HIGH COURT

Record No.2017/109 EXT

BETWEEN

THE MINISTER FOR JUSTICE AND EQUALITY

APPLICANT

AND

LADISLAV SCHOPPIK

RESPONDENT

JUDGMENT of Ms. Justice Donnelly delivered the 8th day of October, 2018

Introduction

1. This is an application on foot of a European Arrest Warrant ("EAW") dated 11th July, 2016, for the surrender of the respondent to the Czech Republic. He is sought for the purpose of serving a sentence of five years imposed on him by judgment of the Regional Court of Ostrava dated 28th November, 2003 in conjunction with the judgment of the High Court of Olomouc dated 4th May, 2004, in respect of seven offences. These judgments are at the core of the issues raised by the respondent in objecting to his surrender. It is appropriate to point out that this is the second EAW issued in respect of this respondent. The first surrender was refused due to lack of clarity in the EAW as it became clear that, although the EAW only referred to five offences, his surrender was in fact being sought for seven offences in total.

2. The first point of objection is that because the judgment of the Regional Court in Ostrava was annulled by the judgment of the High Court in Olomouc, it ought not to be included in the EAW as a basis for the application to surrender him.

The second point is whether the respondent's surrender is prohibited by s. 45 of the European Arrest Warrant Act, 2003, as amended ("the Act of 2003"). The third point concerns an allegation of delay by the Czech authorities to issue an EAW in a timely fashion as required by the Framework Decision of the 13th June, 2002, on the European arrest warrant and the surrender procedures between Member States ("the 2002 Framework Decision").

The background to the European Arrest Warrant

3. The EAW relates to seven offences for which the respondent has been convicted and sentenced. These are five offences in the general nature of tax evasion, and two pertaining to loan fraud. The details of the offences are set out in part (e) of the EAW and can be summarised as follows:

> "1. On 25th October, he submitted false Value Added Tax Return for 3rd Quarter of 1996…in contradiction to Value Added Tax Act no. 588/1992 Coll…and on the grounds of fictitious documents from alleged supplier he wheedled payment of value added tax in total amount of CZK 155,084.00.
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> 2. On 25th October 1996 and 28th January 1997 he filed false Value Added Tax Returns for the 3rd and 4th quarter of 1996 where in contradiction with the Value Added Tax Act no. 588/1992…and having failed to pay value added tax he evaded the tax in total amount of CZK 827,563.00.
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> 3. On 20th October 1997 he filed a false Individual Income Tax Return for tax period 1996, both his and that of his wife… with whom he did business…and based on fictitious documents of alleged suppliers he reduced the tax base in 1996 of both tax payers… and thereby evaded individual income tax in total of CZK 1,488,800.00.
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> 4. On 10th November 1997 he filed false Value Added Tax Returns for the 2nd and 3rd quarter 1997, where among accomplished taxable supplies he included unaccomplished ones…and based on fictitious documents from an alleged supplier, he tried to unlawfully claim the payment of excessive VAT deduction in total amount CZK 180,218.00.
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> 5. On 26th January 1998 he filed a false Value Added Tax Return for the 4th quarter of 1997, where among actually accepted taxable supplies he included unaccomplished supplies…and based on the above mentioned fictitious documents of alleged supplies, he attempted to unlawfully claim excessive value added tax deduction in total amount of CZK 258, 023.00.
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> 6. On 28th August 1998 in Brno together with [named person], Ladislav Schoppik got the loan of CZK 700,000.00… Schoppik committed to pay up the loan before 30th April 1999. Granted loan was used in contradiction to its purpose to pay up previous debts without the knowledge and consent of the Cooperative Savings Association. Schoppik did not pay up the loan…and caused the damage of CZK 700,000.00 to the Cooperative Savings Association.
>
> 7. On 14th January 1997 in Krnov he wheedled from [named person] the loan in the amount of CZK 400,000.00 and promised to pay the money back in one week. On the following day 15th January 1997, Schoppik borrowed from him the amount of CZK 500,000.00 and signed the draft committing himself to pay up the amount of CZK 900, 000.00 before 15th August 1997 although he knew when taking over both amounts that with view to his financial situation he would not be able to pay up the amount in the agreed terms or later, and thus he caused the damage of CZK 900,000.00 to [named person]."

Uncontested Matters

4. Before dealing with the specific points raised by the respondent in objecting to his surrender, I will address the formal requirements of the Act of 2003 with which this Court must be satisfied if it is to make an order of surrender.

A Member State that has given effect to the 2002 Framework Decision

5. The surrender provisions of the Act of 2003 apply to those Member States of the European Union that the Minister for Foreign Affairs has designated as having given effect to the 2002 Framework Decision, under their national law. By the European Arrest Warrant Act 2003 (Designated Member States) (No. 3) Order 2004 (S.I. 206 of 2004), the Minister for Foreign Affairs designated

Czech Republic as a Member State for the purposes of the Act of 2003.

