Neutral Citation Number: [2011] IEHC 209

THE HIGH COURT

2010 229 EXT

2010 230 EXT

IN THE MATTER OF THE EUROPEAN ARREST WARRANT ACT, 2003 AS AMENDED

BETWEEN/

THE MINISTER FOR JUSTICE AND LAW REFORM

APPLICANT

- AND -

PIOTR WLODARCZYK

RESPONDENT

JUDGMENT of Mr Justice Edwards delivered on the 19th day of May 2011

Introduction:
The respondent is the subject of two European Arrest Warrants issued by the Republic of Poland on the 15th of May, 2008; and the 11th of May, 2009, respectively. Both warrants were endorsed for execution by the High Court in this jurisdiction on the 2nd of June, 2010.

The first warrant in time (i.e. the warrant of 15/05/2008) is both a prosecution and conviction type of warrant. To the extent that it is a prosecution type warrant the respondent is wanted in the Republic of Poland for trial in respect of the offence particularised in the warrant under file reference II K 822/06. No box is ticked in respect of this offence and accordingly both correspondence and minimum gravity require to be demonstrated. The offence is particularised in the warrant as follows:

> "On the 19th of July 2006 in Klodzko, in the province of Dolny Œl¹sk, acting jointly and in co-operation with (an)other person(s), with an intent of appropriation they took a diesel lawnmower worth 1000 Polish zloty and thus they acted to the detriment of Mr Bogusław Pi¹tek and Mr Zbigniew £oboda."

The Court is invited to find correspondence with the offence of theft contrary to s. 4 of the Criminal Justice (Theft & Fraud Offences) Act, 2001.

The offence in question is expressed to be contrary to Art 278 § 1 of the [Polish] C.Pen [Code Penal or Penal Code]. It carries a penalty of five years deprivation of liberty, i.e. imprisonment, and so minimum gravity is prima facie satisfied.

To the extent that the first warrant in time is also a conviction type warrant the respondent is wanted in the Republic of Poland to serve a sentence of two years imprisonment outstanding in respect of five offences of which he has been convicted in Poland and which are particularised in that warrant under file reference II K 305/05. These are all offences in respect of which paragraph 2 of Article 2 of the Framework decision is said to apply, and in respect of which boxes have been ticked in part E.1. of the warrant relating to "counterfeiting currency, including the euro" and "forgery of administrative documents and trafficking therein".

The second warrant in time (i.e. the warrant of 11/05/2009) is a conviction type warrant on foot of which the respondent is wanted in the Republic of Poland to serve a sentence of one year and three months imprisonment outstanding in respect of two offences of which he has been convicted in Poland and which are particularised in that warrant. These offences are particularised in that warrant under file reference II K 108/06 as follows:

> "1. On the 4th/5th of October 2005 in Wojciechowice, in the admin district of Klodzko in the province of Dolny Œl¹sk, he stole money at the amount of 1000 Swiss francs, being equivalent to 2,650 Polish zlotys, and to the detriment of Ms Diana Heinrich-Czerkies;
>
> 2. On the 5th of October 2005 in Klodzko, in the province of Dolny Œl¹sk, he made threats to Ms Diana Heinrich-Czerkies that he would beat her up and that he would burn her house all in order to influence her and make her withdraw the notification of offence regarding the theft of money that was to her detriment."

The first offence in question is expressed to be contrary to Art 278 § 1 of the [Polish] C.Pen [Code Penal or Penal Code]. The second offence is expressed to be contrary to Art 245 of the [Polish] C.Pen [Code Penal or Penal Code]. A composite or aggregate sentence of one year and three months imprisonment was imposed on the respondent in respect of these offences. Again, the requirement as to minimum gravity is prima facie satisfied.

The Court is required to be satisfied with respect to correspondence in respect of the offences in question. In respect of the first offence the Court is invited to find correspondence with the offence of theft contrary to s. 4 of the Criminal Justice (Theft & Fraud Offences) Act, 2001. In respect of the second offence the Court is invited to find correspondence with the offence of intimidation with intent to obstruct a police investigation or obstruct the course of justice, contrary to s. 41 of the Criminal Justice Act, 1999, alternatively the offence of threatening to damage property, contrary to s. 3 of the Criminal Damage Act, 1991.

The respondent was arrested by Detective Garda Senan O'Sullivan at Henry Street in Limerick on the 19th of August, 2010 but does not consent to his surrender to the Republic of Poland. Accordingly, this Court is now being asked by the applicant to make an Order pursuant to s. 16 of the European Arrest Warrant Act, 2003 as amended (hereinafter referred to as "the 2003 Act") directing that the respondent be surrendered to such person as is duly authorised by the issuing state to receive him. In the circumstances the Court must enquire whether it is appropriate to do so having regard to the terms of s.16 of the 2003 Act.

The respondent, as is his entitlement, does not concede that any of the requirements of s. 16 aforesaid are satisfied. Accordingly, as no admissions have been made, the Court is put on inquiry as to whether the requirements of s. 16 of the 2003 Act, both controversial and uncontroversial, have been satisfied and this Court's jurisdiction to make an order directing that the respondent be surrendered is dependant upon a judicial finding that they have been so satisfied. In so far as specific points of objection are concerned, the Court is required to consider a number of specific objections to the respondent's surrender on foot of each of the European Arrest Warrants. Some of these objections are common to both cases, while others are case specific.

The following objections are common to both cases:

• The respondent is not a person who should pursuant to s.10 (d) of the 2003 Act be surrendered in circumstances where there is no evidence that he fled the issuing state.

• The surrender of the respondent is prohibited by s.37 of the 2003 Act because the prison conditions in Poland are such that the respondent's rights under the Constitution and the European Convention on Human Rights would be breached including his right to privacy and also his right not to be subjected to inhuman and degrading treatment or punishment under article 3 of the European Convention on Human Rights.

• The surrender of the respondent is prohibited by s.37 of the 2003 act in that to surrender the respondent would be in breach of his constitutional right to fair procedures. In all the circumstances of the case, it would be unjust and disproportionate to the respondent's constitutional rights and rights under EU law and rights under the European Convention on Human Rights to order his surrender.

In addition, the following case specific objections are pleaded :

Re: The European Arrest Warrant of 15th May, 2008

• A corresponding offence under the laws of the State for the offence relating to the lawnmower (reference: II K 822/06) on the European Arrest Warrant is not established.

• The offence outlined at part E1, p. 7, para V of the European Arrest Warrant relating to the appropriation of an identity card is not capable of being marked as a "ticked" offence under the headings counterfeiting or forgery as appears in the warrant.

• A corresponding offence under the laws of the State for the appropriation of an identity card offence outlined in the European Arrest Warrant is not established.

Re: The European Arrest Warrant of 11th May, 2009

• Corresponding offences under the laws of the State for the two offences on this European Arrest Warrant are not established.

• In the event that this honourable Court finds that one of the offences outlined in the warrant corresponds with an offence under the laws of the State the respondent herein will rely on the decision in Minister for Justice Equality and Law Reform v. Ferenca [2008] 4 I.R. 480 to prevent his surrender.

• The European arrest warrant does not comply with the requirements under s. 11(1A)(g)(iii), s. 11(1A)(e) and s. 11(1A)(f) of the European Arrest Warrant Act 2003 in the following respects:

(a) the description of penalties does not provide adequate particulars or adequate information on the conditions attached to the suspended sentence imposed on the 6th of July 2006;

(b) the description of the activation of the suspended sentence does not provide adequate particulars or any adequate information regarding the alleged facts and/or conduct of the respondent which led to the decision of the [District] Court in Klodzko on the 8th of January 2009;

As the aforementioned matters are unclear and unexplained this European arrest warrant application is rendered void for uncertainty under section 11 of the European arrest warrant act 2003 and/or pursuant to the inherent jurisdiction of this honourable Court. In these circumstances, it would not be in accordance with law or the constitutional right to fair procedures to surrender the respondent.

