

THE HIGH COURT**2008 127 Ext.****Between****The Minister for Justice, Equality and Law Reform****Applicant****And****Dominik Slonski****Respondent****Judgment of Mr Justice Michael Peart delivered on the 10th day of March 2009**

The surrender of the respondent is sought by a judicial authority in Poland on foot of a European arrest warrant dated 17th March 2008 so that he can serve a sentence of 12 months imprisonment which was imposed upon him there on the 21st November 2003. That sentence satisfies the minimum gravity requirement, being a sentence of more than four months.

That warrant was endorsed for execution here by order of the High Court, and thereafter the respondent was arrested here on the 10th September 2008, and brought before the High Court as required by s. 13 of the European Arrest warrant Act, 2003, as amended ("the Act").

The sentence of imprisonment was conditionally suspended, the condition being that described in the warrant as "a curator's supervision". It appears that by the 4th November 2005 it had become known by the Polish court that the respondent had left Poland, which was a breach of the supervision condition, and on that date the court lifted the suspension and ordered execution of the sentence. The warrant discloses also that on the 4th April 2005 the respondent had landed at Dublin Airport and was detained there "while smuggling 500g of cocaine". He was sentenced here in respect of that offence and sentenced to a term of seven years' imprisonment which he is currently serving here.

In such circumstances it is submitted by the applicant that the respondent comes within s. 10(d) of the 2003 Act. A point of objection is raised by the respondent in this regard, and I will come to that in due course.

No issue is raised on this application as to the identity of the respondent, and the Court is in any event satisfied from the affidavit of the arresting officer, Sgt. James Kirwan, that the person he arrested on that date is the respondent and the person in respect of which this European arrest warrant has been issued.

No undertaking is required under s. 45 of the Act, as the respondent was not convicted and sentenced in his absence.

The offence for which the respondent was convicted and sentenced in Poland is described in the warrant as follows:

"At night, from 16th to 17th July 2002 in Ostróda, Warmia-Mazurin voivodship, acting jointly and in cooperation, pushing out the board in the entrance door of a grocery shop, he entered the shop where he tried to take some things but did not reach the intended goal as he was scared away by an alarm. They acted to the detriment of Stanisław Błaszczak."

It is submitted by Remy Farrell BL for the applicant that the corresponding offence here for that offence is one of burglary contrary to s. 12 of the Criminal Justice (Theft and Fraud Offences) Act, 2001 ("the 2001 Act"). In addition he submits that the actions of the respondent as disclosed in the warrant would give rise also to an offence of entering a building with intent to commit an offence contrary to s. 11 of the Criminal Justice (Public Order) Act, 1994. An issue is raised by Kieran Kelly BL for the respondent in relation to correspondence and I will come to that and the other objections relied upon by him.

I am satisfied that there is no reason to refuse an order for surrender under sections 21A, 22, 23 or 24 of the 2003 Act.

Subject to reaching a conclusion on the points of objection raised by the respondent, I am satisfied that his surrender is not prohibited by any provision of Part III of the 2003 Act or the Framework Decision.

Points of Objection**1. Section 10 – fleeing:**

Section 10 (d) provides as follows:

"10—Where a judicial authority in an issuing state duly issues a European arrest warrant in respect of a person—

(a) ...

(b) ...

(c) ...

(d) on whom a sentence of imprisonment or detention has been imposed in respect of an offence to which the European arrest warrant relates, and who fled from the issuing state before he or she—

(i) commenced serving that sentence, or

(ii) completed serving that sentence,

that person shall, subject to and in accordance with the provisions of this Act and the Framework Decision, be arrested and surrendered to the issuing state."

The sole basis on which the respondent contends that he does not come within provision is contained in his grounding affidavit at paragraph 5 where he states:

"I was not present in Court in Poland on 4th November 2005 when I was ordered to serve a period of imprisonment. I was in custody in Ireland. In these circumstances I believe I cannot be regarded as having fled Poland before I commenced or completed serving that sentence."

Mr Kelly submits that the onus is upon the Applicant to establish that the respondent is a person who is within the meaning of s. 10 (d) of the 2003 Act, and not upon the respondent to show that he does not. He submits that the applicant has failed to do that in the warrant, since, in his submission, it is the position that the respondent had already left Poland before he was required to serve any sentence, since same had been suspended when it was first imposed.