Section 16(1) of the Act of 2003
6. Under the provisions of s. 16 (1) of the Act of 2003 as amended, the High Court may make an order directing that the person be surrendered to the issuing state provided that:

a) the High Court is satisfied that the person before it is the person in respect of whom the EAW was issued,

b) the EAW has been endorsed in accordance with s. 13 for execution,

c) the EAW states, where appropriate, the matters required by s. 45,

d) The High Court is not required, under ss. 21A, 22, 23 or 24 of the Act of 2003 as amended, to refuse surrender,

e) The surrender is not prohibited by Part 3 of the Act of 2003.

Identity
7. No issue has been raised in relation to the respondent's identity. I am satisfied on the basis of the information in the EAW, and on the affidavit of Malachy Dunne, member of An Garda Síochána, and on the affidavit of the respondent, that Ladislav Schoppik who appears before me, is the person in respect of whom the EAW issued.

Endorsement
8. I am satisfied that the EAW has been endorsed in accordance with s.13 of the Act of 2003 for execution.

Sections 21A, 22, 23 and 24 of the Act of 2003
9. Having scrutinised the documentation before me, I am satisfied that I am not required to refuse the surrender of the respondent under the above provisions.

Part 3 of the Act of 2003
10. Subject to further consideration of ss. 37, 38 and 45 of the Act of 2003 and having scrutinised the documents before me, I am satisfied that I am not required to refuse the surrender of the respondent under any other section contained in Part 3 of the said Act.

Section 38 of the Act of 2003
11. Section 38 of the Act of 2003 provides for two situations in which surrender may be ordered for specific offences. If the offence is an offence set out in para. 2 Article 2 of the 2002 Framework Decision then, provided the requirements of minimum gravity in terms of available sentencing powers have been met, there is no requirement to find correspondence for the offence for which the person is requested with an offence in this jurisdiction. If the offence does not come within that list, correspondence and a different requirement of minimum gravity must be shown. Section 5 of the Act of 2003 states that for the purposes of the Act, an offence specified in an EAW corresponds to an offence under the law of the State "where the act or omission that constitutes the offence so specified would, if committed in the State on the date on which the EAW is issued, constitute an offence under the law of the State".

12. The issuing judicial authority has sought to avail of the opportunity to dispense with the requirement of double criminality by indicating that the offences for which the respondent is sought come within the list of conduct set out in Article 2(2) of the 2002 Framework Decision. The issuing judicial authority has ticked the box "fraud, including that affecting the financial interests of the European Communities within the meaning of the Convention of 26 July 1995 on the protection of European Communities financial interests" and "racketeering and extortion" in part (e)I of the EAW as constituting the offence for which the respondent was convicted and now sought to serve a sentence. He is sought to serve a sentence of five years.

13. The issuing judicial authority has also completed part (e)II of the European arrest warrant. Unfortunately, it did so by writing in "mentioned in section e"; a reference that is itself somewhat opaque. Part (e) II asks for: "Full description of offences(s) not covered by section I above:" . It is only where the offences are not covered that part (e)II should be filled in. If only some offences have been covered in part (e) I, the entry at part e II should make clear which offences are not covered.

14. Given that part (e)II has been completed, there was confusion as to which offences were deemed not to be covered by the ticked offence box. The confusion was somewhat elevated by the fact that a previous EAW dated 5th November, 2007, seeking the surrender of the respondent, had only listed five offences, of which "swindling" was the designation ticked in part (e)I, as distinct from the designation of "fraud" offences. Surrender of the respondent on that EAW was refused by this Court on 9th May, 2016, because of the "gross lack of clarity" contained in that warrant, relating primarily to the number of offences for which his surrender was sought. Indeed, one of the points of objection raised by the respondent is that "it is unclear what sentence the Respondent was given in relation to each offence and/or how the term of 5 years has been determined".

15. To clarify the situation, the Central Authority requested information from the issuing judicial authority by letter dated 10th March, 2017, following receipt of the EAW in the present proceedings. In their reply of 11th April, 2017, the issuing judicial authority stated that "the criminal offenses not covered under the designation of fraud, that has been ticked, are the offenses evading taxes, fees and other mandatory payments in accordance with s. 148 of the Criminal Code referred to in points 1-5 of the Section (e)".

16. As regards offences 6 and 7, in circumstances where the facts of those offences are that of fraudulent activities of loan fraud, and that the issuing judicial authority has clarified that the offences ticked in part (e)I of the EAW relating to fraud refers to those offences, I am satisfied that these are not manifestly incorrect designations.

17. The provisions of minimum gravity have also been met in this regard, since he is wanted to serve a sentence of five years for those offences. Therefore, the surrender of the respondent for offences 6 and 7 is not prohibited by the provisions of s. 38 of the Act of 2003.