Uncontroversial s. 16 issues

The Court has received an affidavit of Detective Garda Senan O'Sullivan sworn on the 15th of December, 2010 and has also received and scrutinised copies of the European Arrest Warrants in this case. Moreover the Court has also inspected the original European Arrest Warrants which are on the Court's files and notes that they each bear this Court's endorsement. The Court is satisfied following its consideration of this evidence and documentation that:

(a) the person before it is the person in respect of whom the two European Arrest Warrants with which it is presently concerned were issued;

(b) Both European Arrest Warrants in question have been endorsed for execution in accordance with s. 13 of the 2003 Act;

(c) the respondent was not tried *in absentia* in respect of any of the offences particularised in the said European Arrest Warrants of which he has already been convicted, such as to require an undertaking with respect to a re-trial;

(e) the Court is not required, under s. 21A, 22, 23, or 24 (inserted by ss 79, 80, 81 and 82 of the Criminal Justice (Terrorist Offences) Act 2005), to refuse to surrender the respondent under the 2003 Act;

(f) subject to an adjudication and ruling on the s.37 objections that has been raised in respect of both warrants, and also subject to an adjudication and ruling on the objections raised as to correspondence in each specific case, the surrender of the respondent is not otherwise prohibited by Part 3 of the 2003 Act, or by the Framework Decision (including the recitals thereto).

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

The evidence adduced by or on behalf of the respondent
The respondent has sworn an identical affidavit in respect of both European Arrest Warrants and these affidavits were sworn on the 19th of October 2010. The substantive evidence relied upon by the respondent is contained in paragraphs 4 to 13 respectively of each affidavit. These are in the following terms:

"4. I am 38 years of age and I am originally from Poland. I am single but I am in a long-term relationship with a woman called Elwira Izdebska who was diagnosed with cancer. She has recently completed radiotherapy in Limerick, and she is now awaiting a prognosis.

5. On about the 27th of January 2007 I arrived in Ireland. There was nothing surreptitious or improper about my departure from Poland. I had informed my probation officer in Poland that I had intended to go to Ireland to seek employment and she made a note of this. I did not leave Poland to escape from or evade justice. I simply came to Ireland to seek work and a better life for myself.

6. On about the 6th of February 2007 I wrote to the District Court in Klodzko to inform them of my whereabouts and new correspondence address and to confirm that I had moved to Ireland to seek employment. I beg to refer to a copy of the letter in Polish and English upon which and marked with the letter "A" I have signed my name thereon prior to the swearing hereof.

7. I say and believe that the circumstances in which I left Poland do not fall within the circumstances as set forth in section 10 of the European Arrest Warrant Act 2003, as I did not flee from Poland but rather left to exercise my rights under EU law regarding the free movement of workers.

8. I say that I have been resident in Ireland since January 2007 and the District Court in Klodzko has not corresponded with me at any stage. I was unaware that I was wanted in Poland until I was arrested pursuant to the within proceedings.

9. I am concerned that my fundamental rights will be breached should I now be surrendered to Poland. While I have never served any time in a Polish prison I am aware that there is an extreme lack of space in prison cells in Poland. I believe that there is a real risk that I will be detained in overcrowded conditions without proper sanitation should I be returned to Poland. No assurance has been given to me that I will not be detained, at any time, in conditions which are inhuman or degrading should I be returned to serve a sentence within the Polish prison system.

10. In addition, I suffer from depression and asthma. I am currently on medication for my depression namely, Efexor XL, Xanax and Nitrazepam. I also take Foradil and Theospirex for my asthma.

11. I am aware that the general level of medical treatment which I can expect to receive in a Polish prison is inadequate. This is a source of concern for me given the serious nature of my health conditions. In this regard, US State Department, 2008 *Human Rights Report for Poland*, dated the 25th of February 2009 states that in Poland *"detention centre conditions did not always meet international standards. Overcrowding and inadequate medical treatment continued to be problems*" and a large number of complaints were made "*mainly regarding for prison conditions, such as poor medical care, and abuse by prison authorities, overcrowding, and violations of mail and visiting rights.*" I beg to refer to a copy of the said report upon which and marked with the letter "B" I have signed my name thereon prior to the swearing hereof.

12. If I am returned to Poland it would destroy my personal life and deprive my ill partner of my company, care and support.

13. In light of all the circumstances outlined above, surrender to Poland would be unjust and oppressive in my case."

The letter to the District Court in Klodzko exhibited marked "A" in the respondents said affidavits is an important document and it is in the following terms:

"Piotr Wlodarczyk

7 Lansdowne Garden,

Ennis Road,

Limerick,

Ireland.

Limerick, 06. 02. 2007

To: District Court in Klodzko

II Criminal Division

I would like to address my request to excuse my absence from the hearing on 31st of January 2007, file no 822/06.

The reason for my absence is that I am seeking job outside of Republic of Poland. I would like to notify that the testimonies I have given so far at the police station and at the prosecutor's office are true, I maintain them in full and I have nothing else to add.

I would also like to state that my leaving was caused by the situation of the job market in Klodzko. The fact that I haven't found a job yet makes the above address my correspondence address only as I am living temporarily at my friends house. I also wish to state that I am aware of the seriousness of the situation and I am prepared to take all the consequences of my deed and I would also request that you convict me without the necessity of my personal presence at the next hearing as simply my financial situation does not allow me to travel to Poland.

Yours sincerely,

Piotr Wlodarczyk"

Additional information received from the issuing judicial authority/ issuing state.
The applicant in his role as the Irish Central Authority requested certain additional information from the issuing judicial authority arising out of the objections raised in respect of both European Arrest Warrants in this case and in the light of the affidavit filed by the respondent.

The first piece of additional information came under cover of a letter from the issuing judicial authority, namely the Circuit Law Court of Œwidnica dated the 3rd of November 2010, enclosing a letter of the same date from the District Law Court of Klodzko. The enclosure relates to the first European Arrest Warrant in time and was in the following terms:

"In response to the letter (fax) of 2 November 2010 concerning the European Arrest Warrant in respect of Piotr WLODARCZYK …. District Law Court of Klodzko, 2nd Criminal Division, would like to clarify the following:

Re: 1. Was the requested person aware of the conditions of the suspension of the sentence?

Sentenced Piotr Wlodarczyk was well aware what the conditions of the suspension of the sentence of two years of deprivation of liberty, imposed on him under the judgment rendered by the District Law Court of Klodzko on the 11th of January 2006 in case II K 305/05 were

The record of the main trial of the 11th of January 2006 shows that the said convicted person was present at the passing and delivering of the court's judgment. He heard the reasons for that judgment presented orally and additionally - being duly informed about the means of appeal and the statutory time limits for it he did apply for having the reasons for the judgment presented in writing. He did not lodge an appeal, either.

Moreover, on being turned over to a probation officer for supervision, which took place on the 21st of February 2006 (the conversation with a sentenced man in his home) the sentenced man was then instructed about the content of the court's judgment. The probation officer informed the sentenced man, in detail, about his rights and duties and explained what his, i.e. the probation officer's, role in the re-socialisation process was going to be. First of all, he informed the sentenced man about the content of Article 75 § 2 of the Penal Code, pursuant to which the court may order the execution of the penalty if the sentenced person in the probation period has flagrantly breached the legal order, and, in particular, if the sentenced person has committed an offence other than that specified in §1 or if the sentenced person has not paid the fine, has evaded supervision, or has failed to fulfil the obligations or penal measures imposed on him.

