

Approved
No redactions required



THE COURT OF APPEAL

Record No 2020/263

Neutral Citation Number: [2021] IECA 209

Birmingham P

Edwards J

Collins J

IN THE MATTER OF THE EUROPEAN ARREST WARRANT ACT 2003

(AS AMENDED)

BETWEEN

THE MINISTER FOR JUSTICE AND EQUALITY

Applicant/Respondent

AND

DORIAN SZAMOTA

Respondent/Appellant

JUDGMENT of the Court delivered by Mr Justice Maurice Collins on 21 July 2021

BACKGROUND

1. This appeal raises important questions as to the scope and effect of Article 4a(1) of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European Arrest Warrant and the Surrender Procedures between Member States (*“the Framework Decision”*) – to which effect is given in Irish law by section 45 of the European Arrest Warrant Act 2003 (as amended) (*“the 2003 Act”*) – in light of a number of significant decisions of the Court of Justice of the European Union and in particular the decision of that Court (Fifth Chamber) in Case C-571/17 PPU, *Samet Ardic* (*“Ardic”*). Related and significant issues also arise concerning Article 6 of the European Convention on Human Rights and Fundamental Freedoms (*“the ECHR”*), Articles 47 and 48 of the Charter of Fundamental Rights of the European Union (*“the Charter”*) and their interaction with section 37 of the 2003 Act.
2. There is only very limited dispute about the relevant facts and they can be stated shortly. The narrative that follows is taken from the European arrest warrant (EAW) dated 26 February 2019 (*“the Warrant”*), the further information provided by the Issuing Judicial Authority (*“the IJA”*), the Affidavits sworn by the Appellant and the judgment of the High Court Judge (Binchy J).

3. On 29 May 2015, the Appellant, who is a Polish national, was convicted by the District Court for Wroclaw-Śródmieście¹ of an offence of carrying out a denial of service attack on a commercial business in Wroclaw accompanied by threats to continue the attack unless a monetary payment was made to him. I will refer to this offence, which was committed in January 2015, as the “*First Offence*”.
4. The Appellant’s conduct was in breach of a number of provisions of the Polish Penal Code which are set out in the Warrant. The Penal Code provides that, in such circumstances, the court sentences for one crime on the basis of all applicable concurrent articles. The Appellant was sentenced to one year’s imprisonment, with the execution of that sentence being conditionally suspended for a probation period of 5 years.
5. The Appellant was notified of these proceedings and he was present in the District Court. He did not appeal against his conviction or sentence.
6. On 21 February 2017, following hearings on 8 and 21 February, the Appellant was found guilty by the District Court in Bydgoszcz of an offence of breaking into a caravan and theft of a number of items from it. That offence was alleged to have taken place in October 2016. He was sentenced to a term of imprisonment of 14 months for this offence, to which I shall refer as “*the Second Offence*”

¹ The translations variously render the Polish “*Sąd Rejonowy*” as “*District Court*” and “*Regional Court*” . For consistency, I will refer to it as the District Court.

7. The Appellant says that he was unaware of the proceedings for the Second Offence and consequently did not have an opportunity to attend the hearings in February 2017 or instruct legal counsel to represent him in his defence. While there is some dispute as to the Appellant's precise state of knowledge regarding the proceedings which led to his conviction and sentence (to which I shall refer in more detail below), there appears to be no dispute that the Appellant was not actually aware of the hearings in February 2017 or that he did not appear at that hearing either in person or by a legal representative.
8. The Second Offence was committed within the probationary period applicable to the sentence imposed in respect of the First Offence in May 2015. As a result, on 16 May 2017, the District Court for Wrocław-Śródmieście made an order pursuant to Article 75.1 of the Penal Code for the enforcement of the one year sentence.² Again, there is no dispute that the Appellant did not know of these further proceedings before the District Court for Wrocław-Śródmieście and he did not appear either personally or by his legal representative at the hearing on 16 May 2017. For the sake of clarity, I shall refer to these proceedings as the "*Enforcement Proceedings*" and the decision of the District Court for Wrocław-Śródmieście made on 16 May 2017 as the "*Enforcement Decision*".

² According to the translation provided by the IJA, Article 75.1 provides that "*The Court will order the sentence to be carried out if, during the probation period, the convicted offender commits an intentional offence similar to the one he or she was validly and finally sentenced to imprisonment for.*" Article 75.1 is, on its face, mandatory and the IJA's response refers to the order on serving the penalty imposed as "*obligatory*." Presumably, however, some assessment of whether the Second Offence was "*similar*" to the First Offence was required.

9. The Appellant had been living in Ireland prior to 2014, when he went back to Poland. He returned to Ireland sometime in 2016 and has been living here since then.
10. On 26 February 2019, the District Court for Wrocław-Śródmieście issued the Warrant. It seeks the surrender of the Appellant in respect of the First Offence only. Surrender has *not* been sought in respect of the Second Offence, a fact on which the Appellant places a good deal of emphasis.
11. The EAW was endorsed by the High Court on 1 July 2019 and the Appellant was arrested and brought before that Court on 23 October 2019. He was subsequently admitted to bail and remains on bail. In due course, the application for surrender was heard and the High Court (Binchy J) gave a detailed judgment on 16 November 2020 setting out its reasons for concluding that the Appellant should be surrendered. On 30 November 2020 the High Court made an order for his surrender to Poland pursuant to section 16(1) of the 2003 Act.
12. The High Court was asked to allow an appeal to this Court pursuant to section 16(11) of the 2003 Act and it duly certified three questions as raising points of law of exceptional public importance for consideration by this Court. These questions are set out later. The essential issue, however, is whether, having regard to Article 4a of the Framework Directive and/or section 37 of the 2003 Act, the surrender of the Appellant ought to be refused in circumstances where the Enforcement Decision was made *in*

absentia and where that the decision was in turn triggered by his *in absentia* trial and conviction for the Second Offence.

13. According to the Appellant, either or both of the decision to convict him for the Second Offence and the subsequent Enforcement Decision is a “*decision*” within the meaning of Article 4a(1), so that his surrender ought to be refused in the absence of compliance with any of the conditions set out in that paragraph. In the alternative, the Appellant says that his surrender in such circumstances would amount to a breach of his fundamental rights and in particular his fair trial rights under Article 6 ECHR and Articles 47 and 48 of the Charter, thus engaging section 37 of the 2003 Act. In response, the Minister says that the CJEU case-law, and in particular its decision in *Ardic*, makes it clear that the only relevant decision for the purposes of Article 4a of the Framework Decision was that of 29 May 2015 (the decision on the First Offence). As the Appellant was present at the trial resulting in that decision, the Minister says that Article 4a(1) is of no relevance. As regards section 37, the Minister says that the evidence falls far short of disclosing a situation where section 37 could possibly operate to bar the Appellant’s surrender.

IN ABSENTIA JUDGMENTS AND THE EAW REGIME

The Right to be Present at a Criminal Trial

14. Article 6(1) of the European Convention on Human Rights (ECHR) protects the right of a person charged with a criminal offence to be present at, and to take part in, the hearing of that offence: see the decision of the European Court of Human Rights (Grand Chamber) in *Sejdovic v Italy* (56581/00, 2006), para 81, where the Court observed that:

“Although proceedings that take place in the accused's absence are not of themselves incompatible with Article 6 of the Convention, a denial of justice nevertheless undoubtedly occurs where a person convicted in absentia is unable subsequently to obtain from a court which has heard him a fresh determination of the merits of the charge, in respect of both law and fact, where it has not been established that he has waived his right to appear and to defend himself ... or that he intended to escape trial (para 82, citations omitted)”

15. According to the ECtHR, the duty of contracting parties 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”* and, 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’” (Sejdovic at para 84, citing Stoichkov v. Bulgaria, (9808/02) 44 EHRR 14)

16. The right to be present is not limited to the adjudication of guilt or innocence and extends to sentencing hearings: see, for instance, *Dementyev v Russia* (43095/05), at para 23.
17. The right to appear may be waived, either expressly or tacitly. However, “*if it is to be effective for Convention purposes, a waiver of the right to take part in the trial must be established in an unequivocal manner and be attended by minimum safeguards commensurate to its importance.*” (*Sejdovic*, para 86).
18. The entrenched and fundamental character of the rule against *in absentia* trial and conviction, unless accompanied by a right to obtain a retrial, is evident from the Strasbourg case-law. As well as *Sejdovic* and *Stoichkov v. Bulgaria*, reference may be made in this context to *Othman v United Kingdom* (8139/09) (2012) 55 EHRR 1. In *Othman*, the ECtHR noted that it was “*established in the Court’s case law that an issue might exceptionally be raised under art 6 by an expulsion or extradition decision in circumstances where the fugitive had suffered or risked suffering a flagrant denial of justice in the requesting country*” (para 258). It went on to observe that the Court had indicated that “*certain forms of unfairness could amount to a flagrant denial of justice*” including “*conviction in absentia with no possibility subsequently to obtain a fresh*

determination of the merits of the charge” (at para 259). I shall refer further to *Othman* below.

