THE HIGH COURT

[2013 No. 142 EXT]

BETWEEN

MINISTER FOR JUSTICE AND EQUALITY

APPLICANT

AND

JANIS LIPATOVS

RESPONDENT

JUDGMENT of Ms. Justice Donnelly delivered on the 4th day of March, 2019

1. Is a European Arrest Warrant ("EAW") required to demonstrate conclusively that a requested person waived not just the right to appear at trial, but in particular waived the right to appear at the sentence hearing? Additionally, should there be evidence of consideration by the trial court of the proportionality of proceeding to sentence instead of issuing an arrest warrant prior to sentence? These questions arise in the present application for surrender of this respondent to serve a sentence of five years' imprisonment imposed upon him for the offence of rape in the United Kingdom of Great Britain and Northern Ireland ("the UK"). The EAW confirms that his trial proceeded in his absence in circumstances where he had knowledge of the scheduled trial and had given a mandate to a lawyer to represent him. He was defended by that lawyer at the trial.

Section 16 of the European Arrest Warrant Act, 2003
2. In any proceedings for surrender under the provisions of the European Arrest Warrant Act, 2003, as amended ("the Act of 2003"), the High Court, as executing judicial authority, must be satisfied that a number of conditions have been met. The court is obliged to satisfy itself in respect of these conditions even if they have not been put directly in contest by the requested person.

A Member State to which the European Arrest Warrant Act applies
3. The Court is satisfied that the Minister for Foreign Affairs has designated the United Kingdom as a Member State of the European Union which has given effect to the Council (EC) Framework Decision of 13th June, 2002 on the European Arrest Warrant and Surrender Procedures between Member States ("the 2002 Framework Decision") under its national laws.

Identity
4. The High Court is satisfied on the evidence of Alan Crummey, a member of An Garda Síochána, the affidavit of the respondent and the details set out in the EAW, that the person before it is the person in respect of whom the EAW has issued.

Endorsement
5. The High Court is satisfied that the EAW has been endorsed in accordance with s. 13 of the Act of 2003 for execution in this jurisdiction.

Sections 21A, 22, 23 and 24 of the Act of 2003
6. The High Court is not required under the above provisions to refuse to surrender the person under this Act.

Part 3 of the Act of 2003
7. Subject to further consideration of s.37, s.38 and s.45, the High Court is satisfied that his surrender is not prohibited under any other section contained in Part 3 of the Act of 2003.

Section 38 of the Act of 2003
8. The respondent was convicted of a single offence of rape. Part E of the EAW sets out in detail the circumstances in which the rape occurred. The issuing judicial authority has ticked the box "Rape", indicating it is relying on Article 2, para. 2 of the Framework Decision to show that double criminality is not required to be established. In the circumstances, there is no manifestly incorrect ticking of that box. Given that the respondent received a five-year sentence of imprisonment, the terms of minimum gravity have been met. The surrender of the respondent is therefore not prohibited by the provisions of s. 38 of the Act of 2003.

Section 45 and Section 37 – Trial *in Absentia*
9. S. 45 of the Act of 2003 states: -

> *"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."*

The table set out in s. 45 is a replica of the table set out in the amended part D of the form of the EAW required in the 2002 Framework Decision. This new form was brought about as a result of requirements set out in the said 2009 Framework Decision, which were designed to provide clear and common grounds for non-recognition of decisions rendered following a trial at which the person concerned did not appear in person.

10. At part D the issuing judicial authority has ticked the box at point (2) saying "*No, the person did not appear in person at the trial resulting in the decision*". The issuing judicial authority has then gone on to tick box 3.2 which states: -

> *"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;"*

11. At part D4, which requires an issuing judicial authority to provide information about how the relevant condition has been met, the issuing judicial authority has stated as follows: -

> *"Janis Lipatovs was present at earlier court hearings to answer these charges. He appeared at the Blackpool Magistrates' Court on 11/03/11, Preston Crown Court on the 23/06/11 and the 15/07/11. He failed to attend his trial*

which commenced on the 3rd January 2012. He was represented throughout the trial by his instructed counsel, Mr. Ciaran Rankin of Deans Court Chambers, Manchester."

