

THE HIGH COURT

Record Nos. 2013/271 Ext.

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

Between/

THE MINISTER FOR JUSTICE AND EQUALITY

Applicant

-AND-

E.G.C.

Respondent

Judgment of Mr Justice Edwards delivered on the 14th day of March 2014

Introduction:

The circumstances of this case are unique in this Court's experience. The respondent is the subject of a European arrest warrant dated the 2nd of September, 2013 on foot of which the United Kingdom of Great Britain and Northern Ireland seeks his surrender. The central issue in this case concerns the purpose for which surrender is sought, and whether the ostensible purpose is one that is accommodated within the legislative provisions of the European Arrest Warrant Act 2003 as amended (hereinafter the Act of 2003), or to the extent that this Court is at liberty to consider it, the underlying European legislation, i.e., Council Framework Decision of the 13th June 2002 on the European arrest warrant and the surrender procedures between Member States, (2002/584/J.H.A.) O.J. L190/1 18.7.2002 as amended by Council Framework Decision 2009/299/JHA of the 26th February 2009, (hereinafter collectively referred to as "the Framework Decision").

The warrant was endorsed for execution in this jurisdiction on the 20th of November, 2013, and it was duly executed on the 22nd of November, 2013. The respondent was arrested by Sergeant Jim Kirwan on that date, and he was brought before the High Court on the same 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 in custody 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 the United Kingdom of Great Britain and Northern Ireland. 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.

Uncontroversial issues

The Court has received an affidavit of Sgt Kirwan sworn on the 23rd of January, 2014 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) No issue as to trial *in absentia* arises in the circumstances of this case.
- (o) There are no circumstances that would cause the Court to refuse to surrender the respondent under s. 21A of the Act of 2003, as amended.

In addition, the Court is satisfied to note the existence of the European Arrest Warrant Act 2003 (Designated Member States) Order 2004 (S.I. No. 4 of 2004) (hereinafter "the 2004 Designation Order"), and duly notes that by a combination of s. 3(1) of the Act of 2003, and Article 2 and the Schedule to the 2004 Designation Order, the United Kingdom of Great Britain and Northern Ireland is designated for the purposes of the Act of 2003 as being a state that has under its national law given effect to the Framework Decision.

The objections to surrender

The following substantive points of objection are pleaded:

- "2. The proposed surrender of the Respondent in respect of the said offences is prohibited as the Respondent is not a person to whom the provisions of section 10 of the Act of 2003 (As Amended) apply. The Respondent has already been convicted of the offences listed in the warrant and has completed his sentence in the issuing State,

3. The European Arrest Warrant does not comply with the provisions of Section 11(1 A) of the European Arrest Warrant Act, 2003 (as amended). The Respondent will contend that the matter in respect of which the Respondent is sought, namely a re-sentencing, is not a matter contemplated either by the European Arrest Warrant Act, 2003 or the Framework Decision and as such it is not possible, in principle, for the issuing state to comply with the provisions of Section 11(1 A).

4. The surrender of the Respondent is barred by reason of the provisions of Section 41 of the European Arrest Warrant Act 2003

5. The proposed surrender of the Respondent in respect of the said offences to Northern Ireland is prohibited by section 37 of the Act of 2003 (As Amended), insofar as it offends against the principles of double jeopardy and/or ne bis in idem. Moreover in circumstances where the Respondent has already served a substantial prison sentence for the offences underlying the European arrest warrant it would be oppressive to surrender him for the purpose of imposition of a further or other sentence in respect of such offences.

6. It is patent from the provisions of Schedule 2 of the Criminal Justice (Northern Ireland) Order, 1996 that the Respondent will be liable to the imposition of a fine of up to £1,000 in addition to being re-sentenced for the original offences. In form and in substance this would amount to the prosecution of the Respondent for an offence other than the offences of rape of which he has been convicted. This gives rise to the following specific pleas:

a. The offence on foot of which the fine of £1,000 might be imposed is not an offence which corresponds with any offence known to the law of Ireland;

b. The offence on foot of which the fine of £1,000 might be imposed is not an offence which is capable of satisfying minimum gravity;

c. In circumstances where it would appear that it is not possible to separate, sever or otherwise disambiguate the offence on foot of which the fine of £1,000 might be imposed from the rape offences underlying the European arrest warrant the Respondent cannot be surrendered in respect of those rape offences if any of the objections intimated herein are upheld;"