Re 2: What were the conditions of the suspension of the sentence?

Under the said judgment the District Law Court of Klodzko sentenced Piotr Wlodarczyk to the penalty of 2 years of deprivation of liberty with the conditional suspension thereof for a probationary period of 5 years. Within the said probationary period the court turned the sentenced man over to a probation officer for supervision and imposed on the sentenced man an obligation to pay PLN 300 (in words: 300 Polish zlotys) in favour of the Dzieroniów charitable organisation called Stowarzyszenie na rzecz Rozwoju I Integracji 'Uœmiech' within 6 months from the date of the judgment's becoming final and valid, i.e. until the 19th of July 2006.

Within the probationary period a probationer is obligated to appear before the court or probation officer when summoned thereto and to provide explanation regarding the progress in his/her probation and the fulfilment of the obligations imposed on him/her, to allow the probation officer to enter his/her flat/house and, in the first place, to inform the officer about every change of his/her employment, place of residence or sojourn.

Re 3: Did the requested person breach the conditions of the suspension of the sentence? What were the nature of those breaches?

The sentenced man definitely breached the conditions of the conditional suspension of the sentence with his conduct. The breaches of those conditions resulted in the order to execute the penalty of deprivation of liberty following the relevant decision rendered by the District Law Court of Klodzko on the 14th of February 2006 in case II Ko 9/08. The said breaches were twofold:

a) the sentenced man was repeatedly informed by the probation officer that on the change of the place of residence, regardless whether it's in Poland or abroad, he had to notify the officer of his new address. The first occurrence of that kind was when, while being at conflict with his parents, he was thinking of living together with his concubine -- Elwira Izdebska – in D¹bróski Street in Klodzko, in the flat belonging to the concubine's sister (the files of the probationary supervision -- supervision card dated the sixth of June 2006). The next time the sentenced man was informed about an obligation of his to give his new address was when he was thinking of going to work abroad -- i.e. to England or Scotland (the files of the probationary supervision -- supervision card dated the 16th of October 2006). According to the view presented in the Polish penal law a sentenced person's departure without giving a probation officer a new address is considered to be the evasion of supervision.

b) on each visit the probation officer reminded the sentenced man that he had to pay money in favour of the Dzieroniów

charitable organisation called Stowarzyszenie na rzecz Rozwoju I Integracji 'Ucemiech'. The time limits to make that payment expired on the 19th of July 2006.

The sentenced man's conduct as a whole, in other words his evasion of supervision imposed on him by the court and his failure to fulfil the obligation of making a payment, caused that the execution of the penalty of deprivation of liberty was ordered.

It should be mentioned here that the court thought that earning PLN 300 within 6 months was not beyond the capacities of a young man (a 36-year-old one when the execution of the penalty of deprivation of liberty was ordered).

Re 4: Was the requested person present/aware when the order was made that he serve the sentence which had been conditionally suspended?

The sentenced man was duly informed about the date of the court session regarding the order to execute the penalty of deprivation of liberty in the way as provided by Polish Code of Criminal Procedure. Pursuant to Art 139 § 1 of Code of Criminal Procedure if a party to the proceedings has changed his/her place of residence or if he/she has not resided under the address designated as his/hers and has failed to notify the relevant agency of his/her new address, a document dispatched to the address last designated by such a party shall be considered to have been served on him/her. In the light of that provision of law the notice informing him about the date of the court session as well as the decision about the execution of the penalty of deprivation of liberty rendered at that session sent to the last address of his known to the court -- i.e. 100/3 Rodzinna Street, Klodzko -- were considered to have been duly served on him."

Yet further information relating to the first warrant in time was later received in a letter from the Circuit Law Court of Œwidnica addressed to the applicant and dated the 22nd of November, 2010, again enclosing a letter of the same date from the District Law Court of Klodzko. The enclosure was in the following terms:

"In response to the letter (fax) of 17 November 2010 concerning the European arrest warrant in respect of Piotr Wlodarczyk ... District Law Court of Klodzko, 2nd Criminal Division, would like to clarify the following:

Re 1: Was the lawnmower are taken without the consent of its owners?

All Piotr Wlodarczyk was charged with the theft of lawnmower of the value of PLN 1000 and to the detriment of Mr Boguslaw Pi¹tok and Mr Zbigniew Loboda. Pursuant to Polish law and act of theft consists in one's taking, with an intent of appropriation, somebody else's movable property without the consent of its owner. Whereas, contrario, an offence of appropriation consists in one's coming into the possession of somebody else's movable property after its owner gave their consent thereto but at the same time the possessor has no intention to give the said property back

The essential difference between theft of appropriation comes down to the following: a perpetrator of theft himself/herself deprives the other person of their control and power over at thing whereas a perpetrator of appropriation takes over at thing without having earlier taken (deprived somebody of) control or power over it.

Re 2: Was the lawnmower actually stole or dishonestly appropriated?

The analysis of the content of the charge presented to the defendant shows that the lawnmower was stolen."

Further additional information then came under cover of a letter from the Circuit Law Court of Œwidnica dated the 26th of January 2011, enclosing a letter of the same date from the District Law Court of Klodzko. This enclosure relates to the second European Arrest Warrant in time and was in the following terms:

"In response to the letter (fax) of 24 January 2011 concerning the European Arrest Warrant in respect of Piotr WLODARCZYK …. District Law Court of Klodzko, 2nd Criminal Division, advises that:

Re: 1. Was the requested person aware of the conditions of the suspension of the sentence?

Sentenced Piotr Wlodarczyk was definitely aware what the conditions of the suspension of the sentence of 1 year and 3 months of deprivation of liberty, imposed on him under the judgment rendered by the District Law Court of Klodzko on the 28th of June 2006 in case II K 108/06 were

The record of the main trial of 28 June 2006 shows that the said convicted person was present at the passing and delivering of the court's judgment. He heard the reasons for that judgment presented orally and additionally, having been duly informed about the means of appeal and the statutory time limits for it he did apply for having the reasons for the judgment presented in writing. He did not lodge an appeal, either.

Moreover, on being turned over to a probation officer for supervision, which took place on the 20th of July 2006 (the conversation with a sentenced man in his home) the sentenced man was then, again, advised of the content of the court's judgment. The probation officer informed the sentenced man, in detail, about his rights and duties and explained what his, i.e. the probation officer's, role in the re-socialisation process was going to be. First of all, he advised the sentenced man about the content of Article 75 § 2 of the Penal Code, pursuant to which the court may order the execution of the penalty if the sentenced person in the probation period has flagrantly breached the legal order, and, in particular, if the sentenced person has committed an offence other than that specified in §1 or if the sentenced person has not paid the fine, has evaded supervision, or has failed to fulfil the obligations or penal measures imposed on him.

Re 2: What were the conditions of the suspension of the sentence?

Under the said judgment the District Law Court of Klodzko sentenced Piotr Wlodarczyk to the penalty of 1 year and 3 months of deprivation of liberty with the conditional suspension thereof for a probationary period of 5 years. Within the said probationary period the court turned the sentenced man over to a probation officer for supervision and imposed on the sentenced man an obligation to pay to make up for the damage done to the aggrieved party, i.e. to pay PLN 2,650 in favour Ms Diana Heinrich, within 1 year from the date of the judgment's becoming final and valid, i.e. from the 6th of July 2006.

At the beginning the supervision went without serious difficulties; the subject declared his positive attitude towards being

supervised and to the probation officer. In the conversation with the probation officer he would say that his own feeling was that he had been unfairly convicted.

