Neutral Citation Number: [2011] IEHC 182

THE HIGH COURT

2009 149 EXT

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

BETWEEN/

THE MINISTER FOR JUSTICE AND LAW REFORM

APPLICANT

- AND -

HENRYK WALKOWIAK

RESPONDENT

JUDGMENT of Mr Justice Edwards delivered on the 6th day of May 2011

Introduction:
The respondent is the subject of a European Arrest Warrant issued by the Republic of Poland on the 4th of November, 2008. The warrant was endorsed for execution by the High Court in this jurisdiction on the 17th of June, 2009. The respondent was arrested at No 46, Spring Meadows, Dungarvan, Co Waterford on the 20th of July 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 warrant is a sentence type warrant and the respondent is wanted in the Republic of Poland to serve an outstanding aggregate or composite sentence of one year and eight months imprisonment imposed on him by the District Court in Œwiebodzin in respect of three offences specified in the warrant. Both correspondence and minimum gravity requires to be demonstrated with respect to the first and third of the offences specified. With respect to the second offence specified this is an offence to which paragraph 2 of Article 2 of the Framework Decision applies and in that respect the issuing judicial authority has ticked the box relating to *"fraud, including that affecting the financial interests of the Eurpoean Communities, within the meaning of the Convention of July 26th, 1995 on the Protection of the European Communities' Financial Interests*" within Part E. 1. of the European Arrest Warrant. In the circumstances only the minimum gravity requirements of s. 38(1)(b) requires to be demonstrated in relation to this offence.

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 addition the Court is required to consider in the particular circumstances of this case four specific objections to the respondent's surrender, namely:

(i) It is contended that the first of the three offences specified in the European Arrest Warrant (i.e an offence contrary to Article 284 § 1 of the Polish Penal Code) would not amount to a criminal offence in this jurisdiction. Accordingly, the respondent maintains that he should not be surrendered in relation to this offence because the European Arrest Warrant fails to comply with s.38 of the 2003 Act in as much as correspondence cannot be demonstrated.

(ii) It is contended that the third of the three offences specified in the European Arrest Warrant (i.e an offence contrary to Article 270 § 1 of the Polish Penal Code) would not amount to a criminal offence in this jurisdiction. Accordingly, the respondent maintains that he should not be surrendered in relation to this offence because the European Arrest Warrant fails to comply with s.38 of the 2003 Act in as much as correspondence cannot be demonstrated.

(iii) If the court is disposed to uphold either or both of the objections set out at (i) & (ii) above, the respondent contends that he cannot be surrendered in respect of any other offence or offences to which the European Arrest Warrant relates because a composite sentence was imposed in respect of all three offences covered by the warrant. The respondent says that in the circumstances severance is not possible and the Court cannot therefore surrender him in relation to any of the offences covered by the warrant.

(iv) The respondent further contends that his surrender is prohibited because the requirements of the 2003 Act , and in particular the requirements of s. 10(d) of that Act (as it was prior to the amendments effected by the Criminal Justice (Miscellaneous Provisions) Act, 2009), have not been satisfied.

Uncontroversial s. 16 issues
The Court has received an affidavit of Detective Garda Martin Keohane sworn on the 22nd of February 2011 and has also received and scrutinised a copy of the European Arrest Warrant in this case. Moreover the Court has also inspected the original European Arrest Warrant which is on the Court's file and which bears 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 European arrest warrant was issued;

(b) the European arrest warrant has been endorsed for execution in accordance with s. 13 of the 2003 Act;

(c) the European Arrest Warrant in this case is in the correct form;

(d) the respondent was not tried in absentia and so no undertaking for a re-trial is required;

(e) the High 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) the surrender of the respondent is not 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 s. 38 objections – minimum gravity and correspondence issues
As previously indicated, one of the three offences specified in the European Arrest Warrant is a ticked box offence, while the other two offences are not ticked box offences. With respect to the ticked box offence, the European Arrest Warrant indicates that what is alleged in Poland is breach of Article 286 § 1 of the Polish Penal Code, a conviction for which attracts a penalty of between 6 months and 8 years imprisonment. That being the case the minimum gravity requirements of s. 38(1)(b) of the 2003 Act are satisfied with respect to this offence.

