THE COURT OF APPEAL

CIVIL

Record Number: 2015 No. 342

Ryan P.
Kelly J.
Peart J.

IN THE MATTER OF THE EUROPEAN ARREST WARRANT ACT 2003

BETWEEN:

THE MINISTER FOR JUSTICE AND EQUALITY

APPLICANT/RESPONDENT

- AND -

ARKADIUSZ PIOTR LIPINSKI

RESPONDENT/APPELLANT

JUDGMENT OF MR JUSTICE MICHAEL PEART DELIVERED ON THE 12TH DAY OF MAY 2016

1. A single issue arises on this appeal as certified by the trial judge (Donnelly J.), after she made her order dated 24th June 2015 for the surrender of the appellant to Poland. That issue is whether the provisions of s. 45 of the European Arrest Warrant Act 2003, as amended, ("the Act") apply where the appellant was present for his trial and sentence in the requesting state, was conditionally released from prison prior to the expiration of his sentence, absconded from that state in breach of the conditions attaching to his conditional release, and was therefore not present in court when an order was made thereafter revoking his conditional release since he left no address to which correspondence should be sent, and the authorities were therefore unable to notify him of the date on which it intended to make that revocation application.

2. The resolution of that issue is a matter of statutory interpretation against the background of Council Framework Decision 2009/299/JHA (the 2009 Framework Decision) which amended the 'trial in absentia' provisions contained in Council Framework Decision 2002/584/JHA (the 2002 Framework Decision) by inserting a new Article 4a into the latter, replacing Article 5(1). Section 45 of the Act of 2003 as originally enacted gave effect to Article 5.1 of the 2002 Framework Decision in as far as 'in absentia' matters were concerned, but was replaced by new s. 45 as substituted by s. 23 of the European Arrest Warrant (Application to Third Countries and Amendment) and Extradition (Amendment) Act, 2012 in order to give effect to new Article 4a.

3. As originally enacted s. 45 of the Act of 2003 provided as follows:-

> *"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."* [underlining added]

4. Following its amendment by substitution, s. 45 now provides:

> *"45. A person shall not be surrendered under this Act if he or she did not appear in person at the proceedings resulting in the sentence or detention order in respect of which the European arrest warrant was issued, unless the European arrest warrant indicates the matters required by points 2, 3 and 4 of point (d) of the form of warrant in the Annex to the Framework Decision as amended by Council Framework Decision 2009/299/JHA, as set out in the table to this section.*
>
> *TABLE*
>
> *(d) Indicate if the person appeared in person at the trial resulting in the decision:*
> *(1) Yes, the person appeared in person at the trial resulting in the decision.*
>
> *(2) No, the person did not appear in person at the trial resulting in the decision.*
>
> *(3) If you have ticked the box under point 2, please confirm the existence of one of the following:*
>
> *3.1a the person was summoned in person on … (day/month/year) and thereby informed of the scheduled date and place of the trial which resulted in the decision and was informed that a decision*

may be handed down if he or she does not appear for the trial;

OR

3.1b the person was not summoned in person but by other means actually received official information of the scheduled date and place of the trial which resulted in the decision, in such a manner that it was unequivocally established that he or she was aware of the scheduled trial, and was informed that a decision may be handed down if he or she does not appear for the trial;

OR

3.2 being aware of the scheduled trial, the person had given a mandate to a legal counsellor, who was either appointed by the person concerned or by the State, to defend him or her at the trial, and was indeed defended by that counsellor at the trial;

OR

3.3 the person was served with the decision on … (day/month/year) and was expressly informed about the right to a retrial or appeal, in which he or she has the right to participate and which allows the merits of the case, including fresh evidence, to be re-examined, and which may lead to the original decision being reversed, and the person expressly stated that he or she does not contest this decision,

OR

the person did not request a retrial or appeal within the applicable time frame;

OR

3.4 the person was not personally served with the decision, but

☐ *the person will be personally served with this decision without delay after the surrender, and*

☐ *when served with the decision, the person will be expressly informed of his or her right to a retrial or appeal, in which he or she has the right to participate and which allows the merits of the case, including fresh evidence, to be re-examined, and which may lead to the original decision being reversed, and*

☐ *the person will be informed of the time frame within which he or she has to request a retrial or appeal, which will be … days.*