Within the probationary period the probationer was obligated to appear before the court or probation officer when summoned thereto and to provide explanation regarding the progress in his probation and the fulfilment of the obligations imposed on him, to allow the probation officer to enter his flat and, in the first place, to inform the officer about every change of his/her employment, place of residence or sojourn.

Re 3: Did the requested person breach the conditions of the suspension of the sentence? What were the nature of those breaches?

The sentenced man definitely breached the conditions of the conditional suspension of the sentence with his conduct. The breaches of those conditions resulted in the order to execute the penalty of deprivation of liberty following the relevant decision rendered by the District Law Court of Klodzko on the 4th of December 2008 in case II Ko 827/08. The said breaches were twofold:

a) the sentenced man was repeatedly informed by the probation officer that on the change of the place of residence, regardless whether it's in Poland or abroad, he had to notify the officer of his new address (the files of the probationary supervision -- supervision card dated the 16th of October 2006). According to the view presented in the Polish penal law a sentenced person's departure without giving a probation officer a new address is considered to be the evasion of supervision.

b) on each visit the probation officer reminded the sentenced man that he had to make up for the damage done to the aggrieved party – to pay the amount of PLN 2,650 in favour of Ms Diana Heinrich within 1 year from the date of the court's decision becoming final and legally enforceable. The deadline for the fulfilment of that obligation was the 6th of July 2007. The subject delayed the repayment of the said amount for months arguing that he was in a bad financial position.

The sentenced man's conduct as a whole, in other words his evasion of supervision imposed on him by the court and his failure to fulfill the obligation of making up for the damage done by him, caused that the execution of the penalty of deprivation of liberty was ordered.

It should be mentioned here that the court thought that making a one-off payment of PLN 2,650 to the aggrieved party might be beyond the subject's financial capabilities at that time but he made no payment to Diana Heinrich, not even a minimal amount, although he was working off and on then.

Re 4: Was the requested person present/aware when the order was made that he serve the sentence which had been conditionally suspended?

The sentenced man was duly informed about the date of the court session regarding the order to execute the penalty of deprivation of liberty in the way as provided by Polish Code of Criminal Procedure. Pursuant to Art 139 § 1 of Code of Criminal Procedure if a party to the proceedings has changed his/her place of residence or if he/she has not resided under the address designated as his/hers and has failed to notify the relevant agency of his/her new address, a document dispatched to the address last designated by such a party shall be considered to have been served on him/her. In the light of that provision of law the notice informing him about the date of the court session as well as the decision about the execution of the penalty of deprivation of liberty rendered at that session sent to the last address of his known to the court -- i.e. 100/3 Rodzinna Street, Klodzko -- were considered to have been duly served on him."

Finally, the applicant has also sought to put before this Court a letter on behalf of the issuing state addressed to the Irish Central Authority and dated the 17th of December 2010. This letter has previously been produced to this court in other European Arrest Warrant cases in which a section 37 objection has been raised by the respondent based upon prisoners in Polish prisons allegedly being subjected to inhuman or degrading conditions. Indeed, the court has previously considered this letter and placed reliance upon it in its decision in *Minister for Justice, Equality & Law Reform v Sawczuk* [2011] IEHC 41. The letter is in the following terms:

"The Government of the Republic of Poland would like to assert that in accordance with article 91 section 1 of the Polish Constitution, the European Convention on Human Rights is a directly binding law, which means that all governmental institutions of Poland, including the Central Board of Prison Service and Courts, are obligated to act in accordance with all of its provisions, including Article 3. At the same time any person who feels that their rights have been violated, is entitled to seek legal remedies available under Polish law.

All judges must take into account relevant legislation on penalties relating to imprisonment or other measures depriving a person of liberty. These provide that all forms of punishment, punitive measures, security and preventative, shall be carried out in a humane manner, respecting the dignity of the prisoner. Torture and inhumane or degrading humiliating treatment and punishment are prohibited (Articles 4, 102 and 103 of the Executive Penal Code).

Regulations in relation to conditions in prison cells and daily food norms must be followed. These specify that the residential area in a cell for a convicted person shall not be less than 3 m². (An area smaller than 3 m² is only admissible under exceptional circumstances, clearly defined by law. This cannot be less than 2 m²). A report by the Directorate-General of the Prison Service shows that as of the 10th of December 2010 population density in correctional facilities and detention centres nationwide is 97.3%. (The data is available on **http://sw.gov.pl/pl/o-sluzbie-wieziennel/statvstyka/ statvstyka-biezaca/** and is updated regularly). In accordance with standards set out, the cells are equipped with appropriate furnishings, providing all prisoners with a separate place to sleep in, adequate hygiene conditions, supply of air and appropriate seasonal temperature, with adequate lighting for work and reading.

There are relevant provisions nutritional requirements, calorific value, nutritional elements, vegetable provisions etc. A prisoner gets three meals a day and beverages, including at least one hot meal per day, taking into account a prisoner's age, employment, religious and cultural requirements. Dietary requirements of prisoners with health problems are met following doctor's prescriptions."

The s. 10(d) argument – the suggestion that the respondent did not flee.
This is a case to which s.10 of the 2003 Act it was prior to the amendment effected by s. 6 of the Criminal Justice (Miscellaneous Provisions) Act, 2009 applies. Prior to the relevant amendment s. 10 of the 2003 Act (as substituted by s.71 of the Criminal Justice (Terrorist Offences) Act, 2005) provided (to the extent relevant):

> "10.—Where a judicial authority in an issuing state issues a European arrest warrant in respect of a person—
>
> (a) ….
>
> (b) who is the subject of proceedings in that state for an offence to which the European arrest warrant relates ….
>
> (c) …. or,
>
> (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.".

Accordingly, to the extent that the warrants are conviction warrants, this Court must be satisfied that the respondent "fled" Poland before commencing, alternatively before completing, the sentences variously imposed upon him for the offences to which each warrant relates. The respondent contends that he did not flee. The Court interprets the word "fled" in accordance with the Supreme Court in *Minister for Justice, Equality & Law Reform v Tobin* [2008] 4 I.R. 42 as importing more than the word "left" and as connoting an escape from justice.

In *Minister for Justice, Equality & Law Reform v Sliczynski* [2008] IESC 73. Macken J stated:

> "All of the factors germane to whether a person can be said to have fled must be taken into account. That includes the motivation of the person sought to be returned to the requesting Member State, which is almost inevitably likely to be a subjective motivation. So also the court must take into account other material factors, such as whether the sentence was suspended, and where the suspension of the sentence was subject to terms, whether those terms were known to the convicted person and whether those terms were complied with. It is telling to recall that the appellant admits he was convicted and sentenced on the first three charges in his presence, and has not challenged the content of the letters exhibited in Mr. Doyle's affidavit. He must therefore be understood to have known and appreciated the significance of the terms attaching to the suspension of those sentences.
>
> The court then must determine whether, objectively speaking, bearing in mind all of these factors, it can be reasonably concluded that the appellant "fled" within the meaning of the subjection. If it were the case that the subjective motivation, as averred to on affidavit, had to be accepted as being conclusive of the question whether a person fled within the meaning of the section, it seems to me that this would always or almost always "trump" any information or material factor presented to the Court and upon which it could be objectively found that a person had fled the requesting state. In the present case, it was a term of the suspension – not denied by the appellant – that he would reside at a particular place, would notify the probation officers or responsible authority of his whereabouts and, in particular, would notify it of any intention to leave Poland. It is axiomatic that if the terms and conditions of a suspended sentence are not met, there is a likelihood of the suspensions being lifted and the sentences having to be served."