12. The central authority sought further information from the issuing state on the 9th January, 2019. That request for information asked the issuing state to advise if it was the case that the trial date was fixed on the respondent's last appearance in court on the 15th July, 2011 and if he was remanded on bail to the trial on that date. The issuing state replied: "*trial date was fixed on 15/7, defendant was present and remanded on conditional bail".*

13. In his points of objection, the respondent pleaded that surrender would be contrary to s. 45 of the Act of 2003 having regard to the fact that the EAW does not establish that the respondent was notified of the intention to proceed with sentencing in his absence or that he had waived his right to make representations. It is expressly accepted by the respondent that he was on notice that there would be a trial and that he was represented at trial by counsel and solicitor. The respondent said that he left the UK approximately four months prior to his trial. The respondent stated that he did not address his mind to the consequences of absenting himself from his trial. In his affidavit, he stated that he assumed the charges would be dropped due to the weakness of the case against him. He claimed he did not properly advert to the risk that there would be a trial in his absence, and in particular he did not consider the possibility that he could be sentenced in his absence.

14. The respondent's solicitor swore two affidavits. He averred to the contact he made with the solicitor who was on record for the respondent in the criminal trial and sentencing in the issuing state. He said he had not been able to get an affidavit from that solicitor. That solicitor attended and represented the respondent at police interview with an interpreter present. The solicitor represented him throughout the Magistrates' and Crown Court appearances; counsel also appeared in the Crown Court. It is specifically stated in the affidavit that the respondent was represented throughout the trial (emphasis added). The respondent agreed and signed a defence statement which was filed. The respondent had spoken often to his solicitor. When mail from the solicitor to the respondent had returned marked "not at this address", and the client was no longer contactable by phone, the solicitor had the case listed before the Crown Court. It is said that the judge insisted however that the trial should proceed in light of "the ten-point test in *R. v. Jones*" [2003] 1 AC 1.

15. An application to adjourn the trial and an application to sever the indictment were both refused. The respondent was represented throughout the trial and a defence was run on his behalf which was consistent with the version of events given during police interviews and with the content of the defence statement. The respondent was convicted and was sentenced to five years imprisonment. There appears to be no contest from what had been said that the conviction and sentence occurred on the same date. It is however stated in the affidavit of the respondent's present solicitor that on the sentence date no plea in mitigation was made, as no mitigation had been provided by the respondent. It was also said that the UK solicitor did not think there was any prospect of a successful appeal against conviction and sentence, notwithstanding that there was a conviction and sentence *in absentia*.

16. In a later affidavit, the solicitor for the respondent put before the Court relevant documents from the file he had received from the solicitor in the United Kingdom. He said that the respondent was not relying on the material. This material was being provided to this Court and the minister in case there was any material they considered potentially relevant. It was submitted to the Court that the file did not demonstrate any information about the sentence hearing. It is noted by the Court that these notes contain a reference to the *Jones* case and to an apparent submission that the case could be adjourned in the hope of utilising the EAW procedure to ensure his presence. The arguments against proceeding in his absence were rejected by the trial judge.

Submissions

17. Counsel for the respondent submitted that a major issue was the meaning of the word "trial" in s. 45 of the Act of 2003 and the 2002 Framework Decision (as amended). This was an issue in light of the decisions of the Court of Justice of the European Union ("CJEU"). Counsel submitted that trial and sentence were different matters, requiring separate consideration. Counsel acknowledged that s. 45 appeared to be premised upon a sentence being granted after a trial; as s. 45 refers to "proceedings resulting in the sentence or detention order". Despite such reference, counsel submitted that this reference did not take from the nature and strength of his argument.

18. Counsel placed emphasis upon the judgment of the CJEU in *Zdziaszek* (Case C- 271/17 PPU). That case concerned a situation where, at a separate hearing date, a combined custodial sentence had been imposed on the requested person, instead of the separate custodial sentences previously imposed upon him. At issue was whether the cumulative sentence came within the scope of Article 4(a)(1) of the 2002 Framework Decision.

19. The CJEU at para. 94 stated as follows: -

> *"As is apparent, respectively, from paragraphs 76 to 80 and 90 to 92 of the present judgment, it is necessary to ensure that the rights of the defence are observed in respect of both the finding of guilt and the final determination of the sentence and, where those two aspects, which are in any case closely linked, are dissociated, the final decisions handed down in that regard must, in the same way, be subject to the verifications required by that provision. That provision seeks precisely to strengthen the procedural rights of the persons concerned by ensuring that their fundamental right to a fair trial is guaranteed (see, to that effect, today's judgment, Tupikas, C-270/17 PPU, paragraphs 58 and 61 to 63) and, as stated in paragraph 87 of the present judgment, those requirements apply both in respect of the finding of guilt and the determination of the sentence."*

