

THE HIGH COURT

Record Nos. 2013/003 Ext.

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

Between/

THE MINISTER FOR JUSTICE AND LAW REFORM

Applicant

-AND-

MACIEJ ANDRZEJEWSKI

Respondent

Judgment of Mr Justice Edwards delivered on the 17th day of January 2014

Introduction:

The respondent is the subject of a European arrest warrant dated the 7th of April, 2008 on foot of which the Republic of Poland seeks his surrender for the purpose of executing the balance outstanding of a two year sentence of deprivation of freedom imposed upon him by the Circuit Court in Poznań some years ago in respect three offences particularised in Part E of the warrant. The warrant was endorsed for execution in this jurisdiction on the 15th of January, 2013, and it was duly executed on the 17th of April, 2013. The respondent was arrested by Sergeant Sean Fallon on that date, and he was brought before the High Court on following day pursuant to s.13 of the European Arrest Warrant Act 2003 (hereinafter "the Act of 2003"). In the course of the s.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.

The respondent does not consent to his surrender to 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 that the respondent be surrendered to such person as is duly authorised by the issuing state to receive him. There is only one issue of controversy in the case, and that arises from an objection to surrender based upon s.10 of the Act of 2003, namely a contention that the respondent did not flee. Therefore, this judgment is predominantly concerned with that issue.

Uncontroversial issues

Quite apart from the s. 10 issue, however, the Court must be satisfied that all of the other requirements of the Act of 2003, and s.16 thereof in particular, are met before it can surrender the respondent. It is therefore necessary to address these issues in addition to the main objection, albeit that they are uncontroversial.

The Court has received an affidavit of Sergeant Fallon sworn on the 11th of October, 2013 testifying as to his arrest of the respondent and as to the questions he asked of the respondent to establish the respondent's identity. When these are compared with the information in Part A of the warrant they can be seen to correspond. In addition, counsel for the respondent has confirmed that no issue arises either as to the arrest or as to identity.

The Court has also received and has scrutinised a true copy of the European arrest warrant in this case. Further, the Court has taken the opportunity to inspect the original European arrest warrant which is on the Court's file and which bears this Court's endorsement.

I am satisfied following my consideration of these matters that:

- (a) The European arrest warrant was endorsed for execution in this State in accordance with s. 13 of the 2003 Act;
- (b) The warrant was duly executed;
- (c) The person who has been brought before the Court is the person in respect of whom the European arrest warrant was issued;
- (d) The warrant is in the correct form;
- (e) The warrant is a conviction type warrant and the respondent is wanted in Poland for the purposes of executing, and being required to serve, the unserved balance of a two year sentence of deprivation of freedom, amounting to seven months and four days, imposed upon him in respect of the three offences particularised in Part E of the warrant. The exact sentencing history is as follows. Individual sentences of one year, one year and four months, and six months deprivation of freedom were initially imposed upon him for each of the three offences to which the warrant relates by the District Court in Grodzisk Wielkopolski on the 23rd of June 2003. However, the respondent's lawyer appealed these sentences and on the 7th of January 2004 the Circuit Court in Poznań substituted a single aggregate penalty of two years deprivation of freedom for the three individual sentences. Moreover, on the 10th of January 2006, after the respondent had served some portion of that sentence, the Circuit Court in Poznań conditionally suspended the balance of it. However, in circumstances where the respondent was held to have failed to comply with the conditions attaching to the suspension of his sentence by evading supervision by the court appointed custodian (his probation officer), the Circuit Court in Poznań revoked the conditional release on the 17th of July 2007. The balance remaining to be served is seven months and four days.
- (f) The underlying domestic decision on which the warrant is based is a decision of the District Court in Grodzisk Wielkopolski dated the 11th of December 2007 issuing a wanted notice in relation to the respondent.
- (g) The description of the circumstances in which the three offences in question were committed is to be found at Part E of the warrant and is as follows:

I. On 27th November 2001 in Rakoniewice, Wielkopolska district, in Mosina, Wielkopolska district, and on the road between those

towns, acting together and in collaboration with Mr. Anatolij Kopiczyński and Mr. Grigorij Matijcik, he beat up Mr. Jaroslaw Baranka by pummeling and kicking him all over his body thereby exposing him to the immediate danger of serious bodily harm and as a consequence of the beating Mr. Jaroslaw Baranka suffered a broken nose bone and ethmoid, bruises to his head and bruises to the right elbow

II. On 27th November 2001 in Rakoniewice, Wielkopolska district, in Mosina, Wielkopolska district, and on the road between those towns, acting together and in collaboration with Mr. Anatolij Kopiczyński and Mr. Grigorij Matijcik, he deprived Mr. Jaroslaw Baranka of his freedom for about five hours by keeping him against his will inside the loading part of a "Fiat Ducato" vehicle. Moreover, he handcuffed him to a box containing meat.

