Neutral Citation [2012] IEHC 388

THE HIGH COURT

Record No 2011/22 EXT

Record No 2011/23 EXT

Record No 2011/24 EXT

Record No 2011/25 EXT

Record No 2011/26 EXT

Record No 2011/27 EXT

Record No 2012/132 EXT

BETWEEN/

THE MINISTER FOR JUSTICE AND EQUALITY

Applicant

-AND-

ARKADIUSZ KRZYSZTOF GUZ

Respondent

JUDGMENT of Mr Justice Edwards delivered on the 31st day of July, 2012.

Introduction:
In this case the respondent was initially the subject of six separate European arrest warrants on foot of which the Republic of Poland seeks his surrender either for prosecution, or to serve a sentence or sentences, as the case may be, in respect of the various offences that are the subject of the six warrants in question. One of these six warrants was subsequently withdrawn. However, a new and seventh warrant was then issued and, in effect, substituted for the withdrawn warrant.

The sheer number of warrants in this case creates the potential for confusion, particularly in circumstances where each case has a separate record number, where some warrants share the same date, where each warrant has a different Polish domestic file reference number (and sometimes more than one where there has been an appeal), and a different Polish European arrest warrant file reference number. Therefore it is necessary at the outset to identify each warrant properly and to give it a single and convenient label of the purposes of this judgment. It is proposed to simply label the warrants as Warrant Nos. 1 - 7, respectively.

Warrant No. 1

This is the subject of the proceedings bearing record no. 2011 No. 22 EXT and is the first of two warrants dated the 26th February, 2008. The Polish domestic file reference number is II K 266/02 and the Polish European arrest warrant file reference number is IV Kop 95/08.

Warrant No.2

This is the subject of the proceedings bearing record no. 2011 No. 23 EXT and is the second of two warrants dated the 26th February, 2008. The Polish domestic file reference number is III K 566/06 and the Polish European arrest warrant file reference number is IV Kop 96/08.

Warrant No.3

This is the subject of the proceedings bearing record no. 2011 No. 25 EXT and dated the 4th November, 2008. The Polish domestic file reference number is XV K 98/03 and the Polish European arrest warrant file reference number is IV Kop 291/08.

Warrant No.4

This is the subject of the proceedings bearing record no. 2011 No. 24 EXT and dated the 7th October, 2008. The Polish domestic file reference number is II K 278/06 and the Polish European arrest warrant file reference number is IV Kop 251/08.

Warrant No.5

This is the subject of the proceedings bearing record no. 2011 No. 27 EXT and dated the 25th May, 2008. The Polish domestic file reference number is II K 358/05 and the Polish European arrest warrant file reference number is IV Kop 86/10. This warrant has recently been withdrawn.

Warrant No.6

This is the subject of the proceedings bearing record no. 2011 No. 26 EXT and dated the 8th June, 2008. The Polish domestic file reference numbers are a II K 307/06, b III K 383/05 & c II K 398/05; and the Polish European arrest warrant file reference number is IV Kop 69/10.

Warrant No. 7

This is the subject of the proceedings bearing record no. 2012 No. 132 EXT and dated the 23rd March, 2012. The Polish domestic file reference number is II K 358/05 and the Polish European arrest warrant file reference number is IV Kop 86/10. This warrant replaces warrant no. 5.

Before considering each warrant individually, and the specific objections to surrender raised in regard to each respectively, it is appropriate to indicate that certain matters are uncontroversial. No issues arise in any of the cases as to proper endorsement for execution in this jurisdiction in accordance with s.13 of the European Arrest Warrant Act 2003 (hereinafter the Act of 2003), or as to arrest or identity.

The Court has affidavits as to arrest and identity covering each of the warrants in question from the arresting members of An Garda Siochana. In addition, oral evidence as to arrest and identity was given before the High Court by the gardai in question in the immediate aftermath of the relevant arrests, which was not challenged. In each case the Court, being satisfied at the s. 13 (of the Act of 2003) hearing as to the execution of the warrant, and as to identity, fixed a date for the purposes of s.16 of the Act of 2003, being a date that fell 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.

In circumstances where no issue has been raised at the surrender hearing concerning proper endorsement, arrest or identity, and in circumstances where the Court has inspected the original warrant in each case, and has before it the affidavit evidence referred to above, the Court is again satisfied that each warrant bears this Court's endorsement, that each warrant was duly executed within the jurisdiction and that in each instance the person who is before the Court is one and the same person as the Arkadiusz Krysztof Guz named in the relevant European arrest warrant.

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. No. 206 of 2004) (hereinafter referred to as "the Designation Order of 2004"), 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 Designation Order of 2004, "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 Council Framework Decision 2002/584/J.H.A. of 13th June 2002 on the European arrest warrant and the surrender procedures between Member States, OJ. L190/1 18.7.2002 (hereinafter referred to as "the Framework Decision").

Warrant No.1:

This warrant which is dated the 26th February, 2008, was endorsed for execution on the 26th January, 2011. It is a sentence type warrant on foot of which the respondent's surrender is sought for the purposes of having him serve an aggregate sentence of one year and six months imprisonment imposed upon him by the Provincial Court of Pilawy, II Penal Division, on the 8th October, 2002, and which became valid on the 16th October, 2002, in respect of the four offences specified in the warrant.

Details of the four offences are set out at paragraph E of warrant and in each case the Court must be satisfied both as to correspondence and minimum gravity.

Correspondence

It is appropriate to first of all recite the circumstances of the four offences as they are set out in the warrant. The warrant states:

> "At night on February 9/10th in Nalêczów, province of Lubelskie, acting in the conditions of a continuous crime, in short periods of time, with premeditation, he perpetrated a burglary:
>
> - into a car Volkswagen Polo, registration number: BLS 3129, having broken the car window in the front car door, he got into the car and took with the purpose of appropriation a car radio 'Gelhard', causing a loss in the amount of 1000 PLN to the detriment of Stanislaw Urbáss;
>
> -into a car Volkswagen Golf, registration number: LPU R 288, having broken the car window in the front car door, he got into the car and took with the purpose of appropriation a car radio 'Fiast', causing a loss in the amount of 460 PLN to the detriment of Marzena Olszta;
>
> -into a car Volkswagen Polo, registration number: LBU 0716, having broken the car window in the front car door, he got into the car and took with the purpose of appropriation a car radio 'Thomsonic' and a first aid kit, causing a loss in the amount of 320 PLN to the detriment of Ewa W6jcik;
>
> -he attempted to break into a car Fiat 126p, registration number: LPO K 749, having broken the car window in the front car door, he got into the car, but he did not achieve the objective due to the lack of a tool suitable for the crime, but he damaged the property of the value of 120 PLN to the detriment of Anna Rymanowska"

In the case of the first three offences, counsel for the applicant invites the Court to find correspondence in each instance, with the offence of theft contrary to s.4 of the Criminal Justice (Theft and Fraud Offences) Act 2001. In the case of the fourth offence, counsel for the applicant invites the Court to find correspondence with the offence of attempted theft contrary to common law; alternatively criminal damage contrary to s.2 of the Criminal Damage Act 1991; alternatively, unlawful interference with the mechanism of a mechanically propelled vehicle contrary to s.113 of the Road Traffic Act 1961.

The respondent raised a late objection shortly after the commencement of the hearing based upon alleged lack of correspondence. It is not formally pleaded but, notwithstanding vehement objection by the applicant, the Court decided in the exercise of its discretion to entertain it. It did so, on the following basis.

The respondent's objections with respect to all of the offences were to the effect that various ingredients of the Irish offences were not made out. In the case of the suggested theft offences he argued that the facts as disclosed in the warrant did not allege dishonest intention and an intention to permanently deprive the owner of the goods. In the case of the suggested criminal damage and unlawful interference offences, he suggested that the facts as disclosed in the warrant did not allege absence of lawful excuse. The Court considered that while it was regrettable that lack of correspondence was not specifically pleaded in points of objection, the applicant had not been ambushed and the interests of justice required that the respondent should be allowed to challenge correspondence notwithstanding that no such objection had been pleaded. The primary purpose of points of objection was to satisfy the rules of natural justice. It would be unfair and contrary to natural justice for an applicant to be ambushed and required to deal with some point that he might not reasonably have anticipated. In this case, however, nothing was being raised that could not

reasonably have been anticipated by counsel for the applicant and that counsel for the applicant would not have had to deal with in any event.