The relevant parts of the warrant

The "boilerplate text" at the commencement of the warrant states:

"This warrant has been issued by a competent judicial authority I request that the mentioned below be arrested and surrendered for the purposes of conducting a criminal prosecution, sentencing following conviction, or executing a custodial sentence or detention"

Regrettably, none of the three possibilities allowed for has been selected by highlighting it or underlining it or otherwise indicating that it is to apply. Moreover, none of the three options has been excised or struck out as inapplicable. In the circumstances this part of the warrant is of no assistance to this Court as executing judicial authority in its efforts to determine for what purpose the warrant has in fact been issued.

Part (b) of the warrant specifies the decisions on which the warrant is based, and states:

"1. Arrest warrant or judicial decision having the same effect:

1 warrant of arrest issued on the 2nd day of September 2013 by Her Majesty's Crown Court in Northern Ireland in respect of 2 offences of rape.

Type: One warrant wherein the requested person is convicted of 2 offences of rape.

2. Enforceable judgment:

Judgment of Her Majesty's Crown Court in Northern Ireland sitting at Craigavon, County Armagh, Northern Ireland on 9th March 2009 wherein the requested person was convicted of 2 offences of rape."

Part (c) deals with indications on the length of the sentence and contains the following information:

"1. Maximum length of the custodial sentence or detention order which may be imposed for the offence(s):

A person who fails to comply with the requirements of a Custody Probation Order may be liable to be dealt with, by having this Custody Probation Order revoked for the offence(s) in respect of which the order was made and then sentenced in any manner in which he could have been dealt with if he had just been convicted of the offence(s). A person guilty of rape and convicted on indictment is liable to imprisonment for life.

2. Length of the custodial sentence or detention order imposed:

On 8th May 2009 in respect of the two offences of rape a Custody Probation Order was imposed whereby the requested person was sentenced to 8 years' imprisonment followed by 2 years' probation.

3. Remaining sentence to be served:

As stated the requested person was sentenced on 8th May 2009 to a Custody Probation Order whereby he was to serve 8 years in prison followed by 2 years on probation.

Rule 15 of The Prison and Young Offenders Centre Rules (Northern Ireland) 1995 provide, so far as is relevant, that:

'(1) A prisoner serving a sentence of imprisonment for an actual term of more than 5 days may, on the ground of his good conduct, be granted remission in accordance with the provisions of this rule, but this rule shall not permit the reduction of the actual term to less than 5 days.

(2) The remission granted shall not exceed half of the actual term and any period spent in custody which is taken into account under, section 26(2) of the Treatment of Offenders Act (Northern Ireland) 1968 (which relates to the duration of sentences).'

By dint of Rule 15 E.G.C. was released from prison on 18th April 2012 and thereafter commenced 2 years on probation which was part of the Custody Probation Order. E.G.C. failed to comply with the requirements of the probation part of the order in that he on 25th June 2012, 4th July 2012 and 5th July 2012 failed to comply with his Probation Workplan with the consequence that he is sought to be brought back to court where he may be re-sentenced for this failure to comply with the requirements of his probation and which may entail him being sentenced as detailed at I. above."

Part (e) of the warrant is then prefaced by the following statement:

"The person in respect of whom this warrant is issued has been convicted of the extradition offences of rape specified in this warrant by a court in the United Kingdom and this warrant is issued with a view to his arrest and extradition to the United Kingdom for the purpose of being re-sentenced for those offences as he did not comply with the probation part of the Custody Probation Order imposed on him on 8 May 2009 - this statement is made pursuant to section 142(5) of the Extradition Act 2003."

The offences to which the European arrest warrant relates are specified within part (e) in the following terms:

"This warrant relates to in total: 2 offences.