III. On 27th November 2001 in Rakoniewice, Wielkopolska district, in Mosina, Wielkopolska district, and on the road between those towns, acting together and in collaboration with Mr. Anatolij Kopiczyński and Mr. Grigorij Matijcik, he threatened Mr. Jaroslaw Baranka to take the lives of his family members - the threatened person had a well-founded fear to expect that the threat would be carried out."

In the case of offence no I, the Court has been invited to find correspondence with the offence in Irish law of assault contrary to s.2 of the Non Fatal Offences Against the Person Act, 1997, and I so find. In the case of offence no II, the Court has been invited to find correspondence with the offence in Irish law of false imprisonment contrary to s.15 of the Non Fatal Offences Against the Person Act, 1997, and I so find. In the case of offence no III, the Court has been invited to find correspondence with the offence in Irish law of threatening to kill contrary to s.5 of the Non Fatal Offences Against the Person Act, 1997, and I so find.

(j) No issue as to *trial in absentia* arises in the circumstances of this case.

(k) There are no circumstances that would cause the Court to refuse to surrender the respondent under s.21A, 22, s.23 or s.24 of the Act of 2003, as amended.

(l) The Court is unaware of any circumstance that would cause it to consider that the surrender of the respondent ought to be regarded as being prohibited under Part 3 of the Act of 2003

In addition, the Court is satisfied to note the existence of the European Arrest Warrant Act 2003 (Designated Member States) (No. 3) Order 2004 (S.I. No. 206 of 2004) (hereinafter referred to as "the Designation Order of 2004"), and duly notes that by a combination of s.3(1) of the Act of 2003, and article 2 of, and the schedule to, the Designation Order of 2004, "Poland" (or more correctly the Republic of Poland) is designated for the purposes of the Act of 2003 as being a state that has under its national law given effect to the Council Framework Decision 2002/584/J.H.A. of 13th June 2002 on the European arrest warrant and the surrender procedures between Member States, O.J. L190/1 18.7.2002.

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)

(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, before this Court could surrender the respondent it would have to be satisfied that the respondent "fled" Poland before commencing, alternatively before completing, the sentence imposed upon him for the offence to which the 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 section. 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.”

This Court will adopt the approach commended by Macken J, and determine, following a consideration of the evidence in the case in its totality, whether, objectively speaking, it can be reasonably concluded that the respondent “fled”.

The evidence adduced by the respondent on this issue

The respondent has submitted an affidavit sworn by him in these proceedings on the 4th of June 2013 in which he deposes, *inter alia*, to the following:

“6. I say that I object to my surrender on foot of this warrant as I did not evade the probation officer that was appointed in my case. I maintained contact with her for over a year following my release from prison. I found it very difficult to make a living in Poland and I actively set about seeking work upon my release. I say that I discussed openly with my probation officer what my circumstances were and that I needed to find work to provide for my family. I say that I told my probation officer that I wanted to go abroad to work and she agreed that I could do so. I say that I travelled to Ireland in September 2006 and have worked openly in Ireland since I came here. I have a new life in Ireland where I provide for my wife and two children. I say that I have lived openly in Ireland in the belief that I no longer had any obligations in relation to my conviction in Poland.

7. I say that I was released from custody in Poland on the 10th January 2006. I say that the conditions of my release were that I would be under the supervision of the probation service for a two year period until the 10th January 2008 and that I was obliged to find work and to abide by the legal order. I say that upon release I went voluntarily and met with the probation service. I say that my probation officer was Zenobia Geisler. I say that there were no formal arrangements made with the probation officer in relation to when we would meet or contact each other. I was not required to attend appointments on an ongoing basis.

