Neutral Citation Number: [2010] IEHC 401

THE HIGH COURT

2010 183 EXT

Between:

Minister for Justice, Equality and Law Reform

Applicant

And

Damian Jankowski

Respondent

Judgment of Mr Justice Michael Peart delivered on the 14th day of October 2010:

The surrender of the respondent is sought by an issuing judicial authority in Poland on foot of two separate European arrest warrants dated respectively 6th February 2009 and 17th March 2010. I will deal with the second warrant first, since the respondent has raised no points of objection in respect thereof. A single point of objection has been raised in respect of the earlier warrant and I will come to that.

Warrant dated 17th March 2010:

This warrant seeks the respondent's surrender so that he can first of all be prosecuted for an offence of driving a motor vehicle while under the influence of alcohol, and secondly so that he can serve a sentence of six months imprisonment in respect of a fraud offence. That warrant was endorsed here for execution on the 12th May 2010, and he was duly arrested on foot of same on the 19th May 2010. No issue has been raised as to the respondent's identity. Both offences satisfy minimum gravity. Correspondence must be established with the driving offence, but not in respect of the fraud offence since that has been marked in the warrant as being an Article 2.2 offence in respect of which double criminality is not required to be verified. I am satisfied that the driving offence referred to in the warrant corresponds here to an offence under section 49 of the Road Traffic Act 1961 as amended.

No undertaking for a retrial is required in respect of the fraud offence for which he has already been convicted and sentenced.

I am satisfied that there is no reason why surrender must be refused under the provisions of sections 21A, 22, 23 or 24 of the Act of 2003, and also that surrender is not prohibited under the provisions of Part III of that Act or the Framework Decision.

I will make an order for surrender on foot of this warrant.

Warrant dated 6th February 2009:

This warrant was endorsed for execution here on the 11th November 2009, and the respondent was arrested on foot of same on the 21st April 2010, and brought before the Court immediately thereafter. No issue arises as to his identity. His surrender is sought so that he can serve what remains of a one year sentence of imprisonment which was imposed upon him on the 24th October 2007 in respect of an offence of robbery. According to the warrant he is required to serve a remaining period of nine months and twenty seven days.

The offence referred to in the warrant corresponds to an offence in this State contrary to section 14 of the Criminal Justice (Theft and Fraud Offences) Act, 2001. No issue to the contrary has been raised. The offence satisfies minimum gravity and no undertaking for a retrial is necessary, as it is not disputed that he was present for his trial.

There is no reason to refuse to order his surrender under sections 21A, 22, 23 or 24 of the Act of 2003, and neither is his surrender prohibited by any provision of Part III of that Act, or the Framework Decision.

The point of objection raised by the respondent is that the warrant fails to disclose any facts which could satisfy this Court that the respondent is a person who comes within the provisions of section 10 (d) of the Act of 2003 – in other words that he 'fled' Poland before serving his sentence - and that in these circumstances this Court has no jurisdiction to make any order for surrender even though the requirements of section 16 of the Act of 2003 are satisfied.

In this regard, John Byrne BL for the respondent relies heavily upon the judgment of Macken J. in *Minister for Justice, Equality and Law Reform v. Slonski,* (Unreported, Supreme Court, 25th March 2010). He submits that in the present warrant there is nothing to indicate that the respondent was required to remain in Poland after this sentence was imposed, and there is equally nothing to indicate even that he was required to serve the remaining part of this sentence.

Section 10 (d) of the Act of 2003 provides:

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."

Mr Byrne submits that until such time as the applicant by reference to what is contained in the warrant has demonstrated that the respondent comes within this provision, there is no onus on the respondent to establish that he did not' flee' in the sense attaching to that word in proceedings of this kind.

Anne Marie Lawlor BL for the applicant has submitted that it is perfectly clear from the fact that an unconditional sentence was imposed and that a period still remains to be served that the respondent is a person on whom a sentence of imprisonment or detention has been imposed in respect of the offence, and that he left Poland in the full knowledge that a large part of that sentence remained outstanding, and that in these circumstances there is no necessity for the warrant to contain a specific statement to the effect that the respondent departed from Poland in the knowledge of that outstanding sentence or that it was required to be served. She submits that this is self-evident, and that if necessary this Court should infer from what is contained in the warrant that the respondent left Poland knowing that by doing so he was evading the sentence which he knew about and which he knew had to be served by him. In relation to the *Slonski* judgment referred to, she distinguishes that case from the present one on the basis that in *Slonski* the sentence imposed was a suspended sentence subject to certain conditions and that there was nothing in the warrant to indicate what conditions were attached to the suspension and no evidence of the manner in which the respondent had breached any such conditions. She emphasises that in the present case there was no suspension of sentence subject to any conditions, and that it is obvious therefore, since the respondent was present for his sentence, that he knew that it was a sentence which he was required to serve, and therefore must be taken as being a person who left Poland possessed of that knowledge and therefore he fled Poland in order to avoid serving the remainder of it.