Circumstances relating to the offences of which the requested person has been convicted

On the 12th April 2008, A.B. was walking in [a certain place in] Belfast, Northern Ireland when she was approached by E.G.C. (the Requested Person). E.G.C. followed her for a number of minutes trying to strike up a conversation with her. Despite being told to go away E.G.C. continued to follow A.B. in a physically aggressive way. He asked A.B. If she would have sex with him, she replied no, however E.G.C. continued to follow her talking to her in a sexualised manner. E.G.C. then grabbed A.B. by the arm, forced her into a secluded area of the forest whilst threatening to stab her with a knife if she did not do what he asked. E.G.C. then subjected A.B. to a violent sexual assault that involved oral, vaginal and anal penetration with his penis. During this assault he punched A.B. to her head, held her throat and threatened to smash her face with a rock.

E.G.C. was convicted on the 9th March 2009 of two counts of rape at Her Majesty's Crown Court in Northern Ireland sitting at Craigavon, County Armagh, Northern Ireland.

On the 8th May 2009 E.G.C. was sentenced in respect of the two offences of rape to a Custody Probation Order consisting of 8 years' imprisonment followed by 2 years' probation.

Events following E.G.C.' release from custody on the 18th April 2012

On the 12th June 2012 E.G.C. appeared at Her Majesty's Crown Court sitting at Craigavon, County Armagh, Northern Ireland on foot of a probation warrant as a result of breaching his curfews when residing at [a certain] Hostel. On the 15th June 2012 this matter was dealt with and he was released from court to reside at [a specified address].

E.G.C. failed to comply with the requirements of the Probation Service in terms of where he stayed and the programmes he was supposed to participate on and as a result the Probation Service sought a Warrant of Arrest on the 5th July 2012 upon foot of which E.G.C. was arrested and brought before Court. He was released on bail to return to Her Majesty's Crown Court in Northern Ireland on the 16th July 2012 but he failed to do this, nor has he since appeared."

The following further information is then provided in part (e) concerning the nature and legal classification of the offences to which the warrant relates:

"The offences for which E.G.C. was convicted on indictment and for which his surrender is sought is as follows:

1. That he, on the 12th day of April.2008, in the County Court Division of Craigavon, had unlawful sexual intercourse with A.B., who at the time of the said intercourse did not consent to it, he either knowing that the said A.B. did not so consent or being reckless as to whether she so consented.

Contrary to Article 18(1) of the Criminal Justice (Northern Ireland) Order 2003 and Common Law.

2. That he, on the 12th day of April 2008, in the County Court Division of Craigavon (other than as at offence 1. above), had unlawful sexual intercourse with A.B., who at the time of the said intercourse did not consent to it, he either knowing that the said A.B. did not so consent or being reckless as to whether she so consented. *

Contrary to Article 18(1) of the Criminal Justice (Northern Ireland) Order 2003 and Common Law.

After reciting the terms of Article 18 of Criminal Justice (Northern Ireland) Order 2003, which it is not necessary to reproduce in this judgment, the warrant then goes to set out the applicable statutory provisions relating to Custody Probation Orders. It states:

"Articles 16, 24 and Schedule 2 of the Criminal Justice (Northern Ireland) Order 1996 provides, so far as is relevant, as

follows:

Article 16

Enforcement etc of community orders

16. Schedule 2 (which makes provision for dealing with failures to comply with the requirements of certain community orders, for amending such orders and for revoking them with or without the substitution of other sentences) shall have effect.

Article 24

Custody probation orders

24.-(1) Where, in the case of a person convicted of an offence punishable with a custodial sentence,a court has formed the opinion..... that a custodial sentence of 12 months or more would be justified for the offence, the court shall consider whether it would be appropriate to make a custody probation order, that is to say, an order requiring him both -

(a) to serve a custodial sentence; and

(b) on his release from custody, to be under the submission of a probation officer for a period specified in the order, being no less than 12 months nor more than 3 years.

(2) Under a custody probation order the custodial sentence shall be for such term as the court would..... pass on the offender less such period as the court thinks appropriate to take account of the effect of the offender's supervision by the probation officer on his release from custody in protecting the public from harm from him or for preventing the commission by him of further offences.

(3)

(4)

(5) A court which makes a custody probation order shall state the term of the custodial sentence it would have passed.....if the offender had not consented to the order.