19. The right of an accused person to be present at their trial has also been given express recognition in Union law in chapter 3 of Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016, one of the measures that arose from the European Council’s “Roadmap” for strengthening the procedural rights of suspects and accused persons in criminal proceedings. Article 8(1) provides that “*Member States shall ensure that suspects and accused persons have the right to be present at their trial.*” Article 9 provides that, where an accused person was not present at their trial and the conditions as to notification/representation laid down in Article 8(2) are not met, Member States must ensure that they have the right to a new trial or to other legal remedy which allows a fresh determination of the merits of the case, including examination of new evidence, and which may lead to the original decision being reversed. Article 10(1) of the Directive requires Member States to ensure that suspects and accused persons have an effective remedy if their rights under the Directive are breached.³

20. It is evident from the recitals to Directive 2016/343 that its provisions are intended to reflect and give effect to the principles in Article 6 ECHR and Articles 47 and 48 of the Charter as interpreted and applied in the jurisprudence.

³ As is explained below, the CJEU has stated that the non-compliance with provisions of Directive 2016/343 is *not* a ground for refusing to execute a European arrest warrant.

21. As to Irish law, the Supreme Court has said that “[n]othing could be clearer than the principle that in order to exercise any of the rights guaranteed by Article 38.1 of the Constitution, which prohibits any criminal trial taking place ‘save in due course of law’, a person accused of a crime must know when and where they are to be tried.” (per Charleton J in *O’ Brien v Coughlan* [2016] IESC 4, [2018] 2 IR 270, at para 8). The right of an accused to be present and to follow the proceedings against them has been characterised as “a fundamental constitutional right of the accused which every court would be bound to protect and vindicate” (per Murphy J in *Lawlor v Hogan* [1993] ILRM 606, at 610). However, that right to be present is not absolute and is capable of being waived in certain circumstances. Where an accused is notified of their trial and elects not to attend, it appears that, in principle, a trial judge may decide to proceed with the trial, though there may be circumstances that require the presence of the accused. In practice, prosecutions rarely proceed in the absence of the accused, even where the court is satisfied that the accused was fully aware of when and where the hearing was take place. If the accused absconds in the course of a trial, the trial may proceed. Similarly, where an accused has to be removed from the courtroom as a result of disruptive behaviour, the trial may continue in their absence: *People (AG) v Messitt* [1972] IR 204. The right to be present extends to the sentencing process and it is clear from *O’ Brien v Coughlan* (following *Brennan v Windle* [2003] 3 IR 494) that no significant sentence of imprisonment ought to be imposed without first taking steps to ensure the attendance of the accused, such as by adjourning the hearing and issuing a bench warrant.

In absentia proceedings and the EAW Regime

22. Surrender for the purpose of serving a sentence imposed by a decision rendered *in absentia* was initially addressed in Article 5(1) of the Framework Decision. However, significant difficulty arose in the practical operation of that provision and a new provision, in the form of Article 4a (“*Decisions rendered following a trial at which the person did not appear in person*”), was inserted by Council Framework Decision 2009/299/JHA of 26 February 2009.
23. The recitals to Framework Decision 2009/299/JHA expressly refer to the requirements of Article 6 ECHR as interpreted by the ECtHR:

“(1) The right of an accused person to appear in person at the trial is included in the right to a fair trial provided for in Article 6 [ECHR] as interpreted by the [ECtHR]. The Court has also declared that the right of the accused person to appear in person at the trial is not absolute and that under certain conditions the accused person may, of his or her own free will, expressly or tacitly but unequivocally, waive that right.

..

(8) The right to a fair trial of an accused person is guaranteed by the [ECHR], as interpreted by the [ECtHR]. This right includes the right of the person concerned to appear in person at the trial. In order to exercise this right, the person concerned needs to be aware of the scheduled trial. Under this Framework Decision, the person’s awareness of the trial should be ensured by

each Member State in accordance with its national law, it being understood that this must comply with the requirements of that Convention. In accordance with the case law of the European Court of Human Rights, when considering whether the way in which the information is provided is sufficient to ensure the person's awareness of the trial, particular attention could, where appropriate, also be paid to the diligence exercised by the person concerned in order to receive information addressed to him or her."

24. Article 4a follows on Article 4 of the Framework Decision which provides for a number of grounds for optional non-execution of an EAW. Article 4a then provides:

"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:

Article 4a(1) then sets out 4 alternative conditions. For present purposes, it is necessary only to set out those at (a) and (b):

"(a) in due time:

(i) *either was summoned in person and thereby informed of the scheduled date and place of the trial which resulted in the decision, or by other means*

and

(ii) *was informed that a decision may be handed down if he or she does not appear for the trial;*

or

(b) being aware of the scheduled trial, 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.”

25. In Case C-108/16 PPU *Dworzecki*, the CJEU (Fourth Chamber) held that the expressions “*summoned in person*” and “*by other means actually received official information of the scheduled date and place of that trial in such a manner that it was unequivocally established that he or she was aware of the scheduled trial*” in Article 4a(1)(a)(i) of the Framework Decision were autonomous concepts of EU law which are required to be interpreted uniformly throughout the Union (para 32). The methods of effecting service of the summons provided for in Article 4a(1)(a)(i) “*by their precise and common nature, are designed to ensure a high level of protection and to allow the executing authority to surrender the person concerned notwithstanding his failure to*

attend the trial which led to his conviction, while fully respecting the rights of the defence.” (para 37) .

26. Section 45 of the 2003 Act (substituted by section 23 of the European Arrest Warrant (Application to Third Countries and Amendment) and Extradition (Amendment) Act 2012)) gives effect to Article 4a(1) in Irish law. In contrast to Article 4a(1), section 45 is expressed in mandatory rather than permissive terms (“*A person shall not be surrendered ... unless..*”).
27. The starting point for the application of Article 4a(1) is to identify the “*trial resulting in the decision*”. That is a central issue in this appeal and it will be necessary to discuss in detail the CJEU jurisprudence on that issue. Having identified that *decision* (which, in fact, may involve multiple decisions) Article 4a(1) then requires consideration whether the person whose surrender is sought appeared in person at the trial resulting in that decision(s). If they did not, then, on the face of Article 4a(1), one of conditions set out at (a) – (d) must be satisfied.
28. In fact, there is more flexibility in Article 4a(1) than might appear: see Case C-108/16 PPU *Dworzecki* and Case C-416/20 PPU *TR*. In *Dworzecki*, the Court observed that the executing judicial authority could, in any event, “*take into account other circumstances that enable it to be assured that the surrender of the person concerned does not mean a breach of his rights of defence*” (para 50). A similar approach was taken in *TR*, the Court stating (at para 51) that “*as Article 4a provides for a case of optional non-execution of that warrant, [the court in the executing State] may, in any event, take into*

account other circumstances that enable it to satisfy itself that the surrender of the person concerned does not entail a breach of his rights of defence, and surrender that person to the issuing Member State". Such "*other circumstances*" included the conduct of the person concerned.

29. *TR* is also significant for the Court's holding that non-compliance with the provisions of Directive 2016/343 could not be advanced as a basis for refusing to execute a European arrest warrant (paras 46 & 47). However, the Court emphasised that that did "*not in any way affect the absolute obligation of the issuing Member State to comply, within its legal system, with all provisions of EU law, including Directive 2016/343.*" The Court did not have to address the question of whether the Directive gives a right to a retrial in respect of convictions *in absentia* which took place *prior to* the date for its implementation by Member States (1 April 2018) where the person concerned is surrendered *after* that date.
30. *Dworzecki* was considered by the Supreme Court in *Minister for Justice and Equality v Zarnescu* [2020] IESC 59, where the court concluded that section 45 of the 2003 Act is to be interpreted purposively and that the Table set out in the section is not to be regarded as exhaustive. Having considered the ECtHR jurisprudence, including the decision of the Grand Chamber in *Sejdovic*, the Court emphasised that any waiver of the right to be present required that it be "*unequivocally established that the person was aware of the date and place of trial*" (para 90(m)). While the degree of diligence exercised by the person concerned could be a factor in that assessment, the focus of the

executing judicial authority's inquiry must at all times be on whether rights of defence have been adequately protected (para 90(r)).