European arrest proceedings are *sui generis* and s. 16 (of the Act of 2003) surrender hearings are predominantly conducted as an inquiry. In the circumstances neither side bears a legal burden of proof as such. The role of the parties is to assist the court in its inquiry. At the end of the day it is for the Court to be satisfied that the requirements of the Act of 2003, including those as to correspondence, have been met. Even if correspondence has never been challenged, counsel for the applicant would still have had to demonstrate (the applicant bearing in that sense an evidential burden of proof, though not a legal burden of proof) that the facts as disclosed in the warrant satisfy the ingredients of the various offences in Irish law put forward as corresponding offences. Accordingly, in every case, counsel for the applicant is required to analyse the facts disclosed in the warrant and any additional information, and form a view as to whether all of the ingredients of the suggested corresponding offences exist. There has to be engagement with this question in every case regardless of whether or not correspondence is challenged by the respondent. Where points of objection assume an importance is where the basis of the challenge is not simply that the disclosed facts fail to satisfy the ingredients of a particular Irish offence, but rather where some issue of law is raised, or there is some suggested implication arising from a fact or facts, that an applicant could not reasonably have anticipated would be raised. Clearly, in that situation, counsel for the applicant has to have adequate notice of what is being raised in order to be able to deal with it. In this case, however, the late challenge consisted only of a suggestion that the facts as disclosed in the warrant do not satisfy various ingredients of the offences in Irish law put forward as candidate corresponding offences. Counsel for the applicant would have had to satisfy the Court as to these matters in a routine way in any event, and it could not legitimately be said that there was any kind of ambush.

Counsel for the respondent has made the further point, which appears to the Court to have at least some substance to it, that although a respondent is required by Order 98 of the Rules of the Superior Courts (as amended by Rules of the Superior Courts (European Arrest Warrant Act 2003 and Extradition Acts 1965 to 2001) 2005 (S.I. No. 23 of 2005) to deliver points of objection containing "a statement in summary form of the grounds and of the material facts on which the person relies to resist the execution of the European arrest warrant," there is a lack of equality of arms in that there is no requirement on the applicant to inform the respondent in advance of the surrender hearing with what offences in Irish law the applicant will invite the Court to find correspondence.

It was suggested that in those circumstances the best that a respondent can do is plead in a very general way that there is a lack of correspondence. If that had been done in the present case it would have made counsel for the applicant none the wiser.

In response, counsel for the applicant suggests that it is always open to a respondent to make a request for that information by letter before the hearing date.

That may be so, but the Court does not consider that that is a satisfactory situation. It is one that has the potential to disadvantage any respondent, particularly an unrepresented respondent, coming from a country where establishment bodies are not known for their openness and transparency and who might therefore believe that in circumstances where the central authority is not obliged to provide such information there is little point in asking for it as the request is likely to be ignored or refused. I accept, of course, that the present case is far removed from that situation.

Nevertheless, I consider that it is desirable that the applicant should in future cases inform a respondent in advance of the hearing, routinely and without having to be asked for it, as to with what offences in Irish law the Court will be invited to find correspondence. I intend to ask for that to be done in future cases.

Equally, from now on, a respondent, having been provided with such information, should plead a correspondence objection not just in a general way but with sufficient particularity to enable counsel for the applicant to identify the precise deficiency being alleged.

In the present case, the point of objection in relation to the theft offences was subsequently withdrawn after the Court drew to the attention of counsel for the respondent the recent *ex-tempore* judgment of Murray J., on behalf of the Supreme Court, in the *Minister for Justice and Law Reform v. Nowakowski* (Unreported, *ex tempore*, Murray J., 12th October, 2011). Having been provided with the opportunity to read the judgment in *Nowakowski*, counsel for the respondent indicated that he was no longer pursuing any correspondence objection in so far as the suggested theft offences are concerned. In the circumstances, and having considered the underlying facts in each instance, the Court is satisfied to find that the first three offences correspond with the offence of theft contrary to s.4 of the Criminal Justice (Theft and Fraud Offences) Act 2001.

That leaves just the fourth offence for further consideration. The case herein was not concluded on the first day of hearing and was adjourned part heard to be resumed at a later date. During the adjournment, and with the encouragement of the Court, the applicant sought additional information from the issuing judicial authority concerning the circumstances in which the fourth offence was committed. The required additional information was subsequently provided in a letter from the issuing judicial authority dated the 23rd January, 2012, which stated (*inter alia*):

> "In the case II K 266/02 the accused acted with no legal justification, he broke into a car in order to steal the car equipment, however there was no radio or a first aid kit"

The Court is satisfied that when the warrant is read in conjunction with this additional information, and the totality of the information provided is considered, it is in fact being alleged that what was done in each instance was done without lawful excuse. Accordingly, the Court is satisfied that correspondence can be demonstrated in relation to the fourth offence with the offence of attempted theft contrary to common law; and/or with criminal damage contrary to s.2 of the Criminal Damage Act 1991; and/or with unlawful interference with the mechanism of a mechanically propelled vehicle contrary to s.113 of the Road Traffic Act 1961.

Minimum Gravity

No point has been raised by way of objection based upon minimum gravity. The relevant threshold is that set out in s. 38(1)(a)(ii) of the Act of 2003 which requires that a term of imprisonment or detention of not less than 4 months should have been imposed in respect of the offence in the issuing state. As an aggregate sentence of one year and six months imprisonment was imposed in this case minimum gravity is clearly met.

Section 10 Issue

Counsel for the respondent has pleaded an objection to the effect that the surrender of the respondent is not permitted under s.10 of the Act of 2003 because there is no evidence on the face of the warrant that the respondent fled from the issuing state. Moreover,

the respondent has stated in paragraph 7 of an affidavit sworn by him on the 30th June, 2011, that he left Poland to live in Ireland to make a new life for himself on or about the 1st October, 2006, and that he did so believing that no outstanding prison sentence had to be served by him.

This is a case involving a warrant that pre-dates the amendment to s.10(d) of the Act of2003 effected by the Criminal Justice (Miscellaneous Provisions) Act 2009 which removed the requirement for the Court to be satisfied as to flight. The particulars of the respondent's claim in that regard are set out in detail in paragraph 2 of the points of objection relating to this warrant and it is not necessary to rehearse them in any detail. Additional information was obtained by the applicant from the issuing judicial authority, and which is contained in a letter from that party dated the 25th October, 2011, to the following effect:

> **"Ref.:Warrant IV Kop 95/08 dated 25th February, 2008 (Ref. No UA: IIK 266/02)**
> a)...
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> b) The sentence dated 8th 0ctober, 2003 included the detention order with its conditional suspension for the 4 (four) years' probation period. Due to the fact that ArkadiuszGuz committed, during the aforesaid probation period, a similar intentional offence, the Court, by means of its discretion dated 11th December, 2006 ordered to serve the detention order. The sentenced was not present at the session when the Court ordered the sentence to be served, and he did not collect the summons, that was notified twice: -/-
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> c) Yet only the enforcement proceeding has been suspended because the sentenced went abroad and it was impossible to continue it without him. The Court does not know the dates when he left Poland, nor the motives of his departure. But it is a fact, that the sentenced, who was obliged to inform the Court about any changes of his address, which resulted both from the instruction under charts 51 & 54 and the essence of the probation period, left Poland without informing the Court about the change in his residence."

Although counsel for the respondent had no instructions to withdraw the s.10(d) objection, he effectively conceded that it was difficult to maintain it in light of this additional information, which makes clear, firstly, that the suspension of the respondent's sentence was lifted because he committed a similar offence during the probation period and secondly, that notwithstanding that he had been notified that he was required to serve the sentence, he absconded in further breach of the terms of his probation. Although his instructions were that his client was continuing to maintain that he left Poland of his own initiative solely for the purpose of making a new life for himself, he provides no evidence to support this mere assertion. A mere and completely unsupported assertion does not constitute evidence of sufficient cogency to put the Court on its inquiry. It could be the case that this assertion is being cynically advanced for entirely self serving reasons. The Court must therefore approach it with a healthy degree of circumspection and have regard to the possibility that it may not be genuine. In circumstances w ere it is obliged to accept at face value the information emanating from the issuing state, in the absence of cogent evidence to the contrary, the Court cannot uphold the s.10(d) objection.