Schedule 2

ENFORCEMENT ETC OF COMMUNITY ORDERS

PART 1

PRELIMINARY

1.- (1) In this Schedule -
"relevant order" means a probation order.....; and

(2)

(3)

PART II

BREACH OF REQUIREMENT OF ORDER

Issue of summons or warrant

2.- (1) if at any time while a relevant order is in force in respect of an offender it appears on complaint to a justice of the peace that the offender has failed to comply with any of the requirements of the order, the justice may -

(a) issue a summons requiring the offender to appear at the place and time specified in it; or

(b) if the complaint is in writing and on oath, issue a warrant for his arrest.

(2) Any summons or warrant issued under this paragraph shall direct the offender to appear or be brought -

(a)

(b) in the case of any other order -

(i) if the order was made by the Crown Court, before that court;

(ii)

(3)

Powers of court of summary jurisdiction

3.

Powers of Crown Court

4.- (1) Where under paragraph 2 an offender is brought or appears before the Crown Court and it is proved to the satisfaction of the court that he has failed to comply with any of the requirements of the relevant order, that court may deal with him in respect of the failure in any one of the following ways, namely

(a) it may impose on him a fine not exceeding £1,000;

(b)

(c)

(d) it may revoke the order and deal with him, for the offence in respect of which the order was made, in any manner in which it could deal with him if he had just been convicted by or before the court of the offence.

(2) In dealing with an offender under sub-paragraph (1)(d), the Crown Court -

(a) shall take into account the extent to which the offender has complied with the requirements of the relevant order; and

(b) may assume, in the case of an offender who has wilfully and persistently failed to comply with those requirements, that he has refused to give his consent to a community sentence which has been proposed by the court and requires that consent.

(3). In proceedings before the Crown Court under this paragraph any question whether the offender has failed to comply with the requirements of the relevant order shall be determined by the court and not by the verdict of a jury.

Exclusions

5.

Supplemental

6.- (1) Any exercise by a court of its powers under paragraph ... 4(1)(a), (b) or (c) shall be without prejudice to the continuance of the relevant order.

(2) A fine imposed under paragraph ... 4(1)(a) shall be deemed for the purposes of any statutory provision to be a sum adjudged to be paid by a conviction.

(3)

(4)

(5)

(6)"

Additional Information

The Central Authority, in the exercise of its powers under s. 20(2) of the Act of 2003, sought certain additional information from its counterpart in the issuing state. The information received in reply is highly relevant to the issues that this Court must determine and it is therefore appropriate to reproduce in full the questions asked (by e-mail dated the 24th of December 2013), and the replies received (by e-mail dated the 9th of January, 2014):

"Question 1:

When [E.G.C.] was sentenced on the 8th May 2009 was he, or his legal advisers, made aware that he could be brought back before the Court as it is now intended ie for the purpose of re-sentencing? Was it an element of that sentence that such a re-entry could occur in the event of default on [E.G.C.]' part?

I attach a copy of the sentencing remarks made by Mr Justice Hart on the 8th May 2009 and would particularly refer you to paragraphs [29] and [30]:

"[29] As the sentence must inevitably exceed 12 months' detention I am obliged to consider whether a custody probation order would be appropriate in this case. All of the evidence shows that this young man has been absent from school for a significant period of his childhood, and he was smoking cannabis. I am satisfied that he would benefit from a period of probation upon his release in order to try to prevent him from committing further offences in the future and thereby also protect the public.

[30]Having regard to the mitigating features of the case, and provided that the defendant consents, on counts one and two I will impose custody probation orders of eight years' detention followed by two years' probation subject to the following conditions:

(1) He resides at accommodation approved by his Probation officer.

(2) He attends as instructed by his Probation officer 10 sessions of work to address

his sentence abuse and that this work to commence within ten weeks of sentencing and be completed within

twelve months of the Order being made.

(3) He completes an individual programme of work to address his sexual offending as directed by his Probation officer.

Had the defendant not consented the sentence on those counts would have been one of ten years' detention....."

Article 24 of The Criminal Justice (Northern Ireland) Order 1996 (CJO 1996) provides at (3) and (5) as follows:

"(3) A court shall not make a custody probation order in respect of any offender unless the offender consents and, where an offender does not so consent, the court shall not pass a custodial sentence of a greater length than the term the court would otherwise pass under Article 20.

(4)

(5) A court which makes a custody probation order shall state the term of the custodial sentence it would have passed under Article 20 if the offender had not consented to the order."