8. I say that before I was imprisoned I had been in business as a Mushroom Farmer for ten years. I say that I lived on a small farm along with my wife and two young daughters. I say that I had a mortgage on the property and as a result of my imprisonment I was unable to maintain the business or pay the loans I had on it. I say that while I was in prison my wife and children resided with her family in Mosina. I say that upon my release I intended to get my business up and running again. I say that I met on a number of occasions with my probation officer and told her what I was doing and what my plans were. My sole intention was to get back to work and provide an income for my family. I say that I wanted to get my business up and running again but was unable to do so as I did not have the money required to carry out necessary repairs to the premises that were required due to my absence while in prison. I say that my probation officer was fully aware of my financial difficulties and my desire to work. I say that I met with my probation officer on a number of occasions and also talked to her by phone and kept her aware of what I was doing. I say that I found myself under severe financial pressure as I had outstanding loans and other bills that had accumulated while I was in prison. I say that the local bailiff in Poland brought re-possession proceedings against my farm and home and took possession of the property in early 2007.

9. I say that I remained in Poland from my release in January until September when I travelled to Ireland. I say that during that time I was in contact with my probation officer. I had met with her a number of times and also talked to her by phone. I had fully explained to her that I needed to find work and had asked her if I could go abroad to work. As far as I was aware there was no difficulty with my going abroad as long as she knew where I was and what I was doing.

10. I say that I came to Ireland on my own on the 13th September 2006 in search of work. I say that I got work as a mechanic with Carroll Kenny Motors in Naas, Co. Kildare. I say that my wife and youngest daughter joined me in Ireland in November 2006. I say that in November 2006 my probation officer telephoned me and I told her I was in Ireland and that I had work. The probation officer did not explain that I was doing anything wrong or that she would be applying to the court.

11. I say that I continued to work in Ireland and in January 2007 I received a further telephone call from my probation officer. I told her that I had ongoing work. She required me to forward to her the address that I was staying at and the name of my employer and I sent her these by text message.

12. I say that I have continued to live in Ireland and have been unaware that I was in breach of any of the terms of my release. I say that I worked in Carroll Kenny Motors until March 2007 when I went to work with Boland's Ford Dealership in Wexford until October 2008. In October 2008 I returned to Dublin and worked as a sole trader mechanic until July 2010 when I set up my own company MJ MOTORS in Blanchardstown where I continue in the motor business.

13. I say that I was surprised to be arrested on foot of this warrant as I have been living my life openly in Ireland in the belief that I was no longer under the supervision of the Polish authorities. I say that my probation officer never explained to me that I would be required to return to Poland and as far as I was aware as long as I remained in employment and did not get into trouble I would complete my period of probation in January 2008. I say that when I left Poland it was in order to obtain work as I was unable to get any work in Poland. I say that I did not flee from Poland or come to Ireland to avoid the authorities. ...”

The respondent further relies upon an affidavit of his lawyer in Poland, a Mr Poitr Binas, sworn in these proceedings on the 28th of October 2013, and the documents therein exhibited. Mr Binas deposes to having carried out a search of the court files in this case in Poland, and to having bespoken copies of relevant documents which he exhibits. He has exhibited the following:

- a. Application to issue a European Arrest Warrant in relation to Maciej Andrzejewski dated 4th March 2008.
- b. Decision to issue a European Arrest Warrant dated 7th April 2008.
- c. Application by the probation officers office to revoke an early release dated 12th June 2007.
- d. Report regarding the supervision of the conditionally released Maciej Andrzejewski dated 12th June 2007.

- e. Decision to revoke a conditional early release dated 17th July 2007.
- f. Report regarding the supervision of the conditionally released Maciej Andrzejewski dated 2nd March 2006.
- g. Probation officers activity sheets
- h. Report from community interview dated 22nd March 2007.

The Court has considered in great detail all of the material exhibited by Mr Binas. As it is voluminous it is not practical or appropriate to seek to quote it in full. However, the Court will quote selected extracts later in this judgment

Additional information adduced by the Applicant

The issuing judicial authority has provided the following additional information by letter dated the 6th of June 2013:

" ..., we wish to advise that after the subject was granted a conditional early release, he was placed on probation until 10th January 2008, under the supervision of a probation officer, and ordered by the court to find gainful employment and lead an exemplary way of life. The probation officer first contacted the respondent on 22nd February 2006. During the second meeting, on 20th March 2006, Maciej Andrzejewski informed the probation officer that he would like to move to England for 3 months to work. The respondent claimed that he would move to England in late March 2006. The probation officer gave Maciej Andrzejewski permission to leave Poland, advising the respondent that he had to notify the probation officer when he moved to England and to inform him of his address in England. The respondent failed to supply the probation officer with the above information, which prompted the probation officer to make a visit at the respondent's Polish address. The respondent informed the probation officer that he did move to England for 2-3 weeks, but failed to find steady employment and returned to Poland. He also claimed that he had no further intention to move abroad and wanted to set up his own business in Poland.

