as to whether the procedure before the state prosecutor was part of the trial process. It is clear that this suggestion was offered more in hope than expectation that any further information that might be provided would assist her case. The Court refused this application on the basis that the position was clear, and that clarification was not required.

In all the circumstances of the case the Court is satisfied that the respondent was in fact tried and convicted *in absentia*, and in the absence of a s.45 undertaking it must refuse to surrender him.