Section 37 Issues

> This objection is pleaded in the following terms:
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> "The European arrest warrant herein dated the 26th of February, 2008, does not comply with s. 37(1)(a)(i) and (ii) of the European Arrest Warrant Act 2003, in the following regard:
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> (a) The respondent submits that throughout his trial on the 8th of October, 2002 he was not represented by legal counsel, and he was a minor at the time of the court case;
>
> (b) The respondent has a right under t e European Convention on Human Rights to free legal aid. At no time was the respondent informed of that right. European Convention on Human Rights Article 6 3(c) "to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require"

This objection is premised upon an assumption that it is legitimate for this Court to seek to review the fairness of a trial that has already taken place in another state in the context of a surrender application. The Court has previously expressed a view in its judgment in *Minister for Justice and Equality v Marjasz* [2012] IEHC 233, (Unreported, High Court, Edwards J., 24th April, 2012), that while this might be theoretically possible, the jurisdiction should be exercised:-

> "....very sparingly indeed, and only in cases where it has been established by the clearest and most cogent evidence that there was a truly egregious unfairness in the circumstances of the underlying trial, and where there is also evidence that all possible remedies I avenues of review I appeals in the issuing state have been tried without success and have been exhausted.
>
> It follows from what the Court has just said that in a conviction case the Court will, in general, be most reluctant to engage in any review of the trial process leading to the conviction on foot of which the warrant is based to determine whether it was fair and lawful. The default and starting position in all cases will be that the Court must proceed upon a presumption that the trial leading to the conviction in question was fair and respected the respondent's fundamental rights, and that in the event of him having some complaint in regard to the fairness of the trial that led to his conviction that it was incumbent upon him, at the material time, to seek an effective remedy in regard to that before the courts of the issuing state."

As the respondent has not addressed in any way the question of possible remedies that might have been, or might even still be open to him in the issuing state it not appropriate that the Court should engage substantively with this objection.

However, quite apart from that it can be stated that although the respondent has put an affidavit before the Court in support of his objections, including this objection, it was accepted by counsel for the respondent that he provides nothing relevant to this point beyond a mere assertion that he was unrepresented, and that he was not told that he could get legal representation free of charge. That much, even if it were unchallenged, would not of itself, and without more, amount to sufficiently cogent evidence to put the Court on its inquiry. However, it is expressly countered in additional information dated the 25th October, 2011, which states:

"Warrant IV Kop 95/08 dated 25th February, 2008 (Ref. No UA: IIK 266/02)

a) On charts 51 and 54 there is an instruction for the suspect on his rights, including the one to defence and counsel's assistance, which was signed by Arkadiusz Guz";

The issuing judicial authority is therefore clearly asserting not merely that the respondent was advised as to his rights but also that they are in possession of a document signed by him acknowledging that he received notice of his rights. The respondent does not engage with this at all.

Counsel for the applicant placed great emphasis on the fact that the applicant was seventeen at the time the offences were committed, and sought to rely heavily on the judgment of the European Court of Human Rights (hereinafter the E.Ct.H.R.) delivered on the 11th December, 2008, in *Panovits v Cyprus* (Application No. 4268/04), and in particular paragraphs 66 and 67, thereof, and also paragraphs 71 to 73 thereof, which state:-

> "67. The Court notes that the applicant was 17 years old at the material time. In its case-law on Article 6 the Court has held that when criminal charges are brought against a child, it is essential that he be dealt with in a manner which takes full account of his age, level of maturity and intellectual and emotional capacities, and that steps are taken to promote his ability to understand and participate in the proceedings (see T. v. the United Kingdom [GC], no. 24724/94, 16 December 1999, § 84). The right of an accused minor to effective participation in his or her criminal trial requires that he be dealt with with due regard to his vulnerability and capacities from the first stages of his involvement in a criminal investigation and, in particular, during any questioning by the police. The authorities must take steps to reduce as far as possible his feelings of intimidation and inhibition (see, mutatis mutandis, T. v. the United Kingdom, cited above,§ 85) and ensure that the accused minor has a broad understanding of the nature of the investigation, of what is at stake for him or her, including the significance of any penalty which may be imposed as well as of his rights of defence and, in particular, of his right to remain silent (mutatis mutandis, S.C. v. the United Kingdom, no. 60958/00, § 29, ECHR 2004-IV). It means that he or she, if necessary with the assistance of, for example, an interpreter, lawyer, social worker or friend, should be able to understand the general thrust of what is said by the arresting officer and during his questioning by the police (ibid).
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> 68. The Court reiterates that a waiver of a right guaranteed by the Convention - in so far as it is permissible- must not run counter to any important public interest, must be established in an unequivocal manner and must be attended by minimum safeguards commensurate to the waiver's importance (Hakansson and Sturesson v. Sweden, 21 February 1990, Series A No. 171, § 66, and most recently Sejdovic v. Italy [GC], no. 56581/00, § 86, ECHR 2006-...). Moreover, before an accused can be said to have impliedly, through his conduct, waived an important right under Article 6, it must be shown that he could reasonably have foreseen what the consequences of his conduct would be (see Talat Tunç; v. Turkey, no. 32432/96, 27 March 2007, § 59, and Jones v. the United Kingdom (dec.), no. 30900/02, 9 September 2003). The Court considers that given the vulnerability of an accused minor and the imbalance of power to which he is subjected by the very nature of criminal proceedings, a waiver by him or on his behalf of an important right under Article 6 can only be accepted where it is expressed in an unequivocal manner after the authorities have taken all reasonable steps to ensure that he or she is fully aware of his rights of defence and can appreciate, as far as possible, the consequence of his conduct."
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> "71 .....the Court considers that it was unlikely, given the applicant's age, that he was aware that he was entitled to legal representation before making any statement to the police. Moreover given the lack of assistance by a lawyer or his guardian, it was also unlikely that he could reasonably appreciate the consequences of his proceeding to be questioned without the assistance of a lawyer in criminal proceedings concerning the investigation of a murder (see Talat Tunç, cited above, § 60).
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> 72. The Court takes note of the Government's argument that the authorities had remained willing at all times to allow the applicant to be assisted by a lawyer if he so requested. It observes that the obstacles to the effective exercise of the rights of the defence could have been overcome if the domestic authorities, being conscious of the difficulties for the applicant, had actively ensured that he understood that he could request the assignment of a lawyer free of charge if necessary (see Talat Tunç, cited above,§ 61, and *Padalov v. Bulgaria*, no. 54784/00, 10 August 2006, § 61). The passive approach adopted by the authorities in the present circumstances was clearly not sufficient to fulfil their positive obligation to furnish the applicant with the necessary information enabling him to access legal representation.
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> 73. Accordingly, the Court finds that the lack of provision of sufficient information on the applicant's right to consult a lawyer before his questioning by the police, especially given the fact that he was a minor at the time and not assisted by his guardian during the questioning, constituted a breach of the applicant's defence rights. The Court moreover finds that neither the applicant nor his father acting on behalf of the applicant had waived the applicant's right to receive legal representation prior to his interrogation in an explicit and unequivocal manner."

It is important to view *Panovits v Cyprus* in its proper context. That case did not concern non-representation of the accused in court. Rather, it concerned the failure of the police to personally inform a seventeen year old accused of his right to have the assistance of a lawyer, and to afford him the opportunity to seek legal advice before submitting to a police interrogation, with no relative or other accompanying adult present, in the course of which he made incriminating admissions to participation in murder and robbery. In that case the seventeen year old had not personally received any notice whatsoever as to his rights. Specifically he was not personally informed of his right to the assistance of a lawyer. His father, who had accompanied him to the police station, was advised to seek the assistance of a lawyer for his son but opted not to do so. The son was not present when this advice was given and did not hear it.