On 6th November 2006 Maciej Andrzejewski contacted the probation officer by telephone and informed him that he was living and working in England. He also claimed that he would stay in England for one more month and after returning to Poland he would contact the probation officer. The respondent again contacted the probation officer by phone on 17th January 2007 and stated that he was still living in London, where he had a job until the end of March 2007. The probation officer obliged the respondent to send documents confirming that he was in fact employed in the UK, and to remain in regular contact. The respondent did not send the requested documents and did not contact the probation officer again. Due to this, the conditional early release granted to the respondent was revoked on 17th July 2007."

Yet further additional information was provided by the issuing judicial authority by letter dated the 26th of July 2013, wherein it is stated:

"The respondent was obligated to inform his probation officer that he was moving abroad before leaving Poland, however, he failed to do so. During a telephone conversation the probation officer accepted the fact that the respondent had moved abroad, but ordered the respondent to remain in contact with the probation officer and to furnish him with documents confirming the fact that he was working abroad. The respondent failed to carry out these obligations and ceased contacting his probation officer. The court found that the respondent was thus evading his probation officer's supervision and therefore revoked his prison licence. The sole fact that the respondent left Poland was therefore not the reason that the licence was revoked."

The Court's Decision

Having carefully considered all of the evidence, and having listened to the submissions of counsel, this Court considers that it is reasonable to infer that the respondent left Poland to evade justice, and must accordingly be considered as having fled. The Court has arrived at this conclusion taking into account, in particular, the following features of the case.

Much emphasis was placed by counsel for the respondent on the fact that the respondent can be demonstrated to have had a level of engagement with the probation service in Poland, albeit that he was in default in a number of respects. Counsel has urged that nonetheless this indicates that far from seeking to evade his responsibilities, the respondent was doing his, admittedly inadequate, best to live up to those responsibilities.

However, in the Court's assessment this interpretation of his intentions and motives is not borne out when the evidence is subjected to close critical analysis.

There are significant discrepancies between the information provided by the Polish authorities, reflected by the official probation records exhibited with the affidavit of Mr Binas, and matters deposed to by the respondent in his affidavit. The respondent is recorded as having expressly represented on a number of separate occasions that he was working in England, whereas in fact that was not true and he was actually in Ireland. Moreover, apart from asserting through his counsel that he stands over the contents of his affidavit, the respondent has not sought to engage with these discrepancies either by means of filing a supplemental affidavit himself or by means of other evidence. It was stated by his counsel that his instructions were that the probation officer may have misheard "Dublin" as "London" in the course of a telephone conversation. However, the respondent himself does not depose to this on affidavit. Moreover, the explanation proffered is otherwise unsatisfactory because according to the respondent's affidavit he was not working in Dublin, but rather was working in Naas, Co Kildare at the material time. Moreover, the Polish records record him as having expressly represented in November 2006 that he had been in London *"for 2 weeks"* and that he was working there *"as a driver"*; and as having represented in January 2007 that he was *"still in London, had a job in a construction company, and that he was employed on a, so-called, fixed term contract until the end of March 2007"*. This is to be contrasted with the contents of the respondent's affidavit which states that he was employed *"as a mechanic"* at Carroll Kenny Motors in Naas from September 2006 until March 2007, at which time he then went to work with Boland's Ford Dealership in Wexford, remaining there until October 2008.

Moreover in the communication recorded in January 2007 where he stated he was still in London, had a job in a construction company, and that he was employed on a fixed term contract until the end of March 2007 he went on to suggest that he had no plans to return to Poland until his contract was up and that, in those circumstances, he *"stated that maybe his wife will join him."* However, we know from the respondent's own affidavit that his wife and daughter had joined him in Ireland as far back as the previous November.

In the circumstances the discrepancies noted by the Court cannot be explained away by the suggestion that something was misheard

in a telephone conversation, and I am not prepared to accept that proposition as being remotely tenable.