18. As it regards the second ticked offence, "racketeering and extortion" in part (e)I of the EAW, the issuing judicial authority has not made reference to which offences fall under that designation. It is also worthy of note that the EAW marked the designation of "fraud, including that affecting the financial interests of the European Communities within the meaning of the Convention of 26 July 1995 on the protection of European Communities financial interests" in bold font whereas "racketeering and extortion" is not. It is possible that the designation of "racketeering and extortion" was mistakenly made during the processing of the European arrest

warrant. In any event, the additional information clarifies that only the Designation of "fraud…" applies to offences 6 and 7. The additional information is silent as to the designation of offences 1-5 and as to the "racketeering and extortion" designation. Combining these factors, it becomes clear that the designation of "racketeering and extortion" ticked in the EAW was made in error, and only the designation of "fraud…" applies.

19. Accordingly, double criminality must be found for offences 1 to 5 in order to satisfy the provisions of s. 38 of the Act of 2003.

20. Counsel for the minister submits that correspondence for these offences of "fraudulent evasion of tax" can be found under s. 1078(1A)(c) of the Taxes Consolidation Act 1997, as amended by s. 142 of the Finance Act 2005. In circumstances where the facts of the offences contained in part (e)I of the EAW makes clear that the respondent engaged in the fraudulent evasion and attempted evasion of tax by submitting false tax returns, false individual income tax return, and false VAT returns, and where he has been found to be guilty of those offences, it cannot be disputed, and indeed the respondent does not, that those offences corresponds with an offence in this State, under s. 1078(1A)(c) of the Taxes Consolidation Act 1997, as amended by s. 142 of the Finance Act 2005.

21. I am satisfied that the respondent's surrender is not prohibited by the provisions of s. 38 of the Act of 2003 insofar as there is correspondence with an offence in this jurisdiction. He is also sought for a sentence of 5 years in relation to these offences and the requirements of minimum gravity has been met.

Point of Objections

Section 11(1A)(g)(iii) of the Act of 2003
22. One of the objections raised by the respondent is that it remained unclear how the offences for which the respondent was convicted resulted in him being sentenced to five years imprisonment. Counsel for the respondent submits that the basis for the request to surrender the respondent on an EAW was unclear. Section 11(1A)(g)(iii) provides that where the requested person has been convicted of the offence specified in the EAW and a sentence has been imposed in respect thereof, the EAW must provide "the penalties of which that sentence consists."

23. The respondent also raised a somewhat related point that "Part (b) 2 states that the warrant is based on a judgment of the Regional Court in Ostrava of the 28th November 2003…in conjunction with the judgment of the High Court in Olomouc of 4th May 2004…" However, the respondent relies upon a translated copy of the decision of the High Court in Olomouc dated 14th May, 2004, (referring to the 4th May, 2004) which is said to have annulled the judgment of the Regional Court in Ostrava in its entirety. The respondent's contention is that the warrant cannot be issued based on a judgment that was annulled and has no legal basis.

Decision
24. The most appropriate way to deal with the issue is to refer to the information provided by the issuing judicial authority in part (f) of the European arrest warrant. This information has been provided under this heading of "optional information" by the issuing judicial authority. In the context of the difficulty with the earlier EAW, it was demonstrably the intention of the issuing judicial authority to give every assistance to the executing judicial authority in understanding the progress of proceedings in the Czech Republic. According to that part of the EAW, the respondent was found guilty of offences 6 and 7 by judgment of the District Court in Bruntal on 16th May, 2003, in conjunction with a Resolution of the Regional Court in Ostrava of 21st November, 2003. He was "sentenced to an imprisonment of 3 years, suspended conditionally for a probationary period of 4 years".

25. The EAW then states that, by judgment of the Regional Court in Ostrava dated 28th November, 2003, in conjunction with the judgment of the High Court in Olomouc dated 4th May, 2004, the respondent was found guilty and sentenced for offences 1 to 5. The judgment of the High Court also had the effect of cancelling the judgments pertaining to offences 6 and 7, and a cumulative sentence of imprisonment was imposed on the respondent for all 7 offences. According to the issuing authority, this is something which the High Court was required to do "when sentencing an offender for a criminal act committed prior to the Judgment of Conviction awarded by the Curt (*sic*) of First Instance for another offence committed by him".

26. This Court is aware from previous cases concerning EAWs from Czech Republic with cumulative sentences, that this is a norm as part of their criminal law (see, *Minister for Justice and Equality v Herman* [2015] IESC 49). The effect of the cumulative sentence is that it cancels "the statement specifying punishment imposed upon the offender by previous judgment".

27. The issue the respondent raises is perhaps understandable, given the manner that the issuing judicial authority has worded the relationship between the judgments in question. This can be seen in their repetition of the term "in conjunction with" when referring to two or more interrelated judgments. The issue however is one which can be overblown in its importance and in its relevance to the role of this Court as executing judicial authority. In the first place, it is possible that the phrase "in conjunction with" can simply be read as "in connection with". It is undoubtedly the case that the later judgment must be read in connection with the earlier decision, as this is the decision that gives it context.