(4) If you have ticked the box under points 3.1b, 3.2 or 3.3 above, please provide information about how the relevant condition has been met." [underlining added]

5. It can be seen from the above provisions that the old s. 45 referred specifically to the person not having been present at his trial and conviction, whereas new s. 45 refers to the person not having been present at the proceedings resulting in the sentence or detention order in respect of which the European arrest warrant was issued. Under the old s. 45 the issuing state was required to give an undertaking that upon surrender the person would be given the opportunity to have a retrial in his presence. In my view that clearly referred to a rehearing of the prosecution for the offence(s) in question, particularly given the reference to "conviction". Following the introduction of the European arrest warrant regime in Member States on the 1st January 2004 experience showed that there was a less than uniform application of the 'in absentia' provisions of the 2002 Framework Decision, and this led to a lack of consistency and uncertainty in their application throughout the European Union. In an effort to address such issues the 2009 Framework Decision was adopted, and by substituting the new Article 4a into the 2002 Framework Decision, thereby replacing Article5(1), it introduced what is now essentially a box-ticking exercise to be completed by the issuing judicial authority where the person whose surrender is being sought on foot of a European arrest warrant was not present at *"the proceedings resulting in the sentence … in respect of which the European arrest warrant was issued"*. A correct completion of that exercise by the issuing judicial authority is intended to provide the executing judicial authority with the necessary assurance that upon surrender the person will be given an opportunity of a retrial where he was not present at *"the proceedings which resulted in the sentence … in respect of which the European arrest warrant was issued"*. This objective is clear from, for example, Recital (6) of the 2009 Framework Decision which states:

> *"The provisions of this Framework Decision amending other Framework Decisions set conditions under which the recognition and execution of a decision rendered following a trial at which the person concerned did not appear should not be refused. These are alternative conditions; when one of the conditions is satisfied, the issuing judicial authority, by completing the corresponding section of the European arrest warrant or of the relevant certificate under the other Framework Decisions, gives the assurance that the requirements have been or will be met, which should be sufficient for the purpose of the execution of the decision on the basis of the principle of mutual recognition."*

6. There are 15 Recitals in total. I will not set them out *seriatim* but many are relevant as a backdrop to a conforming interpretation of new s. 45 of the Act. It seems to me that these recitals evince a clear intention that what the person whose surrender is sought is entitled to is a "retrial" in the sense of a rehearing of the prosecution of the offences of which he has been convicted, where he was not present for his trial in certain circumstances. Given the use of the phrase *"proceedings resulting in the sentence …"* the right to a retrial includes the right to a rehearing of the sentence hearing where the person might have attended his trial, but was absent from a later sentence hearing of which he was not notified. The Recitals are replete with references to a "trial", "rights of defence", "right to a fair trial" and so forth. Specifically, Recital (11) states:

> *"Common solutions concerning grounds for non-recognition in the relevant existing Framework Decisions should take into account the diversity of situations with regard to the right of the person concerned to a retrial or an appeal. Such a*

retrial, or appeal, is aimed at guaranteeing the rights of the defence and is characterised by the following elements: the person concerned has the right to be present, the merits of the case, including fresh evidence are re-examined, and the proceedings can lead to the original decision being reversed."

7. The question on this appeal is whether the right to a retrial, as contemplated by new Article 4a, and therefore new s. 45 of the Act of 2003 (as inserted), now includes the right to a rehearing of a subsequent application to revoke the suspension of the balance of a sentence where the person had been present when that sentence was imposed, the argument of the appellant in that regard being that s. 45 applies because it is nonetheless an application within "the proceedings" as such, at which he was not present, and it has resulted in an order for his return to custody.

Some factual background

8. On the 7th December 1998, the appellant was sentenced to a term of imprisonment of 15 years following his conviction in Poland on what I will loosely call 15 charges of assault causing harm. He was present for his trial, conviction and sentence hearing . On appeal that sentence was reduced to one of 10 years. He was not present for that appeal, but was aware of it and was represented there by his lawyer.