The “Trial Resulting in the Decision” – CJEU Jurisprudence

31. Article 4a has given rise to a significant number of Article 267 references to the CJEU.
32. While not concerned with any issue about identifying the “*trial resulting in the decision*”, the decision of the Grand Chamber in Case C-399/11, *Melloni v Ministerio Fiscal* (a reference from the *Tribunal Constitucional* in Spain) provides important guidance on Article 4a generally. The Court explained that, where one of the conditions in Article 4a applies, the executing Member State is precluded from making execution conditional upon the conviction *in absentia* being open to review upon surrender. Where Article 4a(1)(a) or (b) applies, the person concerned must be deemed to have waived their right to be present for their trial and surrender in such circumstances does not disregard the rights guaranteed by Articles 47 and 48(2) of the Charter. The final issue raised in *Melloni* was whether Article 53 of the Charter should be interpreted as allowing the executing member State (Spain) to make the surrender of a person convicted *in absentia* conditional upon the conviction being open to review upon surrender in order to avoid any breach of the fair trial rights guaranteed by the constitution of the executing Member State. The Court rejected any such interpretation of Article 53, which in its view would undermine the principle of the primacy of EU law and the principles of mutual trust and recognition which Framework Decision 2009/299 – which had effected “*a harmonisation of the conditions of execution of a*

European arrest warrant in the event of a conviction rendered in absentia” – was intended to uphold.

33. The CJEU gave judgment in two further Article 267 references, both from the District Court in Amsterdam, on 10 August 2017. While the issues raised in the two references differ from the issues that arise in this appeal, the judgments of the Fifth Chamber provide important guidance as to the operation of Article 4a.
34. In Case C-270/17 PPU *Tupikas*, Lithuania sought the surrender of Mr Tupikas from the Netherlands for the purpose of carrying out a sentence of imprisonment. Mr Tupikas had appeared at the trial at first instance which had resulted in his conviction and sentence. He had appealed but was not present at the appeal hearing. The appeal procedure provided for the substance of the case to be re-examined. However, the appeal had been dismissed and the sentence imposed at first instance was not in fact altered. The Amsterdam District Court asked the CJEU whether appeal proceedings which involved an examination of the merits and which resulted in a new sentence or a confirmation of the first instance sentence constituted the “*trial resulting in the decision*” for the purposes of Article 4a(1).
35. The Court emphasised that the Framework Decision was based on principles of mutual trust and recognition. It also emphasised that those principles must not undermine the fundamental rights guaranteed to the persons concerned. The Framework Decision is to be interpreted in such a way as to ensure compliance with the requirements of respect for the fundamental rights of the persons concerned “*without, however, calling into*

*question the effectiveness of the system of judicial cooperation between the Member States” (para 61). The expression “trial resulting in the decision” must be regarded as an autonomous concept of EU law (para 67) and, in the absence of any definition, was to be interpreted in the context of the Framework Decision as a whole and, in that context, was to be understood as “referring to the proceeding that led to the judicial decision which finally sentenced the person whose surrender is sought in connection with the execution of a European Arrest Warrant” (para 74). Where there were successive judicial decisions, at least one of which was given *in absentia*, it was important to identify “the instance which led to the last of those decisions provided that the court at issue made a final ruling on the guilt of the person concerned and imposed a penalty on him, such as a custodial sentence, following an assessment, in fact and in law, of the incriminating and exculpatory evidence ...” (para 81). What is decisive is the “judicial decision finally disposing of the case on the merits, in the sense that there are no further avenues of ordinary appeal available” (para 83). Where a person appeared at that stage, but not at first instance, any breach of the rights of defence would be remedied and Article 4a would not apply. Conversely, attendance at first instance did not exclude the application of Article 4a if the person concerned was not present at the hearing leading to the “final sentence” (para 86).*

36. In Case C-271/17 PPU *Zdziaszek*, Mr Zdziaszek had been convicted of a number of offences in Poland over a number of years. In 2012, a four-year cumulative custodial sentence had been imposed on him in respect of three of those offences. In 2014, that cumulative sentence was reduced to a cumulative sentence of three years and six months. That reduction arose from an amendment to the law favourable to Mr

Zdziaszek. He was summoned to appear at the proceedings but did not respond. The relevant court had appointed a lawyer on his behalf and adjourned the hearing. Mr Zdziaszek was summoned to the second hearing but again did not attend though the lawyer appointed for him did participate.

37. The District Court of Amsterdam referred a number of questions, including one directed to the issue of whether the proceedings in which the court of the issuing Member State changed an aggregate custodial sentence previously imposed by a final judgment, without any examination of guilt, constituted a “*trial resulting in the decision*” for the purposes of Article 4a(1).
38. The Fifth Chamber noted that, although the decision to amend the custodial sentence previously imposed did not affect the findings of guilt made at the earlier trials of Mr Zdziaszek, it did modify the *quantum* of the penalty or penalties imposed. It was, the Court considered, necessary to distinguish between measures of that type and “*those relating to the methods of execution of a custodial sentence*”. Article 6(1) ECHR did not apply to questions concerning the methods for executing a sentence, in particular those relating to provisional release (at para 85, citing *Boulois v Luxembourg* 37575/04).
39. Where proceedings were concerned with the determination of an overall sentence, then unless the proceedings were a purely formal and arithmetic exercise not involving any element of discretion, compliance with the requirements of a fair trial entails the right

of the person to be present at the hearing. The fact that the sentence could only be reduced was not relevant in this context:

“91 Given that such proceedings determine the quantum of the sentence which the convicted person will ultimately serve, that person must be able to effectively exercise his rights of defence in order to influence favourably the decision to be taken in that regard.

92 The fact that the new sentence is hypothetically more favourable to the person concerned is irrelevant since the level of the sentence is not determined in advance but depends on the assessment of the facts of the case by the competent authority and it is precisely the duration of the sentence to be served which is finally handed down which is of decisive importance for the person concerned.”

40. In light of that analysis, the Court concluded that *“the concept of a ‘trial resulting in the decision’ ... must be interpreted as referring not only to the proceedings which gave rise to the decision on appeal, where that decision, after a fresh examination of the case on the merits, finally determined the guilt of the person concerned, but also to subsequent proceedings, such as those which led to the judgment handing down the cumulative sentence at issue here, at the end of which the decision that finally amended the level of the initial sentence was handed down, inasmuch as the authority which adopted the latter decision enjoyed a certain discretion in that regard.”*

41. As will be apparent from *Tupikas* and *Zdziaszek*, the ‘*trial resulting in the decision*’ may, in fact, involve a number of hearings and decisions, such as a first-instance trial and a subsequent appeal. However, as *Zdziaszek* demonstrates, proceedings that occur even after a criminal conviction and sentence has become final *may* come within the concept of the ‘*trial resulting in the decision*’, thus requiring the issuing Member State to establish compliance with the conditions in Article 4a(1) (assuming that the person concerned was not present) or otherwise to demonstrate that surrender would not breach that person’s rights of defence.

The Decision in Ardic

42. The circumstances in *Ardic* more closely resemble the circumstances at issue here and thus it warrants particular attention. Mr Ardic had been sentenced to two custodial sentences, each for a period of 20 months, following separate trials at which he appeared in person. After he had served a part of both sentences, the competent German courts granted a suspension of the remainder of the sentences. Subsequently, however, the orders suspending the custodial sentences were revoked on the ground that Mr Ardic had not complied with the conditions attaching to the suspensions and had evaded the supervision of his probation office. Mr Ardic did not appear at the proceedings which led to the revocation decisions and had not been heard on the issue of revocation. Subsequently, his surrender from the Netherlands was sought for the purpose of his serving the balance of the custodial sentences that had been imposed on him. He resisted surrender, arguing that the revocation proceedings constituted a “*trial resulting in the decision*” for the purposes of Article 4a and that the conditions set out in Article 4a(1)

were not satisfied. Although it thought that Article 6 ECHR did not apply to the revocation decisions, the Amsterdam District Court was uncertain as to the possible application of Article 4a and therefore decided to refer that issue to the CJEU pursuant to Article 267 TFEU.