28. In my view however, this is simply not a matter to which this Court must give any great degree of consideration. There is no lack of clarity in this matter either on the face of the EAW and additional information, or even when considered with the judgment which the respondent has provided in original form and in translation. In the first place the EAW and information make perfectly clear that the respondent is sought to serve a 5 year sentence in respect of the seven offences. This translated copy of the judgment provided by him does not dispute that.

29. Secondly, the EAW and additional information make clear that the final judgment dealing with his sentence in respect of all seven offences is that of the High Court in Olomouc of 4th May, 2004. This had been given on appeal by both the prosecutor and the respondent from the judgment of the Regional Court in Ostrava of 28th November, 2003. It was that decision of 28th November, 2003 which had dealt with offences 1 to 5 as well as cumulative sentences with respect to the earlier offences (and sentencing) number 6 and 7. It is a common, if not universal theme of court practice, that an appellate court's jurisdiction may only be founded upon an earlier determination by an inferior court. There is no lack of clarity where the EAW refers to both judgments as founding the basis for the EAW.

30. The respondent's point in so far as it relies upon a translation of a court ruling of the Czech Republic requires this Court to involve itself in an interpretation of that ruling with a view to questioning the validity of the direct statement in the EAW by the issuing judicial authority. In my view, this Court should be most reluctant to enter into any dispute as to the validity of court orders in other member states. As Murray C.J. said in *Minister for Justice v Ó Falluin* [2010] IESC 37: "It would be invidious, to say the least, if the court of one country were to pass judgment on the validity of an order or act of a court in another country under the latter's national law and set it aside as not having the effect which it purports to have on its face". While the judgment of the former Chief Justice contemplated the possibility that there might be egregious circumstances which permitted such an examination to take place, the

facts of the present case are far, far removed from such egregious circumstances. On the contrary, even the judgment relied upon by the respondent clarifies that the last judgment in time referred to in the EAW sentences him to 5 years in respect of each of the seven offences set out in the European Arrest Warrant.

31. The EAW and additional information are clear as to the fact that this is a cumulative sentence, the legal proceedings leading to that sentence and most importantly that the 5 year sentence is the total penalty in respect of all the offences for which his surrender is sought.

Accordingly, I am satisfied that the provisions of s. 11(1A)(g)(iii) of the Act of 2003 have been complied with. I have no hesitation in rejecting these points of objection.

Section 45 of the Act of 2003
32. The respondent submits that his surrender would be in breach of s. 45 of the Act of 2003 as he did not appear in person at the proceedings resulting in the sentence order in respect of which the EAW was issued. He submits this in circumstances where he had not given a mandate to a legal counsellor to defend him at the trial as suggested at part (d)3.2 of the European arrest warrant. He submits that the sentence was ordered by decision of the High Court in Olomouc on the 4th May, 2004, in his absence.

33. Part (d)3.2 of the EAW states that the respondent "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". Section 45 of the Act of 2003 prohibits surrender if a person did not appear in person at the proceedings resulting in the sentence or detention order in respect of which the EAW was issued unless the EAW indicates the matters required by points 2, 3 and 4 of part (d) of the form of the warrant in the Annex to the 2002 Framework Decision as amended by the Framework Decision of 26th February, 2009, on the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial ("the 2009 Framework Decision").

34. It is important to state that in the present case the only issue that arose under s. 45 concerned the final hearing of his case before the High Court in Olomouc on 4th May, 2004. His presence at relevant earlier hearings was not in dispute.

35. In his affidavit, the respondent states at para 14 that:

> "I agree that I had instructed a counsel to appear at the appeal hearing as I was unable to attend myself due to my recent back surgery, but I had only instructed him to inform the Court that I could not attend in the hope that the matter would be adjourned to a date when I was fit to attend. My lawyer notified me on the 18th May 2004 that he had notified the Court in writing that I was unable to attend because of medical reasons but the Court had proceeded in my absence and convicted me and increased the sentence and increased the level of prison security to medium security. I say that I was not represented at the hearing by any lawyer who was instructed by me."

Decision
36. Part (d) of the EAW states that the respondent did not appear in person at the trial on 4th May, 2004, during which the judgment was pronounced. Under the 2002 Framework Decision, each member state may choose to prohibit surrender where there has been a trial *in absentia* unless certain conditions have been met. Ireland chose that option and did so by means of s. 45 of the Act of 2003. The circumstances in which that opt-out is to be exercised formed the basis for the 2009 Framework Decision. By an amendment to s. 45 of the Act of 2003, Ireland implemented the newly inserted Article 4a provisions regarding this optional ground for refusal to surrender.

37. Part (d)3.2 of the EAW have been relied upon by the issuing judicial authority, these being equivalent to paragraphs 3.2 of the Table set out in s. 45 of the Act of 2003 and of the amended standard form EAW provided for in the 2009 Framework Decision.

38. Information as to how this condition is met is set out at part (d)4 of the EAW as follows:

> "The person was aware of the trial.
>
> - Schoppik was present in the trial on 28th November 2003…
>
> - Notice of public hearing…before the High Court in Olomouc …was delivered into Schoppik's own hands on 24th March 2004;
>
> - Schoppik apologized through his counsel for his absence in open court for medical reasons;
>
> - The judgment of the High Court in Olomouc of 4th May, file no.4 To 25/2004 was delivered into Schoppik's own hands on 19th May 2004."