With respect to the first of the three offences specified in the European Arrest Warrant (i.e an offence contrary to Article 284 § 1 of the Polish Penal Code) the offence is particularised as follows in Part E of the warrant:

"Over the period of May, 7 2001 – March 27, 2002, as the owner of 'Firma Handlowo-Uslugowa' of Œwiebodzin 29/4 Œwierczewskiego St, while providing services for 'NITOR Sp z o.o.' of Mistki, based in Œwiebodzin, Sobieskiego St, under the 'bread-delivery contract', being authorised to collect monies – cash payments – for the delivered bread, with premeditation, at short time intervals, Henryk Walkowiak appropriated the following monies:

[lengthy list of amounts and related invoice nos then set out]

of the total value of PLN 8,630.16 – thereby harming the above-named firm."

Further, in a letter dated the 9th of June, 2009 by way of additional information from the issuing judicial authority it is stated:

"As for the offence no 1 as described in the EAW: Mr Henryk Walkowiak was authorised by the harmed company to collect monies which he then appropriated (i.e. stole), instead of delivering them to the company."

The applicant invites the Court to find correspondence with the offence of theft contrary to s. 4 of the Criminal Justice (Theft and Fraud Offences) Act, 2001 (hereinafter the 2001 Act). As the Court understands it the objection pleaded by the respondent was based upon the fact that the particulars initially provided did not specify, or necessarily admit of the inference, that the appropriation was dishonest, which is a necessary ingredient of the Irish s. 4 offence. However, in the light of the additional information provided, which specifically refers to stealing, and having regard to Geoghegan J's judgment in the Supreme Court in *Minister for Justice, Equality & Law Reform v Sas* [2010] IESC 16, the Court is satisfied that the objection raised is not tenable. Accordingly the Court is satisfied that the first offence mentioned in the European Arrest Warrant does correspond with the offence of theft contrary to s. 4 of the 2001 Act.

With respect to the third of the three offences specified in the European Arrest Warrant (i.e an offence contrary to Article 284 § 1 of the Polish Penal Code) the offence is particularised as follows in Part E of the warrant:

"On February 25, 2002, while providing transport services for 'NITOR Sp z o.o.' of Œwiebodzin, with premeditation, at short time intervals, Henryk Walkowiak obtained from Regina Wiœniewska accounting documents, based on VAT invoices, stating the overdue payments for the delivered bread, and then on those documents – without showing them to particular businesses – forged the signatures of the following persons:

[List of names and addresses then set out]"

In the aforementioned letter dated the 9th of June, 2009 from the issuing judicial authority it is further set out by way of additional information that:

"As for the offence no 3 as described in the EAW: Mr Henryk Walowiak forged the signatures of the customers on a specification of monies due for the delivered bread, made by the Vice-Chairman of the Board of 'Nitor', the harmed company. Since he did not hand over the monies to 'Nitor', its management initially believed it was the customers who failed to pay for the bread – so Ms Regina Wiœniewska, board member, made this specification of outstanding payments for them to sign as proof of their intention to settle their debts and asked Mr Henryk Walkowiak to get them to sign it. In order to conceal the truth, he forged the signatures on the specification and gave it back to Ms Regina Wiœniewska who filed it in the company's accounting books."

The applicant invites the Court to find correspondence either with the offence of forgery contrary to s. 25 of the 2001 Act; alternatively with the offence of using false instrument contrary to s. 26 of the 2001 Act.

S.25(1) of the 2001 Act 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."

S.26(1) of the 2001 Act provides:

"A person who uses an instrument which is, and which he or she knows or believes to be, a false instrument, with the intention of inducing another person to accept it as genuine and, by reason of so accepting it, to do some act, or to make some omission, or to provide some service, to the prejudice of that person or any other person is guilty of an offence."

The expression "false instrument" appears in both s.25 and s.26 respectively. An "instrument" is defined in s. 24 of the 2001 Act as :

"any document, whether of a formal or informal character (other than a currency note within the meaning of Part 5) and includes any

(a) ….

……..

……..

(l) ……"

Further, "false" and "making" in relation to an instrument are said to have the meanings assigned to these words by s. 30 of the 2001 Act. S. 30 provides:

"1) An instrument is false for the purposes of this Part if it purports—

(a) to have been made in the form in which it is made by a person who did not in fact make it in that form,

(b) to have been made in the form in which it is made on the authority of a person who did not in fact authorise its making in that form,

(c) to have been made in the terms in which it is made by a person who did not in fact make it in those terms,

(d) to have been made in the terms in which it is made on the authority of a person who did not in fact authorise its making in those terms,

(e) to have been altered in any respect by a person who did not in fact alter it in that respect,

(f) to have been altered in any respect on the authority of a person who did not in fact authorise the alteration in that respect,

(g) to have been made or altered on a date on which, or at a place at which, or otherwise in circumstances in which, it was not in fact made or altered, or

(h) to have been made or altered by an existing person where that person did not in fact exist.