Accordingly, [E.G.C.] was asked to and did consent to a Custody Probation Order being made and it would have been explained to him that if he had not so consented he would have had to serve 10 years' detention. The obligations of the sentence would have been clear to [E.G.C.] and his legal representatives and, as will be detailed below, the law provides for legal consequences for failing to adhere to all the requirements of the Custody Probation Order sentence. Further, whilst it is not on the record as such, his Probation Officer would have explained the consequences of non-compliance with the probation requirements.

Question 2:

If [E.G.C.] is surrendered, will the proceedings for which he is sought be a continuation of the previous sentencing proceedings or will the proceedings constitute new proceedings?

If [E.G.C.] is surrendered he will be subject to the enforcement procedures provided for in Schedule 2 of the CJO 1996. These are the procedures deployed when someone fails to comply with the requirements of the probation part of a custody probation order. This is not a "continuation of the previous sentencing" but rather the means whereby a breach of the requirements of the previous sentence can be dealt with. The powers which are exercisable in this circumstance are those set out in paragraph 4(1)(a) to (d). But if the power exercised by the Crown Court is the revocation of the Order, viz 4(1)(d), then the Court will deal with him for the offence(s) in respect of which the order was originally made, in any manner in which it could deal with him if he had just been convicted by or before the court of the offence. However, in that circumstance, Article 25(3) of the CJO 1996 must be borne in mind which provides that the Court "... shall have regard to the term of the custodial sentence which would have been imposed by the court which made the order had the offender not consented to the order [which in [E.G.C.]'s case was 10 years as per paragraph 30 of Mr Justice Hart's sentencing remarks quoted above] and to the term of the custodial sentence served by the offender in respect of the offence.

Where any of the other powers which are provided for in paragraph 4 are exercised, that is 4(1)(a), (b) or (c) by virtue of paragraph 6(1) of Schedule 2, "Any exercise by a court of its powers under 3(1)(a),(b) or (c) or 4(1)(a), (b) or (c) shall be without prejudice to the continuance of the relevant order."

Question 3:

In regard to the Enforcement of Community Orders provisions and the jurisdiction for the Court to impose a fine of £1,000 - can you please clarify whether or not that fine is considered to be an extension of the original sentence imposed for the original offence ie rape in this case.

No, any such fine would not be an extension of the original sentence but rather, as detailed above, a penalty for failing to comply with the original sentence.

Question 4:

Please provide what clarification you are in a position to provide by reference to the points of objection to surrender, filed on behalf of [E.G.C.]. It may well be that you are unable to provide any comment in regard to same, in circumstances where these objections are based on domestic Irish legal provisions.

I am not familiar with the domestic Irish legal provisions referred to and am thus not in a position to comment. I would however make a couple of observations on a couple of the points made:

1. Paragraph 2: It is stated "The Respondent has already been convicted of the offences listed in the warrant and has completed his sentence in the Issuing State". The Respondent has not completed his sentence in the sense that he was sentenced to a Custody Probation Order consisting of a period in detention and a period on probation. He has thus far failed to complete the probation period.

2. Paragraph 6: It is stated that "the respondent will be liable to the imposition of a fine up to £1,000 in addition to being re-sentenced for the original offences". This is not correct. The powers of the court on enforcement have been set out above and if [E.G.C.] were to be fined the fine would operate alongside the original probation order which he would still have to complete. [E.G.C.] could only be re-sentenced for the original offences in the circumstance where the court decided to revoke the original probation order and, as it were, sentence over again but if that power were exercised then the power to fine could not. They are mutually exclusive powers."

Submissions

Although written submissions were not directed, the Court received detailed written submissions on behalf of the respondent, which were of assistance and for which it is grateful. These were supplemented by oral submissions made at the hearing by counsel for the

respondent.

The Court was not furnished with any written submissions on behalf of the applicant. Moreover, although no formal concessions were made by counsel for the applicant in respect of the respondent's objections, there was no substantive engagement with the respondent's arguments by counsel for the applicant, and it was indicated that the applicant would abide by the ruling of the Court.

