Neutral Citation Number: [2009] IEHC 34

**THE HIGH COURT**

**2008 80 Ext**

**Between**

**Minister for Justice, Equality and Law Reform**

**Applicant**

**AND**

**Grzegorz Dus**

**Respondent**

**Judgment of Mr Justice Michael Peart delivered on the 28th day of January 2009**

The surrender of the respondent is sought by a judicial authority in Poland under a European arrest warrant issued there on the 4th June 2007.That warrant was endorsed for execution here by order of the High Court on the 30th April 2008, and the respondent was arrested on foot of same on the 6th May 2008, and brought before the Court as required by s.13 of the European Arrest Warrant Act, 2003,as amended. He has been remanded from time to time pending the hearing of the present application for his surrender.

There is no issue raised as to the identity of the respondent and I am satisfied in any event from the affidavit evidence of the arresting Garda Officer, Sgt. Martin O'Neill, that the person who he arrested and who is before the Court is the person in respect of whim this European arrest warrant has been issued.

The surrender of the respondent is sought so that he can serve the balance of a sentence of four years and six months' imprisonment imposed upon him on the 12th January 2004 following his conviction in respect of the offences set forth in the warrant. The balance of that sentence yet to be served is one year and one hundred and seventy three days. The respondent was present for his trial and conviction and accordingly no undertaking as to a retrial upon surrender is required to be provided by the issuing judicial authority under s. 45 of the Act.

The sentence imposed is a single sentence in respect of the two offences described in the warrant. The length of that sentence satisfies the minimum gravity requirement of at least four months.

One of the offences for which he was so convicted is marked as being an offence within the categories of offence set forth in Article 2.2 of the Framework Decision, namely 'racketeering and extortion', and is one therefore in respect of which correspondence is not required to be verified. The other offence is set forth as follows:

> *"On 19th January 2003, in the city of Gliwice, acting jointly and in co-operation with Daniel Malczewski, he behaved violently towards Krzystof Konieczny hitting his face, then he stole his mobile phone – Nokia worth 400.-PLN (four hundred PLN) (he took it in order to appropriate it). He committed this offence in circumstances of relapse into crime."*

It is submitted for the applicant that the acts of the respondent giving rise to this offence, would, if committed in this State give rise to an offence here under s. 14 of the Criminal Justice (Theft and Fraud Offences) Act, 2001, namely robbery. I agree. Clearly there is also an offence of assault evident from the facts described. Correspondence is made out.

Subject to reaching a conclusion on the points of objection put forward by Kieran Kelly BL for the respondent, I am satisfied that there is no reason to refuse surrender under sections 21A, 22, 23 or 24 of the Act, and that his surrender is not prohibited by any provision of Part III of the Act, or the Framework Decision.

A relevant circumstance to recite is that according to the warrant, the respondent served a part of the sentence imposed and that he granted what is described as an interruption in that sentence so that he could receive some medical attention, but that following that release he did not return to prison on the 30th June 2006 in order to complete his sentence as required. It is stated further that during his release for medical attention he failed to make contact with the probation officer, and did not appear in court when summoned by the court, resulting in the authorities pursuing him by means of an arrest warrant.

**Points of Objection**

**s. 10 – did not 'flee':**
In his affidavit grounding his points of objection the respondent ahs stated that he did not flee Poland, and that following an injury received while working outside the prison he required specialist medical treatment, and that he believed that he had express permission from the authorities to receive that treatment, and to leave the prison for that purpose. He disputes that his period of treatment for these injuries should be classified as an interruption of his sentence, and that he is unaware of any specific date by when he ought to have returned to prison. He says also that he did not attend court or receive any summons requiring him at attend court as referred to in the warrant, or any notification about the calculation of his remaining sentence. He states that he believes that he has served his sentence, and that he has been in this State since March 2006.

In response to these averments, the issuing judicial authority has provided additional information about the interruption of the sentence. It states that the respondent was granted an interruption of sentence "up till 27th June 2006", and that when that decision was made, the respondent was present and the decision was given to him. It states that what the respondent states is untrue. It goes on to state that apart from granting the interruption of sentence the court "*obliged the condemned person to be in contact with a court-appointed curator, not to change a place of residence without the curator's consent, as well as to undergo treatment",* and that the respondent did not observe these conditions, and gives some detail about attempts to find the respondent at his place of residence.