(2) A person shall be treated for the purposes of this Part as making a false instrument if he or she alters an instrument so as to make it false in any respect (whether or not it is false in some other respect apart from that alteration)."

Finally, s. 24 of the 2001 Act further provides that "prejudice" and "induce", in relation to a person, have the meanings assigned to those words by s. 31 of that Act. S. 31 of the 2001 Act provides:

"1) Subject to subsections (2) and (4), for the purposes of this Part, an act or omission intended to be induced shall be to a person's prejudice if, and only if, it is one which, if it occurs—

(a) will result, as respects that person—
(i) in temporary or permanent loss of property,

(ii) in deprivation of an opportunity to earn remuneration or greater remuneration, or

(iii) in deprivation of an opportunity to gain a financial advantage otherwise than by way of remuneration,

or

(b) will result in another person being given an opportunity—
(i) to earn remuneration or greater remuneration from him or her, or

(ii) to gain a financial advantage from him or her otherwise than by way of remuneration,

or

(c) will be the result of his or her having accepted any false instrument as genuine, or any copy of it as a copy of a genuine instrument, in connection with his or her performance of any duty.

(2) An act which a person has an enforceable duty to do and an omission to do an act which a person is not entitled to do shall be disregarded for the purposes of this Part.

(3) In this Part references to inducing a person to accept a false instrument as genuine, or a copy of a false instrument as a copy of a genuine one, include references to inducing a machine to respond to the instrument or copy as if it were a genuine instrument or copy of a genuine one.

(4) Where subsection (3) applies, the act or omission intended to be induced by the machine responding to the instrument or copy shall be treated as an act or omission to a person's prejudice."

Again, the respondent has pleaded, and as the Court understands it has not withdrawn the plea, that the acts complained of as set out in the particulars furnished would not amount to a criminal offence in Irish law. However, no specific ingredient of the offences provided for in either s.25 or s. 26 of the 2001 Act is identified as being missing or not satisfied.

The Court is satisfied having regard to the totality of the information provided concerning the third offence mentioned in the European Arrest Warrant, and approaching the matter by giving the words used in the particulars furnished their ordinary meanings in accordance with *Attorney General v Dyer* [2004] 1 I.R. 40, that the acts of the respondent described would correspond with both of the suggested offences under Irish law, namely forgery contrary to s. 25 of the 2001 Act, and using false instrument contrary to s. 26 of the 2001 Act.

The European Arrest Warrant states in Part C 3 thereof that an aggregate penalty of 1 year and eight months imprisonment was imposed for the three offences specified within the warrant. According the requirements of s.38(1)(a)(ii) with respect to minimum gravity are met in the case of both the first and third offences, respectively.

As this Court is satisfied (i) that correspondence has been demonstrated with respect to the first and third offences; (ii) that correspondence does not require to be demonstrated with respect to the second offence, and (iii) that minimum gravity requirements are satisfied with respect to all three offences, no question as to the severability of any offence or offences s arises.

Alleged non- satisfaction of s. 10 criteria – the "no flight" contention.
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 duly issues a European arrest warrant in respect of a person—
>
> (a) ….
>
> (b) ….
>
> (c) ….
>
> (d) on whom a sentence of imprisonment or detention has been imposed in respect of an offence to which the European arrest warrant relates, and who fled from the issuing state before he or she—
>
> (i) commenced serving that sentence, or
>
> (ii) completed serving that sentence,

that person shall, subject to and in accordance with the provisions of this Act and the Framework Decision, be arrested and surrendered to the issuing state.".

Accordingly, this Court must be satisfied that the respondent "fled" Poland before commencing, alternatively before completing, the sentence imposed upon him for the offences to which this warrant relates. The respondent contends that he did not flee. The Court interprets the word "fled" in accordance with the Supreme Court's ruling 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 essence, the case that has been put forward by counsel for the respondent, Mr Byrne B.L., is that there is no evidence, alternatively insufficient evidence, before the Court so as to enable the Court to be satisfied that the respondent was not entitled to leave Poland. He contends that in the absence of such evidence the Court would not be justified in drawing an inference that the respondent fled Poland, as opposed to merely leaving Poland, and he argues that his client does not in the circumstances bear any evidential burden to counter the mere suggestion that he may have fled. In support of his case he relies upon the judgment of Peart J in *Minister for Justice, Equality & Law Reform v Jankowski* [2010] IEHC 401, and the Supreme Court judgment of Macken J (nem diss) in *Minister for Justice, Equality & Law Reform v Slonski* [2011] IESC 19.

