THE HIGH COURT

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

Record No. 2011/248 EXT.

BETWEEN:

THE MINISTER FOR JUSTICE AND EQUALITY

APPLICANT

AND

MICHAL LECH BARTOLD

RESPONDENT

EX TEMPORE JUDGMENT of Mr. Justice Edwards delivered the 1st day of March, 2012.

The Court has had produced to it a true copy of a European Arrest Warrant in this matter dated 30 June 2010. The Court is satisfied that that warrant was endorsed for execution in this jurisdiction on the 20 July 2011 and that the warrant was duly executed by Garda Emmet Daly on 4 October 2011, following which Mr. Bartold was brought before the High Court on the following day, 5 October 2011. There was a hearing on that date pursuant to s.13 of the European Arrest Warrant Act. 2003 (hereinafter the Act of 2003) at which a notional date was fixed for the purposes of s.16 of the Act of 2003 and Mr Bartold was remanded on bail to the date fixed. Thereafter the matter was adjourned from time to time. He has, as I understand it, faithfully honored his bail at all stages and no issue arises in regard to that.

The matter comes before the Court today for the purposes of a s.16 hearing. The Court must be satisfied with regard to all of the requirements of the Act of 2003 before it can surrender Mr. Bartold and therefore, in a moment, the Court will go through all of the matters of which it must be satisfied as a matter of course. However, in addition to matters which arise as a matter of course. specific objections have been raised in this case by counsel for the respondent. Mr. Hanrahan B.L., and the Court must al so deal with those. The Court has indicated that it is not disposed to uphold those specification objections and I will set out my reasons for not doing so in a moment.

It is sufficient to say that although six points are raised in the points of objection dated 8 November 2011, only Points 1. 2, 3 and 5 were proceeded with. These can be summarized as relating to correspondence and trial in absentia. I will address those issues specifically in a few moments.

However, the first thing to be said about this warrant is that it is a combination of a prosecution-type warrant and a conviction-type warrant. It relates to a total of three offences. One of those offences is a prosecution matter. The other two offences are conviction matters, i.e. matters in respect of which Mr. Bartold has been tried and convicted before the Courts of the issuing State, and the purpose for which they seek his surrender in relation to those matters is to have him serve out the balance of the sentences imposed upon him for those matters.

I am told that identity is not an issue in this case but in any event the Court is satisfied on the basis of the affidavit of Garda Daly that the person who is before the Court is one in the same person as the person named in the warrant.

I should also say for completeness that the Court is aware that there is a statutory instrument designating Poland as a designated State for the purposes of t he Act of 2003 and the Court takes judicial notice of that statutory instrument.

Now, if I might deal with the prosecution matter first: this is a matter which is particularised as "Case A" in Part E of the warrant and I have been invited to find correspondence with an offence contrary to s. 3 of the Non-Fatal Offences Against the Person Act. 1997 in respect of that matter. No issue was raised in relation to correspondence by the Respondent in so far as this offence is concerned. The Court has considered the particulars set out in Part E in relation to Case A and is satisfied to find correspondence with the offence o r assault ca using harm, contrary to s. 3 or the Non-Fatal Offences Against the Person Act. 1997.

Insofar as minimum gravity is concerned the threshold in regard to a prosecution matter where a box is not ticked is that set out in s. 38 (1)(a)(i) or the Act of 2003 and that provision requires the Court to be satisfied that the offence under the law of the issuing state is punishable by imprisonment or detention for a maximum period of not less than 12 months. We are told in Part C (1) of the warrant that the offence carries up to three years imprisonment in Poland and so minimum gravity is clearly met with regard to this matter.

Obviously no issue can arise as to trial *in absentia* because it is a prosecution matter and there has been no trial.

Nothing has been brought to the Court's attention. nor has any specific objection been raised, concerning the rule of specialty insofar as this particular aspect of the case is concerned and so the Court is not required under ss. 21 A, 22, 23, or 24 of the Act of 2003 to refuse to surrender the respondent in relation to the "case A" offence.

Further, the Court is not aware of any circumstance which would cause it to consider that the surrender or Mr. Bartold for this offence is prohibited, either under Part 3 of the Act of2003. or on foot of the Framework Decision (including the recital s thereto).

In the circumstances the Court is disposed to surrender Mr. Bartold in respect of the "Case A" offence.

Moving then to the two conviction matters, they are set out as "Case B" and "Case C", respectively, in Part E of the European arrest warrant. In relation to the offence particularised as Case B I am invited to find correspondence either with an assault contrary to s. 2

or the Non-Fatal Offences Against the Person Act, 1997 or, alternatively, with an offence of threatening to damage property contrary s. 3 of the Criminal Damage Act, 1991. The Court has considered both candidate corresponding charges. The Court listened to carefully to the submissions made by Mr. Hanrahan suggesting that correspondence cannot be round with either of the candidate corresponding charges, but a t the end of the day Mr. Hanrahan was prepared, if not to totally concede on the issue, to maintain only what was in effect a token objection to the suggestion that correspondence could be found with an offence contrary to s.3 of the Criminal Damage Act, 1991.