I am completely satisfied that what the respondent has stated in his grounding affidavit is untrue, and that he fled from justice by

being in breach of the conditions upon which his temporary release was ordered for medical treatment. He is therefore a person who comes squarely within the provisions of s. 10 of the Act. I reject this point of objection.

**Racketeering and Extortion not appropriately marked in the warrant**
The respondent submits that the issuing judicial authority was not entitled to mark this offence in the warrant as being one of racketeering and extortion given the facts set forth in the warrant as constituting that offence. He states in his grounding affidavit that the facts describing that offence disclose an allegation of "ordinary street crime". That offence is the second offence described in paragraph E.I of the warrant. There is no need to set forth those details herein. The fact is that the issuing judicial authority has chosen to mark the offence as one of 'racketeering and extortion', and this Court is not entitled to go behind that, and require correspondence to be established. Article 2.2 of the Framework Decision provides:

> *"2.2. The following offences, if they are punishable in the issuing Member State by a custodial sentence or a detention order for a maximum period of at least three years and as they are defined by the law of the issuing Member State, shall, under the terms of this Framework Decision and without verification of the double criminality of the act, give rise to surrender pursuant to a European arrest warrant …" (my emphasis)*

Section 38(1)(b)(i) of the Act gives effect to that article.

This Court is obliged to accept therefore that "as defined by the law of the issuing Member State" the offence described in the warrant is one coming within the marked category, and therefore one in respect of which double criminality is not required to be verified, and that accordingly his surrender is not prohibited.

**Composition of sentence – Article 2 Framework Decision**
Another point has been argued on this application, though not one specifically raised in the Points of Objection filed and delivered. I have allowed the respondent make this submission. It relates to the fact that a single sentence of imprisonment was imposed in respect of the two offences for which the respondent was convicted. The issue raised arises from the wording of Article 2 .1of the Framework Decision which provides:

> *"2.1. A European arrest warrant may be issued for acts punishable by the law of the issuing Member State by a custodial sentence or a detention order for a maximum period of at least 12 months or, where a sentence has been passed or a detention order has been made, **for sentences** of at least four months." (my emphasis)*

That Article is reflected in the provisions of s. 38 of the Act, as highlighted, as follows:

> "38.—(1) Subject to subsection (2), **a person shall not be surrendered** to an issuing state under this Act **in respect of an offence** unless—
>
> (a) **the offence corresponds** to an offence under the law of the State, **and**—
>
> (i) under the law of the issuing state the offence is punishable by imprisonment or detention for a maximum period of not less than 12 months, or
>
> (ii**) a term of imprisonment or detention of not less than 4 months has been imposed on the person in respect of the offence** in the issuing state, and the person is required under the law of the issuing state to serve all or part of that term of imprisonment…".

Mr Kelly for the respondent refers to the underlined part of that article and s. 38, and to the fact that in the present case there are two offences but a single sentence, and that accordingly it is impossible for this Court to know whether in respect of each offence a sentence of "at least four months" has been imposed in respect of each offence.

He refers to judgments of Murray CJ and Macken J. in *Minister for Justice, Equality and Law Reform v. Ferenca*, unreported, Supreme Court, 31st July 2008, where the issue of composite sentences was considered, albeit in circumstances different to the present case. In *Ferenca,* the difficulty arising from a composite sentence existed because one of the three offences for which a composite sentence was imposed was found not to correspond to an offence in this State, and accordingly it was not possible to know what level of sentence was applicable to the two remaining corresponding offences. That question does not arise in this case, and that case can therefore be distinguished from this case. But Mr Kelly submits ht the same difficulty arises given the wording of Article 2.1 even where both or all offences the subject of a single sentence correspond. This arises, in his submission, from the use of the plural "sentences" in that Article. In the present case, as already set forth, both offences correspond, and a single sentence has been imposed which exceeds four months.