In the present case the respondent does not deny that he received a notice of his rights in the police station or that he signed for them. However, he states at paragraph 5 of his second affidavit, sworn on the 29th February, 2012, that "even if Charts 51 and 54 were signed by me it would have been ineffective in securing my rights as it would not have informed me of my right to legal aid. Furthermore, it would not have informed me how to avail of representation in practice." The Court is not impressed with this. First, the respondent did not in fact have a right to legal aid but it is clear that he did have a right to the assistance of a state employed lawyer, in effect a public defender type of service, under article 78, alternatively article 79, of the Polish Penal Code. Secondly, the additional information makes it clear that Charts. 51 and 54 instructed him as to his rights, including his rights to defence and the assistance of counsel. Moreover, he has not put forward anything to suggest that he was in fact vulnerable other than the mere fact that he was seventeen years old. It is not suggested in the present case that he had any specific disabilities. There is nothing to suggest that he was unable to read and comprehend the notice given to him. Indeed, the respondent does not say that he did not read the notice given to him, or that he did not appreciate its importance. Furthermore, there is nothing in the evidence before this Court to suggest that the respondent made damaging admissions in the course of being interrogated, a very important distinguishing

feature of *Panovits v Cyprus*. Indeed, he was almost eighteen years when judgment of the Provincial Court of Pilawy, II Penal Division was handed down on the 8th October, 2002, Gust twelve days shy of his eighteenth birthday). The judgment became final just four days before his eighteenth birthday. Accordingly, when the time came for considering possible avenues of appeal or review he had achieved adulthood. However, it appears that he did not pursue any avenues of appeal or review. His affidavits are totally silent with regard to the issue of appealing or seeking a review of his conviction, either on grounds of some alleged unfairness in his trial or on any other grounds.

In these circumstances, and the other circumstances outlined above, the Court is not disposed to entertain, much less uphold, the respondent's said objection.

Warrant No 2:
This warrant which is also dated the 26th February, 2008, was endorsed for execution on the 26th January, 2011. It is a prosecution type warrant on foot of which the respondent's surrender is sought for the purposes ofp1acing him on trial for the three offences specified in the warrant.

Details of the three offences are set out at paragraph E of the warrant. In each case the Court must be satisfied both as to correspondence and minimum gravity.

Correspondence

Once again, as the respondent has raised an objection based upon alleged lack of correspondence it is necessary to first of all recite the circumstances of the three offences as they are set out in the warrant. The warrant states:

"1. On 15 February 2006 in Lublin, in execution of the planned intent, in order to gain property benefit, acting jointly and in agreement with other identified persons he tried to lead Spółdzielcza Kasa Oszczêdnoœciowo-Kredytowa [Co-Operative Savings Credit Fund] at Parafia Opatrznosci Bozej [Parish of Divine Providence] in Gdansk branch in Lublin to unfavourable administration of property at the amount of PLN 11,000 in such a way that in order for Lidia Sobczak to get secured credit he presented forged by Adam Furmga certificate on employment and amount of acquired income in company "FURZEN" Skup- Sprzedaz Hurtowa Owoców i Warzyw [Purchase-- Wholesale of Fruit and Vegetables] in Strzelce, Nalêczów commune, misleading the employees of the fund on the intent and possibilities to pay off the credit agreement and on the authenticity of the presented documents but he did not achieve his aim as the forged documents were verified;

2. On 10th February 2006 in Lublin, acting in order to gain property benefit, jointly and in agreement with other identified person he tried to lead Incest Bank Division in Lublin to unfavourable administration of property at the amount of PLN 6,000 in such a way that in order to get credit he presented forged by Adam Furmga certificate on employment and amount of acquired income in company "FURZEN" Skup- Sprzedaz Hurtowa Owoców i Warzyw [Purchase-- Wholesale of Fruit and Vegetables] in Strzelce, Nalêczów commune, misleading the employees of the bank on the intent and possibilities to pay off the credit agreement and on the authenticity ofthe presented documents but he did not achieve his aim as the forged documents were verified;

3. On 17th January 2006 in Lublin, acting in order to gain property benefit, jointly and in agreement with other identified person in order to get credit at the amount of PLN 3,000 in SKOK im Mikolaja Kopernika he presented forged by Adam Furmga, important for acquisition of credit, certificate on employment and amount of acquired income in company "FURZEN" Skup- Sprzeda¿ Hurtowa Owoców i Warzyw [Purchase -- Wholesale of Fruit and Vegetables] in Strzelce, Nalêczów commune, misleading the employees of the fund on the intent and possibilities to pay off the credit agreement and on the authenticity of the presented documents and by this he led Spółdzielcza Kasa Oszêdnoœciowo-Kredytowa [Co-Operative Savings Credit Fund] of Mikolaj Kopernik with seat in Ornotowice to unfavourable administration of property at the amount of PLN 3000;"

Counsel for the applicant invites the Court to find correspondence in each instance with the offence of using a false instrument contrary to s.26 of the Criminal Justice (Theft and Fraud Offences) Act 2001; alternatively, in the case of the first and second offences, with the inchoate offence of attempting to make gain or cause loss by deception contrary to common law (that being the appropriate inchoate form of the statutory offence of making gain or causing loss by deception created by s.6 of the Criminal Justice (Theft and Fraud Offences) Act 2001), and, in the case of the third offence, with the choate offence of making gain or causing loss by deception contrary to s.6 of the Criminal Justice (Theft and Fraud Offences) Act 2001.

Counsel for the respondent submitted on the first day of hearing into this matter that correspondence cannot be demonstrated with the offence of using a false instrument contrary to s.26 of the Criminal Justice (Theft and Fraud Offences) Act 2001 because there is nothing in the facts as set out in the warrant to indicate that the respondent knew or believed that the documents were forged. Counsel referred to the fact that the warrant asserts that in each instance the respondent either "tried to lead", or "led", a named party "to unfavourable administration of property". It was submitted that this is altogether too neutral as to the motive or intention of the respondent. He has further submitted that correspondence cannot be demonstrated with the offence of making gain or cause loss by deception contrary to s.6 of the Criminal Justice (Theft and Fraud Offences) Act 2001, or with the inchoate version of that offence, because there is nothing in the facts as set out in the warrant to indicate that the respondent acted with dishonest intent.

Since these objections were articulated the applicant has, with the Court's *imprimatur*, sought additional information from the issuing judicial authority relevant to these issues. Additional information dated the 26th January, 2012, has now been placed before the Court which clearly indicates that it is indeed being alleged by the prosecuting authorities that the respondent knew that the documents were forged. Moreover, it is asserted that they have gathered evidence tending to support this view, including explanations furnished by the respondent himself during the preliminary proceedings. It can also be inferred from this additional information that dishonest intent is in fact being alleged, and that evidence exists to support it.

Notwithstanding yet further submissions made by counsel for the respondent suggesting lack of correspondence, including a suggestion that correspondence cannot be demonstrated because the precise legal personality of the alleged injured party in each instance has not been specified, the Court is satisfied, from a consideration of the totality of the information before it, to find correspondence in each instance with the offence of using a false instrument contrary to s.26 of the Criminal Justice (Theft and Fraud Offences) Act 2001, as suggested by counsel for the applicant.

Minimum Gravity

No point has been raised by way of objection based upon minimum gravity. The relevant threshold is that set out in s. 38(1)(a)(i) of the Act of 2003 which requires that under the law of the issuing state the offence should be punishable by imprisonment or detention for a maximum period of not less than twelve months. As each offence in this case carries a potential penalty of up to eight years

imprisonment, the statutory requirement as to minimum gravity is clearly met in each instance.

Warrant No 3:
This warrant which is dated the 4th February, 2008, was endorsed for execution on the 26th January, 2011. It is a sentence type warrant on foot of which the respondent's surrender is sought for the purposes of having him serve a sentence of eight months imprisonment imposed upon him by the District Court in Lublin on the 17th December, 2003, in respect of a single offence specified in the warrant.

Details of the offence to which the warrant relates are set out at paragraph E of warrant and the Court must be satisfied both as to correspondence and minimum gravity.

Correspondence

As the respondent has raised an objection based upon alleged lack of correspondence it is necessary to first of all recite the circumstances of the offence as they are set out in the warrant. The warrant states:

> "In September 2002 in Lublin, the exact time and date remaining unknown, the requested person misappropriated an ATM card belonging to Ilona Sobowiec and misappropriated and concealed personal identity cards belonging to Ilona Sobowiec and Katarzyna Wozniak as well as concealed students' identity cards belonging to Ilona Sobowiec and Katarzyna Wozniak, that the requested person had found."

