THE SUPREME COURT

Record No. 139/2008

Denham J.
Geoghegan J.
Finnegan J.

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

BETWEEN/

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

Applicant/Respondent

and

JAROSLAV STANKIEWICZ

Respondent/Appellant

JUDGMENT of Mr. Justice Geoghegan delivered the 1st day of December 2009

This is an appeal from an order of the High Court (Peart J.) made on the 6th May, 2008 and ordering, pursuant to a European arrest warrant that the above-named appellant be surrendered to such person duly authorised by the Republic of Poland to receive him.

There is only one legal point at issue on this appeal and that is the question of whether the appellant can be said to have *"fled"* within the

meaning of section 10 of the European Arrest Warrant Act, 2003 as amended by section 71 of the Criminal Justice (Terrorist Offences) Act, 2005 and as interpreted by this court in **Minister for Justice, Equality and Law Reform v. Tobin** [2008] 4 I.R. 42.

At the risk of oversimplification, the appellant's case is that he received a suspended sentence in Poland in respect of convictions on two offences. The sentences were imposed by a Polish court on the 15th January, 2001 with a sentence of one year and four months but suspended for five years. The appellant alleges that there were no conditions attaching to the suspension, that he was free to leave the country any time he wished and that to the knowledge of the authorities he worked in Germany for three days in the week for a substantial time. On the alleged basis that he wanted to improve himself he emigrated to Ireland in March, 2005. He says that this was a *bona fide* departure from Poland and that he could not have been characterised as having *"fled"* within the meaning of section 10. The respondent disputes this argument and claims that the appellant *"fled"* within the meaning of the section.

The context in which this issue arises is that according to the documentation before the Irish courts coming from the judicial authorities of Poland, the appellant was again convicted of an offence in a Polish District Court in November, 2004. It is to be noted that that conviction occurred before the appellant left for Ireland.

The appellant denies that he ever committed the offence for which he was convicted in November, 2004 and that he was allegedly tried *in absentia*. It is perfectly clear from the documentation that under the law of Poland, if a person on a suspended sentence commits a further offence a suspension on an earlier sentence may be lifted. Indeed on one interpretation of the documentation before us the lifting may be mandatory. That being so it is irrelevant and somewhat of a *"red herring"* whether there were particular express conditions imposed or not. All that matters is that there was a jurisdiction to activate the original sentence into a custodial sentence if there was a conviction on a later offence committed during the period of suspension. It would seem to me that even if a court had the benefit of much less information on this it could, on the facts, draw a reasonable inference that that would be so. It is a perfectly normal procedure in virtually every jurisdiction and a natural consequence of suspension.

The appellant denies that he ever committed the later offence and complains that he was tried *in absentia*. In this connection, the appellant indirectly invokes section 45 of the Act of 2003. That section reads as follows:

> *"45.- A person shall not be surrendered under this Act if –*
>
> *(a) he or she was not present when he or she was tried for and convicted of the offence specified in the European arrest warrant and*

(b) (i) he or she was not notified of the time when, and place at which, he or she would be tried for the offence, or

(ii) he or she was not permitted to attend the trial in respect of the offence concerned,

unless the issuing judicial authority gives an undertaking in writing that the person will, upon being surrendered –

(i) be retried for that offence or be given the opportunity of a retrial in respect of that offence,

(ii) be notified of the time when, and place at which any retrial in respect of the offence concerned will take place, and

(iii) be permitted to be present when any such retrial takes place."

The appellant accepts that that section applies to an offence in respect of which the extradition proceedings relate and not, as in this case, to a subsequent offence which is not the subject of the extradition proceedings but the conviction for which has had the effect of lifting a suspension of earlier sentences. The appellant's argument, however, is that the court should view the contents of section 45 as representing a public policy which should equally be applied when, what I might describe as a sparking off conviction leading to the lifting of a suspension of a previous sentence arises from a trial *in absentia*. This is an important submission but, in my view, its correctness or otherwise is not relevant to this particular case and I would postpone expressing any opinion on it until

such a case arises. As I will be explaining later in this judgment, the facts surrounding the trial leading to the subsequent offence which caused the lifting of the suspension on the earlier offences are not analogous to the facts postulated in section 45. In summary, therefore, the appellant has argued before this court that the alleged later conviction should be ignored both on the basis that he has asserted on affidavit that he did not commit the latter offence and secondly, or alternatively on the basis that no account should be taken of it having regard to an alleged trial *in absentia*. More importantly, the appellant argues that the later conviction is wholly irrelevant in that he lawfully left Poland for Ireland in circumstances which could not be regarded as fleeing.