Ronan Kennedy BL for the applicant submits that if Mr Kelly's submission is correct, then the Supreme Court in its judgments in *Ferenca* need not have concerned itself at all with the issue of correspondence, but could have simply have found that surrender was prohibited on the basis that a single sentence had been imposed in respect of three offences. He submits that it is clearly envisaged by the Framework Decision that a European arrest warrant may be issued in respect of more than one offence, and that there is nothing in that Framework Decision to indicate in any way that surrender is prohibited where a single sentence has been imposed in respect of more than one offence, that being possible under the penal laws of some Member States. He submits that any reference to "offence" should, in the overall context of the Act and the Framework Decision, be regarded as including the plural. He does not agree that so narrow and literal an interpretation of Article 2 should be permitted to mean that surrender in these circumstances should be regarded as prohibited, and that to so construe same would be to ignore the clear aim and objective of the Framework Decision.

In my view, the surrender of the respondent is not prohibited under s. 38 of the Act. From a perusal of a small sample of the articles of the Framework Decision, it seems clear that the singular and plural in relation to offences is used loosely or interchangeably, so to speak. For example,

> *"Article 4:*
>
> *For offences other than those covered by paragraph 2, surrender may be subject to the condition that the acts for which the European arrest warrant has been issued constitute an offence under the law of the executing Member State, whatever the constituent elements or however it is described." (my emphasis)*

Clearly this is intended to apply to warrants containing either one or more than one act and/or offence.

Similarly in relation to Article 3 which provides, inter alia:

> *"Article 3 Grounds for mandatory non-execution of the European arrest warrant*
>
> *The judicial authority of the Member State of execution (hereinafter 'executing judicial authority') shall refuse to execute the European arrest warrant in the following cases:*
>
> *if the offence on which the arrest warrant is based is covered by amnesty in the executing Member State, where that State had jurisdiction to prosecute the offence under its own criminal law; …"*

It could not be reasonably argued in my view that the reference to the singular 'offence' means that a warrant which includes more than one offence is not a warrant.

I suppose it is worth having regard to the provisions of Article 1 also, which states:

> *"Article 1 Definition of the European arrest warrant and obligation to execute it:*
>
> *1. The European arrest warrant is a judicial decision issued by a Member State with a view to the arrest and surrender by another Member State of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order."*

In the present case "a custodial sentence" has been imposed, albeit one in respect of two distinct offences, as provided for under the law of the issuing state.

That is the context in which the provision of Article 2.1 and section 38 of the Act should be examined and construed.

If need be, in relation to s. 38 of the Act, I would refer also to the provisions of sections 4 (1), 5 (1) and 18 (a) of the Interpretation Act, 2005 which provide:

> *"4.—(1) A provision of this Act applies to an enactment except in so far as the contrary intention appears in this Act, in the enactment itself or, where relevant, in the Act under which the enactment is made."*

*5.—(1) In construing a provision of any Act (other than a provision which relates to the imposition of a penal or other sanction) –*

> *(a) that is obscure or ambiguous, or*
>
> *(b) that on a literal interpretation would be absurd or would fail to reflect the plain intention of*
>
> *(i) in the case of an Act to which paragraph (a) of the definition of 'Act' in section 2(1) relates, the Oireachtas, or*
>
> *(ii) in the case of n Act to which paragraph (b) of that definition relates, the parliament concerned,*

the provision shall be given a construction that reflects the plain intention of the Oireachtas or parliament concerned, as the case may be, where that intention can be ascertained from the Act as a whole."

> *"18.—The following provisions apply to the construction of an enactment:*
>
> *(a) Singular and plural. A word importing the singular shall be read as also importing the plural, and a word importing the plural shall be read as also importing the singular…"*

In the present case, s. 38 of the Act, or that Act generally displays no intention that the Interpretation Act, 2005 should not be applicable. Neither is the 2003 Act one which imposes a penal or other sanction, and so is not excluded from the ambit of the Interpretation Act, 2005. The meaning which I give to the relevant provisions in my view *is "a construction that reflects the plain intention of the Oireachtas",* as mandated by s. 5(1) thereof. I am satisfied also that the use of the singular may be read as including the plural in relation to 'offence' in s. 38, reflecting the provision of the Framework Decision as set forth above.

For all these reasons I am satisfied that the points of objection raised by the respondent must fail, and that the Court is accordingly required to make the order sought by the applicant for the surrender of the respondent to Poland. I will so order.