Counsel for the applicant invites the Court to find correspondence with the offence of theft contrary to s.4 of the Criminal Justice (Theft and Fraud Offences) Act 2001.

The respondent's non-correspondence objection is pleaded in terms that the European arrest warrant relates to an offence of theft (or what used to be called larceny) by finding. The respondent's case is that there is no longer any offence known as larceny (or in today's language, theft) by finding. Although the offence of larceny by finding used to exist under s.1(2)(i)(d) of the Larceny Act 1916. It was repealed by the Criminal Justice (Theft and Fraud Offences) Act 2001 and was not replaced by any new statutory provision covering theft by finding.

The Court has been provided with additional information from the issuing judicial authority dated the 9th December, 2011, dealing specifically with this offence. The additional information states:

"In reply to the question included in the letter dated 81h December, 2011 I kindly inform that:

> 1. Arkadiusz Krzysztof Guz has misappropriated the found cash card of IlonaSobewiese, he misappropriated and concealed the found Identity Cards of IlonaSobowiese and Katarzyna Wozniak as well as he concealed the found student cards of IlonaSobowiese and Katarzyna Wozniak. Arkadiusz Guz did not steal the things belonging to IlonaSobowiese and KatarzynaWozniak, he found them and misappropriated them without consent of the above mentioned aggrieved persons. There is lack of possibility of unequivocal statement if Arkadiusz Guz knew or was reckless of the fact that these items had been stolen;"

In light of the express statement contained in the additional information to the effect that "Arkadiusz Guz did not steal the things belonging to IlonaSobowiese and KatarzynaWozniak, he found them and misappropriated them without consent of the above mentioned aggrieved persons", and the concession that it cannot be stated unequivocally that "Arkadiusz Guz knew or was reckless of the fact that these items had been stolen", it is not possible for this Court to be satisfied that the offence described in the warrant corresponds with any offence in Irish law.

The Court need not proceed to concern itself with minimum gravity in the circumstances.

Other points

Although other points have been raised by way of objection to the surrender of the respondent on foot of this warrant it is not necessary for the Court to engage with them in circumstances where correspondence cannot be demonstrated.

Decision on Surrender

In circumstances where correspondence cannot be demonstrated the Court must refuse to surrender the respondent on this warrant.

Warrant No 4:
This warrant which is dated the 7th October, 2008, was endorsed for execution on the 26th January, 2011. It is a prosecution type warrant on foot of which the respondent's surrender is sought for the purposes of placing him on trial for the single offence specified in the warrant.

Details of the offence to which the warrant relates are set out at paragraph E of warrant and the Court must be satisfied both as to correspondence and minimum gravity.

Correspondence

The circumstances of the offence are set out in the warrant and in that regard the warrant states:

> "On 19 March 2005, in a village Strzelce, Commune Nalêczów, lubelskie voivodship, driving a passenger car Zastawa 1100, number plates LUC 7620, which had been tugged by another traffic participant, he intentionally violated safety regulations on the road. By being unsober /0,35 mg/1, 0.33mg/1 of alcohol in the exhaled air/ and driving a technically out of order vehicle, he did not observe the road properly and he turned aside to the opposite line, where he collided with a car Seat Ibiza, No. Plates LBE4088, which was driven correctly by Jacek Boreczek. As a result of this accident, a passenger, Ewa Boreczek suffered a crush fracture, the seventh body of the breast spine-Th7, which resulted in a health disorder and violation of functions of movement organ for the period of more than 7 days."

The Court has been invited by counsel for the applicant to find correspondence with the offence of dangerous driving causing injury, contrary to s.53 of the Road Traffic Act 1961 or alternatively careless driving causing injury contrary to s.52 of the Road Traffic Act

1961. Once again, the respondent has raised no point as to correspondence in his pleadings in respect of this warrant. However, and again very late in the day, counsel for the respondent has sought to challenge correspondence on the basis that the facts as disclosed do not allow correspondence to be demonstrated. Specifically he contends that since the disclosed facts suggest that the vehicle being controlled by the respondent was under tow it could not be said to be a mechanically propelled vehicle. In support of his argument he relies upon the Director of *Public Prosecutions v. Regina Breheny,* (Unreported, Supreme Court, Egan J., 2nd of March 1993).

With some reluctance, the Court has again decided in the interests of justice to allow the correspondence argument to proceed in circumstances where the respondent had had no advance notice of with what offence the applicant would invite the court to find correspondence. However, once the new system that the Court has flagged its intention to implement is put into operation, no similar latitude will be granted in future cases in the absence of exceptional circumstances.

In the Court's view the *Director of Public Prosecutions v. Regina Breheny* is readily distinguishable from the circumstances of the present case. That case concerned an intoxicated person, found by gardai, sitting in a motor vehicle that was incapacitated following a collision and who was attempting, without success, to re start that vehicle. She was prosecuted as a person "in charge of a mechanically propelled vehicle" for failing to provide a breath specimen when required to do so, and also for later failing to permit a designated medical practitioner to take a blood or urine specimen from her. She ultimately secured acquittal on the basis that the vehicle was not a mechanically propelled vehicle at the time she was found to be in charge of it. In the present case, however, the vehicle, albeit under tow, was both in motion and under the respondent's control at the material time.

Moreover, s.3(2) of the Road Traffic Act 1961, as substituted by s.72 of the Road Traffic Act 2010, states:

> "(2) Where a vehicle, which, apart from this subsection, would be a mechanically propelled vehicle, stands so substantially disabled (either through collision, breakdown or the removal of the engine or other such vital part) as to be no longer capable of being propelled mechanically, it shall be regarded-
>
> (a) for the purposes of the Road Traffic Acts 1961 to 2010, if it is disabled through collision, as continuing to be a mechanically propelled vehicle, and
>
> (b) for all other purposes of this Act as not being a mechanically propelled vehicle."

The Court, having considered the full facts as set out, is satisfied to find correspondence with the offence of dangerous driving causing injury, contrary to s.53 of the Road Traffic Act 1961. Even if the Court had not been prepared to do so, it would in any event have been prepared to find correspondence with the offence of reckless endangerment contrary to s. 13 of the Non-Fatal Offences Against the Person Act 1997. In addition, and by virtue of s. 5 of the Road Traffic Act 2010, the same facts would correspond with the offence of drunken driving under Irish law.

Minimum Gravity

It is also the case that no point has been raised by way of objection based upon minimum gravity. The relevant threshold is that set out in s. 38(1)(a)(i) of the Act of 2003, which requires that under the law of the issuing state the offence is punishable by imprisonment or detention for a maximum period of not less than twelve months. As the offence in this case carries a potential penalty of up to three years imprisonment the requirement as to minimum gravity is clearly met.

The ne bis in idem point

The respondent has pleaded the following specific point of objection in relation to this warrant:

> " The European arrest warrant herein dated 7 October 2008 does not comply with section 37 (1) (b) of the European Arrest Warrant Act 2003, in the following regard:--
>
> (a) the respondent submits that this warrant relates to a warrant dated the 25th of May, 2010, which depicts the exact same facts for which the respondent received a one-year custodial sentence (suspended).
>
> (b) the respondent has a right under the constitution not to be tried for the same offence twice, further the Polish Penal Code at Article 11 states "Article 11. §
>
> 1. The same act may constitute only one offence. § 2. If an act has features specified in two or more provisions of penal law, the courts of senses the perpetrator for one offence on the basis of all concurrent provisions. § 3. In the case specified in § 2. the court shall impose the penalty on the basis of the provision providing for the most severe penalty, which shall not prevent the court from imposing other measures provided for in law on the basis of all concurrent provisions."

The respondent relies on Article 3 (2) of the Framework Decision which is under the heading "Grounds for mandatory non-execution of the European arrest warrant" and is in the following terms:

> "The judicial authority of the Member State of execution (hereinafter 'executing judicial authority') shall refuse to execute the European arrest warrant in the following cases:
>
> 1. ...
>
> 2. if the executing judicial authority is informed that the requested person has been finally judged by a Member State in respect of the same acts provided that, where there has been sentence, the sentence has been served or is currently being served or may no longer be executed under the law of the sentencing Member State;
>
> 3...."