20. At para. 87 of the judgment the CJEU stated: -

> *"In that regard, it is apparent from the case-law of the European Court of Human Rights that the guarantees laid down in Article 6 of the ECHR apply not only to the finding of guilt, but also to the determination of the sentence (see, to that effect, ECtHR, 28 November 2013, Dementyev v. Russia, [[2013] ECHR 1210]). Thus, compliance with the requirement of a fair trial entails the right of the person concerned to be present at the hearing because of the significant consequences which it may have on the quantum of the sentence to be imposed (see, to that effect, ECtHR, 21 September 1993, Kremzow v. Austria, [(1994) 17 EHRR 322])."*

21. The respondent also relied upon the case of *Minister for Justice and Equality and Law Reform v. McCague* [2008] IEHC 154. That case also involved a trial, conviction and sentence in the absence of a requested person by the Crown Court in Northern Ireland. It was decided however on the basis of the original provisions of s. 45 of the Act of 2003 before they were amended to take into account the amendment of the 2002 Framework Decision by the 2009 Framework Decision. The final conclusion with regard to s. 45, i.e. that it does not refer to presence at the sentence, may not be in accord with the amended provisions of s. 45 in light of subsequent decisions of the Court of Justice of the European Union.

22. It is of note however, that Peart J. said in *McCague* that for the purposes of the case before him, he was prepared to conclude that the right to be notified of the date and place of the hearing extends, particularly where sentencing does not follow immediately upon the conclusion of the trial and conviction, to being notified of the date, time and place of that sentencing hearing. The respondent submitted however that it was not appropriate to say that there was no such requirement of notification as regards a sentence which took place immediately. He submitted that the principle was in truth the same; that the sentence was divisible from the trial on guilt or innocence and required its own process including effective representation and notification.

23. Counsel for the respondent submitted that his interpretation of Article 4(a) of the Framework Decision must be read in light of the European Convention on Human Rights ("ECHR") case law. That case law required that if a person was to be tried in his or her absence there had to be a waiver of the right to be present at the trial. Counsel submitted that one could not presuppose that because a person did not appear at the trial in respect of guilt or innocence, that they were waiving their right to be present at the sentence. He submitted that in the present case, the respondent may have been naïve but he did not address his mind to the consequences. He submitted that the issue was one of fact at it must be demonstrated that the issuing judicial authority had grappled with this issue at the time.

24. Counsel submitted that the issuing judicial authority, by virtue of what was said in the EAW, had not demonstrated that the respondent had conclusively waived his right to appear at the sentencing hearing. The additional information had only sought to confirm that the respondent was present when the trial date had been fixed, but it did not clarify what he was told with regard to the sentence. In counsel's submission there was an onus to provide this information in terms of showing how the condition was met.

25. Counsel submitted that a second aspect of the requirement was that it must be shown that the respondent was indeed defended by counsel or at the trial. He submitted that the information he had at present demonstrated that there was no plea in mitigation because that had not been provided.

26. Counsel submitted that in light of the absence of notification about sentence and lack of effective representation at sentence, that there had been a flagrant denial of justice. In his submission, there were always matters that could be put forward in relation to a sentence. He relied on the European Court of Human Rights ("ECtHR") decision in the case of *Colozza v. Italy* [1987] 7 EHRR 516; in particular para. 29 where the court said: -

> *"According to the Government, the right to take part in person in the hearing does not have the absolute character which is apparently attributed to it by the Commission in its report; it has to be reconciled, through the striking of a "reasonable balance", with the public interest and notably the interests of justice. It is not the Court's function to elaborate a general theory in this area (see, mutatis mutandis, the Deweer judgment of 27 February 1980, Series A no. 35, p. 25, para. 49). As was pointed out by the Government, the impossibility of holding a trial by default may paralyse the conduct of criminal proceedings, in that it may lead, for example, to dispersal of the evidence, expiry of the time-limit for prosecution or a miscarriage of justice. However, in the circumstances of the case, this fact does not appear to the Court to be of such a nature as to justify a complete and irreparable loss of the entitlement to take part in the hearing. When domestic law permits a trial to be held notwithstanding the absence of a person "charged with a criminal offence" who is in Mr. Colozza's position, that person should, once he becomes aware of the proceedings, be able to obtain, from a court which has heard him, a fresh determination of the merits of the charge."*

27. In the respondent's submission, one could see a public interest, perhaps where evidence would be lost, in holding a trial *in absentia*, but, as regards sentencing, those public interests were not present. While counsel accepted that perhaps victims' rights had to be considered insofar as they were entitled to closure, they would never receive true closure until the person was actually serving the sentence.