43. The Opinion of Advocate General Bobek records that the Irish Government submitted that, in circumstances where the revocation is not automatic and where the court enjoys a margin of discretion, a person must be regarded as still being subject to criminal proceedings at the revocation hearing. In the language of *Zdziaszek* (see para 91 set out above) in such circumstances the revocation decision determined the *quantum* of the sentence. According to the Irish Government, having regard to the potential consequences for the person concerned, such proceedings relate to the determination of a criminal charge within the meaning of Article 6(1) ECHR and, in any event, more extensive protection could be granted under Article 47 of the Charter, in accordance with Article 53(2) thereof. That submission reflected domestic law and practice relating to the activation of suspended sentences (see section 99 of the Criminal Justice Act 2006 (as amended)).
44. The Court took a different view. It explained that Article 4a was intended to limit the possibility of refusing to execute an EAW by listing, in a precise and uniform manner, the conditions under which recognition and enforcement of a decision following a trial *in absentia* may *not* be refused (para 71). Article 4a therefore seeks to improve judicial cooperation in criminal matters while also strengthening the procedural rights of persons subject to criminal proceedings by ensuring full observance of their rights of

defence, flowing from the right to a fair trial enshrined in Article 6 ECHR and, to that end, the Court ensures that Article 4a(1) is interpreted and applied in accordance with Article 6 (paras 73 & 74). It was apparent from the ECtHR case-law that Article 6 had no application to “*questions relating to the detailed rules for the execution or application of such a custodial sentence*” (para 75)

45. The Court then stated its principal conclusions at paragraphs 76 – 82. For the purposes of Article 4a(1), “*the concept of ‘decision’ ... does not cover a decision relating to the execution or application of a custodial sentence previously imposed, except where the purpose or effect of that decision is to modify either the nature or quantum of that sentence and the authority which adopted it enjoyed some discretion in that regard*”. (para 77). Decisions to revoke the suspension of the execution of previously imposed custodial sentences “*did not affect the nature or the quantum of custodial sentences imposed by final conviction judgments of the person concerned*” (para 78). All that the competent court had to determine was whether there had been non-compliance with the conditions of suspension such as justified requiring the convicted person to serve, in part or in full, the custodial sentences that had been initially imposed and the execution of which, subsequently, had been partially suspended. While that court enjoyed a margin of discretion in that regard, it “*did not concern the level or the nature of the sentences imposed on the person concerned, but only whether the suspensions should be revoked or could be maintained, with additional conditions if necessary.*” (para 80). Accordingly, the CJEU concluded

“81 .. the only effect of suspension revocation decisions, such as those in the main proceedings, is that the person concerned must at most serve the remainder of the sentence initially imposed. Where, as in the main proceedings, the suspension is revoked in its entirety, the sentence once again produces all its effects and the determination of the quantum of the sentence still remaining to be served is derived from a purely arithmetic operation, with the number of days already served in custody being simply deducted from the total sentence imposed by the final criminal conviction.

82 In those circumstances, and in the light of what was stated in paragraph 77 of the present judgment, suspension revocation decisions, such as those at issue in the main proceedings, are not covered by Article 4a(1) of Framework Decision 2002/584, since those decisions leave unchanged the sentences imposed by the final conviction decisions with regard to both their nature and level.”

46. The Court went on to acknowledge that the revocation of a suspension measure was likely to affect the situation of the person concerned. However, the person concerned *“cannot be unaware of the consequences”* of infringing the conditions attaching to the suspension (para 83). In any event, the person had a right under German law to be heard *a posteriori* on the revocation decision, which could be altered (para 85). An interpretation of the concept of *“decision”* in Article 4a(1) broader than that set out in para 77 of its judgement, *“would risk undermining the effectiveness of the European arrest warrant mechanism”* (para 87). Moreover, the Court emphasised, its interpretation of Article

4a(1) merely implied that the absence of the person concerned during the revocation proceedings did not constitute a valid ground for refusing execution of an EAW and it did not exempt Member States from the obligation to respect the fundamental rights and legal principles enshrined in Article 6 TEU (paras 88 & 89).

47. The answer given by the Court to the question referred by the Amsterdam District Court was as follows:

“Where a party has appeared in person in criminal proceedings that result in a judicial decision which definitively finds him guilty of an offence and, as a consequence, imposes a custodial sentence the execution of which is subsequently suspended in part, subject to certain conditions, the concept of ‘trial resulting in the decision’, as referred to in Article 4a(1) of Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, as amended by Council Framework Decision 2009/299/JHA of 26 February 2009, must be interpreted as not including subsequent proceedings in which that suspension is revoked on grounds of infringement of those conditions during the probationary period, provided that the revocation decision adopted at the end of those proceedings does not change the nature or the level of the sentence initially imposed.”

48. As already noted, the fundamental position of the Minister here – one which was accepted by the High Court – is that the decision in *Ardic* is a complete answer to the arguments of the Appellant regarding the effect of Article 4a of the Framework

Decision. While that may well be so, it will be evident that the facts presented here differ from the facts in *Ardic* in a number of respects. Whether any of these differences is material is, of course, another matter. These differences are:

- First and foremost, the enforcement of the sentence here was triggered by a further criminal charge and conviction. Article 6 ECHR clearly applies to the criminal proceedings that resulted in that conviction.
- Unlike the position in *Ardic*, the enforcement decision made by the District Court for Wrocław-Śródmieście on 16 May 2017 appears to have been mandatory rather than discretionary. Upon proof of the Appellant's conviction for the Second Offence, it appears that the Enforcement Decision followed as a matter of law.
- Unlike the position in *Ardic*, the custodial sentence imposed here was suspended *ab initio*. The effect of the Enforcement Decision was to make that sentence enforceable for the first time, rather than restoring the position that obtained when that sentence was first imposed (in *Ardic* the revocation decision restored the *status quo* prior to the suspension decisions which had been made some time after the initial custodial sentences had been imposed and only after Mr Ardic had served a part of those sentences).
- Finally, there appears to be no provision of Polish law equivalent to the provisions of the German Code of Criminal Procedure that allowed Mr Ardic to

be heard *ex post* in relation to the revocation decisions and allowing for those decisions to be amended if appropriate. Of course, if the Enforcement Decision here was one which the District Court for Wrocław-Śródmieście was obliged as a matter of law to make upon proof of the Appellant's conviction for the Second Offence (subject to that offence appearing to be "*similar*" to the First Offence) – as appears to be the case from the information before the Court – it would seem to follow that no useful purpose would have been served by allowing the Appellant a right to be heard in relation to that decision. That serves to highlight that, as Mr Munro SC emphasised, the decisive event in terms of the enforcement of the custodial sentence imposed on Appellant was his conviction by the District Court in Bydgoszcz on 21 February 2017 rather than the subsequent proceedings before the District Court for Wrocław-Śródmieście resulting in the Enforcement Decision of 16 May 2017.

SECTION 37 OF THE 2003 ACT

49. Section 37(1) of the 2003 Act provides (*inter alia*) that a person shall not be surrendered under the Act if (*inter alia*) his or her surrender "*would be incompatible with the State's obligations under (i) the Convention or (ii) the Protocols to the Convention*" (it also prohibit surrender if it would constitute a contravention of any provision of the Constitution but it is the Convention that is relied on here).
50. There is no substantive provision in the Framework Decision equivalent to section 37 but it reflects and give effect to what is stated in recitals (12) and (13) of the Framework

Decision. Recital (12) states that the Framework Decision “*respects fundamental rights and observes the principles recognised by Article 6 of the Treaty on the European Union and reflected in the Charter of Fundamental Rights of the European Union, in particular Chapter VI thereof.*” Chapter VI of the Charter includes Articles 47 and 48. Recital (12) also states that the Framework Decision “*does not prevent a Member State from applying its constitutional rules relating to due process..*”

51. There is a substantial body of authority on section 37, much of it concerned with objections to surrender based on constitutional arguments rather than arguments based on the ECHR (or the Charter), though these obviously overlap to a significant extent. The Supreme Court has given a number of important decisions, including *Minister for Justice v Brennan* [2007] IESC 21, [2007] 3 IR 732, *Minister for Justice v Stapleton* [2007] IESC 30, [2008] 1 IR 669, *Minister for Justice v Balmer* [2016] IESC 25, [2017] 3 IR 562 and *Minister for Justice v Celmer* [2019] IESC 80, [2020] 1 ILRM 121.
52. It is clear from these decisions that the threshold for refusal of surrender under section 37 is a high one. That is unsurprising, given that the EAW regime is premised fundamentally on a high degree of mutual trust and confidence between Member States, bolstered by the Member States’ common commitment to and respect for fundamental rights, including the rights protected by the ECHR and the Charter. Speaking for the Supreme Court in *Stapleton*, Fennelly J observed “*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 state will, as is required by Article*

6.1 of the Treaty on European Union, “respect ... human rights and fundamental freedoms” (at para 70).

53. That high threshold is evident from the language used by Murray CJ in *Brennan*,. The court of the executing State could “*consider the circumstances where it is established that surrender would lead to a denial of fundamental or human rights.*” There might, he went on, “*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*” (at para 40).
54. These observations were cited with approval by Fennelly J in *Stapleton* and again by O’ Donnell J in *Balmer*. In *Balmer* (which involved an objection to surrender based on an assertion that it would involve a breach of the Constitution rather than the ECHR), O’ Donnell J noted that arguments that surrender would breach the ECHR may pose fewer problems for courts, given that the rights guaranteed by the Convention apply in the requesting State and having regard to the availability of the ECtHR which can definitively rule on the compliance of a Member State with it. He did, however, allow that there might be “*rare and, perhaps, egregious cases where the issue raised could justify a refusal to surrender, referring to the “the residual jurisdiction of a court to refuse to surrender a person because of an anticipated breach of rights guaranteed under the Convention”*” (at para 24).
55. The judgment of O’ Donnell J in *Minister for Justice v Celmer* (with which the other members of the Court agreed) contains a very detailed discussion of the applicable

threshold. In *Celmer*, the objection to surrender was that systemic changes had been made to the organisation of the judiciary in Poland that had undermined the independence of the judiciary to such an extent that, if surrendered, Mr Celmer would not receive a fair trial, as guaranteed by Article 47 of the Charter (and also, of course, by Article 6 ECHR).

