

THE HIGH COURT

[2013/162 EXT.]

BETWEEN

THE MINISTER FOR JUSTICE AND EQUALITY

APPLICANT

AND

PIOTR ANTKEWICZ

RESPONDENT

RULING/JUDGMENT of Ms. Justice Murphy delivered the 19th day of December, 2014

Introduction

1. The respondent is a citizen of Poland and he is the subject of a European Arrest Warrant issued by the Republic of Poland on the 14th March 2013. The warrant was endorsed by the High Court for execution on 2nd July 2013. The respondent was arrested pursuant to the warrant on 20th November 2013 by Garda Niamh Coates and was brought before the High Court on the same date pursuant to s. 13 of the European Arrest Warrant Act 2003.

2. In the course of the section 13 hearing a notional date was fixed for the purposes of s. 16 of the Act of 2003 and the respondent was remanded on bail to the date fixed. Thereafter the matter was adjourned from time to time ultimately coming before the Court for the purposes of a surrender hearing on 3rd July, 2014 which continued on 6th October, 2014 and the 3rd November, 2014.

3. The respondent does not consent to his surrender to the Republic of Poland. Accordingly this Court is now being asked by the applicant to make an order pursuant to s. 16 of the Act of 2003 directing the respondent be surrendered to such person as is duly authorised by the insuring state to receive him.

4. Points of Objection

Points of objection were filed on the 18th February 2014. Two of the grounds of objections relate to s. 11 of the Act of 2003. Firstly, the respondent objects that the warrant fails to specify the individual actions and/or the precise degree of involvement of the respondent in the offences outlined in the warrant and each or other of them as required by section 11(1A)(f) of the Act of 2003 and the respondent further objects that the warrant fails to disclose that a warrant for the respondent's arrest in the issuing state has been issued in respect of the offences and each or other of them as required by s. 11(1A)(e) in circumstances where the warrant fails to show any or any adequate connection between the judicial decision of the regional court in Legnica of 15th October 2009 and the offences outlined in the warrant. The respondent objects that the offences and each or other of them described in the warrant do not correspond to offences under the laws of the state and that by reason thereby surrender is prohibited by s. 5 and/or s. 38 of the Act of 2003. The respondent further objects that his surrender is prohibited pursuant to s. 37(1)(a) and or s. 37(1)(b) of the Act of 2003 in that his surrender would be a disproportionate interference with his Article 8 rights under the European Convention on Human Rights having regard to his personal and familial situation, his ill health and the inordinate and inexcusable delay in the issuing, transmission and execution of the European Arrest Warrant. Finally the respondent objects that his surrender is prohibited pursuant to section 21A(1) of the Act of 2003 on the grounds that a decision has not been made by the issuing state to charge the respondent with and try him for the offences outlined in the warrant and each or other of them.

5. The evidence

The European warrant in this case is a prosecution warrant which seeks the surrender of the respondent in respect of 3 offences the particulars of which are stated at paragraph E to be;

(1) In a period from the 2nd January 2005 to 4th September 2006 in Legnica, acting with planned intent, running a business under the name of COL-MET and performing in fact activities connected with scrap metal buying up within the scope of business of the RAFI company of Marcin Antkiewicz, he guided the execution of an unlawful act by Marek Sękowski and Paweł Kowalczyk in such a way that; he ordered Marek Sękowski, being a person entitled to issue documents in form of records of scrap metal purchase from natural persons, to attest an untruth via filling in the said records with untrue details as to quantities and kinds of bought up scrap metals and purchase prices which were of legal meaning for the determination of the scope of business, and which documents are enumerated in pages 1226-1232.

He ordered Paweł Kowalczyk, being a person entitled to issue documents in form of records of scrap metal purchase from natural persons, to attest an untruth via filling in the following records with untrue details as to quantities and kinds of bought up scrap metals and purchase prices which were of legal meaning for the determination of the scope of business, and he ordered him (Paweł Kowalczyk) to forge signatures of persons described as scrap metal sellers, and which documents are enumerated in pages 1232-1238.