28. Counsel also referred to the ECtHR case of *Medenica v Switzerland* [2001] ECHR 391 for the purpose of distinguishing it. He submitted that this was the first case which concluded that a person could be tried and sentenced in their absence. In his submission, the facts of the present case were entirely different. There was no evidence of the deliberate and planned evasion of trial as there has been in *Medenica*. Overall, counsel's focus was more on s. 45 of the Act of 2003 than s. 37 as the proofs required to prohibit surrender under the latter provisions placed a significant burden on the respondent.

29. Counsel's main point was that s. 45 was violated where the respondent did not waive his right to be present at his sentence. He submitted that the decision of the ECtHR in *Sedjovic v Italy* [2004] ECHR 620 held that it must be established in an unequivocal manner that a person had waived their rights. It also had to be attended by minimum safeguards. This is where counsel said effective representation at the sentence hearing must come in. The statement in the EAW, as to the counsel being present at the trial, was not sufficient to show how the respondent had actually been represented. Counsel submitted that at all decisive phases in the trial and sentencing process the principles had to be observed. There had to be a conclusive waiver demonstrated as to sentencing and there was no such waiver demonstrated here.

30. Counsel for the minister submitted that under the s. 37 procedure, the respondent had to demonstrate that there was a fundamental defect in the legal system in the issuing state; this he had failed to do. It was established that the respondent had a right of appeal. It was also demonstrably clear that the case law from the ECHR did not support the claim that a person must be notified separately as to sentencing.

31. The minister relied on the case of *Medenica* and the ECtHR case of *Atanasova v Bulgaria* [2017] ECHR 105 . The latter judgment is, however, only available in French. While the facts were not as clear cut as those in *Medenica*, the minister submitted that the facts in the present case revealed that the respondent had made a conscious decision not to turn up. That was sufficient to waive his rights. Counsel submitted that it could not be the law that a sentence could not proceed unless a person was present. Counsel asked if the question could rhetorically be asked – "what did this respondent think would happen if he failed to show?" In the minister's submission, even if the Court were to engage with the respondent's claim that a proportionality test must be applied for in respect of the decision to proceed in the absence of the respondent, there was no lack of proportionality. This was demonstrated by the fact that in the present case it had taken six and a half years for the respondent to arrested on the European arrest warrant.

32. In relation to s. 45 of the Act of 2003, counsel submitted that there was compliance with those provisions. Section 45 refers to proceedings resulting in sentence or detention. Counsel submitted that he was clearly present at trial. It was also known that the respondent was sentenced on the 10th January, 2012 which was the same day as his conviction. He was represented during the proceedings. The suggestion on behalf of the respondent was only to the extent that there was no plea in mitigation as to what was produced to the court. This did not affect his representation at the trial and sentence.

33. Counsel for the minister relied upon the CJEU statement from para. 94 of *Zdziaszek*, that the finding of guilt and final

determination of the sentence which are in any case closely linked, was a statement to say that the guilt finding and sentence finding could be considered together. Counsel also relied on the decisions in *Dworzecki* (C-108/16 PPU) and *Tupikas* (C-270/17 PPU) of the CJEU. She submitted that Article 4 (a) of the 2002 Framework Decision was worded in terms which referred to sentence.

34. In reply, counsel for the respondent distinguished *Atanasova* on its facts as there were other sentences also involved from previous proceedings. He submitted that it was not as severe as the situation that had occurred here. Counsel submitted that there was no authority for the proposition to say that it was acceptable to proceed for sentence in the absence of the hearing. He also submitted that there could not be a logical distinction between sentencing at the same time or afterwards. This would put a premium on having a summary process rather than a considered sentencing process.

Analysis and decision

Section 37
35. In many respects the respondent ran his submissions on s. 45 and s.37 together. On the other hand he also submitted that they were separate and required different analysis. In particular, s. 45 was a strict requirement that applies even if s. 37 would not prohibit surrender because no breach of fundamental rights had been established. It is appropriate to deal with the two provisions separately.

36. Section 37(1) of the Act of 2003 provides that a person shall not be surrendered if his or her surrender would be incompatible with the state's obligation under the ECHR and s. 37(b) prohibits surrender where surrender would constitute a contravention of any provision of the Constitution. The law in respect of both those subsections is well established.