56. In his judgment in *Celmer* (at para 29), O’ Donnell J observed that Article 47 of the Charter did not apply to Mr Celmer’s trial in Poland because that trial would not itself be within the scope or field of application of European Union law (that restriction following from Article 51 of the Charter, as noted earlier by him). Article 6 ECHR was applicable to any trial, whether implemented domestically in Poland or not. The Charter was, however, engaged by the request for surrender since that was made pursuant to legislation implementing the Framework Decision. The position would appear to be the same here. While the provisions of the Charter were not engaged by the Appellant’s prosecution and conviction in Poland for the First or Second Offences, they are, in principle, engaged by the proceedings for his surrender as these clearly involve the implementation of Union law. Article 6 ECHR is clearly engaged here also.

57. Returning to *Celmer*, following a reference to the CJEU an issue arose as to the threshold test to be applied. The High Court (Donnelly J) applied a test of a real risk of a “*flagrant denial of justice*” (language derived from ECtHR jurisprudence) which it expressed in the alternative as a real risk of “*a breach of the essence of the right*” (language taken from the CJEU decision on the reference). A lower threshold was

argued for on appeal. O’ Donnell J rejected that argument. The following passage from para 76 sets out his reasoning:

“It is clear from the judgment of the CJEU that a distinction is required to be drawn between a breach of the right and a breach of the essence of the right (although for reasons to be addressed later that distinction may not be significant in this case). This is also consistent with the structure of the Union and the relationship between the Member States and their courts, and the institutions of the Union and the CJEU. The TEU creates a mechanism (recognised by the Framework Decision) for the review of the general system of application of European Union law in the Member States, and sets out circumstances in which mutual co-operation may be suspended in respect of a Member State. On the other hand, the courts of a Member State have responsibility for the investigation and determination of breaches of rights and the remedy of such breaches in individual cases. A court of a Member State requested to execute a European arrest warrant is not required or permitted to duplicate the functions of either the Commission or the Council under Article 7, or, indeed, those of the CJEU in an infringement action. It is only when a threshold is reached and it is demonstrated that there is a real risk on substantial grounds of a breach of the essence of a right that the exceptional jurisdiction to refuse surrender arises. Breach of the essence of the right means that the breach should be a “particularly serious breach”, to adopt the neutral terms of para. 68 of the Advocate General's Opinion, before the executing court is required to depart from the obligation of mutual trust, which normally carries

with it a prohibition on checking the implementation of the Treaties (including the Charter) in any other Member State (emphasis in original).”

While O’ Donnell J accepted that the CJEU had not employed the language of “*flagrant breach*” in its judgment (in contrast to the Advocate General) that could not sensibly be read as an indication, *sub silentio*, of the adoption of a “*dramatically different standard.*” (para 78)

58. As I have mentioned, the objection to surrender in *Celmer* was that, if surrendered, the requested person would face a criminal trial before a tribunal that lacked the necessary judicial independence. As O’ Donnell J recorded (at para 80), the CJEU had “*made it clear that findings of generalised or even systemic deficiency were not sufficient. It was also necessary to show that those deficiencies were present at the level of court from which the European arrest warrant had issued, and before which the individual would be tried or sentenced. But, even then, it was necessary to go further and show specifically and precisely that there are substantial grounds for believing that, following his surrender, the requested person will run that risk (of a breach of the right to an independent and impartial tribunal, and therefore of his right to a fair trial) in fact what was required was not merely that the system in general be shown to have deficiencies, even serious ones, but specifically that the trial of the individual on the particular charge would not be a trial before an independent court.*”

59. No issue is raised here as to any alleged “*generalised or even systemic deficiency*” in the Polish criminal justice system. No argument has been advanced that the Polish rules

of procedure relating to notification of accused persons are defective. Rather, what is said is that, if surrendered, this Appellant will have to serve a sentence of imprisonment that is enforceable as a result of a breach of *his* Article 6 rights. The breach alleged is particular to the Appellant, arising from the fact that the proceedings resulting in *his* conviction for the Second Offence were conducted *in absentia*. However, I do not interpret the decision of the Supreme Court in *Celmer*, or the earlier decisions to which I have referred (and which were also considered in *Celmer* itself) as suggesting that the threshold for the application of section 37 of the 2003 Act necessarily requires that some general defect in the criminal justice system of the issuing State must be established. It may that, where such a breach can be demonstrated, exercise of “*the exceptional jurisdiction to refuse surrender*” may more readily be justified, though *Celmer* itself illustrates the difficulty that may arise in establishing a sufficient link between general deficiency and individual breach. But, as a matter of principle, it must be the case that “*a real risk on substantial grounds of a breach of the essence of [the right to a fair trial]*” is capable of arising on the specific facts of an individual case (as is said to be the case here). Otherwise, the protection afforded by Article 6 ECHR would be significantly undermined.

60. One High Court decision on section 37, *Minister for Justice v McCague* [2008] IEHC 154, [2010] 1 IR 456, warrants reference in this context, as it involved the issue of trial *in absentia*. It should be noted that the proceedings pre-dated the amendment of the Framework Decision by the insertion of Article 4a (and the consequent amendment of section 45 of the 2003 Act) and it also predated the CJEU decisions discussed above, including *Zdziaszek* which makes it clear that sentencing decisions are covered by the

Framework Decision. Mr McCague had been convicted and sentenced in his absence in England and Wales. He objected to his surrender, asserting that it was prohibited by section 37(1). It was, however, clear from the evidence that he was fully aware of the trial date and had applied – unsuccessfully – for the trial to be adjourned a few days before it was due to commence. After the adjournment application failed, he discharged his legal team and did not attend at the trial. The trial then proceeded in his absence and he was convicted. In these circumstances, it was wholly unsurprising that Mr McCague’s argument that his in *absentia* conviction triggered the application of section 37 was rejected. Following his conviction, sentencing was adjourned and Mr McCague was not present when the sentencing hearing took place. However, there was no evidence that he had not been aware of the sentencing hearing (now, it would appear, the onus would clearly be on the issuing State to establish such awareness). Nonetheless, Peart J proceeded to address the substantive complaint. He was prepared to assume that the right to be notified of the date, time and place of the hearing of a criminal charge extended to being notified of the date, time and place of any separate sentencing hearing (para 51). There were, however, circumstances in which such a hearing might properly proceed in the absence of the accused; it was a matter for a court to consider in any individual case (para 52). In the judge’s view, section 37 did not require the court to inquire into alleged past breaches of a person’s Convention rights in the issuing State. Rather, the court was concerned solely with whether the *surrender* would be incompatible with this State’s obligations (para 53). It was, in Peart J’s view, “*difficult to envisage, absent some truly extraordinary, exceptional and egregious circumstance, in what way it would be incompatible with this State’s obligations under the Convention to surrender a requested person to a member state of the European*

Union” (para 53). He went on to consider and dismiss a submission that Article 5.1 of the Framework Decision required an undertaking to be given by the issuing State to permit the sentencing hearing to be reheard, on the basis that section 45 clearly applied only to the trial of an offence and not to sentencing (para 68).

61. *Minister for Justice v MaCague* must, I think, be treated with a significant degree of caution. The *in absentia* provisions of the Framework Decision have been significantly amended subsequently (with consequential amendments made to section 45 of the 2003 Act) and there is CJEU guidance on the interpretation and effect of those provisions that obviously was not available to Peart J. It is clear from Article 4a that a Member State may indeed refuse surrender in an individual case where the requested person was convicted or sentenced *in absentia*, unless it is shown that the person concerned effectively waived their right to be present or has been or will be offered a right to a rehearing (whether by way of retrial or appeal). The Union legislator appears clearly to have been of the opinion that a provision to that effect reflected the requirements of Article 6 ECHR. The threshold test under section 37 has been further clarified and it is, in my opinion, clear that, while the threshold is high, it is not the practically insurmountable hurdle suggested by Peart J. In this regard, while Peart J referred to the ECtHR’s decision in *Sejdovic*, it is notable that he did not refer to the strong terms in which the court characterised the rights and interests at issue in this context, language repeated by that court in *Othman* and reflected in Article 4a itself.
62. Finally, I do not consider that any hard distinction between past and future breaches can be drawn in this context. While the alleged breach of Article 6(1) ECHR in *McCague*