Ms Dempsey B.L., representing the applicant, points to the totality of the information contained in the warrant and the additional information provided. In addition to the information provided in the letter of the 9th of June, 2009 (which is not relevant to the issue of possible flight) there is yet further additional information that was supplied by the issuing judicial authority on three subsequent dates, namely on the 30th of November, 2010, on the 13th of January, 2011 and on the 18th of March 2011, respectively.

The additional information of the 30th of November, 2010 states:

> *"In its judgment of August 13th 2003, ref no 11 K 173/03, the District Court of Œwiebodzin sentenced Henryk and Walkowiak to 1 year and 8 months in prison, suspending the sentence and putting Mr Walkowiak on probation for 3 years. The judgment obligated him to make amends for the wrongs he had done by paying the harmed person PLN 9,340.29 within one year of the day the judgment became valid. In its decision of October 15, 2004, ref no Ko 695/04, the District Court of Œwiebodzin ordered the enforcement of the custodial sentence, because Mr Walkowiak had defaulted on the obligation. The court found that he did so deliberately. Mr Walkowiak was present at the announcement of both the sentencing judgement and the enforcement decision. On January 17, 2005 he petitioned for the postponement of the enforcement of the above-specified custodial sentence. In its decision of February 7, 2005, ref no Ko 31/05, the District Court of Œwiebodzin turned down his petition. Mr Walkowiak was present at the announcement of this decision. Then, he failed to turn up of his own accord for serving his term. On April 22, 2005, the police informed the court that he did not reside at his usual address and that they were conducting a search for him. On January 27, 2006, the District Court of Œwiebodzin issued a wanted notice in his respect. On March 28, 2007, the police informed the court that Mr Walkowiak was likely to be staying in Ireland."*

The additional information dated the 13th of January, 2011 states:

> *"The decision of February 7, 2005 by the District Court of Œwiebodzin was not yet valid on the day of its issuance and that is why Henryk Walkowiak could not be arrested then to serve his term. He had the right to appeal within seven days -- which he did do. His appeal was considered by the Circuit Court of Zielona Góra which, in its decision of March 24, 2005, upheld the court's decision of February 7, 2005. Only then was it possible for the Circuit Court of Zielona Góra to order the police to arrest Mr Walkowiak and bring him to the prison to serve his sentence. Such an order was issued by the District Court of Œwiebodzin on April 13, 2005. The police then informed the court that they could not apprehend him, since he had been away. Mr Walkowiak had been informed of the obligation to inform the court of any change in his address already during the preparatory proceedings."*

Finally, the additional information dated the 18th of March, 2011 states:

> *"On behalf of the District Court of Œwiebodzin, Crime Division, with reference to our proceedings ref no II K 173/03 against Henryk Walkowiak, please, be advised that right after our court's decision of October 15, 2004 - to enforce the sentence - became valid and binding, Henryk Walkowiak was ordered to report to the prison to serve his term. Since he failed to do as ordered, the court ordered a warrant for the police to bring him to the prison. Although Mr Walkowiak had been told to inform the court of any change of his usual address, he did leave the country to avoid the enforcement of the sentence.*

> *On March 24, 2005 the Circuit Court of Zielona Góra upheld the District Court of Œwiebodzin's decision to refuse the postponement of the enforcement of the sentence, and on April 11, 2005, the case file was returned to the Œwiebodzin court. It was in this intervening period that Mr Walkowiak fled the country."*

It is clear to this Court from the authorities that have been opened to it that the issue that has been raised must be approached in the manner commended in the judgments of the Supreme Court in *Minister for Justice, Equality & Law Reform v Sliczynski* [2008] IESC 73.