37. In particular, where a person is claiming that there has been a breach of fair trial rights in the issuing state, and that surrender would contravene a provision of the Constitution, the Supreme Court in *Minister for Justice and Equality v. Brennan* [2007] 3 IR 732 held that the mere fact that the legal system or system of trial in another jurisdiction differed from that envisaged by our Constitution would not mean that surrender would contravene our Constitution. Murray C.J. went on to state that: -

> *"That is not by any means to say that a court, in considering an application for surrender, has no jurisdiction to consider the circumstances where it is established that surrender would lead to a denial of fundamental or human rights. There may well be egregious circumstances, such as a clearly established and fundamental defect in the system of justice of a requesting state, where a refusal of an application for surrender may be necessary to protect such rights. It would not be appropriate in this case to examine further possible or hypothetical situations where this might arise. The sole matter which I wish to make clear here is that the mere fact that a trial or sentence may take place in a requesting state according to procedures or principles which differ from those which apply, even if constitutionally guaranteed, in relation to a criminal trial in this country does not of itself mean that an application for surrender should be refused pursuant to s. 37(2) of the Act."*

38. Judgment was given in the case of *Minister for Justice v. Stapleton* [2008] 1 IR 669 shortly after the decision in *Brennan*. The Supreme Court quoted with approval the dicta of Murray C.J. in *Brennan*. In *Stapleton*, Fennelly J. identified the principles of mutual trust and mutual recognition as being at the heart of the EAW system. Fennelly J. stated that the principle of mutual confidence was broader than the principle of mutual recognition. Mutual confidence encompassed the system of trial in the issuing state. It followed therefore that the courts of the executing member state, when deciding whether to make an order for surrender, must proceed on the assumption that the courts of the issuing member mtate will, as is required by Article 6.1 of the Treaty on European Union, "respect human rights and fundamental freedoms". Fennelly J. went on to link the requirement the need to find a clearly established and fundamental defect in the system of justice of the requesting State, to both a claim under constitutional and Convention breaches.

39. In *Stapleton*, what was at stake was a trial in the future, i.e. after surrender. In the case of *Minister for Justice and Equality v. Rostas*, [2014] EHC 391, the High Court (Edwards J.) addressed a claim that the original trial had been unfair in the issuing state. Edwards J. stated as follows at para. 87: -

> *"In Minister for Justice, Equality and Law Reform v. Marjasz [2012] IEHC 233, (unreported, High Court, Edwards J., 24th of April, 2012) this Court acknowledged that, notwithstanding the principle of mutual recognition, it might be possible, in an exceptional case, for a respondent to resist surrender on foot of a European arrest warrant seeking his or her surrender for the purpose of executing a sentence, on the basis that the underlying conviction was the result of an unfair trial. However, I went on to state: "The Court would add, however, that this jurisdiction is likely to be exercised very sparingly indeed, and only in cases where it has been established by the clearest and most cogent evidence that there was a truly egregious unfairness in the circumstances of the underlying trial, and where there is also evidence that all possible remedies / avenues of review / appeals in the issuing state have been tried without success and have been exhausted.*
>
> *It follows from what the Court has just said that in a conviction case the Court will, in general, be most reluctant to engage in any review of the trial process leading to the conviction on foot of which the warrant is based to determine whether it was fair and lawful. The default and starting position in all cases will be that the Court must proceed upon a presumption that the trial leading to the conviction in question was fair and respected the respondent's fundamental rights, and that in the event of him having some complaint in regard to the fairness of the trial that led to his conviction that it was incumbent upon him, at the material time, to seek an effective remedy in regard to that before the courts of the issuing state."*

40. In the view of this Court, the reference to trial referred to in *Stapleton, Marjasz and Rostas*, must also include a reference to sentence. Therefore, for this respondent to establish that his surrender is prohibited under s. 37 of the Act of 2003, he must establish that there was an egregious breach in the system of justice in the issuing state. He must satisfy the Court that he has no remedies as regards that breach in the issuing state such that it would be egregious to surrender him

41. The first and most obvious point in the present case is that the respondent has not demonstrated that he has no right of appeal or right to review in the issuing state the trial *in absentia*. He has not provided any affidavit of laws from the UK or an affidavit from his previous solicitor that would demonstrate any absence of any appeal in the present case. On the contrary, it is clear that the UK authorities have stated that the respondent has an entitlement to appeal his conviction on the grounds that it was unsafe. Furthermore, the respondent has not established that he cannot review his sentence as being a breach of his Article 6 rights.