That (d)4 goes on to explain:

> "He empowered his counsel to represent him.
>
> - Filed Power of Attorney of 2nd September 2002 in which Schoppik authorized Mgr. Hana Milatova to represent him in this criminal case;
>
> - JUDr. Ladislav Lochman substituted Mgr. Hana Milatova in open court on 4th May 2004 before the High Court in Olomouc where the judgment was awarded by the High Court in Olomouc ."

39. Further information was provided by the respondent in his exhibit to his affidavit. That exhibit is a letter from the respondent's law firm in Czech Republic dated 18th May, 2004, to the respondent, informing him of his option to appeal the High Court Judgment of Olomouc. That law firm is Friedelove, Milatova, Penkave and one of their lawyers is Hana Milatova who is the named lawyer as set out in part d to the European arrest warrant. In that letter, the firm states:

> "I would like to provide you with the basic information given to me by JUDr. Ladislav Lochman, the lawyer who represented you in the appeal proceedings before Olomouc High Court on 04/05/2004."

40. The letter goes on to state:

> "It is absolutely true that you were summoned to the public hearing of your appeal to Olomouc High Court in the rightly manner, and although you received the summons to the public hearing, you were absent due to medical reasons, as you said, you were not able to travel from Kronv to Olomouc".

The letter also informs that the High Court of Olomouc did not accept the respondent's reason for not attending. The letter states:

> "Although I notified the Court of Appeal in writing about your medical problems, the court did not accept your excuse for the absence from the public hearing and the case was heard in your absence on the grounds that your medical condition had been adverse for a long time and that the medical report filed in the book of evidence did not contain any new information".

41. Choosing not to accept a reason for the absence of an accused in a trial is a prerogative of the courts here in Ireland and appears also to be the prerogative of the courts of the Czech Republic. Most importantly however, it is not for the High Court to involve itself with whether the courts in the issuing member state was correct to proceed in his absence. The principles of mutual trust and mutual recognition require the High Court to respect the right of the courts of the issuing state to conduct their proceedings in accordance with their own procedures. Those procedures carry with them a presumption that they are in compliance with the 2009 Framework Decision and therefore that the respondent's rights have been protected.

42. Having rejected the respondent's excuse for not showing up for his public hearing, the Czech High Court went on to substitute the respondent's new lawyer for the previously mandated counsel to represent the respondent *in absentia*. In his own affidavit, the respondent states that the only role of his legal counsel was to seek an adjournment for the public hearing on the basis that he was physically unable to attend the public hearing in Olomouc. Having satisfied that duty, the Czech High Court substituted JUDr. Ladislav Lochman to represent the respondent at the trial to represent the respondent under the terms of the mandate.

43. The primary issue at the oral submissions at the hearing of the matter was whether the respondent had to provide a mandate to JUDr. Ladislav Lochman before he could represent him at the appeal hearing. In my view part (d) 3.2 of the 2009 Framework Decision incorporated in s. 45 of the Act of 2003 makes clear that the respondent is entitled to give a mandate to a legal counsellor, either as appointed by him, or, appointed by the State. Whether the lawyer is appointed by the person or by the State, the mandate has to be given. In this case, there is no dispute that a mandate was actually given to a lawyer. The issuing judicial authority has relied upon that mandate and its existence is not disputed by the respondent. The EAW then states that there was a substitution of the lawyer made in open court.

44. It is common place for an accused to be represented by different lawyers, perhaps in the same firm or perhaps as cover by those in other firms. Indeed, it is an everyday occurrence in Ireland for different solicitors and even counsel to represent an accused on different occasions during the trial. In the present case, this substitution took place in open court. The EAW is clear that this was a substitution of a lawyer rather than a different mandate. In those circumstances, there can be no breach of s.45 of the Act of 2003 on the face of the EAW as all the relevant information has been given.

45. Furthermore, although the respondent has disputed in his affidavit the granting of a mandate to JUDr. Lochman save for a mandate to seek an adjournment, I am satisfied that this must be rejected. It is an entirely self-serving assertion that is wholly unsupported by the letter that his law firm wrote. The first point to note is that the respondent has not filed any letter either to or from JUDr. Lochman to verify the precise extent of the mandate. Secondly, the law firm's letter implies that they had represented him at the appeal, in the first place because they had written to the Court of Appeal about his medical problems but they state that the reasons were not accepted for his absence and that the case was heard in his absence. They also refer to providing him with "basic information given to me by JUDr. Vladimir (sic) Lochman, the lawyer who represented you in the appeal proceedings." This implies a close relationship with that lawyer, and also importantly that he was a lawyer who represented him at the entirety of the appeal and not merely at an appeal for the purpose of an adjournment. Moreover, the letter does not deal with any issue of the absence of full representation or the lack of a full mandate. One would expect this to be a major concern of the respondent and in particular his lawyers if there had been any breach of his precise mandated instructions to another lawyer.