The main plank of the respondent's case is that this court must recognise the later conviction and must accept that by the law of Poland the suspension of sentences in respect of the earlier offences may as a consequence of the later conviction be lifted by the court and that that did in fact lawfully happen. Furthermore, the respondent refutes the allegation that the trial in respect of the later conviction should be characterised as a trial *in absentia*. Alternatively, the respondent argues that section 45 has no application. The essence of the respondent's case is that at the time the appellant departed for Ireland, he knew he had committed the later offence and, therefore, knew that the suspension could be lifted and yet did not comply with Polish law which required the

furnishing of an address in Poland at which court notices could be served and that he was bound by the Polish law that once service was effected on that address, the appellant was deemed to have been properly notified. Furthermore, the appellant did in fact continue to have legal representation even though he now claims this was unauthorised.

Before expressing an opinion on the issues between the parties, I think it important to outline the material information coming before the court emanating from Poland. In doing this exercise, I will confine myself to the parts which are relevant to this issue. Much of the procedural history of the case is not really material.

In the European arrest warrant, the offences are described as follows:

> *"On the 21st July, 1997 in Gorzow Wlkp acting jointly and in conspiracy with other offenders beat and kicked Dariusz Mielczarek over all his body injuring his body by causing a haematoma behind his right ear and a bruised upper lip, which exposed him to a direct threat of bodily harm and serious health impairment or serious health breakdown.*
>
> *On the 21st June, 1998 in Gorzow Wlkp in the 'Bara-Bara' club in 30 Stycznia Street, acting jointly and in co-conspiracy with another person beat Artur Pioch hitting him with his head in his face, and with his hands and kicking in his head, causing bodily injuries such as bruises on his head, by which he exposed him to a direct threat of bodily harm and serious health impairment or serious health breakdown".*

On the 15th January, 2001 the relevant District Court and with a case number VII K422/98 conditionally suspended a penalty of one year and

four months of deprivation of liberty for a probation period of five years.

As a consequence of a conviction on the 18th November, 2004 of a different offence the suspension was lifted and execution was ordered of the sentence imposed on 15th January, 2001 at a court hearing on the 19th May, 2005. There was a long history of appeals and applications arising out of that order but it was finally confirmed by an appeal on the 17th May, 2006.

By affidavits sworn on the 6th March, 2008 and 14th March, 2008 respectively by Anthony Doyle, an executive officer in the Department of Justice, Equality and Law Reform, correspondence from the Polish court authorities both of first and second instance is exhibited. I think it unnecessary to set out this correspondence in full in this judgment but I will quote what I regard as relevant extracts. In the first letter, it is for instance stated as follows:

> *"In the light of the fact that during the period trial consequent to the sentence VII K422/98 the convict had committed another crime for which he was punished in case VII K139/04 the court summoned the above-mentioned person to the court sitting on the 19th May, 2005 the a/m person did not appear. He did not respond to the summons, even though it was sent to the indicated address. So-called 'advice note' summons are treated by the Polish law as delivered ones and so the court treated the convict as properly informed about the term of the court's sitting and on the 19th May, 2005 ordered an execution of the penalty of one year and four months of imprisonment.*

> *The convict had the knowledge of the court's decision because he personally filed a complaint against this decision."*

The letter goes on to describe how a barrister purporting to act for the appellant filed a petition seeking an adjournment of the execution of the penalty. One of the reasons given was that the appellant *"stays in England"*, where he works. As the appellant in his own affidavit makes clear that he never worked in England, it is perfectly obvious that the reference to *"England"* was a mistaken reference to Ireland. The petition for the adjournment of the execution of the penalty was refused and apparently according to the letter the appellant's mother received the decision. The same barrister, acting on behalf of the appellant, filed a further complaint with a view to obtaining an adjournment. It is then commented in the letter as follows:

> *"Consequently, we can assume that the convict had a full knowledge of being wanted and that the arrest warrant issued as a result of not appearing before the court."*

The second exhibit in the first affidavit of Mr. Doyle largely contains a repetition of the same information though coming this time from the regional court judge, that court being the appeal court. However, the last paragraph in the letter is worth quoting:

> *"Attention should be brought to the fact that the wanted person, throughout the proceeding on this matter, had a defence attorney, who informed him (at least he should have) about the legal situation of his mandator. Thus it should be assumed that the wanted person was fully aware of his legal*

> *situation in the proceedings. It should also be added that Jaroslav Stankiewicz did not inform the court about a change in the place of his residence (if any) which was his obligation."*

The first exhibit in the second affidavit of Mr. Doyle is a letter of clarification on certain matters that are not all relevant to this appeal, but two extracts are relevant and I quote them as follows:

> *"The court further clarifies that Jaroslav Stankiewicz's conviction by the District Court ... on November 18th 2004 case number VII K139/04 for an offence committed on October 9th, 2003 was merely a basis for obligatory reactivation of the suspended imprisonment sentence handed down in case number VII K422/98 which in turn constitutes the basis for the EAW. In other words, Jaroslav Stankiewicz is wanted under the EAW in question because he was convicted by the District Court ...on January 15th, 2001 in case number VII K422/98. Although the imprisonment sentence was conditionally suspended for a trial period, it was afterwards ordered to be carried out since Mr. Stankiewicz had committed a similar intentional offence, one for which he had already been convicted."*

The second relevant extract reads as follows:

> *"The Circuit Court confirms that Mr. Stankiewicz was represented by his attorney both on May 19th, 2005 when the suspended sentence was reactivated, and throughout the entire length of court proceedings that ended with the final ruling on October 25th, 2006.*
>
> *Also, be advised that Mr. Stankiewicz's residing at an indicated address was not a condition of the suspended sentence, nor was it a condition in the second offence. The court has to know an address of a person only to be able to deliver correspondence to that person; if a person chooses to reside elsewhere without notifying the court of the fact that he or she has changed addresses, any correspondence sent to the last known address of that person is automatically considered properly served."*

The second exhibit in that affidavit is the decision of the court to issue the European arrest warrant. I do not find it necessary to cite any of its contents for the purposes of resolving the issues in this appeal.

The appellant himself swore an affidavit on the 2nd April, 2008. In that affidavit, the appellant refers to the fact that the decision to enforce the sentence against the appellant was made on the 19th May, 2005. He goes on to state that he left Poland for Ireland in March, 2005 *"for the purpose of work"*. He then states that between January, 2001 and March, 2005, he did not commit any criminal offences in Poland nor did he breach any conditions imposed on him by a court. He goes on to assert that when he left Poland in March, 2005, there was no reason for him not to leave Poland and there was no condition placed on his suspended sentence that he should remain in Poland. In paragraph 7 of the affidavit, he refers to the work in Germany which I have already mentioned. He then states that he was never informed of the decision made on the 19th May, 2005 to enforce the sentence until he received the European arrest warrant. He makes a bald denial that he committed the later offence and he also denies that he ever instructed any lawyer to appear in proceedings in relation to the second offence or any proceedings after he left Poland.

That is a summary of the facts and indeed of the conflict of facts. I now want to refer to the relevant law.

I will start with the judgment of Peart J. in this particular case. He correctly points out that the only argument against the required order is the *"fled"* argument based on section 10(d) of the Act of 2003. This is what the judge then had to say:

> *"This point of objection must fail at the outset since in my view the respondent has failed to discharge the onus of rebutting the strong presumption that the issuing state will not seek the respondent's surrender in circumstances where he is not in breach of a condition of suspension attaching to the sentence imposed on the 15th January 2001. The respondent has simply asserted that he left Poland only to seek work and not in breach of conditions imposed. While he has stated that his then lawyer is deceased, it does not follow that the information as to the nature of the conditions imposed upon him could not be obtained from the Court which sentenced him, and in my view it does not prevent him from obtaining assistance from some other lawyer in Poland in order to gather the necessary information to assist him in satisfying this Court that no conditions were breached by him by leaving Poland and coming to this State."*

The learned High Court judge then goes on to point out there is in general an obligation on this State to surrender persons the subject of European arrest warrants *"unless very clear circumstances and facts are shown to exist why such an order should not be made."* He further opined that the court could safely assume *"that an issuing state acts in good faith in these matters and it follows that there is a heavy onus upon any respondent who raises a point of objection, to support that objection by cogent evidence. Mere assertion cannot be sufficient. To conclude otherwise would lead to a situation where the aims and objectives of the*

Framework Decision would be undermined and set at nought simply by unsubstantiated assertions made on affidavit by a respondent." I believe this court should endorse that statement of principle which seems to me to be entirely sound. In due course, I will be explaining why I entirely agree with the learned High Court judge that the order sought by the respondent, i.e., the surrender of the appellant should be granted. I would go somewhat further that Peart J. in my interpretation of the evidence produced by the Polish authorities.