(2) In a period from 25th February 2005 to 21st December 2006 in Legnica acting as the owner of the Skup Surowców Wtórnych COL-MET Piotr Antkiewicz company [scrap metals buying up company], and fulfilling criteria of continuous offence, i.e. in short intervals acting to satisfy the same intent, he provided untrue details in his VAT-7 tax returns covering the period from January 2005 to November 2006 submitted to the Revenue Office in Legnica, in such a way that he indicated the tax assessed in the said tax returns in a total amount of PLN 1,165,811.00 resulting from invoices documenting transactions which in fact had not occurred, and with persons who had not run any real businesses, and he indicated the tax due in a total amount of PLN 1,296,913.00 resulting from invoices which did not reflect in a real manner the transactions of scrap metal buying up, in result of which he exposed the reduction of the tax amounting to PLN 1,165,811.00 (page 1248).

(3) In a period from 26th January 2007 to 25th April 2007 in Legnica, fulfilling criteria of continuous offence, in order to

suppress running a business in the scope of scrap metal and wooden palette buying up he used a name of another company i.e. KONGLOMERAT GPP Witold Szymczak, ordering to issue 57 sales invoices specified in details in pages 1248-1249, in which he was not showed as a party of transactions though he in fact participated in scrap metal and wooden palette buying up, in result of which he exposed the reduction of the tax amounting to PLN 136,690.48 due to non payment of this tax liability by Witold Szymczak.

6. The nature and legal classification of the offences are stated to be as follows; in respect of offence number 1 it is stated to be an offence against credibility of documents contrary to Article 270§1 and Article 271§1 of the penal code. The second offence is stated to be a tax offence contrary to Article 56§1 of the tax penal code and the third offence is similarly described as being contrary to Article 55§1 of the tax penal code, a tax offence. Reliance has not been placed on any of the tick box offences and accordingly correspondence is required to be established.

7. At paragraph B of the warrant, the decision on which the warrant is based is said to be an enforceable verdict on provisional detention being the *"judicial decision of regional court in Legnica of 15th October 2009 in case file number VI Ds. 3/10 (former No. V Ds. 26/06) on application of preventive measure in form on pre-trial detention (emphasis added) for a period of 14 days since the day of apprehension (II Kp 769/09)"*, an *"enforceable verdict on application of another measure consisting in deprivation of freedom"* being the *"decision of the Public Prosecutor of Regional Prosecutor's Office in Legnica of 5th November 2009 in case file No. VI Ds. 3/10 (former number No. V Ds. 26/06) on institution of seeking by wanted notice final verdict"*. The file number in which the verdict was made is stated to be VI Ds. 3/10/Sp (former No. V Ds. 26/06).

8. At paragraph C of the warrant the potential sentences for the three offences are set out. Offence number 1 carries a potential sentence of five years deprivation of liberty. Offence 2, being an offence against the tax penal code, carries a potential sentence of five years deprivation of liberty. The third offence, which is another offence contrary to the tax penal code, carries a potential sentence of three years deprivation of liberty. The warrant goes on to specify the effect of the order of the regional court and it is specified to be fourteen days of deprivation of liberty (referring to provisional (pre-trial) detention). At paragraph F of the warrant the time limitation period for prosecution is stated to expire on 25th April 2027. The judicial authority which issued the warrant is identified as the District Court of Legnica III Criminal Department and the judge is named as Bartłomiej Treter.

9. Upon receipt of the warrant and prior to submitting it to the High Court for endorsement the central authority wrote to the judge who issued the warrant on the 8th April 2014 looking for the following information;

(1) In what way did Piotr Antkiewicz order Marek Sekowski and Pawel Kowalczyk to falsify the records?

(2) What control did Piotr Antkiewicz exert over Marek Sekowski and Pawel Kowalczyk?

(3) Were/Are Marek Sekowski and Pawel Kowalczyk implicated in the VAT fraud?

(4) Were/Are Marek Sekowski and Pawel Kowalczyk being prosecuted as co-defendants with Piotr Antkiewicz or are they being prosecuted in any way in connection with the VAT fraud alleged against him?

(5) Please confirm that Piotr Antkiewicz is being sought for trial.