46. I am satisfied that the respondent's claim on affidavit that he was represented at the appeal hearing by a lawyer with only a limited mandate is without merit and that the provisions of s. 45 have been complied with. His surrender is therefore not prohibited under the provisions of s. 45 of the Act of 2003.

47. Furthermore, in keeping with the principles set out in *Minister for Justice and Equality v Skwierczynski* [2016] IEHC 802 and [2018] IECA 204, there is no indication that the respondent's rights of defence have been violated. He was afforded the option of an appeal. As identified in the decision of the Court of Justice of the European Union ("CJEU") in *Openbaar Ministerie v. Pawel Dworzecki* (Case C-108/16 PPU, 24th May 2016) which was relied on in *Skwierczynski*, the executing judicial authority is entitled to 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.

48. The purpose of s. 45 of the Act of 2003, which was amended by the European Arrest Warrant (Application to Third Countries and Amendment) and Extradition (Amendment) Act 2012 in order to transpose the 2009 Framework Decision into Irish law, on the most basic level, is to ensure that the respondent's right to a defence is not breached. In *Skwierczynski*, where the respondent objected to his surrender on the basis that he had been tried and convicted *in absentia*, this Court held that "[o]n the contrary, he had a full appeal of his conviction *in absentia*. Such an appeal unquestionably ensures that his Article 6 rights under the ECHR have been met and that there has been no unfairness in the provision of a trial *in absentia*." This approach to the interpretation of s. 45 of the Act of 2003 was accepted by the Court of Appeal in *Skwierczynski* [2018] IECA 204, wherein the Court of Appeal held at para 56:

> "In the light of the judgments of the CJEU in the *Tupikas* and *Zdziaszek* cases it is now conceded that if the appellant had the right to a full appeal in accordance with the framework decision then any defect that might have arisen in relation to the first instance trial is cured thereby. The evidence contained within the EAW shows that the appellant did have a right of appeal. In the light of the appellant's silence in the face of the issuing authority's statement that he did appeal and that that appeal was dismissed I can find no basis for disagreeing with the finding of fact made in this regard by the learned High Court judge to the effect that he did appeal and that his appeal was dismissed. Thus any defect in the first proceedings is clearly cured."

49. It is undoubtedly clear and not contested by the respondent that on two separate occasions he availed of a right to an appeal. The additional information dated 11th April, 2017, informs that the first attempt was when the respondent sought to appeal the

conviction and sentence imposed on him by the District Court in Bruntal on 16th May, 2003. That appeal was unsuccessful in the Regional Court in Ostrava on 21st November, 2003. The second attempt of appeal was successful however; the respondent appealed the sentence imposed on him by the Regional Court in Ostrava dated 28th November, 2003, to the High Court in Olomouc. He therefore was very familiar with the nature and concept of an appeal.

50. The EAW says that the respondent was served with the judgment into his own hands on the 19th May, 2004. He does not dispute that. Furthermore, the letter that he exhibits from his law firm in the Czech Republic dated 18th May, 2004, also informed the respondent of the outcome of the appeal. That letter also invited the respondent to appeal the decision of the High Court in Olomouc, asking the respondent to consider to "try to settle the matter" by submitting all necessary documentation regarding his adverse medical condition to the legal counsel and asking the respondent to inform the legal counsel as to whether to submit an application for appellate review. A year after that letter was sent, the respondent had come to Ireland because, as stated in his own affidavit, "he was scared to go to prison", and accordingly waived his rights to an appeal.

51. Accordingly, I am satisfied that the respondent's right to a defence, as protected by s. 45 of the Act of 2003 has not been breached, in circumstances where no ambiguity arises as to whether he was served or present at his trial resulting in conviction, and where he had availed of his rights to an appeal before subsequently waiving that right. The surrender of the respondent is not prohibited under this point.

Section 37 of the Act of 2003
52. The respondent objects to his proposed surrender on the basis of s. 37 of the Act of 2003 and states that the application to surrender him would be an abuse of process because it constitutes, *inter alia*:

> a. a breach of his constitutional rights to fair procedures because of the unjustified delay in issuing, endorsing and executing the within European arrest warrant.
>
> b. A breach of his constitutional rights to fair procedures because the respondent was arrested on 3rd December, 2015, in relation to a previous EAW relating to the same matters as is contained in the current European arrest warrant. The respondent states that the issue of the current warrant is an attempt to circumvent the decision of this Court relating to the failure of the issuing authority to provide information to the executing judicial authority as had been requested by the Court in advance of the hearing of the previous warrant in May, 2016.
>
> c. An impermissible interference with the respondent's rights to family and private life under article 8 of the European Convention on Human Rights ("ECHR"), particularly in light of the considerable period of delay involved.
>
> d. Owing to the prison conditions in the Czech Republic and the requirement that he is to serve his five-year sentence in a security prison, there are reasonable grounds for believing that he will be exposed to inhuman or degrading treatment in breach of s. 37(1)(c)(iii)(II) of the Act of 2003 and Article 3 of the ECHR.