In the present case the issue again arises, as it did in *Slonski* and in *Minister for Justice, Equality and Law Reform v. Sliczynski,* (Unreported, Supreme Court, 19th December 2008) as to whether there is sufficient information contained in the warrant and any other information provided by the issuing judicial authority to demonstrate that the respondent is a person who can be considered to have 'fled' from the issuing state before serving the sentence imposed, and whether in the light of the information that has been so provided the respondent has either chosen not to or has failed to counter a conclusion arising from that information that he fled. In *Sliczynski,* the position was that in relation to three suspended sentences imposed on the respondent and later activated because of a breach of certain conditions attaching to the suspension, the applicant had provided information from which it could be concluded that he must have been aware of the conditions and that a breach of any of them would lead inevitably to an activation of the sentence, in spite of the fact that the respondent had stated on affidavit that his subjective intention when leaving Poland to come to this country had been to better himself financially and to get away from an unsuitable group of people in Poland with whom he had been associating. Discussing the question of whether or not there was an onus on a respondent to establish that he did not flee, the learned Chief Justice stated:

"As to the present case, if, having regard to the information on the terms of the suspension in Polish law, it is objectively established that there was a deliberate decision to leave Poland in breach of the very terms as to residence and notification known to the appellant, even if the subjective motivation for leaving Poland is stated to be different, it is reasonable for a trial judge to conclude that the appellant has done so in circumstances which make it impossible for him to serve the sentence imposed. If leaving the requesting member state was done in circumstances where, as here, the terms and conditions attaching to the suspension are not denied, and therefore it must be accepted that they were both known and appreciated by the appellant, but were breached, it seems to me to follow that the appellant has, objectively speaking, placed himself in a position that he has 'fled' the issuing Member State, in the sense of having left Poland in circumstances which make it impossible for the sentence to be served, and is a person who "fled from the issuing state before he commenced serving that sentence". I do not consider that the learned High Court judge altered the onus of proof required of an applicant in s. 10 of the Act of 2003. Rather his judgment, while perhaps slightly infelicitously worded, must be understood in the sense that, having had all of the information from the issuing judicial authority which enabled him to find that the appellant had, on the basis of that information, when viewed objectively, fled Poland, the appellant had not himself chosen to do any of the several things he might have done to counter that inevitable conclusion, which flowed from an examination of the information provided. When speaking of the heavy onus, I think it fairer to say that this concerned, not a legal onus on the appellant to establish in law something he was not obliged to establish, but rather an onus on him having regard to the information and material furnished in Mr Doyle's affidavit, the veracity of which was not challenged in any way by the appellant, to establish that the material furnished did not support its natural conclusion that he had fled."

What seems to flow from this statement is that it is for the applicant [the Minister] to establish by the contents of the warrant and any other information furnished by the issuing judicial authority that the respondent is a person who comes within section 10 (d) of the Act of 2003, before there is any need for the respondent to establish in whatever way he may, that he did not do so. A distinction between that case and the present one is that in the present case is that according to what is contained in the warrant dated the 6th February 2009, the one year sentence imposed was not a suspended sentence which was later activated for alleged breach of any conditions, as was the case in both *Slonski* and *Sliczynski*.

In *Slonski,* Macken J. was of the view that as there was no evidence or other material before the High Court to indicate the manner in which the respondent was said to have breached a condition attaching to the suspension of the sentence described in the warrant as "curator's supervision". In that regard, the learned judge having set out that the only information available to the High Court on the application for surrender was that the respondent had been convicted and sentenced to one year's imprisonment, that the punishment was suspended conditionally, that a 'curator's supervision was imposed on the respondent, and finally that on a certain date execution of the punishment of imprisonment was ordered against the applicant. In that case the Minister applicant had argued that it could be clearly implied from the terms of the warrant and the fact of the lifting of the suspension, that there had been a breach of the curator's supervision condition, and in addition that this was breached by the very act of leaving Poland since the practical effect of so doing was that he would no longer be subject to the supervision of the 'curator'. In rejecting the argument that a breach of the condition could be implied in order to find that the respondent 'fled' from Poland, and having referred to what she had stated in her judgment in *Sliczynski* in relation to the objective and subjective motivation of a respondent who leaves the issuing

state, the learned judge stated:

> *"There was no information before the learned High Court judge as to the conditions imposed, as to what constituted 'curator's supervision', as to what conditions attaching to his suspension were allegedly breached, or led to the lifting of the that suspension, and in particular as to whether or not the fact that the appellant left Poland was a breach of the conditions attaching to the suspension, or if becoming involved in criminal activities, whether inside or outside Poland, constituted a breach of the same conditions or other conditions attaching to the suspension. It is unclear to me on what evidence the learned High Court judge based his finding of fact that the appellant's leaving of Poland "was a breach of the supervision condition". Unlike the position in MJELR v. Sliczynski, there was no information before the High Court that the terms of the suspension had been imposed in the presence of the appellant, such that would have permitted the High Court to conclude that he knew them, had not denied them, and appreciated that any breach of them would naturally lead to the suspension being lifted."*

She concluded:

> *"I am satisfied in the foregoing circumstances that there was wholly inadequate material before the learned High Court judge upon which he could properly reach the conclusion that the appellant was a person who came within the ambit of s. 10 of the Act of 2003, as a person who fled Poland."*