Ms Cathleen Noctor B.L., representing the applicant, points to the totality of the information contained in the warrant and the additional information provided and says there is ample evidence of flight. She relies upon the Supreme Court judgments in Sliczynski, and in particular the passages just quoted from the judgment of Macken J in that case, as well as upon the judgment of Macken J in the Supreme Court appeal in *Minister for Justice, Equality & Law Reform v Slonski* [2010] IESC 19. She has argued that the additional information provided in respect of both of the warrants presently before this Court contains full details of how, in respect of the offences of which the respondent has been convicted, the relevant sentences came to be suspended, the conditions upon which they were suspended, and how in each instance they came to be re-activated. Ms Noctor has argued that it clearly to be inferred that he left Poland knowing he was in default and of the likely consequences of his default, and that he did so to evade justice. Moreover, she attaches much significance to the letter of the 6th of February 2007 which relates to the offence for which he is wanted for prosecution on foot of the first warrant in time. She contends that in addition to acknowledging his guilt and that he must accept the consequences, it also acknowledges that he was aware that he had been required to appear at the Court hearing that occurred in Poland just days previously on the 31st of January 2007 which he had failed to attend, and, although flight does not require to be established with respect to the prosecution offence, that it is clearly to be inferred that he also made a conscious decision to flee Poland to avoid being tried for that offence.

In reply Ms Katherine McGillicuddy B.L., representing the respondent, contends that the question of fleeing really revolves around an attempt to evade justice and that objectively speaking there is no evidence in this case that the respondent fled Poland. She seeks to distinguish the present respondent's case from position of the respondent in the *Sliczynski*. She points out that in the present case the respondent did contact the District Court in Klodzko, which is the Court that was concerned with all of the cases in respect of which the respondent is wanted, by means of his letter dated the 6th of February, 2007. While the respondent did ask the Court to convict him in his absence of the matter in respect of which he had failed to turn up for his trial, counsel submitted that the Court should focus on the fact that the letter does provide his correspondence address in Ireland and the further fact that it asserts that he left Poland because of the job situation in Klodzko. Counsel urges that the fact that he designated a new address is evidence of a clear attempt on the part of the respondent to engage with process and to co-operate with the Court. She emphasises that the applicant does not dispute that this letter was sent and received, and she submits that it demonstrates her client's bona fides and is evidence that he has not attempted, and is not attempting, to evade justice.

The Court has carefully considered the arguments on both sides and has concluded that there is strong evidence that his true motivation in leaving Poland was to seek to evade justice, notwithstanding the assertions in his affidavit as to what his subjective

motivation was. He knew that his trial in the prosecution matter was pending, that he was required to turn up for it, and the date of the trial. Yet he left Poland and made no contact with the relevant authorities until after the trial date had passed. It is clearly to be inferred that he did so to evade justice.

Further, in respect of the conviction matters he was present for the suspension of those sentences, was fully aware of the conditions on which they were suspended, did not comply with the conditions and was fully aware of the consequences of his non compliance. It is clearly to be inferred that he left Poland knowing he was in default and of the likely consequences of his default. It is again clearly to be inferred that he did so to evade justice.

Accordingly the Court is satisfied that the respondent did, in each instance, flee Poland and that the requirements of s. 10(d) are satisfied.

The s. 37 objection – Polish prison conditions
S.37(1) of the 2003 Act provides (*inter alia*) that:

"A person shall not be surrendered under this Act if—

(a) his or her surrender would be incompatible with the State's obligations under—

(i) the Convention, or

(ii) the Protocols to the Convention,

(b) his or her surrender would constitute a contravention of any provision of the Constitution (other than for the reason that the offence specified in the European arrest warrant is an offence to which section 38(1)(b) applies),

(c) there are reasonable grounds for believing that—

(i) .....

(ii) .....

(iii) were the person to be surrendered to the issuing state—

(I), ...or

(II) he or she would be tortured or subjected to other inhuman or degrading treatment."

Moreover, s. 37(2) provides (*inter alia*) that:

"In this section—

"Convention" means the Convention for the Protection of Human Rights and Fundamental Freedoms done at Rome on the 4th day of November, 1950, as amended by Protocol No. 11 done at Strasbourg on the 11th day of May, 1994"

In this Court's recent judgment in *Minister for Justice, Equality & Law Reform v Mazurek* (unreported, High Court, Edwards J, 13th May 2011) I stated:

"In my judgment in *Minister for Justice, Equality & Law Reform v Sawczuk* [2011] IEHC 41 I reviewed in some detail the law relating to objections under s. 37 based upon an alleged real risk of ill-treatment contrary to Article 3 of the Convention. I do not propose to repeat that exercise. It is sufficient to state that the following principles can be distilled from the authorities:

- "The normal presumption is" (per Fennelly J in *Minister for Justice, Equality and Law Reform v Rettinger* [2010] IESC 45) "the courts of the executing member state, when deciding whether to make an order for surrender must proceed on the assumption that the courts of the issuing member state will, as is required by Article 6.1 of the Treaty on European Union, "respect … human rights and fundamental freedoms"." (per Fennelly J in *Minister for Justice, Equality and Law Reform v Stapleton* [2008] 1 I.R. 669);

- However, "by virtue of the absolute nature of the obligation imposed by Article 3 of the European Convention on Human Rights and Fundamental Freedoms, which provides that *"No one shall be subjected to torture or to inhuman or degrading treatment or punishment",* the objectives of the system of surrender pursuant to the Council Framework Decision on the European Arrest Warrant cannot be invoked to defeat an established real risk of ill-treatment contrary to Article 3." (per Fennelly J in *Rettinger*);

- The two foregoing principles are readily reconcilable and they do not imply that "there is any underlying conflict between the Convention and the Framework Decision." (per Fennelly J in *Rettinger*);

- The subject matter of the court's enquiry "is the level of danger to which the person is exposed." (per Fennelly J in *Rettinger*);

- "it is not necessary to prove that the person will probably suffer inhuman or degrading treatment. It is enough to establish that there is a 'real risk'" (per Fennelly J in *Rettinger*) "in a rigorous examination." (per Denham J in *Rettinger*). However, the mere possibility of ill treatment is not sufficient to establish an applicant's case. (per Denham J in *Rettinger*);

- A court should consider all the material before it, and if necessary material obtained of its own motion. (per Denham J in *Rettinger*);

> - Although a respondent bears no legal burden of proof as such a respondent nonetheless bears an evidential burden of adducing cogent "evidence capable of proving that there are substantial grounds for believing that if he (or she) were returned to the requesting country he, or she, would be exposed to a real risk of being subjected to treatment contrary to Article 3 of the ECHR." (per Denham J in *Rettinger*);
>
> - It is open to a requesting State to dispel any doubts by evidence. This does not mean that the burden has shifted. Thus, if there is information from an applicant as to conditions in the prisons of a requesting State with no replying information, a court may have sufficient evidence to find that there are substantial grounds for believing that if the applicant were returned to the requesting state he would be exposed to a real risk of being subjected to treatment contrary to Article 3 of the ECHR. On the other hand, the requesting State may present evidence which would, or would not, dispel the view of the court. (per Denham J in *Rettinger*);
>
> - The court should examine the foreseeable consequences of sending a person to the requesting State. (per Denham J in *Rettinger*). In other words the Court must be forward looking in its approach;
>
> - The court may attach importance to reports of independent international human rights organisations, such as Amnesty International, and to governmental sources, such as the U.S. State Department."