It is also noteworthy that the official records record that on several occasions he was asked in the course of telephone conversations to provide his precise address, and to forward a copy of his work contract, but that he failed to do so. It is to state the obvious that if he had done as he had been asked, and there was indeed a genuine misunderstanding as to his whereabouts (which, I must reiterate, this Court is not prepared to accept on the evidence before it), any genuine misunderstanding would have been exposed and the correct position readily established. No explanation is proffered for not complying with the requests to forward his precise address and contract of employment.

Other important information contained in the official records is that the respondent has significant debts in Poland; that on the 29th of December 2006 a local court bailiff took possession of the respondent's properties in his absence and cut off the electricity; that after this the bailiff continued to try to locate the respondent, and that in doing so he called to the respondent's wife's parents house and was told by them that the respondent "*was staying in London*" which of course was untrue.

The report regarding the supervision of the conditionally released Maciej Andrzejewski dated 12th June 2007 refers to the fact that the respondent and his wife, who had previously owned and operated a mushroom farm, owed a sum of PLN 600,000 to a bank, which sum had been borrowed to buy the farm, and that:

"The probationer commenced negotiations with the bank regarding settling the outstanding debt, he would also like to discuss the matters of the payment of the instalments with the local Court's bailiff as the debt is under execution by a bailiff from the time before the probationer was imprisoned."

It is subsequently recorded in a minute dated the 26th of February 2007 that the bailiff, being unable to locate the respondent, had proceeded to sell the respondent's property.

The records further establish that the probation authorities only discovered that the respondent was in fact in Ireland in the course of a "community interview" authorised by a Polish Court to assist them in locating his whereabouts, and conducted in late March 2007. The report of that interview states:

"Regarding the convicted Maciej Andrzejewski, son of Justyn and Jozefa, born on 28.06.1973

The report written on the basis of:

- a conversation with the convicted person's father - Mr. Justyn Andrzejewski, on 21.03.2007 at his place of residence, i.e. Mosina, ul. Strzelecka 92,
- a conversation with police officers from the county police headquarters in Mosina - Mr. Artur Sobolewski and community constable Dariusz Flieger at the county police headquarters in Mosina on 14.03.2007.

From the obtained information it can be concluded that Maciej Andrzejewski lives in Dublin, Ireland. In December 2006 his wife joined him. The convicted person's children - two daughters 13 and 100 years old are currently living with their grandparents - the convicted person's parents. The younger daughter will be having her First Communion in May and then one of the parents will definitely come to Poland. Mr. Justyn Andrzejewski informed me, that his son, together with his wife, are planning to take the children to Ireland when a new school term starts and from September the daughters will be attending a Polish School in Dublin. It seems that Maciej Andrzejewski and his family are planning on staying in Ireland for longer. The convicted person is working at Ford dealership.

I asked Mr. Justyn Andrzejewski to remind his son during the next telephone contact with him to get in touch with the probation officer leading the case and to send to the Local Court in Grodzisk Wielkopolski some documents confirming that he is staying in Ireland, e.g. contract of employment."

The record establishes that the respondent also failed to comply with this further request.

This, coupled with the other available information, invites the inference that the respondent was deliberately trying to conceal his actual whereabouts by sowing misinformation, while maintaining the pretence of partial co-operation with the probation services. Indeed, the totality of the available information suggests that the likely motivation for him doing so was to avoid being located by the court bailiff who he would have known was actively searching for him in connection with his indebtedness.

This Court has previously stated in *Minister for Justice, Equality and Law Reform v Ciechanowicz* [2011] IEHC 106 (unreported, High Court, Edwards J, 18th of March 2011) that:

"It is ... of the essence of any kind of probation supervision that the supervisor should be made aware of where the probationer is residing, and that if during the period of probation there is to be any change in where the probationer is residing the supervisor should be informed. Moreover, it is also of the essence of probation supervision that the probationer should stay in regular contact with, and be readily available to, his supervisor."

In the circumstances it is clear that the respondent was not in fact co-operating with his supervisor, and sought to place himself beyond the reach of the Polish court authorities. While it may have been his subjective intention to only seek to evade the Polish civil court authorities, and in particular the bailiff, it is nevertheless the case that in evading his court appointed supervisor, and in coming to Ireland without informing that supervisor, he must be treated objectively as having placed himself beyond the reach of the criminal court which had only conditionally released him, and which had required him to co-operate with, and subject himself to supervision by, its supervisor. The only inference that can be drawn in this Court's view is that he came to Ireland to evade justice, and he must be regarded as having fled in the *Tobin* sense.