The Section 10 Objection

In counsel for the respondent's submission, the purpose for which the respondent is wanted by the issuing state is not a purpose contemplated by any of the three alternatives contemplated by s. 10 of the Act of 2003. Those purposes are correctly reflected in the boilerplate text that appears at the commencement of the form of the warrant as specified in the annex to the Framework Decision. What is contemplated is surrender for one of three purposes, i.e., for the purpose of conducting a criminal prosecution; alternatively, sentencing following conviction, alternatively, executing a custodial sentence or detention. Neither s.10 of the Act of 2003, nor the Articles 1 and 2 of the underlying Framework decision to which regard may be had for the purposes of giving s. 10 of the Act of 2003 a conforming interpretation, contemplates surrender for the purpose of re-sentencing someone who has already been sentenced.

The Section 11 Objection

It was further submitted by counsel for the respondent that the warrant does not comply with s. 11 of the Act of 2003 in that it is in an inherently self contradictory format. In part (b) of the warrant information appears at both (b) 1 and (b) 2. It was submitted that whilst this is not entirely remarkable in circumstances where there are two offences it is quite clear from other information in the warrant that the information contained at (b) 1 and (b) 2 is intended to apply to both offences simultaneously.

It was contended that the information at (b) 1 and (b) 2 suggests that the warrant has been issued for the purpose of enforcing two distinct domestic warrants. The first of these being the warrant dated 2nd September, 2013 (the prosecution warrant) and the second being dated 9th March, 2009 (the sentence warrant).

Counsel for the respondent submitted that providing the information in this format clearly contravenes the provisions of s.11(IA)(e) of the Act of 2003 which provides:

"(1A) Subject to subsection (2A), a European arrest warrant shall specify—

...(e) that a conviction, sentence or detention order is immediately enforceable against the person, or that a warrant for his or her arrest, or other order of a judicial authority in the issuing state having the same effect, has been issued in respect of one of the offences to which the European arrest warrant relates,"

It was submitted that the use of the word "or" in the provision just quoted is significant in that it makes it clear that s.11(1 A)(e) does not contemplate the possibility of a given offence coming under both headings. It was further submitted that support for such an analysis is to be found in relevant provisions of the Framework Decision, in particular Article 8.1(c) which provides:

"1. The European arrest warrant shall contain the following information set out in accordance with the form contained in the Annex:

...(c) evidence of an enforceable judgment, an arrest warrant or any other enforceable judicial decision having the same effect, coming within the scope of Articles 1 and 2;"

Counsel for the respondent contends that it is apparent that the Framework Decision regards these two alternatives as being mutually exclusive rather than as being capable of co-existence.

It was further submitted that quite apart from the difficulty with regard to s.11(1A)(e), the applicant faces a further difficulty in as much as s.11(1 A)(g) is also incapable of being satisfied. This provides:

"(1A) Subject to subsection (2A), a European arrest warrant shall specify—

(g) (i) the penalties to which that person would, if convicted of the offence specified in the European arrest warrant, be liable,

(ii) where that person has been convicted of the offence specified in the European arrest warrant but has not yet been sentenced, the penalties to which he or she is liable in respect of the offence, or

(iii) where that person has been convicted of the offence specified in the European arrest warrant and a sentence has been imposed in respect thereof, the penalties of which that sentence consists."

It was submitted that the respondent's situation is not capable of being captured by any of these eventualities as he is a person who has been sentenced but is now not sought for the purpose of executing that sentence, or at least the custodial component thereof. Counsel for the respondent suggests that support for this argument is to be found in a consideration of the relevant parts of the underlying Framework Decision – in particular Article 8.1(f), which provides:

"1. The European arrest warrant shall contain the following information set out in accordance with the form contained in the Annex:

...(f) the penalty imposed, if there is a final judgment, or the prescribed scale of penalties for the offence under the law of the issuing Member State;

Again, it was submitted, the language of the Framework Decision presumes that the two categories are mutually exclusive alternatives.

It was further submitted that the surrender of the respondent would also be precluded by reason of the provisions of Section 41 of the 2003 Act, which provides:

"41.—(1) A person shall not be surrendered under this Act for the purpose of his or her being proceeded against in the issuing state for an offence consisting of an act or omission that constitutes in whole or in part an offence in respect of which final judgment has been given in the State or a Member State."

It was submitted that the reference to a member state in Section 41 must be taken as also being a reference to the issuing state. In those circumstances the respondent is somebody who has been subject to "final judgement" in the issuing state and therefore a member state.