That provision has in turn been transposed into Irish law by means of s.41 of the Act of 2003, which provides:

> "41.--(1) A person shall not be surrendered under this Act for the purpose of his or her being proceeded against in the issuing state for an offence consisting of an act or omission that constitutes in whole or in part an offence in respect of

which final judgment has been given in the State or a Member State.

(2) A person shall not be surrendered under this Act for the purpose of his or her being proceeded against in the issuing state for an offence consisting of the act or omission that constitutes an offence in respect of which final judgment has been given in a third country, provided that where a sentence of imprisonment or detention was imposed on the person in the third country in respect of the second-mentioned offence-

(a) the person has completed serving the sentence, or

(b) the person is otherwise no longer liable under the law of the third country to serve any period of imprisonment or detention in respect of the offence."

The respondent has raised an interesting and somewhat difficult issue. The respondent has already been convicted of a drink driving offence arising out of the incident that occurred on the 19th March, 2005, while he was driving a towed motor car LUC 7620. The Polish authorities now wish to prosecute him for what is characterised at Part E 2 I of the warrant as "an offence against safety in communication" contrary to article 177, paragraph 1, and article 178a, paragraph 1 of the Polish Criminal Code, - in effect a dangerous/careless driving type offence in the circumstances of this case.

There is little or no recent Irish case law on the subject, which really comes under the heading of what is known, both in this and in the neighbouring jurisdiction, as the plea of *autrefois convict*. In *Registrar of Companies v. Anderson* [2005] 1 I.R. 21, one of the few recent Irish authorities, Murray C.J. said at p. 25:-

> "It has for a long time been a principle of the common law that a person cannot be prosecuted and punished for an offence of which he has already been acquitted or convicted. This is commonly referred to as the rule against double jeopardy. It is a rule which applies to the prosecution of criminal offences. The rule, or what also might be called the notion, of double jeopardy is not normally relied upon in express terms in the sense that if a person is prosecuted for an offence arising out of the same breach of the law or the same essential ingredients for which he has previously been tried and either convicted or acquitted, his defence to the second prosecution will be based on the pleas of *autrefois acquit orautrefois convict*. If either plea is successful the prosecution may proceed no further."

There are further recent references to the principle, but no significant analysis on the "same facts" aspect of the matter, in *0'Brien v. Fahy* [2009] IEHC 252; [2009] 5 JIC 2604 (Unreported, High Court, Hedigan J., 26th May, 2009) and *D.S. v. Judges of the Circuit Court* [2008] 4 I.R. 379. The leading English case of assistance is *Connolly v. D. P.P.* [1964] A.C. 1254. In that case Lord Devlin stated at p. 1340:-

> "For the doctrine of autrefois to apply it is necessary that the accused should have been put in peril of conviction for the same offence as that with which he is then charged. The word "offence" embraces both the facts which constitute the crime and the legal characteristics which make it an offence. For the doctrine to apply it must be the same offence both in fact and in law. Robbery is not in law the same offence as murder (or as manslaughter, of which the accused could also have been convicted on the first indictment) and so the doctrine does not apply in the present case.
>
> I would add one further comment. My noble and learned friend in his statement of the law, accepting what is suggested in some dicta in the authorities, extends the doctrine to cover offences which are in effect the same or substantially the same. I entirely agree with my noble and learned friend that these dicta refer to the legal characteristics of an offence and not to the facts on which it is based: see *Rex v. Kendrick and Smith*. I have no difficulty about the idea that one set of facts may be substantially but not exactly the same as another. I have more difficulty with the idea that an offence may be substantially the same as another in its legal characteristics; legal characteristics are precise things and are either the same or not. If I had felt that the doctrine of autrefois was the only form of relief available to an accused who has been prosecuted on substantially the same facts, I should be tempted to stretch the doctrine as far as it would go. But, as that is not my view, I am inclined to favour keeping it within limits that are precise."

The case of *Rex v. Kendrick and Smith* (1931) 144 L.T. 748, C.C.A referred to by Lord Devlin is reviewed in some detail in the judgement of Lord Morris of Borthy-Gest and is instructive. He states at p. 1324 *et seq:-*

> "In Rex v. Kendrick and Smith the two accused were convicted of charges of threatening to publish photographic negatives with intent to extort money (contrary to section 31 of the Larceny Act, 1916), but on charges, contained in the same indictment, of uttering letters demanding money with menaces (contrary to section 29 of that Act) the jury disagreed. On a retrial on those charges pleas of autrefois convict were filed. They failed. The accused were found guilty and their appeal to the Court of Criminal Appeal was on the basis that their pleas of autrefois convict should have succeeded. The appeals failed. In giving the judgment of the court Swift J. said: "It is quite clear that, to enable an accused person to rely on that plea" (autrefois convict), "the offence with which he is charged on the second occasion must be the same offence, or practically the same offence, as that with which he was charged on the first occasion. It is not enough to say that the evidence tendered on the second charge was the same evidence as that offered to prove the first charge. It is not the evidence which is material to the charge that grounds the plea, but the offence which is charged." Swift J. pointed out that it was impossible to say that the two offences were the same or substantially the same. It is to be observed that in that case the charges were being tried together and that they were separate charges. The charge under section 29 was the graver charge. Swift J. touched on the questions whether "if you prove a case under section 29, you must prove a case under section 31": he said "but I do not decide that this is so."
>
> That there is no rule or principle to the effect that evidence which has first been used in support of a charge which is not proved may not be used to support a subsequent and different charge is further illustrated by the case of Rex v. Miles [(1909) 34 T.L.R. 587; 3 Cr. App.R. 13, C.C.A.]. On one indictment the accused was charged with larceny. On that indictment he was acquitted. (On well recognised principles that acquittal would (since the Criminal Procedure Act of 1851) include an acquittal for an attempt.) The case had depended upon the evidence of two witnesses who said that they saw the accused in a lane and saw him take money from a person's pocket. The second indictment subsequently tried was for an offence under section 7 of the Prevention of Crimes Act, 1871, and had as one of its constituent elements that he had been found in a public place with the intention of committing a felony. (The words of the section are "that he was about to commit" or "was waiting to commit.") The felony alleged to be contemplated was described in the second indictment exactly as in the first. The two witnesses who had given evidence on the trial of the first indictment gave the same evidence again on the second trial as they had given on the first. An appeal against conviction on the second indictment was dismissed. My Lords, I think that the decision was correct. The offences were different. On

the first indictment there could not have been a conviction for the second offence. On the second indictment the necessary proof did not involve guilt of the first offence. The case shows that it would be wrong to suppose that the maxim nemo debet bis vexari pro eadem causa means that the same incident or event or story may not be under investigation in more than one trial or that evidence once given at one trial may not again be given at a later trial."

Lord Morris concluded at pp. 1305 to 1306:-

"In my view, both principle and authority establish: (1) that a man cannot be tried for a crime in respect of which he has previously been acquitted or convicted; (2) that a man cannot be tried for a crime in respect of which he could on some previous indictment have been convicted; (3) that the same rule applies if the crime in respect of which he is being charged is in effect the same, or is substantially the same, as either the principal or a different crime in respect of which he has been acquitted or could have been convicted or has been convicted; (4) that one test as to whether the rule applies is whether the evidence which is necessary to support the second indictment, or whether the facts which constitute the second offence, would have been sufficient to procure a legal conviction upon the first indictment either as to the offence charged or as to an offence of which, on the indictment, the accused could have been found guilty; (5) that this test must be subject to the proviso that the offence charged in the second indictment had in fact been committed at the time of the first charge; thus if there is an assault and a prosecution and conviction in respect of it there is no bar to a charge of murder if the assaulted person later dies; (6) that on a plea of autrefois acquit or autrefois convict a man is not restricted to a comparison between the later indictment and some previous indictment or to the records of the court, but that he may prove by evidence all such questions as to the identity of persons, dates and facts as are necessary to enable him to show that he is being charged with an offence which is either the same, or is substantially the same, as one in respect of which he has been acquitted or convicted or as one in respect of which he could have been convicted; (7) that what has to be considered is whether the crime or offence charged in the later indictment is the same or is in effect or is substantially the same as the crime charged (or in respect of which there could have been a conviction) in a former indictment and that it is immaterial that the facts under examination or the witnesses being called in the later proceedings are the same as those in some earlier proceedings; (8) that, apart from circumstances under which there may be a plea of autrefois acquit, a man may be able to show that a matter has been decided by a court competent to decide it, so that the principle of res judicata applies; (9) that, apart from cases where indictments are preferred and where pleas in bar may therefore be entered, the fundamental principle applies that a man is not to be prosecuted twice for the same crime."