53. Point b. can be rejected immediately. The law places no bar on bringing a fresh application to the court for surrender of the respondent: (*Minister for Justice and Equality v. Tobin* [2012] 4 I.R. 147, *Minister for Justice and Equality v J.A.T. (No 2)* [2016] IESC 17, *Bolger v. O'Toole & Bolger v. Haughton* [2008] IESC 38). In *Minister for Justice and Equality v. J.A.T.* [2014] IEHC 320, Edwards J. held, at p. 41, that an abuse of process occurs where there is a repeat application which renders the subsequent proceedings unconscionable: "[…]to seek the extradition of such a person is not *per se* abusive of the process. It would only be abusive of the process where to do so is unconscionable in all the circumstances." Furthermore, the respondent has not provided submissions or further evidence as to how an abuse of fair procedures has taken place.

54. Point d. may also be rejected in a summary fashion since the respondent did not advance the point in a substantive manner. No evidence, in terms of any reports from international or internal organisations or tribunals concerning the prison conditions in the Czech Republic, has been provided to the court nor has he addressed how the requirement that he is to serve his five-year sentence in a security prison will expose him to inhuman or degrading treatment. In the absence of specific evidence as to the prevailing conditions in the Czech Republic prison system, I cannot be satisfied that there is a real risk that the respondent's Article 3 ECHR rights will be violated should he be surrendered. I therefore reject his Article 3 ECHR point.

Article 8 of the ECHR
55. The respondent submitted that it would be a disproportionate interference with his right to respect for his personal life to surrender him to the issuing state to serve this relatively short sentence for offences, though serious in nature, relating to business offences as opposed to more serious crimes of violence. Counsel for the respondent relied upon the delay in seeking the respondent's surrender. He submits that the offences go as far back as 22 years, ranging from 25th October, 1996, to 28th August, 1998; 14 years had elapsed since the High Court of Olomouc gave its judgment before the previous EAW of 5th November, 2007 was issued. Counsel also relied on the judgment delivered by this Court on 9th May, 2016, wherein references were made to the consideration that this Court gave in relation to the delay point of objection made in the surrender proceedings pertaining to that previous warrant.

56. In the *ex tempore* judgment of 9th May, 2016, this Court, in its decision on whether to seek further information under the provisions of s. 20 of the Act of 2003, stated:

> "In my view, a factor that has to also be taken into account in this case is that these are very, very old offences going back, as they do, almost 20 years…The European Arrest Warrant was also issued in 2007 and there has not been an explanation as to why, even though it said he may be living in Ireland or Britain, that the warrant was not sent to Ireland until 2013. Those on its own would not be sufficient without more because delay itself is not a reason not to send somebody back, but it is a factor that this Court has to take into account in relation to issues such as seeking further information."

That decision must be understood in the context that this Court had previously asked for the information to clarify the situation but no satisfactory clarification had been given. It now transpires that the initial EAW had wrongly sought his surrender for only 5 offences rather than the 7 offences for which he is required to serve the 5-year sentence for which surrender is sought.

57. Essentially, counsel for the respondent makes the same argument of delay made in the previous EAW hearing. He submits that his argument is further strengthened by the fact that this Court refused to seek further information under s. 20 of the Act of 2003 and the considerable amount of time that has elapsed in this case.

58. Counsel also refers to the family situation of the respondent, as well as his medical circumstances relating to his back, though no

updated medical evidence was presented. The evidence presented as an exhibit to the respondent's affidavit is dated 1st March, 2005, and 19th April, 2005. Those reports indicated that the next medical exam was to occur on 31st January, 2006, but of course the respondent was unable to attend since, according to him, he had been residing in Ireland as of October, 2005. No further medical reports have been provided to this Court and consequently little regard must be had to his back condition. Indeed, despite those earlier medical reports suggesting that "[d]ue to the chronic medical condition, his ability to continuously generate income has been reduced by at least 66%", the respondent states in his affidavit that he "worked in construction jobs for the first year after coming here [to Ireland] until [he] became unemployed". In circumstances where he was medically "assessed as a driver" and that assessment resulted in his ability to work reduced by at least 66%, the respondent knowingly engaged in employment which could be perceived as far more physically tasking than that of being a driver, though he did not stipulate the tasks he was engaged whilst working in construction. The respondent states that he "was unable to work as a result of ongoing back pain", knowing he was unable to work in any event since, according to the medical reports, he had been in receipt of "full invalidity pension since 3.2.2004".

59. The respondent also notes in his affidavit that he has troubles with varicose veins and is receiving treatment for them. It is clear that the respondent is not anywhere near the type of situation that applied in *J.A.T. (No 2).* It is important that these issues, as per O'Donnell J. in *J.A.T. (No 2),* are scrutinised rigorously. Accordingly, very little consideration must be given to the respondent's point that he should not be surrendered because of his medical condition.