was past, the Court was being asked to make an order for his surrender which, if made, would result in his future imprisonment. It is true that, in *Balmer*, O’ Donnell J refers to “*anticipated*” breaches. The asserted breach in *Balmer* was that Mr Balmer would, if surrendered, be held in custody in the *future* on foot of an *existing* order in circumstances which would (according to Mr Balmer) amount to preventative detention. Past breaches clearly can produce future effects in this context. While Peart J was undoubtedly correct to focus on the issue of whether *surrender* would be incompatible with the State’s obligations, that focus does not require or permit the court to disregard a past breach where (as here) there is said to be a decisive causal connection between the breach and the sentence sought to be enforced by the issuing State. The past breach is the necessary springboard for the argument that, in such circumstances, the surrender and (future) detention of the requested person would be wrongful and ought to be refused. It could hardly be the case that, if Mr Celmer’s surrender had been sought for the purpose of serving a sentence *already* imposed on him following a conviction by a court which he claimed to lack independence, his objections to surrender would have to be dismissed *in limine* on the basis that they related to a “*past breach*”. Nor could it be the case that surrender might be refused where the requested person faces the risk of future conviction based on coerced testimony but not where they have already been convicted on the basis of such evidence. Finally – and to the same effect – I would note that the ECtHR in *Othman* referred to circumstances “*where the fugitive had suffered or risked suffering a flagrant denial of justice in the requesting country*” (my emphasis). Insofar as *Minister for Justice v McCague* can be read as suggesting that section 37 is concerned only with future breaches and that past breaches

are categorically irrelevant in this context – and I doubt that Peart J intended to be so understood – I would not follow it.

THE HIGH COURT JUDGMENT

63. The Appellant objected to his surrender on the basis that the purpose of his surrender was to serve a sentence of imprisonment that had been activated by a conviction *in absentia*. Surrender in such circumstances would, it was said, violate section 37 of the 2003 Act. Article 4a(1) had to be construed and applied in accordance with Article 6 ECHR and Article 6 ECHR applied here in circumstances where the activation of the sentence was triggered by a criminal conviction. Two decisions of the ECtHR, *Bohmer v Germany* (37568/97) (3 October 2002) and *El Kaada v Germany* (2130/10) (12 November 2015) were relied on by the Appellant as authority for the proposition that Article 6 was engaged in such circumstances. Before the High Court (and again before this Court on appeal) the Appellant argued that it was significant that the decisions in *Bohmer* and *El Kaada* had not been referred to in *Ardic*. According to the Appellant, the circumstances in which the sentence had been activated also engaged Article 4a(1)/section 45: because the sentence here had been activated by a criminal conviction, the trial leading to that conviction and/or the subsequent hearing resulting in the Enforcement Decision had to be regarded as the “*trial resulting in the decision*”.
64. The Judge rejected both of these arguments. While the decisions in *Bohmer* and *El Kaada* appeared to pose a “*conundrum*”, he was satisfied that, on analysis, they were not inconsistent with the view of the Article 6 jurisprudence taken in *Ardic* and in

particular the weight that the Court in *Ardic* had given to the ECtHR's decision in *Boulois v Luxembourg* (3 April 2012). While in *Bohmer* and *El Kaada* the ECtHR had found Article 6 applicable to revocation hearings, that was because the revocation hearings in those cases had wrongly proceeded on the basis of assuming the guilt of the person concerned, in advance of the lawful determination of such guilt by an Article 6 trial. Thus, the presumption of innocence that the persons concerned were entitled to under Article 6(2) ECHR had been infringed (para 46). That was not the case here, however, as the Enforcement Decision had been made on the basis of Mr Szamota's conviction for the Second Offence. The suggested distinction between the ratio in *Ardic* and the ratio in *Bohmer* and *El Kaada* was therefore "illusory" (para 47). In any event, the Judge was of the view that section 37 was concerned with potential future breaches of the Convention rights in the event of surrender, not with alleged past violations of it, citing *Minister for Justice v McCague*. Even if there was a violation of Article 6 by reason of his conviction *in absentia* and/or by reason of his absence from the subsequent hearing leading to the Enforcement Decision, any such violation was not relevant to the surrender decision (paras 48 & 49).

65. As regards the argument that Article 4a(1)/section 45 applied, the Judge considered that *Ardic* answered the point. The CJEU had clearly held that the absence of the person concerned from proceedings leading to a decision to activate a suspended sentence, which did not involve a determination of guilt or result in any change to the nature or level of the sentence imposed, could not constitute a valid ground for refusing execution of an EAW. While there had been a determination of guilt at the trial for the Second Offence, that was of no relevance in circumstances where surrender was not sought for

that offence. Accordingly, the proceedings leading to the Enforcement Decision could not be regarded as a “*trial resulting in the decision*” for the purposes of Article 4a(1) – that trial was the Appellant’s trial before the District Court for Wrocław-Śródmieście in May 2015 at which his fair trial rights had been fully respected (para 52).

66. Before concluding, the Judge noted that there was a conflict as to whether the Appellant had been notified of the trial for the Second Offence and the subsequent hearing resulting in the order for the enforcement of his sentence on the First Offence. In his view, that conflict had to be resolved in favour of the Minister, as part of the trust and confidence which the Court was required to accord to the IJA (para 54). Nonetheless, the Judge noted that the evidence fell short of establishing that the Appellant had actually received the summonses which the IJA said had been sent to the address provided or that he was aware of the hearing date for the trial of the Second Offence or the date of the subsequent revocation hearing (para 55).

67. Though the Judge did not consider it necessary to make any finding on this point (because of the view he took that the hearing before the District Court of Wrocław-Śródmieście in May 2015 was the only relevant *trial* for the purposes of Article 4a(1)/section 45), it seems clear that, if the trial of the Appellant for the Second Offence was to be regarded as “*the trial resulting in the decision*” (or part of such trial) none of the conditions set out in Article 4a(1) would be satisfied. As to (a), even if what is said by the IJA is taken at its height, it falls significantly short of “*unequivocally establishing*” that the Appellant was aware of the scheduled trial. Furthermore, as Mr Munro SC for the Appellant observed in argument, what is said by the IJA is notably

lacking in specifics, such as the nature of the “*preliminary proceedings*” referred to, when and where the “*hearing*” took place (and whether, at the time it took place, a decision had been made to charge the Appellant) and by whom and in what terms the Appellant was *instructed* about the obligation to provide a correspondence address and the consequences of not doing so. As to Article 4a(1)(b), no counsellor was mandated to defend the Appellant at that trial. As to Article 4a(1)(c) and (d), the Appellant has not been offered (and if returned will not, it seems, be offered) an opportunity to request a retrial or an appeal. His sole remedy is, the evidence suggests, the “*extraordinary legal remedy*” of a motion to re-open the proceedings.⁴

68. On the same assumed premise – that the trial of the Appellant for the Second Offence is properly to be regarded as “*the trial resulting in the decision*” for the purposes of surrender here (or part of such trial)– it is difficult to see how, on the information currently available, a court here could be satisfied that the surrender of the Appellant would not entail a breach of his rights of defence on the basis of the broader assessment

⁴ In response to a request from the High Court, the Bydgoszcz District Court explained that the period within which the Appellant could appeal his conviction for the Second Offence has already expired. However, according to that Court, it is open to any party to “*lodge an extraordinary legal remedy (reversal, motion to re-open the proceedings).*” No further information about that procedure has been provided. From the information provided by the IJA, it is evident that, unless and until an order is made suspending the execution of the order of 21 February 2017, the Enforcement Decision made by the District Court for Wrocław-Śródmieście on 16 May 2017 continues in force.

mandated by *Dworzecki* and *TR* (and reflected here in the Supreme Court's decision in *Zarnescu*).

69. If the hearing before the District Court of Wroclow-Śródmieście in May 2017 which resulted in the making of the Enforcement Decision is to be regarded as the “*the trial resulting in the decision*” (or a part of such trial) for the purposes of surrender here, the same position would appear to apply.
70. In either scenario, it would appear, surrender could not properly be ordered on the basis of the information currently before the Court and the Court would have to consider seeking further information from the IJA in such circumstances (including further information about the nature and scope of the “*extraordinary legal remedy*” that will evidently be available to the Appellant if surrendered). No doubt, the Judge would have sought such further information had he been persuaded to take a different view of the law.
71. For the purposes of this appeal, it appears to me that the Court is entitled to reach a provisional view that the Appellant's trial and conviction *in absentia* for the Second Offence was not in compliance with Article 6 ECHR. Similarly, the Court is in my view entitled to proceed on the basis of a provisional view that, if the trial of the Appellant for the Second Offence and/or the subsequent hearing which led to the Enforcement Decision is properly to be regarded as “*the trial resulting in the decision*”(or a part of such trial) for the purposes of surrender here, the requirements of Article 4a/section 45 would not be satisfied. The real issue on the appeal is whether, as a matter of principle,

such matters are relevant to the surrender decision at all. If determined to be relevant, further inquiry may then be necessary before making a definitive assessment as to whether surrender should actually be refused on the facts.