Mr Farrell for the applicant accepts that there is no heavy onus upon a respondent to show that he has not fled, but that the warrant in this case has stated the fact that a sentence was imposed on 21st November 2003 and that as a fact the respondent is a person who has not served that sentence. He submits that accordingly the respondent comes within the clear wording of the section, and that the fact that the sentence imposed was suspended, and that he left Poland before the suspension was lifted, does not alter the fact that he fled Poland before serving the sentence which was imposed in November 2003. He submits that the applicant has established the necessary facts by what is stated in the warrant in this regard, and that it is incumbent upon the respondent to disturb those facts, if he seeks to argue that he has not fled within the meaning of the section. He submits that the bald statement contained in paragraph 5 of his affidavit fails to establish that the respondent did not flee in the sense intended by s.10 (d) of the 2003 Act.

I am satisfied firstly that the date on which this sentence was imposed was the 21st November 2003, and not the date on which the suspension was lifted on 4th November 2005. The wording of s. 10(d) is clear and unambiguous. If the respondent leaves the issuing state after that sentence was imposed and before he has served the sentence, it is clear that he must be considered as having fled the issuing state before serving the sentence, regardless of the fact that the suspension was lifted after he left. I reject this ground of objection.

2. Correspondence:

In so far as the applicant puts forward an offence under s.12 of the 2001 Act, an offence of burglary, Mr Kelly submits that this Court cannot simply infer from the facts recited in the warrant that the respondent entered the premises in question as a trespasser. He refers to the fact that there is no reference in the warrant to the respondent entering as a trespasser. I have already set out the extent of the information contained in the warrant as to the acts of the respondent which gave rise to the offence for which he was convicted and sentenced. Mr Farrell for the applicant submits that the Court should feel entitled to have regard to the overall circumstances in which the offence was committed in order to be satisfied that the respondent on the date in question had no lawful authority to enter the premises and therefore conclude that when he entered the premises he did so as a trespasser for the purpose of finding that the offence corresponds to the offence here under s. 12 of the 2001 Act.

I have already set forth the information contained in the warrant as to the circumstances in which the offence was committed. The actions described make it quite clear that he broke into these premises rather than enter them by using a key or otherwise simply opening the door. Having broken into the premises he attempted to take goods but was scared away by the alarm being activated. In my view the fact that the word trespass is not used or that the respondent is not described as a trespasser as such in the warrant does not alter the fact that if he were to commit these acts in this jurisdiction he would be guilty of the offence of burglary under s. 12 of the 2001 Act, which provides:

"12. – (1) A person is guilty of burglary if he or she –

(a) enters any building or part of a building as a trespasser and with intent to commit an arrestable offence, or

(b) having entered any building or part of a building as a trespasser, commits or attempts to commit any such offence therein."

In my view correspondence is made out with the offence provided for in s. 12 (1)(b) of the 2001 Act. An "arrestable offence" is defined in s. 12 (4) thereof for the purpose of this section as "*an offence for which a person of full age and not previously convicted may be punished by imprisonment for a term of five years or by a more severe penalty.*" Clearly an offence of theft under the 2001 Act is such an offence.

3. Section 11 – lack of information as to range of sentence for Polish offence.

Mr Kelly has submitted that the warrant does not contain certain information which he says is required to be given by virtue of the provisions of s. 11 of the 2003 Act and does not fulfil the requirements of Article 8 of the Framework Decision, and in particular "the precise details and the circumstances in which the penalty was imposed". Article 8 sets out a number of matters to be included in a warrant, including, as relevant herein, that at paragraph (f), namely "*the penalty imposed, if there is a final judgment, or the prescribed scale of penalties for the offence under the law of the issuing Member State*". Section 11(1A) (iii) of the 2003 Act states that the warrant shall in so far as practicable state "*where that person has been convicted of the offence specified in the European arrest warrant and a sentence has been imposed in respect thereof, the penalties of which that sentence consists*".

Mr Kelly submits that the warrant fails to give any information as to the extent of the penalty to which the respondent may be sentenced – in other words what the maximum sentence was.

I do not see any difficulty arising from the way this warrant has been completed. This is a case in which the respondent has already been sentenced. The warrant states the length of that sentence. That is what is required to be stated either under Article 8 of the Framework Decision or s. 11 of the Act.

For all these reasons I am satisfied that the Court is required to make the order sought for the surrender of the respondent to Poland, and I will so order.