60. In *J.A.T. (No 2),* O' Donnell J. stated at para. 11:

> "In any future case, where all or any of the above factors may be relied on, it would not, in my view, be necessary to carry out any elaborate factual analysis or weighing of matters unless it is clear that the facts come at least close to a case which can be said to be truly exceptional in its features. Even in such cases, which must be rare, it is important that the considerations raised are scrutinised rigorously."

61. The disruption to the private family interests that the respondent also submits should bar surrender, are no more difficult or different from the expected disruption to a person's life by virtue of the extradition process. He does not have the family concerns either that existed in *J.A.T. (No 2),* where there was a very specific illness relating to an adult son. The respondent has lived with his wife since 2006 and states that both her and their only child who lives near them with her husband and six children, depend on him for support and that they will suffer should he be surrendered. The respondent has not made clear what form of support he provides his family, whether financial or otherwise. The respondent also refers to the support he provides to his daughter and grandchildren following an ongoing divorce process taking place between his daughter and her husband. He also notes that he has no close relations in the Czech Republic, though his sister lives there but they do not have a close relationship: all of his immediate family live here in Ireland.

62. The respondent has not provided the court with information as to the ages of the grandchildren. No evidence has been provided to this Court on the impact surrender will have on the family that goes beyond that which is expected as a result of extradition proceedings. There is no evidence that it would be particularly harmful, injurious or oppressive to surrender him. Overall this is not a case which comes even remotely close to being of the type of exceptional case where surrender must be prohibited. Should the respondent be surrendered, there is nothing that prohibits contact with his family via the normal prison communication system. On the basis of the principles of mutual trust, attention will be paid to the respondent's medical needs should he be surrendered.

63. I am required to weigh in the balance the public interest in his surrender against his own private interests. While these are not offences of violence, they are nonetheless serious offences of fraud and tax evasion involving significant amounts of money. Importantly, a very significant 5-year sentence was imposed in respect of the seven offences. As regards the delay and the repeated application it is important to repeat the words of O'Donnell J in *J.A.T. (No. 2),* at para 10:

> "These factors - repeat application, lapse of time, delay, impact on the appellant's son, and knowledge on the part of the requesting and executing authorities of those factors - when weighed cumulatively, are powerful. Even then, and without undervaluing the offences alleged here, it is open to doubt that these matters would be sufficient to prevent surrender for very serious crimes of violence. This illustrates that the decision in this case is exceptional, and even then, close to the margin."

64. O'Donnell J. made this comment in circumstances where the facts of that case establish that the crimes for which the respondent in that case was sought were for crimes alleged to have occurred in 1997. He goes on to say:

> "There is, as I understand it, no suggestion that the United Kingdom authorities ought to have detected the alleged crime any earlier. In any event, such an allegation is one which a court should be extremely slow to entertain. The relative antiquity of the offences, however, is relevant in considering those elements of delay in the issuance of the first warrant, and more importantly, the second warrant, and its execution in this jurisdiction. I do think that these delays are factors in the Court's assessment, but, regrettable and worthy of criticism as they are, in my view they fall far short, by themselves, of establishing any abuse of process or grounds for refusal of surrender. Nor do they do so when taken in conjunction with the fact that a second warrant was issued."

65. The facts of the respondent in this present case is not that dissimilar to that of *J.A.T. (No 2)* as it relates to the issue of delay. Both respondents were/are sought for offences that date back to 1997 and two EAWs were issued. O'Donnell J. made clear that delay by itself is not a bar to surrender, even when taken in conjunction with the fact that a second EAW exists. One unsatisfactory feature of this case is that no explanation for the delay in transmitting the initial EAW dated 5 November, 2007, to Ireland at an earlier stage despite knowing that the respondent was abroad, "probably in Great Britain or Ireland" since June, 2006. In the absence of any explanation, I can only make this delay the responsibility of the issuing state. Despite this responsibility, it is clear that a public interest remains in ensuring that a person convicted of a number of serious financial offences warranting a significant sentence is made amenable to justice.

66. In those circumstances, I reject the respondent's standalone opposition to his surrender on the grounds of delay. In so far as the delay is to be taken into account in his terms of Article 8 objection, I am of the view that the delay, while lengthy, is not such as to reduce the public interest in his surrender for these serious offences to a level where it would make it disproportionate to surrender him in light of his private and family circumstances. In short, this is not a case where it would be oppressive to surrender this respondent, who deliberately left the Czech Republic to avoid serving his 5-year prison sentence for serious offences of fraud/tax evasion, who rejected the opportunity to make a further appeal even though he set up his life in Ireland with his family since 2004, and has had to face two sets of EAW proceedings.

Conclusion

67. Having considered but rejected all the respondent's points of objection, I am satisfied that there is no reason to prohibit the surrender of this respondent to the issuing state under this European arrest warrant. I therefore may make an Order for the surrender of this respondent to such person as is duly authorised by the Czech Republic to receive him.