72. Returning to the Judgement, the Judge explained that he had at one stage considered referring the questions raised by the proceedings to the CJEU but had ultimately concluded that *Ardic* had made very clear the status of the “*revocation hearings*” for the purposes of the Framework Decision and that there was no ambiguity or uncertainty arising from *Ardic* such as to necessitate a reference.
73. Nevertheless, the Judge was persuaded to certify the following points of law pursuant to section 16(11) of the 2003 Act:

“1. If the requested person has been found guilty in final proceedings conducted in his presence and had had imposed on him a custodial sentence, the execution of which has been suspended subject to certain conditions, do either

(a) subsequent revocation proceedings, conducted in absentia, in which the court, in the absence of the requested person, orders that suspension to be revoked on the ground of being convicted of a second similar offence in absentia, or

(b) the trial for the second similar offence

constitute a ‘trial resulting in the decision’ as referred to in Article 4a of Framework Decision [2002.584]

2 Where the surrender of a person is being sought for service of a sentence of imprisonment which was previously suspended, and the revocation of suspension was based solely on a conviction for a second offence, is the executing authority obliged to inquire as to whether there was a violation of fair trial rights in obtaining the conviction for the second offence, when deciding whether the surrender is prohibited by section 37 of the European Arrest Warrant Act 2003, in circumstances where the conviction for the second offence is not subject to an automatic right of appeal in the issuing state?

3 Is it acte clair whether the decision in [Ardic] applies to the revocation hearing of the 16th May 2017 in circumstances where the revocation of the suspension of sentence, was due to a conviction imposed in absentia?”

DISCUSSION AND DECISION

74. The essential question on this appeal is the scope and effect of the decision in *Ardic* and whether it effectively excludes the objections raised by the Appellant to his surrender here. Significant issues arise in that context about Article 6 ECHR and Articles 47 and 48 of the Charter. The Judge concluded that *Ardic* compelled him to reject the objections to surrender here but nonetheless he obviously considered that the importance of the issue was such as to warrant consideration by this Court.

Consideration of Ardic in Ireland

75. *Ardic* has been considered here on a number of occasions but never, it appears, by this Court. In *Minister for Justice and Equality v Lipinski* [2017] IESC 26 (which pre-dated the decision in *Ardic*) the Supreme Court decided to make a reference to the CJEU on the proper interpretation of Article 4a in circumstances where the surrender of the respondent was sought to serve the balance of a custodial sentence that had been suspended but which was subsequently activated by reason of his failure to comply with the conditions of his release (in other words, circumstances closely resembling the circumstances in *Ardic*). Subsequently, the Supreme Court concluded that the issue referred had been definitively determined by *Ardic* and the reference did not proceed: [2018] IESC 8.
76. In *Minister for Justice and Equality v Palonka* [2019] IEHC 803, the material facts were similar to the facts here (and different to the facts in *Lipinski*) in that surrender was sought in respect of a conviction and sentence for one offence, in circumstances where the sentence imposed for that offence was initially suspended but where execution of it had subsequently been activated as a result of a later *in absentia* conviction for a separate offence. This Court had previously refused to surrender Mr Palonka for a separate offence, on the basis of Article 4a/section 45 ([2015] IECA 69). However, it was not entirely clear whether it was that offence that had activated the sentence sought to be enforced in the second EAW, though that appeared to be the case.

77. Mr Palonka once again relied on section 45 in objecting to his surrender on the second warrant (he also argued that his surrender should be refused on grounds of delay/abuse of process, relying on *Minister for Justice and Equality v JAT (No 2)* [2016] IESC 17). The High Court (also Binchy J) noted that the section 45 argument depended “*not upon his conviction for the offences in respect of which his surrender is sought, but upon his conviction of another offence which resulted in the revocation of the suspension of the sentence imposed upon him.*” In his view, that issue had been dealt with “*resolutely*” by the CJEU in *Ardic*. It was not in dispute that the decision to revoke the suspension of sentence had not changed the nature or the level of the sentence initially imposed upon Mr Palonka and accordingly the section 45 argument had to be rejected. He also rejected the abuse of process argument and accordingly made an order for surrender.
78. Having unsuccessfully sought leave to appeal to this Court, Mr Palonka then sought leave to appeal directly to the Supreme Court pursuant to Article 34.5.4 of the Constitution. Leave was granted by the Supreme Court ([2020] IESCDET 54) including on the question “*whether surrender may be ordered in respect of the in absentia activation of a suspended sentence if such activation was triggered by an in absentia conviction for which surrender has been refused.*”
79. The Supreme Court gave a preliminary decision in July 2020: [2020] IESC 40. For the reasons set out in the judgment of Charleton J (with which Clarke CJ and Baker J agreed), the Court concluded that the High Court should seek certain further information from the Polish authorities, including information directed to the *Ardic* issue. While the Supreme Court retained the appeal, the High Court was directed to

make such additional findings of fact as might reasonably be necessary to enable an assessment of the legal issues, including the possibility of a reference to the CJEU “*on the imposition of a sentence, or activation of a sentence, in absentia.*” At the hearing of this appeal, the Court was informed that a number of further information requests had been sent to the Polish authorities in *Palonka* and that the proceedings are still before the High Court.

80. *Ardic* was also considered by the High Court (Binchy J once again) in *Minister for Justice and Equality v Siklosi* [2020] IEHC 682. *Siklosi* again involved the activation of a previously suspended sentence by reason of a subsequent *in absentia* conviction, with the additional feature that the subsequent, triggering offence (failure to pay child maintenance) was not one known to Irish law. The Court in *Siklosi* followed its decision in *Szamota* and made an order for the surrender of Mr Siklosi. However, it granted leave for an appeal and both appeals were heard by the same panel and this Court also gives its judgment in *Siklosi* today.

Consideration of Ardic in England and Wales

81. There appears to have been very limited consideration of *Ardic* by the courts of England and Wales. The interesting issue presented in *Murin v District Court in Prague* [2018] EWHC 1532 (Admin) was whether the requested person could be surrendered to the Czech Republic for the purpose of a hearing to determine whether to activate a previously suspended custodial sentence. Surrender was opposed on the basis that a warrant for that purpose was not valid, as it was issued neither for the purpose of the

person being sentenced nor for the purpose of serving a sentence. The district judge had dismissed that argument and his decision was upheld by the Queen Bench Division on appeal. While the issue does not arise here, *Murin* indicates that Poland could have sought the surrender of Mr Szamota for the purposes of the proceedings that led to the making of the Enforcement Decision. Undoubtedly, it could have sought his surrender for the purpose of his trial for the Second Offence.

Framework for considering whether to make an Article 267 Reference

82. The third of the points certified by the High Court asks whether it is *acte clair* whether the decision in *Ardic* applies in the circumstances here. The significance of that question is that, if this Court is “*a court ... against whose decisions there is no judicial remedy under national law*” – or, as it sometimes put, a court of last resort – then if the matter is not *acte clair* (or *acte éclairé*) it may be obliged to make a reference to the CJEU under Article 267(3). However, this Court is not such a court: *In the matter of Permanent TSB Group Holdings plc* [2020] IECA 1, at para 130. It follows that the Court is free to make a reference or not, depending on whether “*it considers that a decision on the question is necessary to enable it to give judgment*”: Article 267(2). Of course, if the Court were to take the view that the legal position is absolutely clear, then no necessity for a reference could properly be said to arise.

Is a reference necessary to enable this Court to give judgment on this Appeal?

83. The facts here differ from the facts in *Ardic* in a number of respects which I have already identified. Arguably, the most significant difference is that the trigger for the enforcement of the custodial sentence imposed on Mr Szamota for the First Offence was his subsequent *in absentia* conviction for the Second Offence. Although the Enforcement Decision was a distinct judicial decision, it appears to have been a formality: in light of Mr Szamota's conviction for the Second Offence, it appears that the District Court had no discretion and was obliged to order enforcement of the suspended sentence. In substance, therefore, it was the conviction for the Second Offence that had decisive effect in triggering the activation of the Appellant's previously suspended custodial sentence for the First Offence.
84. Even so, it may be said that the Enforcement Decision was no more than "*a decision relating to the execution or application of a custodial sentence previously imposed*" and that neither that decision nor the Appellant's earlier conviction for the Second Offence had the purpose or effect of modifying the nature or *quantum* of the custodial sentence imposed on Mr Szamota in respect of the First Offence (*Ardic*, para 77). Furthermore, the fact that the District Court lacked any discretion in this context is another relevant factor identified in *Ardic* (*ibid*). While a decision to activate a previously suspended sentence obviously has significant consequences for the person concerned, it was held in *Ardic* that such a decision does not have the effect of modifying the nature or *quantum* of the sentence. On that basis, it can be said to follow that the precise nature of the triggering decision – whether a decision to revoke a conditional release for breach

of the conditions of release as in *Ardic* or a decision to activate a previously suspended sentence consequent upon a further criminal conviction as is the position here – is not material. That was the view taken by the Judge and, in light of the decision in *Ardic*, it was an entirely legitimate view to take.