The learned High Court judge, finally in his judgment, distinguishes the case from the case heavily relied on by the appellant both in that court and in this court i.e. **Minister for Justice, Equality and Law Reform v. Tobin** cited above. That was a case where he himself refused the order on the basis that the person sought had not *"fled"* within the meaning of section 10 and that decision was upheld by this court. But as he points out, it was based on *"the very particular facts of that case"* and as he further points out:

> *"It was clear that the respondent had breached no law or obligation imposed upon him by the Court in Hungary. It was clear that the Court in Hungary accepted that this was so. The onus of proving that situation was discharged by that respondent in a way which has not been done in any way in the present case."*

I turn now to consider in more detail the **Tobin** case. There is absolutely no doubt both Peart J. in the High Court and Fennelly J. who delivered

the judgment with which the other members of the Supreme Court agreed in that case were regarding the facts of that particular case as being very special and so indeed they were. Perhaps the simplest approach to take to it is that Mr. Tobin well and truly discharged the onus upon him required to resist the surrender as indicated by Peart J. in this particular case. The following two paragraphs on page 71 of the judgment of Fennelly J. confusingly doubly numbered as 31 and 32 on the one hand and 28 and 29 on the other respectively are worth quoting:

> *"The regularity of the procedure whereby the respondent left Hungary is confirmed in several documents, notably the arrest warrant itself, which contains the following:-*
>
> > *'Pursuant to section 586(1) of Act XVIV of 1998 on the Hungarian Criminal Code, 'in cases where the accused lives abroad bail may be deposited upon his request, with the permission of the prosecutor prior to the submission of the indictment, and after it, with the permission of the court. In such a case the proceedings may take place* in absentia*'.'*
>
> *The document continues by referring to provisions, where the accused person has followed this procedure, for serving documents on the legal representatives of the accused. The Hungarian Ministry of Justice informed the applicant, in a letter, that 'the reason why Mr. Tobin was not present during the trial was because he laid a deposit of 500,000 HUF at the court'. The principal consequence for the respondent of his having availed of this procedure was that, although he had been tried* in absentia *there could be no retrial if he returned to Hungary. For present purposes, however, the pursuit of this procedure mainly demonstrates that the respondent left Hungary with the full authority and approval of the Hungarian prosecutor and of the court'."*

I think that the citation of those two paragraphs alone demonstrates the special facts on which the **Tobin** case was based. There was not a fleeing from justice at the relevant time, rather there was a departure from Hungary with the consent of the authorities that there need be no return for the trial. The money deposit that had to be paid of course was paid.

The **Tobin** case came to be considered by this court again in **Minister for Justice, Equality and Law Reform v. Sliczynski** [2008] IESC 73 unreported with judgments by Murray C.J. and Macken J. both with the concurrence of Finnegan J. There were other important matters to be considered in that case but the *"fleeing"* issue did arise. Murray C.J., in his judgment, endorsed the more detailed treatment of the subject by Macken J. in her judgment. The Chief Justice particularly laid stress on the fact that the parties sought to be surrendered in that case had already been sentenced in the form of a number of suspended sentences subject to various conditions of which he was in breach. It is clear from that, that the High Court judge who was also Peart J. was entitled to conclude from the evidence and material before him that a suspension of the sentences of imprisonment was removed by the reason of the breaches of the conditions of suspension which occurred before the appellant had left Poland *"and indeed by the very act of leaving Poland itself."* Murray C.J. went on to further agree with Macken J.