In the present case we are not concerned primarily with the common law formulation of the plea of *autrefois convict*, but rather with the closely related concept of *ne bis in idem* as it finds expression in both article 3(2) of the Framework Decision and Article 41 of the Act of 2003. The concept as it appears in Article 3(2) of the Framework Decision ostensibly accords with the common law position as expressed in *D.P.P. v. Connolly*.

The European Court of Justice (ECJ) has, in a number of cases, looked at and considered the principle in yet another context, namely in the body of case law developed by the ECJ in relation to Article 54 of the Convention implementing the Schengen Agreement of 14 June 1985. Article 54 of that Agreement precludes prosecution in successive states "for the same acts". The ECJ has considered the meaning of "same acts" in a number of cases including *Criminal Proceedings Against Kraaijenbrink* (Case C-367/05) [2007] E.C.R. I-06619, *Criminal Proceedings Against Van Esbroeck* (Case C-436/04) [2006] E.C.R. I-02333 and most recently in Mantello (Case C-261/09) [2010] E.C.R. I-11477.

In Mantello the *Oberlandesgericht* Stuttgart decided to stay the proceedings before it and to refer the following questions to the Court of Justice for a preliminary ruling:-

'(1) Is the existence of the "same acts" within the meaning of Article 3(2) of the Framework Decision ... to be determined:

(a) according to the law of the issuing Member State, or

(b) according to the law of the executing Member State, or

(c) according to an autonomous interpretation, based on the law of the European Union, of the phrase "same acts"?

(2) Are acts consisting in the unlawful importation of narcotic drugs the "same acts", within the meaning of Article 3(2) of the Framework Decision, as participation in an organisation the purpose of which is illicit trafficking in such drugs, in so far as the investigating authorities had information and evidence, at the time at which sentence was passed in respect of such importation, which supported a strong suspicion of participation in such an organisation, but omitted for tactical reasons relating to their investigation to provide the relevant information and evidence to the court and to institute criminal proceedings on that basis?'

In reply the ECJ stated:-

"36 The principle of mutual recognition, which underpins the Framework Decision, means that, in accordance with Article 1(2) of the Framework Decision, the Member States are in principle obliged to act upon a European arrest warrant (Case C-388/08 PPU *Leymann and Pustovarov* [2008] ECR 1-8983, paragraph 51).

37 The Member States may refuse to execute such a warrant only in the cases of mandatory non-execution laid down in Article 3 of the Framework Decision or in the cases listed in Article 4 thereof (see, to that effect, *Leymann and Pustarov*, paragraph 51).

38 In that regard, the concept of 'same acts' in Article 3(2) of the Framework Decision cannot be left to the discretion of the judicial authorities of each Member State on the basis of their national law. It follows from the need for uniform application of European Union law that, since that provision makes no reference to the law of the Member States with regard to that concept, the latter must be given an autonomous and uniform interpretation throughout the European Union (see, by analogy, Case C-66/08 *Koszlowski* [2008] ECR I-6041, paragraphs 41 and 42). It is therefore an autonomous concept of European Union law which, as such, may be the subject of a reference for a preliminary ruling by any court before which a relevant action has been brought, under the conditions laid down in Title VII of Protocol No 36 to the Treaty on the Functioning of the European Union on transitional provisions.

> 39 It should be recalled that that concept of the 'same acts' also appears in Article 54 of the CISA. In that context, the concept has been interpreted as referring only to the nature of the acts, encompassing a set of concrete circumstances which are inextricably linked together, irrespective of the legal classification given to them or the legal interest protected (see Case C-436/04 *Van Esbroeck* [2006] ECR 1-2333, paragraphs 27, 32 and 36, and Case C-150/05 *Van Straaten* [2006] ECR 1-9327, paragraphs 41, 47 and 48).
>
> 40 In view of the shared objective of Article 54 of the CISA and Article 3(2) of the Framework Decision, which is to ensure that a person is not prosecuted or tried more than once in respect of the same acts, it must be accepted that an interpretation of that concept given in the context of the CISA is equally valid for the purposes of the Framework Decision.
>
> 41 Where it is brought to the attention of the executing judicial authority that the 'same acts' as those which are referred to in the European arrest warrant which is the subject of proceedings before it have been the subject of a final judgment in another Member State, that authority must, in accordance with Article 3(2) of the Framework Decision, refuse to execute that arrest warrant, provided that, where there has been sentence, the sentence has been served or is currently being served or may no longer be executed under the law of the sentencing Member State.
>
> 42 In its reference for a preliminary ruling, the referring court states that it would at first sight be inclined to consider that the acts relied upon for the purposes of the final judgment of 30 November 2005, that is to say Mr Mantello's possession of 155.46 g of cocaine on 13 September 2005 at Vittoria, are, for the purposes of the concept of the 'same acts', different from those referred to in the arrest warrant, that is to say, first, the acts which took place between January 2004 and November 2005 concerning Mr Mantello's participation in a criminal organisation as courier, middleman and supplier and, second, those concerning the illegal possession of drugs during the same period in a number of Italian and German cities.
>
> 43 Thus, in fact, the referring court's questions must be considered to relate more to the concept of 'finally judged' than to that of 'same acts'.

The questions posed were ultimately answered as follows:-

> "For the purposes of the issue and execution of a European arrest warrant, the concept of 'same acts' in Article 3(2) of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States constitutes an autonomous concept of European Union law.
>
> In circumstances such as those at issue in the main proceedings where, in response to a request for information within the meaning of Article 15(2) of that Framework Decision made by the executing judicial authority, the issuing judicial authority, applying its national law and in compliance with the requirements deriving from the concept of 'same acts' as enshrined in Article 3(2) of the Framework Decision, expressly stated that the earlier judgment delivered under its legal system did not constitute a final judgment covering the acts referred to in the arrest warrant issued by it and therefore did not preclude the criminal proceedings referred to in that arrest warrant, the executing judicial authority has no reason to apply, in connection with such a judgment, the ground for mandatory non-execution provided for in Article 3(2) of the Framework Decision."

The difficulty that the Court has in the present case is that in transposing Article 3(2) of the Framework Decision the Oireachtas appears to have gone beyond what it was required to do by the Framework Decision. If s.41 of the Act of 2003 had followed the wording in the Framework Decision, this Court would simply have had to apply *Mantello*. However, the Oireachtas has gone further and has referred in s.41(1) of the Act of 2003 to acts or omissions which constitute "in whole or in part" the offence in question. This is considerably more restrictive (in the sense of potentially capturing more cases) than is the reference to "same acts" that appears in Article 3(2) of the Framework Decision. Having reflected at length on the matter the Court has arrived at the conclusion that the objection based upon *ne bis in idem* must be upheld in this case having regard to the wording of s. 41(1) of the Act of 2003. In the circumstances the Court is prohibited from surrendering the respondent on foot of this warrant.

Warrant No 5:

This warrant, which is dated the 25th May, 2010, and which was endorsed on the 26th January, 2011, has recently been withdrawn. In the circumstances the Court has vacated its endorsement and has directed that the proceedings relating to it be struck out. It is not therefore necessary to consider it further.

Warrant No 6:

This warrant which is dated the 8th June, 2008, was endorsed for execution on the 26th January, 2011. It is a sentence type warrant on foot of which the respondent's surrender is sought for the purposes of having him serve three sentences imposed upon him on different dates by Pulawy District Court for the five offences which are the subject matter of this warrant.

The first sentence which was imposed on the 26th September, 2006, and is a sentence of two years imprisonment, relates to the first offence listed at E2(a) in the warrant. This bears the Polish domestic file reference IIK 307/06. The second sentence which was imposed on the 19th December, 2005, and which is also a sentence of two years imprisonment, relates to the second, third and fourth offences listed at E2(b) in the warrant. These bear the Polish domestic file reference IIIK 383/05. Finally, the third sentence which was imposed on the 9th June, 2006, and is a sentence of one year and six months imprisonment, relates to the fifth offence set out at E2(c) in the warrant. The relevant Polish domestic file reference is IIK 398/05.