10. In a response dated 15th April 2014 the issuing judicial authority replied in relation to question 1: *"Piotr Antkiewicz ordered orally Marek Sękowski and Pawel Kowalczyk to forge entries"* and in relation to question 2: *"Piotr Antkiewicz exercised control over Marek Sękowski and Pawel Kowalczyk because he performed actual management activities in companies run by the above named men (so called "straw men" [or "shell companies"])"*. In response to question 3 and 4 it was stated: *"Marek Sękowski and Pawel Kowalczyk were participants of the mechanism of tax frauds in respect of the goods and services tax who were attesting an untruth in documents and who were sentenced by a valid and final judgment rendered by the Regional Court in Legnica on 30th April 2009, case file No. II K 116/09"*. The response to question number 5 was: *"Piotr Antkiewicz is not requested to participate in a trial. Within the applicable procedure, it is necessary to perform actions involving his participation, namely to present charges to his (sic) and to question him"*. This response prompted a further letter from the central authority dated 24th April 2014 which stated *inter alia*:

*Please be informed that unless an intention based on the existing evidence to put the person on trial exists the position under Irish law is that surrender will not be possible. Please state if there is **an intention** on the part of the prosecutor to put the (sic) Piotr Antkiewicz on trial and there is enough evidence to do so notwithstanding that the investigation may not be closed as Mr. Antkiewicz will have to be heard if and when he is surrendered before the trial can proceed.*

11. This further letter, which in its second paragraph is not particularly clear, prompted a response dated 6th May 2014 from the issuing judicial authority enclosing a letter from the District Prosecutor's Office in Legnica. That letter states:-

with reference to the letter of the Irish party of 8th April 2014...sent by your court to our Prosecutor's Office and the respective reply provided by our Prosecutor's Office in Legnica on 14th April 2014, as well as with reference to successive enquiries of...24th April, 2014, please be informed that our Prosecutor's Office does uphold fully the grounds for the surrender of Piotr Antkiewicz to the Polish prosecution authorities (case file No. VI Ds. 3/10 conducted by the District Prosecutor's Office in Legnica) under the European arrest warrant issued by the District Court in Legnica on 14th March 2013, case file No. III Kop 40/13. Procedural bases of the European arrest warrant issued in this case have been and are obvious and the very issue of the warrant raised no doubts on the hand of the District Court in Legnica which assessed the evidence gathered in the investigation process in case file No. VI Ds. 3/10. In particular it should be stressed that the Regional Court in Legnica had no doubts as to the substantiation of the fact of committing offences by Piotr Antkiewicz as charged contrary to article 18§1 of the penal code in relation to article 271§1 of the penal code and others, which Court made a judicial decision on 15th October 2009 applying a provisional (pre-trial) arrest in respect of him, case file No. II Kp 769/09. Consequently, following the mentioned above judicial decision, the District Court in Legnica issued the European Arrest Warrant of which questioning by the Irish party is considered beyond reason by me.

Even in translation, one can discern a note of exasperation on the part of the Polish authorities, that what they consider such a clear case for surrender is being questioned by the Irish central authority.

12. On the 7th June 2014, the central authority made a further request of the Polish authorities seeking clarification as to the reason for completion of sections C2 and C3 in what otherwise appeared to be a prosecution warrant. The response of the Polish authorities dated 17th June 2014 states *inter alia*:

*The European arrest warrant in respect of Piotr Antkiewicz was issued for detention of the named and his remand (pre-trial detention) for a period of 14 days since detention and surrender of the named **for conducting penal proceedings against him** (emphasis added). In event when Piotr Antkiewicz has been detained and surrendered to Poland, a public prosecutor shall make a decision within 14 days on possible extension of the pre-trial detention period.*

13. A further letter was sent by the central authority on the 21st June 2014 seeking information on the nature of the offences alleged against the respondent and a reply was sent on the 25th June, stating that offence 1 was an offence against the credibility of documents while offences 2 and 3 were described as fiscal offences.

14. No further correspondence ensued before the warrant was executed by the High Court on 2nd July 2013. An affidavit of the respondent, sworn and filed on 5th March 2014 sets out the factual basis underpinning the respondent's objections to surrender. He avers that he came to Ireland in February 2008 and that his reason for leaving Poland was that he had no money to live. He avers that his son Marcin Antkiewicz and his granddaughter live in Ireland. He states that he worked as a package delivery driver but he no longer works. At paragraph 5 he refers to his state of health. He says: *"I am of ill health. On 21st January 2014 I suffered a heart attack outside Court 21, Courts of Criminal Justice, Parkgate Street, Dublin 8. I say that I was taken to the Mater Misericordiae University Hospital, Eccles Street, Dublin 7. I say that I was admitted to the Mater Hospital on 21st January 2014 as an inpatient of the Cardiology Unit"* and he exhibits a letter from the Mater Hospital confirming the facts. At paragraph 6 of his affidavit he says that while in the Mater Hospital he underwent coronary artery stenting and was discharged on 28th January 2014. He exhibits a letter from his G.P. confirming the fact of a heart attack and the treatment afforded to him and the fact that as of 31st January 2014 he was still in the recovery phase post operation. The respondent avers that in the event of his surrender he will not receive the medical care that he is currently receiving. He avers that he has no medical facilities in Poland sufficient to deal with his undoubted cardiac condition. Furthermore the respondent avers that he has difficulties with his spine as a result of an assault on him on 26th October 2011 in Palmerstown, Dublin 20. He avers that his spinal condition is reviewed by the spinal unit in the Mater Hospital regularly and that he has ongoing physiotherapy with the Health Service. He says that in the event of his surrender he will not be able to stay with his elderly mother and sister who live together in Poland. He avers that having nowhere to stay will make it difficult for him to get bail pending any hearing.