42. Secondly, and perhaps more fundamentally, the respondent has singularly failed to provide any legal authority that establishes that where a person knowingly waives their right to a trial, that the sentencing of that person if found guilty, cannot proceed unless

and until it is established that they were quite separately waiving their right to be present at any sentence hearing. It is important to recall that it is established in the case law of the ECtHR, Article 6 protections apply throughout the entirety of the criminal proceedings including the sentencing process (see *Phillips v. the United Kingdom* [2001] ECHR 437). Therefore the protections as to the right to attend for trial must be viewed in the context that fair trial rights under Article 6 include sentence rights.

43. The respondent has relied upon the case of *Sejdovic v. Italy* [2004] ECHR 620 in which the ECtHR held:-

> *"84. . . . the duty to guarantee the right of a criminal defendant to be present in the courtroom – either during the original proceedings or in a retrial – ranks as one of the essential requirements of Article 6 . . .. Accordingly, the refusal to reopen proceedings conducted in the accused's absence, without any indication that the accused has waived his or her right to be present during the trial, has been found to be a "flagrant denial of justice" rendering the proceedings "manifestly contrary to the provisions of Article 6 or the principles embodied therein".*

44. It should be recalled, however, that in *Sejdovic* the applicant had been convicted and sentenced in his absence. There is no suggestion in the decision of the ECtHR that the proceedings at issue were anything other than the trial at which his guilt was determined and the appropriate penalty imposed upon him. In *Sedjovic* the ECtHR held that in the absence of an unequivocal waiver of the right to be present, the absence of a right to have a fresh determination of the merits of the charge against him amounted to a violation of his Article 6 rights.

45. In *Colozza v. Italy*, the ECtHR rejected the presumption in Italian law that where adequate searches by the criminal investigation police have been unsuccessful an intention to evade arrest is to be presumed, formed a sufficient basis to establish a waiver of the right to be present at one's trial. The respondent argued that the European Court left it as an open question whether it would be sufficient to demonstrate a waiver of the right to be present where a person accused of a criminal offence actually does abscond.

46. The ECtHR in the case of *Medenica v. Switzerland* held that a conviction and resulting sentence after a trial *in absentia*, where an accused had deliberately absented himself from trial, did not breach Article 6. The respondent submits that those were extreme facts and must be distinguished. That argument is not sufficient to deal with the principle established: that there is no breach of Article 6 where a sentence has been imposed after conviction following a trial *in absentia* where there has been a waiver of the right to be present. That principle was followed in the case of *Atanasova*, where the facts were much more mundane. Again the respondent's attempt to distinguish that case on the grounds that the applicant in *Atanasova* was already familiar with the criminal justice system does not set aside the general principle that Article 6 rights are not breached where a sentence has been imposed after a waiver of the right to be present at trial.

47. In reality, none of the cases referred to by the respondent lay down authority for his proposition that waiver of the right to be present at trial and waiver of the right to be present at sentence require separate and distinct consideration. On the contrary, the ECtHR has looked at the trial proceedings as a whole in deciding whether fair trial rights have been breached. For example, in the case of *Dementyev v. Russia* [2013] ECHR 1210, a decision of the ECtHR mentioned by the CJEU, the ECtHR was dealing with the situation where there had been an aggregation of sentences previously imposed at which the applicant was not present. Even in those circumstances, the ECtHR was not necessarily prepared to find there had been a violation of Article 6 of the Convention where he had been present and represented during both trials and was able to appeal against his convictions. The ECtHR considered that the domestic court could, as a matter of fair trial, have properly examined the issue on the basis of the case file and the parties' written submissions without a direct assessment of the evidence given by the applicant in person. There was no violation of Article 6 in those circumstances, although it should be noted that the ECtHR went on to state that there had been a waiver of his right to be present in the overall circumstances of that case.

48. This Court has not been furnished with any authority from the ECtHR or any national court, that has decided that the right to a fair trial means there must be a bifurcated process regarding notice of trial on the one hand and then notice of sentence as a separate event. Instead, the case law produced has implicitly, and on occasion explicitly, regarded the notification as to trial as a trial which will encompass a sentence hearing. In those circumstances, the concept of trial encompasses the sentence hearing. Therefore, if there has been a waiver of the right to be present at the trial, it can be said that there is a waiver of the right to be present at the sentence.