It is manifest from the facts set out in relation to Case B that there was a threat to burn the music club referred to in the particulars. S. 3 of the Criminal Damage Act, 1991 provides that "a person who without lawful excuse makes to another a threat. intending that that other would fear it would be carried out- (a) to damage any property belonging to that other or a third person." etc etc commits an offence. The particulars furnished describe a clear threat to damage property belonging to the owner of the music club, whether that is the named victim or another person. It is not clear from the particulars whether the named person is in fact the owner, but it does not matter. There is a threat to damage the music club that belongs to some person and it is quite clear from the circumstances set out in Case B that that threat was proffered intending that those hearing it would fear it would be carried out. In those circumstances I am absolutely satisfied that correspondence can be demonstrated with the suggested s. 3 offence. In the circumstances the Court need ex press no view with respect to the suggested alternative.

In regard to minimum gravity, the respondent on being convicted of the offence in Poland received a sentence of eight months' imprisonment. The minimum gravity threshold in regard to sentence matters where a box has not been ticked is that set out in Section 38 (1) (a) (ii) of the Act of 2003. That provision requires it to be demonstrated that a sentence or imprisonment or detention of not less than four months has been imposed by a Court in the issuing State. The sentence that was actually imposed here was eight months. In circumstances where the threshold is four months minimum gravity is clearly met.

Moving on then to Case C. as it is described in the European arrest warrant, the Court was invited in regard to this matter to find correspondence with one of four candidate offences. It was suggested that correspondence could be demonstrated with the offence of assault contrary to s.2 of the Non-Fatal Offences Against the Person Act, 1997; alternatively the offence of assault causing harm contrary to s. 3 of the Non-Fatal Offences Against the Person Act, 1997; alternatively with the offence of violent disorder contrary to s. 15 of the Non-Fatal Offences Against the Person Act, 1997; alternatively with an offence of entering a building with intent to commit an offence, contrary to s. 11 of the Criminal Justice (Public Order) Act, 1994. While the Court has considered all of these options it is satisfied that the clearest correspondence can be demonstrated with the s. 2 assault offence, and with the s. 15 violent disorder offence. In those circumstances the Court does not feel it necessary to express any view as to whether or not there is also correspondence with the s. 3 assault offence, or with the suggested s. 11 offence, viz entering a building with intent to commit an offence.

In regard to the finding of correspondence with s. 2 assault there is a clear statement within the particulars furnished that the respondent and two other men attacked a named person, and the particulars go on to describe the nature of the attack and it is clear that items were thrown at the victim, including a dustbin liner, a dustbin, and chairs. Moreover, it is also clear from the particulars that each of the attackers threw something. In those circumstances the Court is satisfied that the ingredients of a s.2 assault offence are made out.

Similarly as three persons were acting in concert in a violent way and in the manner that I have described I have no hesitation, having had opened to me the terms of the s. 15 provision relating to violent disorder, in finding correspondence with violent disorder.

Turning to minimum gravity again the threshold with regard to this offence is four months. The sentence that was imposed for this was ten months' imprisonment and so minimum gravity is clearly met.

There remains a specific objection which affects the offence described as Case C only. This objection is based on a contention that the respondent was tried *in absentia* and that the Court should not surrender him unless and until an undertaking that he will receive a re-trial is forthcoming from the issuing State as required by s. 45 of the Act of 2003.

The first thing to be said is that in terms of the initial trial and conviction the evidence is all one way to the effect that he was not tried *in absentia*. He was present for his trial. He was present when he was convicted and he was present when the sentence was imposed upon him.

However, it does appear that he may have appealed. That said, it is unclear from the information before the Court as to whether his appeal was against both conviction and sentence or against sentence only. There also appears to have been a cross-appeal in as much as another charge which had been the subject of the same indictment had resulted in an acquittal of Mr. Bartold at first instance. It appears that the prosecutor cross appealed against that acquittal.

We are told from additional information which has been provided, and which is dated 13 December 2011, that the acquittal was overturned by the Regional Court in Lódz and that the sentence of ten months' imprisonment, which had been initially suspended, remained valid and enforceable. However, it is unclear to this Court whether or not the issue concerning the accused's guilt or innocence of the charge, which is the subject of Case C. was re-visited on appeal.