In the *Sliczynski* case, which involved three suspended sentences imposed on the respondent and later activated because of a breach of certain conditions attaching to the suspension, the applicant had provided information from which it could be concluded that the respondent must have been aware of the conditions in question and that a breach of any of them would lead inevitably to an activation of the relevant sentence or sentences. Peart J, giving judgment in the High Court, had felt justified in inferring that the respondent had fled from the issuing state so as to avoid serving the sentences in question, notwithstanding that the respondent had stated on affidavit that his subjective motivation in leaving Poland and coming to Ireland was to better himself financially and to get away from certain undesirable former associates in the issuing state. The learned High Court Judge had in effect rejected the respondent's contention on the basis that the subjective motivation proffered was no more than unsupported assertion and there had been a failure to substantively engage with the information put before the court by the applicant (in an affidavit sworn by a Mr Doyle.) In the course of his judgment Peart J stated *"I have no doubt at all but that it would have been possible for the respondent to obtain copies of the relevant court documents, should he have requested them, so that he himself could discharge the very heavy onus which lies upon him to make out the factual background necessary to support his contention that he left lawfully"*. One of the grounds of appeal was based upon the learned High Court judge's reference to the respondent bearing a "very heavy onus" which, it was argued (*inter alia*), connoted that there was a legal onus on the respondent to establish in law something that the statute did not require him to establish. The Supreme Court rejected this argument and held that the learned High Court judge was correct in the circumstances of that case in finding that the respondent had "fled" Poland within the meaning of s. 10 of the Act.

In the course of her judgment in *Sliczynski*, Macken J considered whether there was an onus on the respondent to establish that he did not flee. She expressed the following views, with which Murray C.J. in the course of his judgment stated he was in agreement: She said:

> *"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.*
>
> *As to the present case, if, having regard to the information on the terms of the suspension in Polish law, it is objectively established that there was a deliberate decision to leave Poland in breach of the very terms as to residence and notification known to the appellant, even if the subjective motivation for leaving is stated to be different, it is reasonable for a trial judge to conclude that the appellant has done so in circumstances which make it impossible for him to serve the sentence imposed. If leaving the requesting member state was done in circumstances where, as here, the terms and conditions attaching to the suspension are not denied, and therefore it must be accepted that they were both known and appreciated by the appellant, but were breached, it seems to me to follow that the appellant has, objectively speaking, placed himself in a position that he has "fled" the issuing Member State, in the sense of having left Poland in circumstances which make it impossible for the sentence to be served, and is a person who "fled from the issuing State before he commenced serving that sentence".*

I do not consider that the learned High Court judge altered the onus of proof required of an applicant in s.10 of the Act of 2003. Rather his judgment, while perhaps slightly infelicitously worded, must be understood in the sense that, having had all of the information from the issuing judicial authority which enabled him to find that the appellant had, on the basis of that information when viewed objectively, fled Poland, the appellant had not himself chosen to do any of the several things he might have done to counter that inevitable conclusion, which flowed from an examination of the information provided. When speaking of the heavy onus, I think it fairer to say that this concerned, not a legal onus on the appellant to establish in law something he was not obliged to establish, but rather an onus on him having regard to the information and material furnished in Mr. Doyle's affidavit, the veracity of which was not challenged in any way by the appellant, to establish that the material furnished did not support its natural conclusion that he had fled.

The learned High Court judge was in the circumstances correct in finding that the applicant had "fled" Poland within the meaning of s.10 of the Act.

The first thing to be said with respect to Mr Walkowiak's case is that he has not filed an affidavit in support of his points of objection and accordingly he has put forward no subjective motivation for leaving Poland. In effect, he is putting the applicant upon "proof" of flight. Of course, to put it in that way is to slightly misrepresent the true legal position, and so I use the word "proof" in the loose sense. The true position is that the applicant does not bear any burden of proof as such. Nor of course, does the respondent. As I pointed out in my judgment in *Minister for Justice, Equality & Law Reform v Gorka* [2011] IEHC 121, and as is also pointed out in the Supreme Court judgments in *Sliczynski*, the proceedings herein which are *sui generis* in nature are more in the nature of an inquiry than an adversarial contest. Accordingly neither side has a case as such, nor has either party a burden of proof to discharge. It is for the Court to determine on all the evidence available to it whether the requirements of s. 16 have been met. I also said in *Gorka* that:

> *"The parties are primarily present for the purpose of assisting the Court in ascertaining the true state of facts. They are, of course, interested parties, and their entitlement to be there and to participate stems partly from their interest in the outcome, and partly from the requirement that the procedure should be fair and transparent and in accordance with the rules of natural justice as they apply to this unique procedure. At the end of the day, however, the view of either side as to the facts, or as how the law should be applied to the facts, is not determinative."*

I am satisfied on the basis of the information supplied by the applicant in this case that the respondent was present when his sentence was suspended and well knew the conditions upon which it had been suspended. Further, it must have been apparent to him that if he breached the conditions of the suspension it was likely that he would be called upon to serve the sentence in question. One of the relevant conditions was that he should pay compensation to the injured party within a specified time. He deliberately failed to do so. It was for breach of this condition that the suspension of his sentence was lifted.