Details of the offences to which the warrant relates are set out at paragraph E of warrant and the Court must be satisfied both as to correspondence and minimum gravity.

Correspondence

As the respondent has raised an objection based upon alleged lack of correspondence it is necessary to first of all recite the circumstances of each of the offences as they are set out in the warrant. The warrant states:

> "a) The judgment II K 307/06:

-I- on 6th June, 2005, in Strzelec, Iubelskie voivodship, acting in complicity and in conspiracy with Marcin Siwiec and Tomasz Boruch, with the intent to gain financial benefit, he committed an assault on Czeslaw Bukowski and Wanda Goliszek. Having firs broken a window in a house, inhabited by these people, he demanded money, threatening them with murder. However, he was not able to achieve his aim, due to the attitude of Czeslaw Bukowski, as well as being scared away and the fear of intervention of other people. After leaving the building, he used force towards the victims and he pushed them and knocked them over on the gour. Next he took money in the amount of PLN 800, with the intent to appropriate it, to the detriment of the above mentioned people;

b) The judgment II K 383/05:

-II- on 15th April 2005, on a public road between Wawolnica-Nateczow- Strelce, and then to a village Kolonia Chruszczow, commune Naleczow, lubelskie voivodship, he was driving a car Fiat 125p, car plates LUB 15HM, while being intoxicated /0,42,0,35 and 0,31 mg/1/;

-III-on 15th April, 2005, in a village Chruszow, commune Naleczow, lubelskie voivodship, he uttered threats of murder towards a policeman Waldemar Tupaj, in order ot make him abandon performing his legal duties;

-IV- in the place and time as in point III, he insulted policemen Walemar Tupaj, Szymon Stocki, Rafal Pomorski, Daniel Krawczynski and Piotr pytlak, by uttering vulgar names towards them, while they were performing their duties;

c) the judgment II K 398/05

-V- in the period from March 2005 to July 2005, date not exactly established, in a village Kolonia Drzewce 8, lubelskie voivodship, acting in complicity and conspiracy with another person, with the prior intention, in short time intervals, with the intent to appropriate them, he took 200 steel under rail washers from Railway Station Naleczow, oftotal weight 1600kg, of total value PLN 800, to the detriment of Zaklady Linii Kolejowych PKP SA in Lublin;"

Counsel for the applicant has invited the Court, in the case of the first offence at E2(a) I, to find correspondence with the offence in Irish law of assault contrary to s.3 of the Non-Fatal Offences Against the Person Act 1997; alternatively with the offence of theft contrary to s.4 of the Criminal Justice (Theft and Fraud Offences) Act 2001; alternatively criminal damage contrary to s.2 of the Criminal Damage Act 1991; alternatively the offence of threatening to kill contrary to s.5 of the Non-Fatal Offences Against the Person Act 1997.

Counsel for the applicant has further invited the Court, in respect of the offence described at E2(b) II, to find correspondence with the offence in Irish law of driving while under the influence of an intoxicant contrary to s.49 of the Road Traffic Act 1961 (as amended). The Court is further invited, in respect to the offence described at E2(b) III, to find correspondence with the offence in Irish law of threatening to kill contrary to s.5 of the Non-Fatal Offences Against the Person Act 1997. The Court is further invited, in respect of the offence described at E2(b) IV, to find correspondence with the offence in Irish law of obstructing a peace officer in the performance of his duty contrary to s.19(3) of the Criminal Justice (Public Order) Act 1994.

Finally, counsel for the applicant invites the Court, in respect of the offence described at E2(c) V, to find correspondence with the offence in Irish law of theft contrary to s.4 of the Criminal Justice (Theft and Fraud Offences) Act 2001.

The Court was also provided with additional information from the issuing judicial authority in the letter of 23rd January, 2012, that states the following:

"Warrant IV Kop 69/10 dated 8th June 2010

- in the case II 358/05 the examination was concerning Arkadiusz Guz and it defined the concentration of alcohol in the exhaled air.

- Arkadiusz Guz was aware that he was dealing with policemen, because they arrived in marked police cars. The threats directed towards policemen were equivalent to obstructing their duties, however the insult was not."

Notwithstanding submissions made by counsel for the respondent suggesting lack of correspondence in the case of all the offences which are the subject of this European arrest warrant, the Court has no hesitation in the case of the offences particularised at E2(a)I, E2(b)II, E2(b)III and E2(c)V, respectively, in finding correspondence with the offences suggested by counsel for the applicant. However, there is a problem with the offence described at E2(b)IV. The additional information of the 23rd January, 2012, makes it clear that the insults, as opposed to the threats, hurled at the policemen on the occasion in question did not obstruct the said policemen in the carrying out of their duties. In the circumstances the Court cannot find correspondence with the suggested offence of obstructing a peace officer in the performance of his duty contrary to s.19(3) of the Criminal Justice (Public Order) Act 1994.

As an aggregate sentence was imposed in respect of all three offences in E2(b) the non-corresponding offence at E2(b)IV cannot be severed from the offences at E2(b)II and E2(b)III respectively. Accordingly the Court cannot surrender the respondent on any of the three offences at E2(b).

Warrant No 7:

This warrant is dated the 23rd March, 2012, and was endorsed for execution on the 17th April, 2012. It is a conviction type warrant on foot of which the respondent's surrender is sought for the purposes of having him serve a sentence of one year of detention imposed upon him by the Provincial Court in Pulawy on the 12th of April, 2006, in respect of a single offence specified in the warrant.

Details of the offence to which the warrant relates are set out at paragraph E of warrant and the Court must be satisfied both as to correspondence and minimum gravity.

Correspondence

It is appropriate to all recite the circumstances of the offence as they are set out in the warrant. The warrant states:

"On 19 March, 2005 in the police called Strzelce (Lublin Volvodship) Arkadiusz Guz was driving a passenger car Zastawa

with the registration plates no LUC 7620 along the public road being drunken (0.35 and 0.33 mg/1 alcohol in inhaled air). He committed this offence without complying with the decision of the Provincial Court in Opole Lubelskie, II Penal Division (Case file number II K 567/04) on prohibition of driving all the vehicles in the land traffic for the period of 6 (six) months starting from 28th of December 2004 until forced July, 2005"

Counsel for the applicant has invited the Court to find correspondence with the offence of driving while under the influence of alcohol under s.49 of the Road Traffic Act 1961 as amended. She does so in circumstances where the Court has been informed that the Irish limit is 22øg/100ml in inhaled air. Converting this to the equivalent units used in the statement of facts in part E of the warrant the Irish limit can be expressed as 0.22mg/1. In circumstances where the readings taken from the respondent were between 0.35 and 0.33 mg/1 alcohol in inhaled air it can be seen that it is clearly alleged that the respondent was over the legal limit. The Court has no hesitation in finding correspondence with the suggested offence in the circumstances of this case.

Minimum Gravity

No point has been raised by way of objection based upon minimum gravity. The relevant threshold is that set out in s. 38(1)(a)(ii) of the Act of 2003 which requires that a term of imprisonment or detention of not less than four months should have been imposed in respect of the offence in the issuing state. As a sentence of one year's detention was imposed in this case minimum gravity is clearly met.

The s. 45 point

The respondent was tried and convicted of this offence in *absentia* and in the circumstances he has raised a s.45 (of the Act of 2003) objection to his surrender. However, the Court is in receipt of additional information dated the 17th July, 2012, from the issuing judicial authority which indicates that the respondent was personally notified and was actually aware of his trial. The additional information states that "the receipt of the summons letter informing about the date of the hearing of the first instance court and appeal court was personally endorsed by his name. He did not appear in Court and gave no excuse for his absence." In circumstances where there has been no engagement with this by the respondent in any of his affidavits, the Court has no evidence of sufficient cogency to cause it to doubt this statement, and must rely upon it. The s.45 (of the Act of 2003) objection cannot therefore be upheld.

Conclusion

The Court will surrender the respondent for the offences contained in warrants nos. 1, 2, & 7, and also for the offences at E2(a) and E2(c) on warrant no. 6. The Court will not surrender the respondent for the offences on warrants nos. 3 and 4, and for the offences at E2(b) on warrant no. 6. Warrant no. 5 has been withdrawn.