15. At paragraph 11 of his affidavit he avers that he has met with the prosecutor in the case but he does not give a date for that meeting. However, given his averment that he came to Ireland in February 2008 one can reasonably draw the inference that it was prior to that date. He avers that the prosecutor showed him a document which outlined that he is a suspect. He avers that he has not been presented with any charges and it is his belief that he is still a suspect. A supplemental affidavit was filed on 25th July 2014 in which the respondent gave an update in relation to his medical condition, in particular his cardiac difficulties. The respondent exhibited a letter confirming that he is on a cardiac rehabilitation program with the Mater Cardiology Unit which was due to commence in August and last until September 25th.

16. The section 16 hearing commenced on 3rd July 2014 and the Court requested pursuant to s. 20(1) of the European Arrest Warrant Act, 2003 and Article 15.2 of the Framework Decision that the issuing judicial authority be asked to provide the following additional information. The question asked by the Court was *"what is to happen to the respondent if the High Court surrenders him to the Polish authorities? Please set out the process following his surrender."* A reply, dated 9th July 2014, was received from the issuing judicial authority. It states:

with reference to your letter of 3rd July 2014 our District Court in Legnica III Criminal Department informs you kindly that pursuant to the European Arrest Warrant No. III Kop 40/13 issued by the District Court in Legnica on 14th March 2014 (sic) in respect of the suspect, Piotr Antkiewicz, in case of the surrender, as expected by the District Prosecutor's Office in Legnica consistently to the issued EAW, of Piotr Antkiewicz by the Irish party to the Polish party, the named above requested person shall be heard immediately by a public prosecutor of the District Prosecutor's Office in Legnica pertaining to the acts he is suspected of committing. After Piotr Antkiewicz's hearing, an issue of examination and assessment of a possible line of defence of the suspected person shall be considered, and next a respective decision on basis of merits shall be made in respect of Piotr Antkiewicz. Findings made and the evidence gathered as of today in the course of the investigation and case file No. VI Ds. 3/10 indicate that an indictment shall be made against Piotr Antkiewicz including the acts as described in the European Arrest Warrant. Any completion of the investigation conducted against him is not possible without hearing of the suspected person due to obvious reasons. It may happen that a public prosecutor shall quash the preventive measure in form of pre-trial detention imposed on the suspected person, Piotr Antkiewicz, however it cannot be emphasised before the surrender and hearing of Piotr Antkiewicz.

17. The foregoing information was presented to the Court at a resumed hearing on 6th October 2014. However before matters could be concluded the hearing had to be adjourned due to the manifest illness of the respondent. The Court was subsequently informed that he had been taken from the precincts of the Court by ambulance to hospital. The foregoing is the evidence upon which the Court must determine whether Mr. Antkiewicz should be surrendered to the Polish authorities. The Court proposes to deal with each of the points of objection in turn.

18. Correspondence

In relation to offence number 1 on the warrant which is described in the warrant as an offence against credibility of documents under article 270§1 of the penal code and article 271§1 of the penal code, counsel for the applicant submitted that the actions described would constitute an offence in this jurisdiction under s. 6 of the Criminal Justice (Theft and Fraud Offences Act), 2001 or, alternatively, that such actions correspond to the offence of forgery provided for by s. 25 of the same Act. Section 6 of the Criminal Justice (Theft and Fraud Offences Act), 2001 provides:-

A person who dishonestly, with the intention of making a gain for himself or herself or another, or of causing loss to another, by any deception induces another to do or refrain from doing an act is guilty of an offence.

Section 25 of the Criminal Justice (Theft and Fraud Offences Act), 2001 provides:-

A person is guilty of forgery if he or she makes a false instrument with the intention that it shall be used to induce another person to accept it as genuine and, by reason of so accepting it, to do some act or to make some omission, to the prejudice of that person or any other person.