9. Some years later on the 20th September 2004, after he had completed part of his sentence, the Polish court made an order for his conditional release, and the suspension for a period of 3 years of the balance of his sentence. One condition of his conditional release was that he should remain under the supervision of his probation officer. Another was that any change of address must be notified to his probation officer. On the date of his conditional release some eleven months of his sentence remained to be served after time spent in pre-trial detention was taken into account. He failed to comply with the conditions stated and instead left Poland and came to Ireland in July 2006. According to the warrant the Polish court made an order quashing his parole on the 29th December 2006, thereby rendering him liable to serve the remaining part of the sentence imposed on the 7th December 1998, as reduced on appeal by order dated 21st September 2000.

10. Following the revocation of his conditional release the authorities were unable to locate the appellant, and proceeded to issue a European arrest warrant on the 15th December 2009. According to para. B thereof the decision on which the warrant is based is the sentence imposed on the 7th December 1998 as varied by the appeal decision dated 21st September 2000, on each of which dates he was either present in person or was legally represented having been aware of the date of the hearing. In other words, the decision on which the warrant is based is not the order made on the 29th December 2009 revoking the conditional release, and at which he was not present due to his absconding. That fact is central to this appeal since the appellant's reliance on non-compliance with the provisions of s. 45 for his resistance to an order for his surrender is predicated upon a failure by the Polish authority to notify him of its intention to seek an order for the revocation of his conditional release after he had breached his supervision condition having absconded to this State in July 2006, and the fact that he was therefore not present when that particular order was made on the 29th December 2006.

11. In addition it can be noted that when completing the European arrest warrant the issuing judicial authority did not complete Paragraph D thereof, which applies in 'in absentia' cases, and indicated that this paragraph was not applicable. That of course does not determine the issue arising, since it involves the interpretation of national legislation, but it indicates at least that the Polish judicial authority does not consider the revocation order to be the kind of decision that brings into play the 'in absentia' provisions of the Framework Decisions in question, since it was not the decision by which the sentence of imprisonment was originally imposed.

The High Court Decision

12. In the course of her judgment, Donnelly J. referred to the extensive submissions that had been made to her in the High Court, and to a number of judgments both at first instance, and on appeals to the Supreme Court, where s. 45, and the circumstances in which it applied, both in its original incarnation and as later substituted, have been discussed and determined – albeit sometimes on *an obiter* basis.

13. A judgment to which she paid particular attention, and which she decided should be followed, is the judgment of Edwards J. in *Minister for Justice and Equality v. Obst, ex tempore,* 27th May 2014 where the same issue arose as arises in the present case. Ms. Obst was not present for an application to have her suspended sentence revoked. Donnelly J. noted that during the course of his *ex tempore* judgment, Edwards J. had referred to an earlier judgment given by him in *Minister for Justice and Equality v. Surma* [2013] IEHC 618 in which he had considered, *inter alia*, whether the amendments to s. 45 of the Act of 2003 had retrospective effect, and in which, when concluding that they had, he remarked that the amendments were *"procedural in nature rather than substantive".* In the course of her very detailed consideration of *Obst,* Donnelly J. stated that even though it was a judgment delivered *ex tempore*, it was not one given on the same day as the hearing, but after the judge had taken time to consider the decisions made and the authorities opened to him. She concluded, using the words of Clarke J. in *Kadri,* that there were no strong reasons to show that the decision in *Obst* was incorrect. She considered the question of interpretation of s. 45 in the light of this Court's judgments in *Minister for Justice and Equality v. Palonka* [2015] IECA 69, and that of Murray C.J. in *Minister for Justice and Equality v. Tokarski* [2012] IESC 6, and concluded that *Palonka,* while addressing s. 45, did so in a different respect which did not assist in the interpretation of the words *"appear in person", "the proceedings resulting in the sentence or detention order"* or the word *"trial"* as they are used in s. 45 and the attached 'Table' to be completed by an issuing judicial authority in 'in absentia' cases.

14. Her conclusions are set forth in paras. 90-92 of her extensive judgment in the following terms:

"90. In my view, the use of the two distinct words, namely "proceedings" and "trial", within the section raises a certain ambiguity. The word "proceedings" is a word which can cover an extremely wide variety of situations. An example is the case of the Minister for Justice v. The Information Commissioner [2001] 3 I.R. 43, where the High Court (Finnegan J.) held that in s. 46 of the Freedom of Information Act, 1997, the word "proceedings" meant a step in an action held in public. Even giving the word "trial" a broad interpretation, it is still a word which on its face applies to a more limited set of circumstances than is covered by the word "proceedings". In that regard, I am of the view that the reference in Lawrence v. R as approved in Messitt to "the whole of the proceedings" meant that part of a trial on indictment commencing with the arraignment. Prior procedural appearances were not intended to be covered by that definition of trial. Yet, the definition of "proceedings" in s. 45 is not so easily clarified as automatically meaning any step, at any stage, in the process of a criminal trial.