The appeal court, i.e. the Regional Court in Lódz, may, on the present information, have had to consider whether or not to uphold the conviction by the court below. Allowing for that possibility, it is counsel for the respondent's case that since guilt or innocence had not been finally determined his client had a right to be there. Moreover, if as appears to have happened, the appeal proceeded in his absence it was submitted that this Court should regard him as having been tried *in absentia*, and that in the absence of evidence that he was actually notified in the manner required by the Supreme Court , and in particular the judgment of Murray C.L as he then was, in *Minister for .Justice. Equality and Law Reform v Sliczynski* [2008] IESC 73 (unreported. Supreme Court, 19th of December, 2008) that the Court should refuse to surrender him unless an undertaking has been received that he will receive a re-trial or at least a re-hearing of his appeal.

It has been urged on the Court by counsel for the applicant. Ms. Cathleen Noctor B.L., that the reference to trial and conviction in s. 45 must be construed as referring only to the trial *ab initio*, that is the trial before the Court at first instance, and that it would be incorrect to interpret s. 45 as ex tending to an y re-visitation of the issue of guilt or innocence in circumstances where the respondent has himself initiated the appeal. It was further urged that there is a duty of due diligence on t he respondent where he initiates the appeal process to prosecute his appeal, and to remain amenable to the authorities for the purposes of notification in accordance with Polish law. It appears from the judgments in *Sliczynski*, and the Court is also aware of the fact from other cases, that the position in Poland is that a person who is either facing trial *ab initio*, or concerned with an appeal, must furnish the authorities with a designated address for the purpose of being notified in writing of the hearing date. The warrant in this case refers

to Mr. Bartold having been duly served the summon s in relation to the appeal. The Court infers from this that he was notified at t he designated address in the normal way that it is done in Poland.

However, the Irish Supreme Court, in construing s. 45 of the Act of 2003, has said, certainly in regard to a trial at first instance, which is what that Court was concerned with in the *Sliczynski* case. that for the purposes of any Court in this country considering whether not to surrender a person on foot of a European arrest warrant, that it is not enough to establish that notification in writing was sent to the respondent at a designated address concerning the date of his trial. What is required under Irish law for the purposes of s. 45 is that a person be personally notified, that is there should be personal service on him, or there should at least be evidence that he actually was made aware of the date of the hearing.

The Court has been invited by counsel for the applicant to distinguish *Sliczynski* and to take the view that *Sliczynski* is only intended to apply to a trial at first instance, and that it doesn't apply to a re-visitation of the issue of guilt or innocence on appeal because that is a process that is initiated by the respondent and one in respect of which the respondent is expected to show due diligence, so that if he furnishes an address at which he is to be notified he is required to remain in a situation where that can lead to effective notification of him.

In this particular instance the evidence is that Mr. Bartold upped and left Poland. Having filed his Notice of Appeal, He could not be notified at the designated address because, of course, he had left and gone to Ireland. Counsel for the applicant urges that it would be absurd that somebody could escape surrender on that basis, effectively in circumstances where they had contrived a situation whereby they couldn't be extradited, and that the Court should not interpret the legislation in a way that allows for that.

The Court challenged counsel for the applicant that that very situation arises also at first instance, but Ms. Noctor B.L. differentiates the trial at first instance from the appeal process by saying that the procedure of first instance is not one initiated by the respondent himself whereas the appeal process is initiated by the respondent and the respondent carries responsibilities as a result of that which don't exist in respect of a trial of first instance. I think there is force and strength in that argument and I consider that it represents a legitimate basis for differentiating the situation at first instance from the situation on appeal.

Accordingly, I am not disposed to apply the *Sliczynski* judgment to a situation where a person has lodged an appeal , and having done so has absconded, and by reason of his absconding has had his appeal determined in his absence. I do not think that s. 45 was intended to apply to that situation. I believe that counsel for the applicant is correct in saying that s. 45 must be interpreted, insofar as it refers to trial and conviction, as referring to the trial and conviction of the respondent at first instance, and I so rule.

Having so ruled, it seems to me that there is no substance in the objection raised by counsel for the respondent in regard to Case C and I reject that objection. The Court is satisfied that the respondent was not tried and convicted in absentia and that nos. 45 undertaking is required in regard to the offence which is the subject of Case C.

Returning then to whether or not there are any other grounds on which the Court could refuse to surrender Mr. Bartold in respect of Cases Band C, no issue has been raised or pleaded raising the rule of specialty and so there is no reason to believe that the Court must refuse surrender under ss. 21A, 22, 23, or 24 of the Act of 2003, insofar as these offences are concerned. Similarly the Court is not aware of any circumstance that would cause it to believe that the surrender of Mr. Bartold is prohibited either under Part 3 of the Act of 2003, or on foot of the Framework Decision (including the recitals thereto), in respect of Cases Band C.

In all the circumstances of the case I am disposed to surrender Mr. Bartold on all three offences covered by this warrant and I will make an order pursuant to s. 16(1) directing that he be surrendered to such person as is duly authorised by the issuing state to receive him.