It was conceded that, on the facts described, it is clear that the respondent did not himself fill in the said records with untrue details.

However the applicant contends that having ordered others to do so, this corresponds to joint enterprise or the inchoate offence of conspiracy to commit forgery.

19. On behalf of the respondent it was contended that correspondence with s. 6 would require the establishment of an element of dishonesty and an intention of making a gain for himself or another or causing loss to another. It was further submitted that the use of the word 'by' in s.6(1) renders the offence a results based offence, therefore the applicant must show on the facts outlined in the offence that there has been a loss or a gain. While the Court does not accept that a loss or gain has to be established in order to constitute an offence under s. 6 of the Criminal Justice (Theft and Frauds Offences Act), 2001 the intent to do so is a necessary ingredient. The Court was concerned that on the facts set out in offence number 1 in the warrant, that correspondence was not established either with s. 6 or s. 25 of the Criminal Justice (Theft and Frauds Offences Act), 2001. The description of the offence in the warrant is as follows:-

In a period from 2nd January 2005 to 4th September 2006 in Legnica, acting with planned intent, running a business under the name of COL-MET and performing in fact activities connected with a scrap metal buying up within the scope of business of the RAFI company of Marcin Antkiewicz, he guided the execution of an unlawful act by Marek Sêkowski. and Pawel Kowalczyk in such a way that: he ordered Marek Sêkowski, being a person entitled to issue documents in form of records of scrap metal purchase from natural persons, to attest an untruth via filling in the said records with untrue details as to quantities and kinds of bought up scrap metals and purchase prices which were of legal meaning for the determination of the scope of business, and which documents are enumerated in pages 1226-1232.

He ordered Pawel Kowalczyk, being a person entitled to issue documents in form of records of scrap metal purchase from natural persons, to attest an untruth via filling in the following records with untrue details as to quantities and kinds of bought up scrap metals and purchase prices which were of legal meaning for the determination of the scope of business, and he ordered him, (Pawel Kowalczyk) to forge signatures of persons described as scrap metal sellers, and which documents are enumerated in pages 1232-1238.

20. To paraphrase the description of the offence, the respondent is alleged "with planned intent" i.e. deliberately, to have "guided the execution of an unlawful act", the unlawful act being ordering Marek Sêkowski to fill in required records for determining the scope of a business "with untrue details" as to the quantities, kinds and purchase prices of scrap metals. Further, it is alleged he ordered Pawel Kowalczyk to complete records required for the determination of the scope of business and to fill in records with untrue details as to the quantities and kinds of scrap metals bought, and the purchase prices thereof. In addition, it is alleged he ordered him to forge signatures of persons described as scrap metal sellers.

21. It initially appeared to the Court both from the description of the offence and indeed the name of the offence, which is an offence against credibility of documents, that there is in Poland a legal requirement for the completion of documents for the purpose of determining the scope of a business. The filling of those documents untruthfully is in itself an offence without proof of an intention of making a gain for himself or of causing loss to another. The false entry results in a false impression of the scope of the business. It appears to the Court from the description of the circumstances of the offence that under Polish law the giving of a false impression of the scope of a business is an offence simpliciter. The offence stipulates the documents which were falsified.

22. It appears to the Court that the facts alleged most closely correspond with s. 10 of the Criminal Justice (Theft and Fraud Offences Act), 2001 in this jurisdiction which deals with false accounting and provides:-

(1) A person is guilty of an offence if he or she dishonestly, with the intention of making a gain for himself or herself or another or of causing loss to another-

(a) destroys, defaces, conceals or falsifies any account or any document made or required for any accounting purposes,

(b) fails to make or complete any account or any such document, or

(c) in furnishing information for any purpose produces or makes use of an account, or any such document, which to his or her knowledge is or may be misleading, false or deceptive in a material particular.