The first question for the Court is whether the respondent has, in this particular case, placed sufficiently cogent evidence before the Court to place it on its enquiry as to whether or not there are substantial grounds for believing that if the applicant were returned to the requesting state he would be exposed to a real risk of being subjected to treatment contrary to Article 3 of the Convention, notwithstanding that the normal assumption on which the Court would proceed, were it not for such evidence, would be that the issuing member state will respect human rights and fundamental freedoms, as is required by Article 6.1 of the Treaty on European Union .

It is clear from the respondent's affidavit that he has no personal experience of Polish prisons. His concerns, such as they are, are seemingly based on anecdotal and hearsay accounts of unidentified persons, as well as on the quotations of the US State Department, *2008 Human Rights Report for Poland*, dated 25th of February 2009 set out in his affidavit. The Court must be forward looking in its assessment, and, as Denham J also said in *Minister for Justice, Equality & Law Reform v Rettinger* [2010] IESC 45:

> "The relevant time to consider the conditions in the requesting state is at the time of the hearing in the High Court."

It seems to this Court that the respondent has not put forward any cogent evidence tending to suggest that there is an on-going problem with respect to Polish prison conditions at the present time. He offers no direct evidence at all, neither evidence based on his own personal experience, nor the testimony of any third party based upon that third party's personal experience. The high water mark of what he puts forward is the US State Department, *2008 Human Rights Report for Poland* which is, at this stage, two years old and which speaks of the conditions encountered in some Polish prisons in 2008. We are now in 2011 and the report is ostensibly out of date. It records, for example, the occupancy of Polish prisons, as of 31 July 2008, as being 84,960 and states that although the total capacity had increased compared to the previous year, it remained unchanged at 117% of capacity. However, the letter of the 17th of December 2010 records occupancy as of the 10th of December 2010 as being down to 97.3% of capacity. Accordingly, in the absence of cogent evidence suggesting the contrary, the Court is entitled to proceed on the assumption that the Polish state will respect the respondent's human rights and fundamental freedoms. The Court is certainly not required in the circumstances of this case to look behind the information provided by the applicant.

What then is the information provided by the applicant? It consists first and foremost of the letter of the 17th of December, 2010.

In *Minister for Justice, Equality & Law Reform v Sawczuk* [2011] IEHC 41 this Court, referring (*inter alia*) to the letter of the 17th of December, 2010, expressed the view that:

> "The Court has been impressed by the level of detail supplied, by the references to the data sources unpinning the claims made, by the fact that the relevant data is in the public domain and may be accessed via the internet, and by the up to date nature of the information in question, and in the circumstances has no hesitation in attaching considerable weight to it."

Since then the Court has rendered its judgment in *Mazurek* (unreported, High Court, Edwards J, 13th May 2011), a case in which the Court of its own motion, and in response to criticisms by the respondent concerning difficulties in interpreting the tabulated data available on the internet site to which the letter of the 17th of December 2010 refers (i.e., the National Portal of the Polish Prison Service), and which the letter reader is invited to consult, sought additional information from the issuing judicial authority concerning the meaning of certain headings, and how to decode various abbreviations that are routinely used, within the data table exhibited on the said internet site. That additional information was provided in a letter of the 11th of April 2011 from the issuing judicial authority in the *Mazurek* case and is reproduced within this Court's judgment in *Mazurek*. It provides translation of relevant headings, and decodes the various abbreviations that are routinely used.

As has been stated the Court must be forward looking and have regard to prison conditions in the requesting state as of the date of the hearing. The most up to date information is that contained in the letter of the 17th December, 2010 which must be read in conjunction with the most up to date data available from the website given in the letter, namely that of the National Portal of the Polish Prison Service, interpreted in accordance with the further additional information now available as a result of this Court's s. 20(1) request in *Mazurek*. In this particular case, the most up to date data available (as of the date of this judgment) was data updated to the 13th of May 2011 which shows prison occupancy in Poland nationally to be at 98.7% of capacity, and specifically in four of the five prisons/detention centres in Klodzko where the respondent is from, to range between 90.2% and 102.2% of capacity. (The sole exception to the general picture in the Klodzko area relates to one semi-open type prison for recidivists, which is at 129.1 % of capacity, a figure which does not give rise to major concern in the Court's view because of the semi-open nature of the facility). In the Court's view these figures come within what must be considered as an acceptable margin of appreciation, and it considers that any prison institution whose occupancy figures are generally of the order indicated, or come within the range noted (ignoring the aforementioned exception), could not be regarded as being so overcrowded as to give rise to a "real risk" of living conditions amounting to inhuman or degrading treatment.

There are, of course, other aspects to the respondent's concerns apart from overcrowding. The contents of the letter of the 17th of December 2011, which have not been contradicted, provides the Court with adequate reassurance concerning the size of residential cells, their equipment with appropriate furnishings, issues such as the provision of a separate place for prisoners to sleep in, the provision of adequate hygiene conditions, supply of air and appropriate seasonal temperature, and adequate lighting for work and

reading.

The Court is also reassured by the information, which has not been contradicted, that as of the 17th of December 2010 at least, the dietary needs of prisoners in Polish prisons are regulated concerning nutritional requirements, calorific value, nutritional elements, vegetable provisions etc. The information is that a prisoner gets three meals a day and beverages, including at least one hot meal per day, taking into account a prisoner's age, employment, religious and cultural requirements. The Court is also told that dietary requirements of prisoners with health problems are met following doctor's prescriptions.

While there is no specific reference in the letter of the 17th of December to medical treatment and facilities, other than the oblique reference to doctor's prescriptions, neither has the respondent put forward any cogent evidence concerning a current problem in that regard. The Court accepts that he has depression and asthma, and that he is under treatment for both of these conditions, but there is no evidence to suggest that continuing treatment for these quite common medical conditions would be unavailable to the respondent in the event that he is surrendered.

Finally, as the Court stated in *Mazurek*:

> "Perhaps the greatest reassurance of all stems from the information that the European Convention on Human Rights is a directly binding law in Poland, which means that all governmental institutions of Poland, including the Central Board of Prison Service and Courts, are obliged to act in accordance with all of its provisions, including Article 3, and that any person who feels that their rights have been violated, is entitled to seek legal remedies available under Polish law. The fact that the *Orchowski* case was brought, and was ultimately successful before the ECHR (which requires previous exhaustion of domestic remedies) demonstrates that aggrieved persons can invoke their Convention rights, both before the Polish Courts and the ECHR, and ultimately secure vindication of them."

In so far as the s.37 objection is purportedly based upon a suggestion that the respondent's surrender would constitute a contravention of a provision of the Constitution, the respondent has not pleaded, and counsel for the respondent has not identified, any specific provision of the Constitution that the surrender might contravene.

Accordingly, in all the circumstances of this case the Court is not satisfied that there are substantial grounds for believing that if the respondent were returned to the requesting state he would be exposed to a real risk of being subjected to inhuman or degrading treatment contrary to Article 3 of the Convention, or that his surrender would constitute a contravention of a provision of the Constitution . In the circumstances the court is not disposed to uphold the objections in each case based upon s. 37 of the 2003 Act.

The correspondence issues and s.11 issues

Re: The European Arrest Warrant of 15th May, 2008

It is pleaded in the respondent's points of objection that a corresponding offence under the laws of the State for the offence relating to the lawnmower (reference: II K 822/06) on the European Arrest Warrant is not established. As previously stated the applicant invites the Court to find correspondence with the offence of theft contrary to s. 4 of the Criminal Justice (Theft & Fraud Offences) Act, 2001 (hereinafter "the 2001 Act").