As I have stated, the present case is one where it is disclosed in the warrant that a sentence of one year's imprisonment was imposed on the respondent on the 24th October 2007, and that of this sentence a period of nine months and twenty seven days remains to be served by him. It was not suspended and it was imposed in the presence of the respondent. Ms. Lawlor for the applicant submits that this Court can infer therefore that the sentence was immediately enforceable against the respondent and that the respondent was aware that he was required to serve it, and therefore the Court can safely infer and conclude that by leaving Poland before serving the remainder of the sentence he is a person who' fled' for the purpose of coming within section 10 (d) of the Act of 2003, and she refers to the fact that this respondent has filed no affidavit even to counter that inference by putting forward any subjective motivation for so leaving.

Given the judgments in *Slonski* and in *Sliczynski* to which I have referred it seems clear that the applicant Minister must by reference to what is actually contained in the warrant and other additional information which may be adduced on behalf of the issuing judicial authority satisfy the Court on an application for surrender to serve a sentence that the respondent 'fled'. Without being taken as reaching a firm conclusion as to whether such an inference can be made in a case where a sentence is imposed in the presence of the respondent and the entire sentence remains to be served – that remaining to be decided on facts appropriate to such an argument – the position in the present case is that according to one interpretation of the information in the warrant, the respondent has already served a period of three months and a few days of the sentence. Another interpretation possible is that before being sentenced he had spent that period of two months or so on remand in custody awaiting his trial. Yet another potential interpretation is that in stating that a period of nine months and twenty seven days remains to be served, the issuing judicial authority is taking into account what is referred to in this jurisdiction as remission for good behaviour. Yet another possible scenario is that following sentence the respondent was taken into custody to commence serving the sentence but benefited from some form of early release after two months and a few days and possibly subject to certain conditions. However we do not know the circumstances in which less than the sentence imposed remains to be served.

It seems to me, for the purposes of the present case at least, and where these different possibilities exist from the facts and material before the Court, that I cannot simply infer from the fact that the issuing judicial authority has stated that a period of imprisonment remains to be served, that the respondent is a person who fled, even in the absence of anything put forward by him to indicate his intentions when leaving Poland and his awareness or otherwise of the existence of this outstanding sentence. It seems to me that the Minister must in the circumstances of the respondent possibly having served part of this sentence explain by additional information from the issuing judicial authority the circumstances in which that partial service of sentence has occurred.

In the event that the respondent was in pre-trial custody up to the date of sentence, this court would need to know the circumstances in which, following sentence, he was not simply returned to prison to serve the balance of the imposed sentence, and if released pending being notified of a date on which he was to present himself at the prison to serve the sentence, whether his liberty during that intervening period was subject to any conditions which may have been breached, or whether perhaps he was written to present himself at the prison and he failed to do so. That is one scenario.

If it is the position that he was not in pre-trial detention at all, this Court needs to know how it is that part of the sentence has been served. Was he for example taken into custody and released on licence subject to some conditions which he has failed to comply with. That is another scenario, and the Court would need information about that.

The third scenario postulated by me is that he was not in pre-trial custody at all, but received a one year sentence, but a period of remission for good behaviour or suchlike has been taken into account in deciding how much of the sentence remains. However even in that situation, this Court needs to know how it is that having received this one year sentence he was not thereupon taken into custody in order to commence serving it. Maybe the procedure in Poland is that having been handed a sentence of one year, the convicted person is free to leave court, subject to certain conditions or not as the case may be, and that he then must await being notified by the authorities of a date on which he is to present himself at the nominated prison in order to commence that sentence. That seems to happen in some EU Member States. But maybe such a respondent during such a period is made subject to conditions, but again this Court does not know.

In a case where only a portion of a sentence remains to be served, as in the present case, it would be helpful for the explanation for that fact to be apparent from the contents of the warrant, or at least from additional information obtained by the Central Authority here prior to the hearing of the application for surrender, in order to avoid unnecessary delays should the Court itself decide that further information needs to be sought by the exercise of powers in that regard contained in section 20 of the Act of 2003.

For the reasons given above, given the various possible situations which may pertain, I do not believe that this Court can safely draw the inference that this respondent has 'fled' simply by reference to the fact that a sentence was imposed upon him in his presence and that on some later date he left Poland and arrived in this State before having served what remains of the sentence imposed. In these circumstances, the applicant has not yet fulfilled the onus upon him to satisfy this Court initially that the respondent is a person in respect of whom an order for surrender may be made, and the fact that the respondent has put in no affidavit to explain his awareness of the situation or otherwise or deal with the question of whether or not he 'fled' is irrelevant at this stage.

There is sufficient in this judgment to make clear the additional information which this Court needs before it can finally conclude

whether or not the respondent is a person to whom section 10 (d) applies, and I will request the Central Authority, on the Court's behalf, pursuant to powers in that regard contained in section 20 of the Act of 2003, to request from the issuing judicial authority the necessary information so that this Court to perform its function under the Act, and I will consider any information and material so provided, and will hear such further submissions in relation thereto as either or each party wishes to make in due course.