23. The Court would readily find correspondence between offence 1 and s. 10 of the Criminal Justice (Theft and Fraud Offences Act), 2001 were it not for the requirement in our law that such falsification be done with the intention of making a gain for himself or herself or another or of causing loss to another. While it is clear that the conduct alleged was unlawful and dishonest, it is not clear from the circumstances described in the particulars of the offence whether the respondent was going to gain by the false accounting or that anyone else was going to lose by the false accounting. In determining this issue, the Court found assistance in the additional information supplied by the issuing authority on the 15th April 2014. It is stated in that correspondence that: "Marek Sêkowski and Pawel Kowalczyk were participants of the mechanism of tax frauds in respect of the goods and services tax who were attesting an untruth in documents and who were sentenced by a valid and final judgment rendered by the Regional Court in Legnica on 30th April 2009, case file No. II K 116/09". Relying on that additional information, the Court is satisfied that offence 1 relates to tax fraud in respect of which the other two named parties have been convicted and sentenced. The Court is therefore satisfied that offence 1 in the warrant corresponds with an offence under section 10 of the Criminal Justice (Theft and Fraud Offences) Act and also with an offence under s. 1078 of the Taxes Consolidation Act, 1997.

24. Offences 2 and 3

The Court has no difficulty in holding that offence number 2 in the warrant corresponds to an offence under s. 1078 of the Taxes Consolidation Act, 1997 which provides at s. 1078(2):-

A person shall, without any prejudice to any other penalty to which the person may be liable, be guilty of an offence under this section if the person -

(a) knowingly or wilfully delivers any incorrect return, statement or accounts or knowingly or wilfully furnishes any incorrect information in connection with any tax,

(b) knowingly aids, abets, assists, incites or induces another person to make or deliver knowingly or wilfully any incorrect return, statement or accounts in connection with any tax,

(c) claims or obtains relief or exemption from, or repayment of, any tax being a relief, exemption or repayment to which, to the persons knowledge, the person is not entitled,

(d) knowingly or wilfully issues or produces any incorrect invoice, receipt, instrument or other document in connection with any tax.

25. The particulars of the offence described at offence 2 in the warrant allege that the respondent "provided untrue details in his VAT-7 tax returns covering the period from January 2005 to November 2006 submitted to the Revenue Office in Legnica, in such a way that he indicated the tax assessed in the said tax returns in a total amount of PLN1,165,811.00 resulting from invoices documenting transactions which in fact had not occurred, and with persons who had not run any real businesses" which exposed the authorities to a loss of PLN 1,165,811.00.

26. Offence number 3 again alleges fraudulent activity in relation to taxes. It alleges that in order to hide the fact that he was running a particular business in the purchase of scrap metal and wooden pallets, that the respondent ordered the issue of 57 sales invoices in the name of a company which did not discharge a tax liability of PLN 136,690.48. This appears to the Court to correspond with an offence under s. 1078 of the Taxes Consolidation Act and in particular s. 2(a) and or (d).

27. Section 21 (A) Objection

The respondent submits that on the evidence in this case the Court should be satisfied that a decision has not been made to charge the respondent with and try him for the offences set out in the warrant and accordingly the Court should refuse to surrender the respondent.

28. Section 21A(2) creates a presumption that a decision has been made to charge and try the respondent for the offences in the warrant. That presumption can only be rebutted by cogent evidence that no decision to charge and to try has been made. In seeking to discharge the burden on him of rebutting the presumption, counsel for the respondent has fixed on one phrase in the correspondence, namely the phrase used in a letter from the issuing authority on the 15th April: "*Piotr Antkiewicz is not requested to participate in a trial*". Secondly, he relies on the averment in the respondent's affidavit at paragraph 11 that he has met with the prosecutor in the case that the prosecutor showed him a document which outlined that he is a suspect.

29. The Court is not persuaded that the presumption in s. 21A(2) is rebutted. While the Court had an initial concern arising from the use of that phrase and sought from the issuing authority further information, the Court, on the totality of the information furnished, is not persuaded that no decision to charge and try Mr. Antkiewicz has been made. The isolation of one phrase from a number of letters leads to a misunderstanding of the evidence. When the full response to the question posed and the answer given is considered, it is clear that the issuing authority is providing information on the Polish criminal process. The question posed was "*Please confirm that Piotr Antkiewicz is being sought for trial*". The answer given was "*Piotr Antkiewicz is not requested to participate in a trial*". It then goes on to say: "*Within the applicable procedure, it is necessary to perform actions involving his participation, namely to present charges (emphasis added) to his (sic) and to question him*".