However, counsel for the respondent has very fairly acknowledged that the decision of the Supreme Court in *Minister for Justice, Equality and Law Reform v. Renner-Dillon* [2011] IESC 5 (unreported, Supreme Court, Finnegan J, (*nem diss*) 11th February 2011) is problematic for his case in that regard.

In the Renner-Dillon case the consent of the High Court was sought to permit further prosecution of the respondent in relation to an offence of which he had been acquitted in the UK some years previously. The authorities there had since uncovered DNA evidence and were proposing to make an application to set aside the conviction in order that he might be prosecuted again. The Supreme Court concluded that in the circumstances of his case the judgment was not to be considered a "final judgment". The judgment of the Court was given by Finnegan J, who stated:

"From the judgment in *Mantello* it is clear that "finally judged" in the Framework Decision has an autonomous meaning in the law of the European Union. Where under the law of the issuing Member State a judgment, in this case a judgment of acquittal, does not definitively bar further prosecution or as stated in *Mantello* "constitute a procedural obstacle to the possible opening or continuation of criminal proceedings in respect of the same acts against that person", then that person has not been finally judged. A judgment which does not definitively bar further prosecution does not constitute a ground for mandatory non-execution of a European arrest warrant.

It is clear that the acquittal of the appellant of the offence does not definitively bar the commencement of further criminal proceedings in respect of the offence under the law of the United Kingdom by virtue of the Criminal Justice Act 2003 section 76(1). Accordingly it cannot be said that the appellant has been finally judged in respect of the offence. Accordingly the grounds for mandatory non-execution of the European arrest warrant in Article 3.2 of the Framework Decision do not apply. Section 41 of the European Arrest Warrant Act 2003 transposes into Irish law Article 3.2 of the Framework Decision and must be given conforming interpretation. Having regard to the decision in *Pupino* the phrase "final judgment" in section 41(1) must bear the autonomous meaning ascribed by the European Court of Justice to "finally judged" in Article 3.2 of the Framework Decision. The judgment of acquittal in respect of the offence accordingly is not "a final judgment" within the meaning of section 41 of the Act of 2003. The surrender of the appellant is not prohibited by section 41(1) of the Act of 2003. While before the Court of Appeal in the United Kingdom counsel for the prosecution considered the judgment of acquittal to be a final judgment until such time as it should be quashed this is not determinative for the purposes of this application: it is clear on the jurisprudence of the European Court of Justice that for purposes of the European arrest warrant the judgment of acquittal is not a final judgment, as in *Mantello* the acquittal does not constitute "a procedural obstacle to the possible opening or continuation of the criminal proceedings."

Counsel for the respondent seeks to distinguish the *Renner-Dillon* case from the instant case. Here, the respondent was convicted and sentenced (as opposed to being acquitted) by a court of relevant jurisdiction. Thereafter he served the sentence imposed. It was submitted that if a conviction and sentence which has been served and not appealed cannot be regarded as "final judgement" then that very concept itself becomes meaningless.

The Section 38 Objections (Correspondence and Minimum Gravity)

Counsel for the respondent points to paragraph 4 of Schedule 2 of the Criminal Justice (Northern Ireland) Order, 1996 which he contends suggests that in addition to being re-sentenced the respondent may also be fined up to £1,000. It was submitted that whilst this is not a particularly severe or significant penalty it nonetheless gives rise to a situation whereby the respondent is now liable to punishment for conduct over and above the matter for which he has been convicted, namely the rapes.

It was urged upon the Court that, in effect, the respondent is now sought not solely for the purpose of being prosecuted/sentenced for rape offences but additionally for failing to comply with the directions of a probation officer. Counsel submitted that whilst it is undoubtedly the case that the potential fine in respect of non-compliance is minor as compared with the penalties that might be imposed in relation to the rape offences the fact remains that he faces some additional punitive element over and above that which relates solely to the penalty prescribed for rape. As such, the surrender of the respondent is sought not just for the purpose of punishing him for rape but also for non-compliance with the conditions of his probation. It was submitted that in effect the issuing state has conflated both of these matters into one offence for the purposes of seeking the rendition of the respondent on foot of the European arrest warrant the subject matter of these proceedings.