91. In the light of the foregoing, there is no literal interpretation that will bring total clarity to the phrases that I have highlighted. Therefore, in accordance with the established jurisprudence, it is quite proper for this Court to interpret s. 45 as far as possible in the light of the wording of the purpose of the Framework Decision in order to attain the result which they pursue.

92. In those circumstances I am bound to follow the decision of Edwards J. in Obst on section 45. The learned judge had applied the principle of conforming interpretation to the section on the particular issue in this case. As stated already, there is no good reason to disagree with that decision. I therefore hold that under s. 45, a person has appeared in person at the proceedings resulting in the sentence or detention order in respect of which the EAW was issued where he or she was present at the trial in which his or her guilt has been determined, where he or she was present at the original sentencing hearing but where he or she was not present at the hearing at which a suspended sentence was revoked, not having received notification of that hearing. That finding is subject to the following observation: there may be a difference between the decision of Edwards J. in Obst that under s. 45 the proceedings referred to are those "at which your guilt or innocence is at issue" and the submissions by the Minister to the effect that it is also presence at "the appropriate sentence to be imposed" after the determination of guilt or innocence [sic]. That is an issue for another day."

The parties' submissions

15. Remy Farrell SC for the appellant has focussed on the change of wording adopted by the Oireachtas when enacting new s. 45 of the Act. In particular he submits that by adopting in the new section the phrase *"did not appear in person at the proceedings resulting in the sentence …"*, a substantive change and not a mere procedural change has been wrought whereby the rights of the person whose surrender is being sought have been altered and enhanced. It is submitted that this change must lead to a broader meaning, so that the concept of 'in absentia' must now extend beyond the actual trial and conviction hearing (see *e.g. Minister for Justice, Equality and Law Reform v. McCague* [2010] 1 I.R. 456), but to any application in the "proceedings" from which the person was absent but which leads to an order for his imprisonment. He includes within that broader definition of "proceedings" an application such as in the present case where an order was made subsequent to the passing of sentence, and which results in a suspended period of the sentence being revoked, since this is the decision that in reality will result in the imprisonment of the appellant, and therefore is a hearing which fair trial rights mandate an entitlement to be present. Put another way, it is submitted that without the hearing of the application to revoke the suspended part of the sentence, this European arrest warrant could not have been issued since there would be no custodial sentence to be executed, and therefore despite the fact that the issuing judicial authority has completed paragraph B of the warrant in a way that indicates that the decision upon which the EAW is based is the original sentence decision made on the 7th December 1998, it is in reality based upon the later decision to revoke the suspended period of that sentence which was made in the absence of the appellant, and therefore the warrant is invalid since the issuing judicial authority has wrongly indicated therein that s. 45 is inapplicable, and has therefore omitted to complete the Table required for the purpose of providing the necessary information to satisfy the High Court on the s. 16 application for surrender that *"the matters required by section 45"* are stated in the warrant, as required by s. 16(1)(c) of the Act.

16. Mr Farrell has submitted that the general 'in absentia' rule must be considered as one which requires that a person who was not present at any part of the "proceedings" which results in a decision to imprison him will not be surrendered, and that this otherwise general rule is modified only if certain conditions are fulfilled in accordance with new s. 45 of the Act, reflecting new Article 4a as inserted by the 2009 Framework Decision.

17. In so far as the trial judge followed the judgment of Edwards J. in *Obst*, Mr Farrell urges this Court to consider that *Obst* was wrongly decided and that it should not be followed. He points to the fact that in his decision in *Obst* (as appears from a transcript note of the *ex tempore* decision) Edwards J. has not set forth any authorities other than his own decision in *Surma* dealing with a question of retrospective application of the new s. 45 provisions.