However, and this is relevant to the flight issue, another condition of the suspension of his sentence was that he should submit to a regime of probation supervision for three years. As I stated in *Minister for Justice, Equality & Law Reform v Ciechanowiczi* [2011] IEHC 106 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."* He left Poland for Ireland within the three year period ostensibly without seeking the permission of the sentencing Court, without telling it that he was going and then, having arrived in Ireland, failed to advise the Court of his new address. In doing so he placed himself beyond any effective probation supervision. It is therefore clearly to be inferred that he travelled to Ireland in breach of the condition that he should submit to a regime of probation supervision for three years.

Moreover, the additional information states expressly that it was a condition of the suspension of the respondent's sentence that he should inform the court of any change of his usual address, and that he been expressly informed of his obligation in that regard. The evidence clearly establishes a further specific breach in that regard.

The respondent was present when the suspension of his sentence was ordered to be lifted. He knew at that point that unless he could have the enforcement of the sentence postponed, or the enforcement decision reversed on appeal, he would be shortly be called upon to serve his sentence Before leaving for Ireland he had requested the District Court of Œwiebodzin to postpone the enforcement of the sentence. That request was turned down and he was present in Court on the 17th of January 2005 when it was turned down. He then appealed the lifting of the suspension on his sentence by the District Court of Œwiebodzin to the Circuit Court of Zielona Góra. He left Ireland while that appeal was pending. Shortly after his arrival in Ireland the Circuit Court of Zielona Góra rejected his appeal.

It is clearly to be inferred from all the circumstances of the case that he was not at liberty to leave the jurisdiction without the court's permission to do so. He left Poland for Ireland having failed to seek permission from the Court to do so, and having failed to inform the Court of his plans, and then having arrived in Ireland he failed to inform the Court of his new address.

It is quite clear to the Court that the respondent must have known when travelling to Ireland that he was placing himself beyond supervision and was therefore breaching the terms of his probation; that there was a significant risk that his pending appeal would not succeed, and that if it did not succeed he would shortly be called upon to serve the sentence imposed upon him. The Court considers that when the facts of the case are viewed objectively it is reasonably to be inferred that he fled from Poland to evade justice.

I consider that the cases of *Jankowski* and *Slonski*, respectively, upon which the respondent relies, are distinguishable on their facts from the circumstances of the present case. The inference as to flight in the present case arises from the evidence contained in the information which the applicant has put before the Court concerning the circumstances in which the suspension of the relevant sentence was lifted for breach of the conditions of the suspension, coupled with the procedural history of the case. The *Jankowski* case did not concern the lifting of a suspended sentence, and the circumstances in which the Court decided that no justifiable inference of flight could be drawn were wholly different from the circumstances of the present case. While the *Slonski* case did concern the lifting of a suspended sentence there was a clear lacuna in the evidence concerning what were the conditions upon which the sentence had been suspended, and in particular as to what constituted a "curator's supervision", and as to what conditions attaching to the respondent's suspended sentence were allegedly breached and had led to the lifting of the suspension. There is no such evidential deficit in the present case. The conditions upon which the sentence was suspended are clear, the particular breach for which the suspension was lifted is clearly identified, and it is also clear that the respondent could have been under no illusions as to the likely consequences of committing a breach or breaches of the conditions of his suspension. These matters taken in conjunction with the procedural history of the case as outlined in the information put before the Court, and the further ostensible breaches of the conditions of his suspension committed by the respondent, provide clear support for an inference that in leaving Poland when he did, and in the circumstances in which he did so, the respondent was fleeing that jurisdiction in order to evade justice.

The Court is satisfied in all the circumstances of this case that the respondent has not discharged the heavy onus upon him to adduce cogent evidence to establish that the information provided by the applicant does not in fact support the natural and reasonable inference to be taken from it, namely that he had fled. The Court is satisfied that the available evidence establishes that the respondent did flee Poland in the "*Tobin*" sense and that he left that country in order to evade justice and to avoid serving the sentence for the offences to which the European Arrest Warrant in this case relates.

Conclusion

The Court is not disposed to uphold any of the specific objections made by the respondent in this case, and in the circumstances it is appropriate to make an order for his surrender under s. 16 of the 2003 Act.