30. The totality of the evidence indicates that the respondent is already the subject of criminal proceedings in Poland. The case file contained in VI Ds. 3/10 was placed before the Regional Court in Legnica on the 15th October 2009. That court ordered pre-trial detention of fourteen days. Thereafter, the prosecutor on the 5th November 2009 issued a wanted notice which is described in the warrant at B as "*final verdict*". This suggests that he is wanted for charge, not investigation. There is also the excerpt from the letter from the issuing authority dated the 17th June 2014, which makes the position clear:

RE: Sections C2 and C3 of the European arrest warrant

*The European arrest warrant in respect of Piotr Antkiewicz was issued for detention of the named and his remand (pre-trial detention) for a period of 14 days since detention and surrender of the named **for conducting penal proceedings against him** (emphasis added). In event when Piotr Antkiewicz has been detained and surrendered to Poland, a public prosecutor shall make a decision within 14 days on possible extension of the pre-trial detention period.*

31. In addition there is the fact that his two co-accused, in respect of offence 1 in the warrant, have already been tried and sentenced for their role in the alleged tax fraud.

32. The averment in the respondent's affidavit does not bring the matter any further. The evidence is that the respondent, Mr. Antkiewicz, has been in Ireland since 2008. His meeting with the prosecutor is undated but perforce must have been before February 2008. At that juncture, the offences for which his surrender is sought were in all likelihood still under investigation. The Court notes that the decision upon which the warrant is based which was a judicial decision to impose pre-trial detention on the respondent, is dated 15th October 2009, more than one year and a half after Mr. Antkiewicz left Poland.

33. The Court is satisfied on the particular facts of this case, that the presumption contained in s. 21A(2) that a decision has been made to charge and try the respondent has not been rebutted.

34. Section 11 Objection

The respondent further submitted at paragraph 3 of the notice of objection, that the warrant fails to comply with Article 8(1)(c) of the Framework Decision and/or section 11(1A)(e) of the European Arrest Warrant Act, 2003. Section 11(1A)(e) provides that a European arrest warrant shall specify, subject to the exception under s. 11(2A):

that a conviction, sentence or detention order is immediately enforceable against the person, or that a warrant for his or her arrest, or other order of a judicial authority in the issuing state having the same effect, has been issued in respect of one of the offences to which the European arrest warrant relates.

35. Counsel for the respondent constructed an elaborate argument based on one line in section F of the warrant which states:

Time limitation of the amenability to the penalty for the offence in case VI Ds. 3/10/Sp (former No. Ds. 26/06) in respect of Piotr Antkiewicz ceases on 25th April 2027.

36. Counsel extrapolated from this that the case file relates to only one offence not three, and that there is no underlying detention order for the two other offences in the warrant. The Court is not persuaded. Firstly, section F of an EAW is designed for an issuing state to provide optional information which is not in any way determinative of issues which might arise on a warrant. In this instance the issuing state has provided information on statutory limitation periods which operate in Poland and goes on to state that the

limitation period in respect of case file VI Ds. 3/10 expires on the 25th April 2027. The fact that the word offence as opposed to offences is used is entirely irrelevant.

37. The warrant is clear at B that the decision upon which the warrant is based is the decision of the Regional Court in Legnica of the 15th October 2009 on file VI Ds. 3/10. The warrant at C sets out the maximum sentences for the three offences involved and at E sets out the details of the three offences involved. The Court therefore holds that there is no want of compliance with s. 11(1)(A)(e) of the 2003 Act.

38. Counsel for the respondent also submitted at paragraph 1 of the notice of objection that the warrant fails to comply with Article 8(1)(e) of the Framework Decision and/or section 11(1A)(f) of the 2003 Act. Section 11(1A)(f) of the 2003 Act provides that an EAW shall specify:

The circumstances in which the offence was committed or is alleged to have been committed, including the time and place of its commission or alleged commission and the degree of involvement or alleged degree of involvement of the person in the commission of the offence.

39. Counsel contends that the information on offence 3 contained in paragraph E of the warrant is not sufficiently precise. The description uses the word 'he' a lot rather than specifically referring to the respondent. It also mentions another individual (Witold Szymczak). The regular use of the word 'he', according to counsel for the respondent, renders the information unclear as to who did what and when they did it. Therefore in the circumstances, he contends there is insufficient information to prove what the precise degree of involvement of the respondent was.

40. The Court disagrees. In the Court's view, while the language used may appear a little unwieldy, the clear import of the particulars is that the respondent, between January and April 2007, sought to hide the fact that he was dealing in the purchase of scrap metal and wooden palettes by issuing invoices in the name of a company Konglomerat GPP Witold Szymczak. During the period he ordered the issue of 57 such invoices. The company didn't pay the tax liability on those invoices and a tax loss of PLN 136,690.48 resulted. The 57 sales invoices are particularised in the file at pages 1248 and 1249. In the circumstances the respondent cannot be in any doubt as to the allegation against him.