18. This Court also heard submissions by Michael Lynn SC in relation to Article 6 rights under the European Convention on Human Rights, and Article 47 of the Charter on Fundamental Rights and their implications for the Court's consideration of whether the right to a retrial extended to a rehearing of the application to revoke the suspended part of the appellant's sentence. Mr Lynn placed particular reliance upon a judgment of the CJEU in *I.B. Reference for a Preliminary Ruling – Case C-306/09* for his submission that fair trial requirements extend beyond the trial itself, and to a sentence hearing, and he supported Mr Farrell's submission that the revocation hearing is in reality a sentence hearing to which fair trial rights must apply, and therefore is within the meaning of new Article 4a of the 2009, which respects fundamental rights, and is also within s. 45 of the Act.

19. I should perhaps explain that Mr Lynn was Counsel retained by another appellant whose appeal was listed and heard with the present appeal since the same issue arose in each appeal. It was made clear by Mr Farrell that those submissions by reference to the Convention and the Charter were also relied upon by Mr Lipinski. It can also be noted for the record that between the hearing of this appeal and delivery of this judgment Mr Lynn's client's sentence had been fully served since he was in custody here awaiting surrender, and in those circumstances the Court acceded to a request by the Minister to discharge that appellant as his surrender was no longer being sought by the issuing judicial authority. In those circumstances judgment is required to be delivered only in Mr Lipinski's appeal.

20. Diarmuid McGuinness SC made submissions on behalf of the Minister. He does not disagree that under the 2009 Framework Decision and s. 45 the trial includes also the occasion on which a sentence is imposed. But while accepting that this is so, he highlights the fact in the present case that there is no doubt that the appellant was indeed present for his trial and for the hearing at which his sentence of 15 years was imposed and was legally represented at the appeal hearing which resulted in the reduction of that sentence to one of 10 years. He submits that the later application to revoke the part of that sentence that was suspended when the appellant was given early conditional release is not a hearing at which any sentence was imposed, but rather comprised an enforcement of the sentence imposed, and that this takes it outside the ambit of new Article 4a, and of new s. 45 of the Act.

21. Mr McGuinness referred to the judgment of Murray C.J. in *Minister for Justice and Equality v. Tokarski* [2012] IESC 61. He submits that this judgment makes clear that when a right to a retrial is referred to in the Framework Decision and s.45 it refers only to a rehearing of the question of the guilt or innocence of the person and/or the sentence imposed. In that regard he refers to what is stated by Murray J. at paras. 73-77 of the judgment as follows, albeit that it is stated by reference to Article 5.1 of the 2002 Framework Decision and not Article 4a as later inserted by way of substitution:

"73. The European arrest warrant in this case has been issued for the purpose of executing a sentence imposed by a Polish court.

74. Article 5(1) of the Framework Decision reads as follows:

"Where the European arrest warrant has been issued for the purposes of executing a sentence or detention order imposed by a decision rendered in absentia … " (emphasis added)

75. Article 5 then refers to the fact that surrender may be subject to the condition that the issuing judicial authority give an assurance that the person, if surrendered, "will have an opportunity to apply for a retrial of the case in the issuing member state and to be present at the judgment". (emphasis added)

76. In referring to the decision that imposed a sentence the reference is, evidently, to a judicial decision, and one which led to the imposition of the sentence. It seems to me that it would be entirely incompatible with Article 5 (1) of the Framework Decision if the phrase "tried for" in s. 45 was to be so narrowly interpreted that it only applied to a judicial determination where the court was required to hear witnesses on the merits of all the prosecutions allegations of fact pointing to the accused's guilt.

77. The State argued that the use of the term "retrial" meant that Article 5(1) only referred to the full trial as to whether the facts or evidence pointing to the accused's guilt should or should not be accepted. I do not think this logically follows from a reading of Article 1 of the Framework Decision. On the contrary, if the reference to a person being entitled to a retrial in certain circumstances has a bearing at all it is one which suggests that a judicial decision which results in the imposition of a sentence is a trial, since it is that decision which must be taken again if a person is surrendered pursuant Article 5(1) on the basis of an assurance that he would be offered a retrial. The same applies if the person has been adjudged to have been convicted and then sentenced on foot of a judicial decision and is surrendered on foot of assurances referred to in Article 5(1). Then it is that judicial determination of his or her guilt or the imposition of a sentence which must be retried."