49. The Court will deal with the decision in *Zdziaszek* in more detail below. The Court is satisfied however that it is not authority for the proposition that it is a breach of his fair trial rights to proceed to sentence where there has been no separate consideration of whether he was notified of the fact that he would be sentenced or whether the court should proceed to sentence him. In the view of the Court, the respondent has not established that there has been a flagrant denial of justice in the issuing state whereby the UK court proceeded to sentence him in circumstances where there was a clear waiver of his right to be present at the trial and where in fact he was represented at that trial. Moreover, the respondent has not established that he would have no remedy in the issuing state for any such breach of rights. The respondent has therefore not established that this is an argument that he is precluded from advancing within the legal system in the United Kingdom. In the absence of establishing an egregious breach in the system of justice, it is not therefore a breach of either the Convention or the Constitution to surrender him in those circumstances.

Section 45 of the Act of 2003

50. Section 45 is the implementation provision of Article 4a of the 2002 Framework Decision as inserted by Article 2 of the 2009 Framework Decision. Article 4(a)(1) states as follows: -

> *"The executing judicial authority may also refuse to execute the European arrest warrant issued* for the purpose of executing a custodial sentence or a detention order if the person did not appear in person at the trial resulting in the decision, *unless the European arrest warrant states that the person, in accordance with further procedural requirements defined in the national law of the issuing Member State:*
>
> *[the following..] . . ."(Emphasis added)*

51. The wording of Article 4(a) demonstrates that consideration of trial *in absentia* arises where there has been a custodial sentence or detention order imposed following a trial where the person did not appear and which resulted in the decision. In those circumstances, Article 4(a) is based upon the presupposition that the trial will have resulted in a sentence. That understanding of trial corresponds with the understanding of a trial such as that which Ó Dálaigh J. referred to in *People (Attorney General) v. Messitt* [1974] IR 406 when quoting with approval from Lord Atkin in *Lawrence v. R* [1933] AC 699 when he said:

> *"It is an essential principle of our common law that the trial for an indictable offence has to be conducted in the presence of the accused, and, for this purpose, trial means the whole of the proceedings, including sentence."*

52. From the foregoing, Article 4(a) applies a common understanding of the meaning of trial. It includes the hearing on guilt or innocence, and the sentencing hearing where there is a finding of guilt. Such an interpretation is consistent with the interpretation to trial given by the European Court of Human Rights. It also accords with the commonly understood meaning of criminal trial, a process leading to a determination of guilt or innocence and the imposition of sentence on a guilty person. A person who is notified of their rights in respect of being present at a trial and who mandates a person to appear for them at that trial is clearly given notice of both the trial and the fact that the mandate will include any sentencing matter.

53. The height of the respondent's case under s. 45 was based upon *Zdziaszek* (as well as *Tupikas* which dealt with appeals). It was submitted that the significance was that the executing judicial authority must consider each part of the criminal trial process to ensure that where a decisive hearing on criminal culpability takes place, fair trial rights have been complied with. A careful interpretation of *Zdziaszek* (C-271/17 PPU), in which it is recognised that trial and sentence are closely linked, does not however provide authority for a requirement of separate notification of the sentence hearing as distinct from the trial of guilt or innocence.

54. It is important to recollect that in *Zdziaszek* what was at issue was a cumulative sentence imposed in a separate hearing from those in which the two individual sentences had been imposed. All of the references to sentence must be seen in that regard. In particular, it can be seen from para. 87 of the judgment in *Zdziaszek*, that the CJEU had regard to the fact that the guarantees laid down in Article 6 applied not only to the finding of guilt, but to the determination of the sentence. The CJEU went on to state: "*Thus, compliance with the requirement of a fair trial entails the right of the person concerned to be present at the hearing because of the significant consequences which it may have on the quantum of the sentence to be imposed".* The hearing referred to is the trial and right to be present is important because of the consequences it may have on the quantum of sentence to be imposed. The sentence therefore is part and parcel of the hearing that is at issue for the purpose of Article 4(a) of the 2002 Framework Decision.

55. The CJEU went on to state at para. 88 that: "*This is the case with respect to specific proceedings for the determination of an overall sentence where those proceedings are not a purely formal and arithmetic exercise, but entail a margin of discretion in the determination of the level of the sentence, in particular, by taking into account of the situation or personality of the person concerned, or of mitigating or aggravating circumstances.*" The reference by the CJEU to "specific proceedings" is to the hearing as to the cumulative sentence. Those "specific proceedings" are separate from the hearing as to guilt or innocence and the determination of sentence. Therefore, proceedings giving rise to a judge handing down a cumulative sentence, leading to a new determination of the level of custodial sentences imposed previously, are relevant for the application of Article 4 (a) (1) of the Framework Decision 2002/584. This is so where they entail a margin of discretion in the determination of sentence.