41. Article 8 Issue

Paragraph 4 of the respondent's notice of objection claims that the surrender of the respondent is prohibited pursuant to section 37(1)(a) and/or section 37(1)(b) of the 2003 Act and/or pursuant to the Framework Decision on the basis of the rights of the respondent under Article 8 of the European Convention on Human Rights and Articles 3 and 7 of the Charter of Fundamental Rights of the European Union. Paragraph 5 of the notice of objection further claims that the surrender of the respondent would be a disproportionate interference with the rights referred to in paragraph 4.

42. Counsel on behalf of the respondent made a rolled up plea that having regard to the respondent's state of health and the delay in issuing and prosecuting the EAW, surrender would constitute a disproportionate interference with the respondent's human rights.

43. The Court is in no doubt that the respondent suffers from a serious heart condition, the effects of which were manifest during the course of the s.16 hearing. As recently as 6th October 2014, a hearing had to be adjourned while the respondent was taken by ambulance to the Mater Hospital where he has been a patient of the Cardiology Department since he first suffered a heart attack in the precincts of this Court in January 2014. However ill health of itself is not a reason to refuse surrender. The Court must presume that the issuing state will comply with the requirements of the Framework Decision unless the contrary is shown. The respondent has asserted that he will not receive appropriate treatment for his condition in Poland in the event that he is given bail on his surrender. It seems to the Court that mere assertion, without further proof is not sufficient to displace the presumption contained in s. 4A of the 2003 Act.

44. The respondent's ties to this jurisdiction are relatively tenuous. By reason of his medical condition, he is unable to work. He does not appear to be in a relationship. He doesn't appear to have anyone in this jurisdiction who is dependent on him either financially or emotionally. He avers that his son and grandchild live here, but gives no further detail of his involvement with them. His elderly mother and sister live in Poland and while he states that he would not be able to live with them, he would clearly not be without support in his home state.

45. Delay

Counsel for the respondent invited the Court to conclude that the delay which has occurred in this case added to the respondent's physical debility and is sufficient to tip the scales in favour of the respondent's private law interests against the public interest in his extradition.

46. The alleged offences occurred between January 2005 and April 2007. The offences were under investigation when the respondent left Poland in February 2008. He had a meeting with the prosecutor who informed him at that time that he was a suspect. His co-accused in offence 1, Marek Sękowski and Paweł Kowalczyk, were convicted and were sentenced on the 30th April 2009. The warrant for the respondent's pre-trial detention was issued on the 15th October 2009 and a wanted notice issued on the 5th November 2009. It was almost three and a half years before the EAW issued on the 14th March 2013. This delay is unexplained, however the respondent who absented himself from Poland in 2008, has offered nothing to the Court to suggest that the Polish authorities should have found him sooner. It does not appear to the Court to be unreasonable that it might take up to three and a half years to locate someone in the European Union.

47. Counsel referred the Court to the judgment of Edwards J. in *Minister for Justice and Equality v Wiesław Ciecko* (unreported, High Court, Edwards J., 18th December 2013). The circumstances of that case are entirely distinguishable from those of this case. In that case there was an unexplained delay of twelve years and in addition there was a failure to explain why the sentence in respect of which surrender was sought had not been imposed when the respondent had appeared before the issuing state's court four years after that sentence had first been imposed.

It appears to the Court that the effect of surrender of this respondent is such as would normally flow from arrest, detention or surrender. As stated by Edwards J in *Minister for Justice and Equality v T.E.* ([2013] IEHC 323) at principle 15: "Reliance on matters which could be said to typically flow from arrest detention or surrender, without more, will little avail the affected person."

48. While the surrender of this respondent creates additional difficulties for him by reason of his poor health, surrender could not in his circumstances be said to be a "measure giving rise to exceptionally injurious and harmful consequences for an affected individual", as stated by Edwards J. in T.E. at principle 16.

The onus is on the respondent to demonstrate that surrender would result in a disproportionate interference with his Article 8 rights. Unfortunately for Mr. Antkiewicz, the onus is not discharged by the evidence before the Court.

49. The Court being satisfied that the requirements of s. 16 have been met and further being satisfied that there are no grounds upon which his surrender is prohibited orders that the respondent be surrendered to such person as is duly authorised to receive him.

50. The Court will now hear submissions on its powers under section 18.