22. Mr McGuinness acknowledges that the above is stated in the context of Article 5(1) of the 2002 Framework Decision, but submits that there is no real difference of substance between it and new Article 4a, and that what is stated above by Murray C.J. is equally applicable since Article 4a is headed *"Decisions rendered following a trial at which the person did not appear"*, and in para. 1(d) thereof (and reflected in paragraph 3.4 of the Table as it appears set forth in new s.45) the right is to a "retrial". It is therefore submitted that the appellant could not be correct to submit that he may not be surrendered in the absence of a guarantee of a rehearing of the revocation application, since such a rehearing would not be a "retrial" of his guilt or innocence or of the sentence imposed upon him, since the revocation order does not impose the sentence, but merely enforces the balance of it.

23. In support of these submissions Mr McGuinness has referred to the Recitals to the 2009 Framework Decision, and submits that nowhere among the 15 Recitals is there anything to suggest that the right to a retrial upon surrender was to thenceforth extend beyond a retrial of the guilt or innocence of the person surrendered and/or the imposition of the sentence.

24. In relation to the arguments put forward by the appellant in reliance on Article 6 ECHR and Article 47 of the Charter, Mr McGuinness points to the fact that Article 4a of the 2009 Framework Decision provided for an optional basis for refusal of surrender, as did Article 5.1 of the 2002 Framework Decision, and that in circumstances where it is an optional ground for refusal, there can be no breach of Article 6 rights. In fact, I understood the appellant's Article 6 argument to be that he has a right under Article 6 to be present at the hearing of the revocation application, and hence he has an entitlement to an assurance of a rehearing of that application as a pre-condition to any order being made for his surrender, and therefore that to surrender him without such an assurance would constitute a breach of his Article 6 rights under the Convention. There is no doubt that if the appellant had not left Poland, and his whereabouts were known to the authorities, he would have received notification of the intended hearing of an application to revoke his parole, as it were. It can be presumed that this would have happened. However, I am satisfied that it does not come into consideration under s. 45 of the Act, whatever about s. 37 of the Act. It could potentially come for consideration under s. 37 since surrender may be prohibited under Part III of the Act, and s. 37 is within that Part. Section 37 provides:

"37(1) A person shall not be surrendered under this Act if:-

(a) his or her surrender would be incompatible with the State's obligations under (i) the Convention, or (ii) the Protocols of the Convention,

(b) …,

(c) … ".

25. However, s.37 is not in play on this appeal. Donnelly J. as part of her consideration of the s.16 (1) surrender application considered, as she must, the appellant's submission that it would breach his Article 6 rights to surrender him to Poland where he had not been given notice of the application for revocation. She concluded that he had not established substantial grounds for contending that his surrender would amount to a real risk that he would be exposed to a breach of his Article 6 rights (see paras. 100 – 102 of her judgment), and that his surrender was not prohibited under Part III of the Act (see para. 11 of her judgment). Her conclusions in this regard do not arise for consideration on this appeal, since they are not within the point of law certified for this appeal.

Conclusions

26. The extensive written and oral submissions on this appeal belie the rather straightforward issue which arises for determination. It is essentially a question of statutory interpretation assisted in part by reference to the terms of the 2009 Framework Decision, and indeed its predecessor. The question arising, as certified, is whether the provisions of s. 45 as amended are engaged in circumstances where a person was present for the hearing of his guilt or innocence and the imposition of his sentence but was not present for, or notified of, the application to activate the balance of the sentence which was in effect suspended when he was given conditional early release. In short, my view is they are not, and I will endeavour to explain why I believe that to be so.

27. The appellant is incorrect in my view that the changes wrought by the 2009 Framework Decision and specifically the insertion of new Article 4a into the 2002 Framework Decision were substantive in nature and not merely procedural. There is nothing in the wording to indicate an enlargement of the type of decisions for which the assurance of a retrial upon surrender is required. The objective was to bring greater clarity to the existing arrangements, and not to alter them in a substantive way. I note that the heading of the 2009 Framework Decision speaks of *"thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial"* [emphasis added]. Recital 2 refers to the fact that previous Framework Decisions *"do not deal consistently with the issue of decisions rendered following a trial at which the person concerned did not appear in person"* and that *"this diversity could complicate the work of the practitioner and hamper judicial cooperation"*. Recital 3 noted that the 2002 Framework Decision permitted refusal of surrender, and went on to note that it also allowed authorities *"to require the issuing judicial authority to give an assurance deemed adequate to guarantee the person … that he or she will have an opportunity to apply for a retrial of the case … and to be present when judgment is given".* That Recital went on to state that *"the adequacy of such an assurance is a matter to be decided by the executing judicial authority, and it is therefore difficult to know exactly when execution may be refused"* [emphasis added].