> *"that while the subjective reasons given by a person such as the appellant for leaving the issuing state and coming to Ireland, in this case that he wanted to make a better life for himself, may be taken into account within the context of the facts and circumstances of the case as a whole, the appellant, having already been the subject of three separate terms of imprisonment, albeit suspended, was placed under certain judicial constraints a breach of which would or could lead to an order requiring him to serve those sentences. As Macken J. also points out the courts must also look at the objective circumstances in which a person such as the appellant left the country in question. I am satisfied that on the evidence before him the learned trial judge was entitled to be satisfied that in leaving Poland the appellant was seeking to evade the consequences of the three sentences which had been imposed on him prior to leaving Poland and therefore to conclude that he had 'fled', within the meaning of the section, the jurisdiction which imposes the sentences."*

Macken J. with whose views, as I have already indicated, Murray C.J. agreed said the following in her judgment:-

> *"It is true that, as with other sections of the Act of 2003, this subsection (i.e. section 10(d)) of the Act of 2003 as inserted by section 71 of the Criminal Justice (Terrorist Offences) Act, 2005) is not quite as fully worded as one would wish. It might have included 'whether or not the sentence had been at some time suspended', for example, but it does not. However I am not at all convinced, that in order to give an ordinary meaning to the words in the subsection, it is necessary to strain the language of the phrase 'and who fled from the issuing State before serving the sentence', to fit the circumstances which may often arise such as those in the present case, where a sentence has been suspended, but the suspension is later lifted. Those words apply equally to such facts.*
>
> *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 subsection. 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."

I thought it fit to cite in full that lengthy passage because I have found it very helpful in forming a conclusion. Put simply when the appellant departed for Ireland in March 2005 he had already committed the later offence. That meant that at the very least he was in potential danger of the suspensions in relation to the earlier offences being lifted.

He would have known that he would have to be notified of any applications to have that done. But equally he knew that he had to give the authorities an address for service of documents which indeed he did. He must be taken to have known or ought to have known that under Polish law any such proceedings against him would go ahead in his absence if he did not appear. Irrespective therefore of whether he authorised the lawyer who did in fact appear for him or not, in my view, by not ensuring he would receive the notifications, he must be taken to have been evading justice. As has been pointed out in the judgments he cannot simply make assertions of innocence. There would be a heavy onus of proof on him which of course was discharged by Mr Tobin in his case. Not only has the appellant not discharged that onus in this case but quite frankly the most natural inference to be drawn from the acts and information before the court is that he is not telling the truth. Peart J. did not go that far and I am quite happy to uphold the approach he adopted. I do so because in my view irrespective of whether he had actual knowledge of the later proceedings or not he must be taken to have *"fled"* (once if it be true) proper methods of notifying him were not left in place. Furthermore, this court is bound to accept that he was convicted and properly convicted of the later offence. I utterly reject the submission that a perceived public policy arising from section 45 requires this court to disregard the later conviction. Quite apart from the

dubiousness of the existence of any such public policy in a situation where a later offence gave rise to the lifting of a suspension in respect of an earlier offence and the trial in respect of the later offence took place *in absentia* and without notification. None of that applies here. In the absence of very strong proof to the contrary, this court must accept that a barrister or attorney appearing in Poland on behalf of the appellant was properly authorised to do so and it must also regard the appellant as having been notified of the time when and place at which he would be tried for the offence. The court has no reason to believe that such notification was not sent to the address supplied by the appellant and under Polish law that is deemed to be proper service. I find nothing offensive in such a rule.

The most recent decision of this court on the *"fled"* issue is contained in a judgment of Fennelly J., delivered the 18th November, 2009 in the case of **The Minister for Justice, Equality and Law Reform v. Gheorghe**. In that judgment, Fennelly J. refers, as I have done, to the very exceptional facts which were applicable in the **Tobin** case. Again, as I have done in this judgment, he endorses the relevant passages on this subject from the judgments of Murray C.J. and Macken J. in the **Sliczynski** case cited above. One important point of interpretation has been finally determined by the judgment of Fennelly J. in **Gheorghe**. This is that the fleeing may take place before the

imposition of a sentence of imprisonment. In the **Tobin** case, Peart J. had taken the opposite view though he has since changed his mind in subsequent cases. In the Supreme Court judgment of Fennelly J. in **Tobin** the point was left open but it has now been finally decided. In the way I have approached this particular case, I do not think that the determination of this important point of law affects the outcome of this particular case. I am quite satisfied that the appellant *"fled"* within the meaning and in the context of the section.

I conclude that the learned High Court judge was entitled to make the findings and reach the conclusions which he did. Accordingly the appeal should be dismissed.