Ss.4(1) & 4(2), respectively, of the 2001 Act state:

> "(1) Subject to section 5, a person is guilty of theft if he or she dishonestly appropriates property without the consent of its owner and with the intention of depriving its owner of it.
>
> (2) For the purposes of this section a person does not appropriate property without the consent of its owner if—
>
> (a) the person believes that he or she has the owner's consent, or would have the owner's consent if the owner knew of the appropriation of the property and the circumstances in which it was appropriated, or
>
> (b) (except where the property came to the person as trustee or personal representative) he or she appropriates the property in the belief that the owner cannot be discovered by taking reasonable steps,
>
> but consent obtained by deception or intimidation is not consent for those purposes."

For completeness, ss.5 of s. 4 of the 2001 Act states:

> "appropriates" in relation to property means usurps or adversely interferes with the proprietary rights of the owner of the property;
>
> "depriving" means temporarily or permanently depriving."

Counsel for the respondent has argued in the course of her oral submissions to the Court that the facts as disclosed in the warrant and the additional information are insufficient to enable this Court to find correspondence with s. 4 theft. In particular she points to the use of the word "took" in body of the warrant and submits that that is not sufficient in itself to establish dishonest appropriation. She has submitted that the facts as disclosed in the warrant and the additional information do not preclude that the respondent borrowed the lawnmower. It is contended that the borrowing of a lawnmower is not an uncommon thing, and it is submitted that the respondent may come within s. 4(2) of the Act. In that regard, Counsel has submitted that the Court must not presume things or read any facts or elements into the warrant that are not there.

In support of her general argument Counsel has drawn the Court's attention to the judgment of Peart J in *Minister for Justice, Equality & Law Reform v Fil* [2009] IEHC 120. In that case, at p.4 of the judgment, Peart J summarized the respondent's argument on the correspondence issue as follows:

> "John Fitzgerald BL for the respondent submits that there are four elements required to be present for this offence, namely dishonest intention, appropriation as defined by s. 4 (5) of the Act, the absence of the owner's consent, and depriving the owner of the property either temporarily or permanently. He concedes that the use of the word "steal" in

> the description of the offence meets the concept of appropriation for the offence but he submits that the facts as disclosed are insufficient to establish dishonest intent, the absence of consent, or an intention to deprive the owner of the diesel oil either temporarily or permanently."

Borrowing Mr Fitzgerald's arguments for the purposes of this case, Ms McGillicuddy B.L., says there are four elements to be satisfied with respect to the offence of theft, namely, (1) dishonesty, (2) appropriation, (3) absence of consent, and (4) intention to deprive the owner of the property either temporarily or permanently. She submits that in this case we cannot say from the facts disclosed that the respondent had no claim of right made in good faith and the facts do not show conclusively that the respondent intended to deprive the owner of the property. The Court is asked not to read words into the warrant that are simply not there and, in support of that, Counsel relies upon Fennelly J's judgment in *Attorney General v Dyer* [2004] 1 I.R 40. The Court was also referred to *Minister for Justice, Equality & Law Reform v Dunkova* [2008] IEHC 156 where Mr Justice Peart refused to order surrender because the warrant used the word "took" which the Court considered to be a neutral word which could not imply lack of consent.

It was further urged that the State has not discounted possibility that the respondent comes within the second clause of s.4(2)(a) of the 2001 Act, i.e, that the respondent may have believed that he would have the owner's consent if the owner knew of the appropriation of the property and the circumstances in which it was appropriated.

The Court has carefully considered the arguments advanced on behalf of the respondent but is nonetheless satisfied that the facts as disclosed in the warrant and additional information are sufficient to enable this Court to find correspondence in this jurisdiction with the offence of theft contrary to s. 4 of the 2001 Act. The warrant makes clear that the lawnmower was taken with "an intent of appropriation" and that there was a taking "to the detriment of" the named persons. The additional information clarifies what was meant by the reference to "appropriation" in the warrant and that what is in fact being alleged is that the lawnmower was "stolen". In the court's view, having regard to the totality of the information provided, and the judgment of Mr Justice Geoghegan on the Supreme Court appeal in *Minister for Justice, Equality & Law Reform v Sas* [2010] IESC 16, the Court is entitled to give the word "stolen" its popular meaning. Stealing as popularly understood involves taking property with dishonest intent, without the consent of the owner and with the intent of depriving the owner of it. Accordingly, the requirements of s.4(1) are met. This, in fact, was the very approach taken by Peart J in the *Fil* case upon which the respondent relies. What Counsel for the respondent failed to allude to was that Peart J in *Fil* noted that the warrant did not simply allege a taking or misappropriation but rather it was specifically alleged that the respondent had stolen. In those circumstances the Court was entitled to infer a dishonest intent to permanently deprive the owner of the goods. In the present case the additional information makes it clear that, as was the case in *Fil*, it is being alleged that the respondent had stolen.

As regards the s.4(2)(a) argument the Court is not concerned with whether on the facts alleged the case could be proven beyond reasonable doubt. That is a matter for the Court of trial. If the matter was being tried here the respondent might well be able to run a "failure to prove an essential component beyond reasonable doubt" defence based upon s.4(2)(a) and might perhaps be successful but it would not prevent the charge being brought. It is not a requirement under s.16 of the 2003 Act that the Court should be satisfied that the respondent should have no possible defence to the charge. Rather, in accordance with the judgment of Fennelly J in the Dyer case the Court is concerned with whether the facts or conduct alleged would amount in this State to a crime. Proceeding on that basis, the Court is satisfied as to correspondence in this instance.

It is also pleaded in the respondent's points of objection that the offence outlined in part E1, p. 7, para V of the European Arrest Warrant relating to the appropriation of an identity card is not capable of being marked as a "ticked" offence under the headings counterfeiting or forgery as appears in the warrant. The Court was referred by counsel for the respondent to an *obiter dictum* of Peart J in the High Court decision in *Minister for Justice, Equality & Law Reform v Butenas* [2006] IEHC 378 which is advanced in support of the proposition that there is a little room for looking behind the ticking of a box where there is evidence of a manifest error or a suggestion of bad faith on the part of the requesting authority. At page 2 of his judgment in *Butenas* Peart J stated:

> "The Court is precluded from looking at that question further, and there is absolutely no question in this case but that the facts set forth in the warrant justify the ticking of that box. There can be no question of it having been ticked through some manifest error, and neither is there any room for any suggestion of bad faith on the part of the requesting authority."

It is suggested by Counsel for the respondent that there is evidence of manifest error with respect to the ticking of the box relating to "counterfeiting of currency or forgery of administrative documents including trafficking therein" in relation to the offence consisting of the appropriation of an identity card. It is also suggested that insufficient particulars with respect to the offence is supplied, and in particular that they have failed to specify a date for the offence.

In response to this Ms Noctor, B.L., representing the applicant, relies upon *Minister for Justice, Equality & Law Reform v Ferenca* [2008] 4 I.R. 480 wherein it was held that article 2.2 of the Framework Decision did not refer to offences in any conceptual way but simply listed a number of offences by way of general name or label and it was exclusively for the issuing member state to determine what offences as defined by its law were offences to which the paragraph applied.