It was further contended that whilst the rape offence has been the subject of certification pursuant to Article 2.2 of the Framework Decision that certification is patently not intended to relate to the non-compliance offence. As such the surrender of the respondent is precluded by reason of a want of correspondence.

Counsel for the respondent has advanced a similar objection *mutatis mutandis* in relation to minimum gravity.

Analysis and Decision

If it were the case that the surrender of the respondent was being sought exclusively and definitely for the purpose of re-sentencing him in circumstances where the initial sentence imposed upon him did not represent a "final judgment" (within the autonomous meaning to be afforded to that expression under the Framework Decision, as confirmed by the Court of Justice of the European Union in its judgment in *Mantello*, Case C.261-09 of 16th November 2010), then, arguably at least, the case might be regarded as coming within that category of cases where a respondent has been convicted, but not yet sentenced. Such cases are provided for in s.10 of the Act of 2003, in particular by subsection (c) of s. 10.

However, matters are not that clear cut and the applicant faces at least one fundamental problem in the Court's view in terms of

trying to fit the square peg that is this case into the round hole represented by s.10(c) of the Act of 2003.

That fundamental problem stems from the fact that the totality of the information establishes that the respondent is not in fact being sought exclusively and definitely for the purposes of re-sentencing him. The warrant as issued, and in particular the statement contained in the preface to part (e), tended to create the impression that that was the case. It will be recalled that that statement asserted, *inter alia*, that "*this warrant is issued with a view to his arrest and extradition to the United Kingdom for the purpose of being re-sentenced..... as he did not comply with the probation part of the Custody Probation Order imposed on him on 8 May 2009*" However, the additional information dated the 9th of January 2014 makes it clear that it is by no means certain that the respondent will in fact be re-sentenced. It is no more than a possibility.

At the present time the respondent faces a mere allegation that he did not comply with the probation part of the Custody Probation Order imposed on him on 8 May 2009. While *prima facie* evidence that that is so may well exist, it requires to be established formally at a hearing before the Crown Court that imposed the Custody Probation Order. It may be inferred, having regard to the principle of *audi alteram partem*, a principle universally recognised throughout the democratic world, that at such a hearing the respondent would be entitled to be heard, to challenge the evidence against him if he wished, and to proffer evidence on his own behalf. The powers of the Crown Court under paragraph 4 of Schedule 2 of the Criminal Justice (Northern Ireland) Order, 1996 could only fall for consideration once it has been established at such a hearing that the respondent did not comply with the probation part of the Custody Probation Order imposed on him on 8 May 2009. The additional information makes it clear that it will be at that point, if that point is indeed reached, that Crown Court judge will have a number of options open to him, amongst which are those provided for in paragraph 4(1)(a) of Schedule 2 (i.e., imposition of a fine of up to £1000) and in paragraph 4(1)(d) of Schedule 2 (i.e., revocation of the Custody Probation Order and re-sentencing.) The additional information makes it clear that these are two mutually exclusive alternatives, and that as yet there can have been no decision as to which might apply. It is of course reasonable to infer that the prosecuting authorities intend, if afforded the opportunity to do so, to argue in favour of the revocation and re-sentencing option, but equally it may be inferred that if the respondent could point to any extenuating or mitigating circumstances in terms of his failure to comply with the probation part of the Custody Probation Order imposed on him he would likely to argue in favour of the imposition of a fine instead.

That being the position, the status of the existing sentence is that it has not yet been revoked. Moreover, the custody component of it has been served and there is no immediately enforceable sentence of imprisonment or detention that requires to be executed. There is a warrant of arrest, certainly, but that seeks to bring him before the Court in connection with an enforcement procedure ancillary to a probation scheme and not for the purpose of trial for a discrete offence in respect of which a person can be sentenced to detention or imprisonment.

The objections based upon s. 10 and s. 11(1A)(e) and (g) must therefore be upheld. It is unnecessary in the circumstances to express any view on whether or not the initial sentence imposed upon the respondent must be regarded as representing a final judgment, or as to whether the case of *Minister for Justice, Equality and Law Reform v. Renner-Dillon* can be legitimately distinguished as suggested by counsel for the respondent.

The Court is not disposed to surrender the respondent on foot of this warrant in the circumstances of the case.