28. It is clear from Recital 2 that the problem was not as to what decisions could be the subject of the assurance as to a retrial, but rather uncertainty as to what constituted an adequate assurance. It was this aspect that lacked certainty, and which the new Framework Decision addressed. Recital 4 makes no reference to expanding the categories of decision, but states that *"this Framework Decision is aimed at refining the definition of such common grounds allowing the executing judicial authority to execute the decision despite the absence of the person at the trial, while fully respecting the person's right of defence. … "*. Recital 6 states that the Framework Decision sets out conditions under which the execution of a decision rendered in absentia should not be refused, and that when one of those conditions is indicated by the issuing judicial authority as being met (by marking the appropriate section of the warrant) this *"gives the assurance that the requirements have been or will be met, which should be sufficient for the purpose of the execution of the decision on the basis of mutual recognition"*. Recitals 7, 8, 9 and 10 all refer to either "a decision rendered following a trial", "the right to a fair trial of an accused person", or "the scheduled date of a trial". The clear context of these Recitals by reference to the ordinary meaning of the words used, and as commonly understood by all, is that the trial or retrial relates to the original decision as to guilt or innocence and/or the sentence imposed thereafter, or the rehearing of those matters. If there was any doubt about this, it can be quickly assuaged by the words of Recital 11 which state, *inter alia*: *"… Such a retrial, or appeal, is aimed at guaranteeing the rights of the defence and is characterised by the following elements: the person concerned has the right to be present, the merits of the case, including fresh evidence are re-examined, and the proceedings can lead to the original decision being reversed"* [emphasis added].

29. Further clarification in this regard can be gleaned from the CJEU in its judgment in *I.B. Reference for a Preliminary Ruling – Case C-306/09* to which I have already referred. The facts of that case are unusual and quite complex, and it is unnecessary for present purposes to describe the fact save to note that prior to an appeal to the Romanian Supreme Court, two lower courts had permitted the convicted person to serve a sentence of four years not in prison but *"at his workplace".* What that means in practice I do not know, but the Supreme Court of Romania in due course altered the sentence by requiring that he serve it in prison. Before he was imprisoned on foot of that ruling he had absconded to Belgium. A European arrest warrant was issued and sent to Belgium so that I.B. could be surrendered. The Supreme Court hearing in Bucharest had taken place in the absence of I.B. and an issue arose as to the applicability of Article 5.1 of the 2002 Framework Decision. My single reason for referring to the judgment of the CJEU to whom the Belgian court had made a reference concerning, *inter alia*, the proper interpretation of Article 5.1 is because of what the CJEU states at para. 57 of its judgment:

> *"57. Given that the situation of a person who was sentenced in absentia and to whom it is still open to apply for a retrial is comparable to that of a person who is the subject of a European arrest warrant for the purpose of prosecution, there is no objective reason precluding an executing judicial authority which has applied Article 5(1) of the Framework Decision 2002/584 from applying the condition contained in Article 5(3) of that Framework Decision."*

30. While I appreciate that the appellant argues that the range of decisions captured by the in absentia provisions must now be considered to have been deliberately expanded by the use of the word "proceedings" in new s. 45 of the Act, that word does not appear in Article 4a inserted into the 2002 Framework Decision. It refers to "at the trial resulting in the decision" as already stated, and it is against the wording of that new Article that new s. 45 falls to be interpreted in accordance with the decision *Pupino* (Case 105/03) [2005] E.C.R. 1-5285) in circumstances where it is argued to be ambiguous or otherwise unclear. The wording of Article 5(1) in the original 2002 Framework Decision is not substantively different to Article 4a. Nothing in it indicates that the concept of a retrial was extending beyond what it had been under Article 5(1). The CJEU in I.B. has explained that a person who has been convicted in absentia and who is entitled to a retrial upon *surrender "is comparable to that of a person who is the subject of a European arrest warrant for the purpose of prosecution".* It cannot be said that Mr Lipinski is in that position when all that he was absent for was an application to have enforced against him that portion of his sentence which had been suspended upon his conditional release. It is so different a context that it would require very specific words if the 'in absentia' arrangements were intended to be expanded by Article 4a, and very particular words in s. 45 if that was the intention of the Oireachtas, even if Article 4a is seen to be silent on the matter.