56. From the foregoing it can be seen that the decision of the CJEU at para. 94, quoted above, of *Zdziaszek*, was a determination reached by the court in the context of the findings referred to in the earlier paragraphs. Para. 94 makes specific reference to the finding of guilt and the final determination of the sentence being closely linked. It is only where they are dissociated that the final decisions handed down must in the same way be subject to the verifications required by that provision.

57. Counsel for the minister has submitted that in this case there is no dissociation as the decision was held on the same day. It is more correct to interpret the determination of the CJEU at para. 94 as one aimed at an entirely different issue; that of cumulative sentences which result in a dissociation from the original hearing such as to require separate verification. In any event, it is may not be necessary to go that far in the present case as there was no dissociation at all. The finding of guilt and the sentence took place within the context of the trial.

58. In the circumstances, there is no breach of s. 45 as the respondent was informed of the scheduled trial and gave a mandate to his lawyer. The EAW also states that the respondent was represented throughout the trial by his instructed counsel who is so named. As regards the representation, the respondent submits that this is insufficient explanation in the context where he has an affidavit which, albeit hearsay, states that there was no plea in mitigation as no mitigation had been provided by the respondent. The respondent also says he was not asked to give information about his personal circumstances to be used in the event of his conviction, he says the issue was not discussed. It is noted that he appears to have absconded at least four months before his trial and that he did not contact his solicitors during that time.

59. The fact that no mitigation was given is not an indication that he was not represented at the sentence stage. On the contrary, that is an indication that no mitigation was presented to the court, as no mitigation had been forwarded by the respondent. Implicit within that is that the respondent was represented at the hearing but no plea in mitigation made. That confirms, rather than detracts from, the statement in the EAW that he was represented throughout the trial by counsel. Therefore, in the context where the respondent waived his right to be present at his trial but gave a mandate to his lawyer, there is no breach of s. 45 of the Act of 2003. He had given the mandate and was in fact defended at the trial.

60. Moreover, it can be observed that the respondent in his affidavit does not at any time make the case that he was told that he would not be sentenced. His averment is that he did not think the trial would proceed without him, he did not want to think about it, he had an unrealistic view of the charges against him and he was under the impression that the case was weak against him and that his co – accused was in more trouble. The respondent concluded that the charge against him would ultimately be dropped and he did not think that the trial would proceed without him being present. The high point of his case is that he says that he had no idea that if he was convicted that the judge might proceed to sentence him in his absence, but that must be seen in the context where he is also averring that he did not think the trial would proceed.

61. It must be said that the respondent's averments are rather self-serving. They must also be viewed in light of the prism that he says when he returned to Latvia he made some efforts to find out what had happened to the charge. He says he contacted two people who he knew worked at the hotel where the incident happened, including the manager, and was advised that the charges were long gone. The respondent said when he travelled to Ireland to see his sister he had no idea that there was a conviction or that there was a European Arrest Warrant against him. This was a senseless way to make enquiries when he was represented by solicitor and counsel but yet made no contact with them. In my view, this indicates a deliberate decision not to alert anybody in a position of authority, be they police or a lawyer, as to his presence. The only inference to be drawn is that the respondent deliberately chose to avoid being present at the trial of the serious charge he was facing and went to great length afterwards not to draw attention to his enquiries about what had happened. On a factual basis, the respondent's argument concerning sentence is wholly contrived. He deliberately chose to abscond and declined to engage with his solicitor who sought to contact him before the trial. There is a very clear waiver of his right to participate in the trial.

62. In the view of the Court, the respondent has not established that there has been a flagrant denial of justice in the UK court by proceeding to sentence him in circumstances where there was a clear waiver of his right to be present at the trial and where in fact he was represented at that trial. Therefore, it is not a breach of either the Convention or the Constitution to surrender him in those circumstances.

63. Furthermore, the Court is satisfied that although he was absent from his trial which included the imposition of sentence on him, the matters required to be stated by s. 45 have been stated by the issuing judicial authority in point (d) of the European arrest warrant. His surrender is therefore not prohibited by s. 45 of the Act of 2003.

Conclusion

64. For the reasons set out above, I am satisfied his surrender is not prohibited under s. 16 of the Act of 2003. I therefore make an order for his surrender to such person in the issuing state as is duly authorised to receive him.