The Court agrees with Ms Noctor that the circumstances of this case come four square within the principle enuciated in *Ferenca* and that the Court is not entitled to look behind the ticking of the box. It is not necessary in this case for the Court to decide definitively whether or not the Court is precluded from ever looking behind the ticking of a box, as it is satisfied that no circumstances such as those instanced by Peart J in *Butenas* as possibly allowing for it, exist in the present case. The Court is satisfied that the type of manifest error being spoken about by Peart J was not the circumstance which exists in this case in which it is not immediately obvious how the appropriation of an identity card might come under the heading "counterfeiting of currency or forgery of administrative documents including trafficking therein." Moreover I am satisfied that there is no substance in the insufficient particulars point, and that sufficient particulars are in fact given. I am satisfied that the approach which this Court must adopt to the ticking of the box in this case is that set out in following paragraphs from the judgment of the Chief Justice in *Ferenca* [at pp 495/496 of the report]:

> "[58] Article 2.2 does it not itself specify a form or course of conduct from which it can be deduced that a particular offence is one to which it applies. The paragraph does not refer to offences in any conceptual way but simply lists a number of offences by way of general name or label and it is exclusively for the issuing member state to determine what offences as defined by its law are offences to which article 2.2 are applicable. This is what Ireland has done in s. 32 of the Act. The section is quoted later in the judgment. In *Advocaten voor de Wereld VZW v. Leden van de Ministerraad (Case C-303/05)* [2007] E.C.R. I-3633 it was argued that article 2.2 of the Framework Decision breached a fundamental principle of the community law, namely legal certainty in the application of community law on the grounds that the list of offences contained in article 2.2 was so vague and imprecise. It was also claimed that "the offences set out in that list are not accompanied by their legal definition but constitute very vaguely defined categories of undesirable conduct".

[59] At para. 50 of the judgment of the court in that case it acknowledged that the principle of certainty or of "the legality of criminal offences and penalties" implies "that legislation must define clearly offences and the penalties which they attract".

[60] In rejecting the allegation of breach of such a principle the court referred (at para. 51) to article 2.2 of the Framework Decision, according to which the offences listed in that provision give rise to surrender if they are punishable in the issuing member state "as they are defined by the law of the issuing member state". It then went on to make the statement, cited earlier in this judgment, that "the Framework Decision does not seek to harmonise the criminal offences in question in respect of their constituent elements or of the penalties which they attract".

[61] The court then concluded in the ensuing paragraph:- "Accordingly, while article 2.2. of the Framework Decision dispenses with verification of double criminality for the categories of offences mentioned therein, *the definition of those offences and of the penalties applicable continue to be matters determined by the law of the issuing member state which* …¦ must respect fundamental rights and fundamental legal principles as enshrined in Article 6 EU, and, consequently, the principle of the legality of criminal offences and penalties" [emphasis added].

[62] In short the principle of legal certainty or "of the legality of criminal offences" is observed because the offences to which article 2.2 applies are not defined by the vague terms of article 2.2 itself but by the national law of the issuing state and only by that means. Thus it is not open to a court to ascertain whether an offence in a warrant is an offence to which article 2.2 applies by looking at some conceptual element by reference to article 2.2 alone."

Re: The European Arrest Warrant of 11th May, 2009

It is again pleaded in the respondent's points of objection that a corresponding offence under the laws of the State for first offence on this European Arrest Warrant is not established. As previously stated the applicant invites the Court to find correspondence with the offence of theft contrary to s. 4 of the Criminal Justice (Theft & Fraud Offences) Act, 2001 (hereinafter "the 2001 Act").

The respondent has advanced what is essentially the same argument as was advanced in respect of the first offence on the European Arrest Warrant of the 15th of May 2008. The Court's attention is drawn to the fact that the word "stole" is used in particulars set out in the warrant. It was submitted that this is not sufficient to establish the ingredients of an offence under s.4 of the 2001 Act. In that regard it was reiterated that the Court must be satisfied as to (1) dishonesty, (2) appropriation, (3) absence of consent, and (4) intention to deprive the owner of the property either temporarily or permanently. It has been submitted that the facts before the Court do not enable the Court to be satisfied as to all elements.

The Court is satisfied that it must reject the argument advanced, and it does so, again, by giving the word "stole" its popular meaning in accordance with the approach commended in the judgment of Mr Justice Geoghegan in the Sas case. In this court's view correspondence is clearly demonstrated with the offence of theft contrary to s. 4 of the 2001 Act.

Turning then to the second offence on this European Arrest Warrant. As previously stated the applicant invites the Court to find correspondence with the offence of intimidation with intent to obstruct a police investigation or obstruct the course of justice, contrary to s. 41(1) of the Criminal Justice Act, 1999; alternatively the offence of threatening to damage property, contrary to s. 3 of the Criminal Damage Act, 1991.

Before considering the respondent's submissions it may be useful to set out the relevant statutory provisions.

S. 41(1) of the Criminal Justice Act, 1999 (hereinafter "the 1999 Act") provides:

"41.—(1) Without prejudice to any provision made by any other enactment or rule of law, a person—

(a) who harms or threatens, menaces or in any other way intimidates or puts in fear another person who is assisting in the investigation by the Garda Síochána of an offence or is a witness or potential witness or a juror or potential juror in proceedings for an offence, or a member of his or her family,

(b) with the intention thereby of causing the investigation or the course of justice to be obstructed, perverted or interfered with,

shall be guilty of an offence."

S. 3 of the Criminal Damage Act, 1991 (hereinafter called "the 1991 Act") provides (to the extent relevant) :

"3.—A person who without lawful excuse makes to another a threat, intending that that other would fear it would be carried out—

(a) to damage any property belonging to that other or a third person, or

(b) to damage his own property in a way which he knows is likely to endanger the life of that other or a third person,

shall be guilty of an offence …."

Counsel for the respondent submits that in both offences, with which it is contended by the applicant correspondence could be found, the element of intention is very important. She submits that this Court cannot, on the information supplied, be satisfied that the intention of the perpetrator as outlined in the warrant would match the requisite intention in Irish law.

In respect of the s. 41 offence counsel has submitted that the requisite intention is that the investigation or the course of justice is to be obstructed, perverted or interfered with, and the facts set out in the warrant do not disclose that intention.

This Court, with all due respect to Counsel's submission, disagrees. The facts as stated in the warrant clearly allege that the threats in question were proffered "in order to influence her and make her withdraw the notification of offence regarding the theft of money that was to her detriment." It could not be clearer in the court's view that what was done was done with the intent of causing the investigation or the course of justice to be obstructed, perverted or interfered with. The Court therefore has no hesitation in finding correspondence with the offence of intimidation with intent to obstruct a police investigation or obstruct the course of justice, contrary to s. 41(1) of the 1999 Act.

In respect of the s. 3 offence counsel has submitted that the requisite intention is that the "other would fear it to be carried out". Counsel submitted that the facts set out in the warrant do not disclose that intention. In particular she urges upon the Court that the applicant has not foreclosed on the possibility that the words constituting the alleged threat were words uttered in anger or in jest. It was submitted that if the words might have been uttered in anger or in jest the requisite intention cannot be established, and the Court's attention was drawn to the judgment of the Court of Criminal Appeal in *The People (DPP) v Wayne Dundon* [2008] IECCA 14 in support of this argument.

Once again, the Court disagrees with, and rejects, the respondent's submission. As previously noted it is specifically alleged that the threats in question were proffered "in order to influence her and make her withdraw the notification of offence regarding the theft of money that was to her detriment." Words spoken in anger or in jest could not be said to have been uttered in order to influence the victim and make her do a specific thing. Yet that is specifically alleged in the warrant. It is clear that what is alleged is that the perpetrator in proffering the threat intended that the "other would fear it to be carried out". Accordingly the Court has no hesitation in also finding correspondence with the offence of threatening to damage property, contrary to s. 3 of the 1991 Act.

Finally, the Court has also considered the objections based upon alleged non compliance with the various requirements of s. 11(1A) of the 2003 Act and is satisfied, having regard to the totality of the information provided, both in the warrant itself and in the additional information furnished by the issuing judicial authority, that these are not made out.

Conclusion
The Court is disposed to make s. 16 Orders and to surrender the respondent to the issuing state on foot of both European Arrest Warrants.