31. Article 4a commences with a heading which reads "Decisions rendered following a trial at which the person did not appear in person", and then proceeds at para 1. to provide that surrender may be refused in a case where the warrant seeks surrender for the purpose of executing a custodial sentence or detention order *"if the person did not appear in person at the trial resulting in the decision"* unless the warrant states at least one of a number of alternative matters is satisfied, and a Table is provided so that the box-ticking exercise can be carried out in order to indicate the matters applicable to the case in question. But at all times it speaks of the "trial". I accept that a reference to "trial" must include the conviction and the sentence decision, but I see no possible way on the basis of an ordinary use of language and its commonly understood meaning how "trial" can be seen as extending beyond that and as far as an application to revoke parole or lift a suspended part of a sentence, or however one wishes to describe what happened in this case which is described in paragraph F of the warrant as follows*: "[The Court] quashed the conditional release of serving the remaining part of the penalty granted to the convict by virtue of the decision of 20th September 2004, and ordered execution of the remaining part of the penalty imposed by virtue of the enforced judgment … of 7th December 1998"*. In other words, the suspension was lifted and the court ordered execution of the balance of the sentence which had already been imposed. It did not impose the sentence. It enforced the existing sentence imposed when the appellant had been present – in the sense that he was legally represented at the appeal hearing when the 15 year sentence was reduced to one of 10 years as already described.

32. As stated, the appellant has submitted that the decision to revoke the suspension should be considered a decision in respect of which he should be entitled to a retrial or rehearing since realistically it is that decision which has resulted in his surrender being sought so that he can return to prison. While that may reflect the reality, one must still be guided by s. 45 of the Act and, if necessary by Article 4a and the two Framework Decisions generally as to whether surrender must be refused in the absence of the completion of the Table within the section. Section 16 (1) enables the High Court to make an order for surrender provided that a number of matters are established as set forth in its sub-paras. which include at (c) where *"the European arrest warrant states, where appropriate, the matters required by section 45 …"* [emphasis added]

33. Much is made by the appellant of the change in the wording of new s. 45 and in particular its reference to not appearing at *"proceedings"* instead of, as in old s. 45 *"not [being] present when he or she was tried for and convicted …".* But it is not correct to focus on the word "proceedings" in new s. 45. One must read more than that in order to see the full context which can be gleaned from the *words "did not appear at the proceedings resulting in the sentence … in respect of which the European arrest warrant was issued …".* There is no doubt that "the proceedings resulting in the sentence" can only refer to the sentence imposed in December 1998, as adjusted downwards on appeal. He was present and/or legally represented at those proceedings. If he was not present at the proceedings when the sentence was imposed, s. 45 would undoubtedly be engaged. I reiterate that the lifting of a suspension of an imposed sentence is not to be confused with the imposition of that sentence in the first place. To find in favour of the appellant's submission in this regard would require the reading into new s. 45 words that simply are not there. In my view, as I have said, the word *"proceedings"* must be read in tandem with the words that follow, namely *"resulting in the sentence or detention order in respect of which the European arrest warrant was issued"*. The sentence or detention order in respect of which this warrant was issued is the sentence imposed on the 7th December 1998 as later adjusted to 10 years on appeal. No sentence was imposed by the

revocation order made, and the warrant does not state in paragraph B thereof that this is the order on which the warrant is based. In so far as it is necessary to say so, I believe that this interpretation of *"proceedings resulting in the sentence or detention order in respect of which the European arrest warrant was issued"* is one which conforms to the objectives of the Framework Decision, and does no violence to s. 45. This interpretation is not therefore *contra legem*.

34. I have reached my own conclusions on this appeal and without reliance upon the judgment of Edwards J.in *Obst*. But I have no reason to disagree with the basis on which he arrived at a similar decision on the facts of that case.

35. For the above reasons I consider that the trial judge was correct to order the surrender of the appellant, and I would dismiss this appeal.