85. At the same time, it must be acknowledged that the circumstances presented here differ from the circumstances of *Ardic* and have a much closer nexus to Article 6 ECHR (and to Articles 47 and 48(2) of the Charter) than was the case in *Ardic*. The custodial sentence for the First Offence is enforceable only because of Mr Szamota's *in absentia* conviction for the Second Offence. Otherwise there would be no enforceable custodial sentence for which surrender could be ordered on foot of the Warrant. In this context, Mr Munro submitted that, just as the courts here would not recognise or give effect to the *in absentia* conviction in respect of the Second Offence if Mr Szamota's surrender had been sought for that offence (because of the provisions of Article 4a/section 45) they ought not to recognise or give effect to that conviction for the purpose of his surrender for the First Offence.

86. Certainly, assuming for the purpose of this analysis that Article 4a/section 45 would have barred the surrender of Mr Szamota to serve the sentence imposed on him for the Second Offence had such surrender been sought (and Mr Szamota attached significance in this context to what was said to be the unexplained failure to seek that his surrender for that offence), it would seem anomalous if he is liable to be surrendered to serve the sentence imposed on him for the First Offence, where that sentence is enforceable only by reason of the self-same *in absentia* conviction. That is particularly so where (as is

the case in *Siklosi*) the sentence imposed on foot of a subsequent conviction may be materially less than the suspended sentence triggered by that conviction.

87. The ECtHR jurisprudence considered in *Ardic*, such as the decision in *Boulois v Luxembourg*, does not really address this issue. *Boulois* was not concerned with the activation of a suspended sentence resulting from a subsequent conviction. Rather, it was concerned with decisions relating to prison leave, conditional release and prison transfer taken by the Prison Board in Luxembourg. The ECtHR considered that Article 6(1) ECHR in its criminal aspect was not applicable to proceedings before the Prison Board because such proceedings did not relate in principle to the determination of a “*criminal charge*” (para 87). The civil aspect of Article 6(1) did not apply either because the applicant did not have a “*right*” to prison leave/conditional release. (para 102).
88. Here, in contrast, there is no doubt that Article 6 did apply to the Appellant’s trial and conviction for the Second Offence. As already noted, that conviction was decisive for the purpose of the enforcement of the suspended custodial sentence imposed on the Appellant for the First Offence. As a matter of substance, that conviction triggered the enforcement of the sentence, even if the order directing enforcement was formally made subsequently by the District Court.
89. In these circumstances, it appears to me to be arguable that the Enforcement Decision is so closely connected to the conviction for the Second Offence that a breach of Article 6(1) affecting that conviction must also affect the Enforcement Decision. The decisions

of the ECtHR in *Bohmer v Germany* and *El Kaada v Germany* might be said to provide support for such an argument. In contrast to *Boulois* and the other authorities referred to in *Ardic*, those decisions were concerned with the enforcement of a suspended sentence on the basis of the commission of a subsequent criminal offence. As the Minister submits, the facts were different in that the courts made the enforcement orders on the basis of a determination of guilt that was not based on a final conviction reached after a criminal trial. There was thus, the Strasbourg Court found, a violation of the respective applicant's right to be presumed innocent protected by Article 6(2) ECHR. That is not the case here. However, on the Appellant's case, just as the enforcement decisions in *Bohmer* and *El Kaada* were bad in law on the basis that they each relied on a determination of guilt that violated Article 6(2) ECHR, the Enforcement Decision here is bad in law on the basis that it relied on a determination of guilt – the conviction for the Second Offence – that violated Article 6(1) ECHR. In the latter case as much as in the former, arguably, “*a disadvantage that .. equates with a penalty*” – the revocation of the suspension of the prison sentence under the initial conviction – has been imposed as a result of the “*new criminal offence*” (*Bohmer*, para 66).

90. *Bohmer* and *El Kaada* are thus capable of being read as supporting a broader principle to the effect that, where a suspended sentence is sought to be enforced as a result of the subsequent commission of a criminal offence, the decision to enforce must be based on a determination of guilt that complies with Article 6 ECHR.
91. As regards the seriousness of any non-compliance here, the ECtHR jurisprudence suggests that the conviction of a person *in absentia* with no possibility to obtain a fresh

determination of the merits of the charge is, in principle, capable of amounting to a “*flagrant denial of justice*” and thus “*exceptionally*” may be raised under Article 6 by an extradition (or surrender) decision (*Othman*, para 259). Article 4a itself reflects that position – it expressly empowers the courts of executing States to refuse to surrender where “*the trial resulting in the decision*” (as that expression has been interpreted) took place *in absentia* in circumstances that amount to a breach of Article 6(1). *In absentia* convictions are, quite properly, seen as a serious matter, engaging vital norms of criminal justice and fundamental rights and which may, in principle, warrant the extreme step of refusing surrender. Notably, in cases within the scope of Article 4a, the executing State is *not* required to leave the remedying of any Article 6 breach to the courts of the issuing State; where there has been such a breach, it may, on that basis, refuse surrender, absent an appropriate guarantee of a retrial.

92. As regards the scope of Article 4a(1) of the Framework Decision, it appears to me that it is arguable that, in circumstances such as those presented here, the substantive vindication of the Article 6 rights of the requested person (and their rights under Articles 47 and 48 of the Charter) require that the “*the trial resulting in the decision*” should be read as including subsequent criminal proceedings resulting in a conviction where that conviction has played a decisive role in the enforcement of a previously suspended sentence in respect of which surrender is sought.
93. While that would expand the category of relevant “*decision*” for the purposes of Article 4a(1), arguably that would not adversely affect or undermine the effectiveness of the European arrest warrant mechanism in circumstances where Member States are already

obliged to comply with Article 6(1) ECHR in their criminal procedures in any event. Therefore, where a suspended sentence has been triggered by a subsequent conviction, it would not seem to place an undue burden on the issuing State to establish that the requested person was present at the trial resulting in that conviction or, if not, that his Article 6 rights were otherwise respected. That is what ought to have occurred in any event.

94. In light of the above discussion, I do not think that it can be said that *Ardic* unambiguously forecloses acceptance of the arguments advanced by the Appellant in the circumstances here. Given the fundamental importance of these issues, and the need for clarity and certainty as to the extent of the respective obligations of issuing and executing States in this context, it appears to me to be appropriate to make a reference to the CJEU pursuant to Article 267 TFEU.
95. The Court has had the benefit of submissions from the parties as to the form of questions to be referred in the event that the Court concluded that such a reference was appropriate. The Court has had regard to those submissions in formulating the draft questions set out below. A draft order for reference is attached to this judgment and the parties will have a further brief opportunity to make observations on that order (including the questions as drafted).

“1. Where the surrender of the requested person is sought for the purpose of serving a custodial sentence which was suspended ab initio but which was

subsequently ordered to be enforced as a result of the conviction of the requested person for a further criminal offence, in circumstances where the order for enforcement was mandatory by reason of the conviction, do the proceedings leading to that subsequent conviction and/or the proceedings leading to the making of the enforcement order constitute the 'trial resulting in the decision' for the purposes of Article 4a(1) of Council Framework Decision 2002/584/JHA?

2. In the circumstances set out in question 1 above, is the court of the executing State entitled to inquire into whether the proceedings leading to the subsequent conviction and/or the proceedings leading to the enforcement order, all of which were conducted in the absence of the requested person, were conducted in compliance with Article 6 of the European Convention on Human Rights and Fundamental Freedoms and, in particular, whether the absence of the requested person from those proceedings involved a violation of the rights of the defence and/or of the requested person's right to a fair trial?

3. In the circumstances set out in question 1 above, if the court of the executing State is satisfied that the proceedings leading to the subsequent conviction and enforcement order were not conducted in compliance with Article 6 of the European Convention on Human Rights and Fundamental Freedoms and, in particular, that the absence of the requested person involved a violation of the rights of the defence and/or of the requested person's right to a fair trial, is that court entitled and/or obliged (a) to refuse surrender of the requested person on

the basis that such surrender would be contrary to Article 6 of the Convention and/or Articles 47 and 48(2) of the Charter of Fundamental Rights of the European Union and/or (b) to require the issuing judicial authority as a condition of surrender to provide a guarantee that the requested person will, upon surrender, be entitled to a retrial or appeal, in which they will have a right to participate and which allows for the merits of the case, including fresh evidence, to be re-examined which may lead to the original decision being reversed, in respect of the conviction leading to the enforcement order?

96. The appeal will be stayed pending the ruling of the CJEU on those questions.