Neutral Citation Number: [2008] IEHC 154

THE HIGH COURT

Record Number: 2006 No. 122 Ext.

BETWEEN

MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

APPLICANT

AND

THOMAS MARTIN MCCAGUE

RESPONDENT

Judgment of Mr Justice Michael Peart delivered on the 30th day of May 2008

1. The surrender of the respondent is sought on foot of a European arrest warrant which issued in the United Kingdom on the 18th August 2006. That warrant was duly endorsed here for execution here on the 19th September 2006, and the respondent was arrested on foot of same on the 31st July 2007, and brought before the Court as required by s. 13 of the European Arrest Warrant Act, 2003, as amended. Thereafter he was remanded on bail from time to time pending the determination of this application for his surrender.

2. The respondent's surrender is sought, firstly, so that he can serve two sentences of five years imposed in respect of two offences, namely conspiracy to fraudulently evade excise duty, and conspiracy to conceal or transfer the proceeds of criminal conduct, and secondly so that he can face prosecution for a third offence, namely for failure, without reasonable excuse, to surrender to the custody of the Crown Court. The first two named offences are ones which have been marked on the warrant as being offences coming within the list of offences in Article 2.2 of the Framework Decision as being those in respect of which double criminality does not require to be verified. The third offence is one which I am satisfied corresponds with an offence in this State, namely one under s. 13 of the criminal Justice Act, 1984. The latter offence satisfies the minimum gravity requirement under the Act, and the sentences remaining to be served in respect of the first two offences satisfy the minimum gravity requirement also.

3. Subject to addressing the Points of Objection pursued on this application, I am satisfied that the respondent is the person in respect of whom this European arrest warrant has been issued. I am also satisfied that there is no reason under Sections 21A, 22, 23 or 24 of the Act to refuse to order surrender, and that his surrender is not prohibited by any provision of Part III of the Act, or the Framework Decision.

4. The respondent was tried, convicted and sentenced in his absence in respect of the two offences for which he has already been sentenced. His trial had been fixed for hearing on the 10th January 2005. The respondent had pleaded not guilty, and in his Defence statement had indicated the basis of his defence as being that he had been confused with his uncle Thomas McCague senior. This is the defence which he proposed mounting at his trial. However, in the days immediately preceding his trial his lawyers applied for an adjournment of the trial, having received instructions from him that he was medically unfit to attend his trial as he was "suffering from depression, anxiety and gallstone pain". In addition it appears that he informed his solicitor that he had been informed by the Police Service of Northern Ireland on the 30th December 2004 that there was a paramilitary threat against his life if he attended his trial and gave evidence against his uncle. His solicitor has exhibited a copy of as police message dated 30th December 2004 which reads:

> *"Anon male reports to Newry Samaritans "Tommy McCague from Armagh is giving evidence against an uncle and he overheard a conversation that the RA were for doing something".*

5. The respondent instructed his solicitor also that he had received a bullet in the post together with a Mass card on the 7th January 2005. In this regard the respondent has filed an affidavit sworn by his Parish Priest in Dungannon who states that he recalls being contacted by the respondent in early January 2005, and that when he called to the respondent's home he appeared to be greatly shocked and showed him a Mass card and a bullet which had been posted through the letter-box of his home. He states further that he is in no doubt that the respondent was genuinely in fear for himself and his family, and that he immediately went to the local police station in Armagh and gave them the card and the bullet and told them what had happened.

6. The respondent's solicitor has averred that on the 10th January 2005 he and counsel attended at the Crown Court for the trial, but that by reason of his medical condition and these threats the respondent was not present. His solicitor spoke to the police at Armagh who confirmed that the bullet and Mass card had been handed into Armagh police station. He had also contacted the respondent's general practitioner and received some medical reports in relation to the respondent. These have been exhibited and refer to anxiety, depression and abdominal pain, and that gallstones were diagnosed on the 15th October 2004 for which the respondent was awaiting treatment by means of cholecystectomy. These reports stated also that the respondent was believed to be unfit to travel to Great Britain, and that it was not possible to predict when he might be in a position to do so.

7. This material was submitted to the Crown Court on the 10th January 2005, whereupon the judge adjourned the matter to the following day, the 11th January 2005, so that arrangements could be made to have the respondent independently medically examined. Three appointments were set up both in Craigavon and in Belfast, but the respondent failed to attend either appointment. On the 11th January 2005 the respondent informed the solicitor that he was unwilling to attend any of these appointments out of fears for his safety. His solicitor was also provided with further disclosure by the prosecution that there was intelligence to the effect that the respondent's uncle was concerned that charges preferred against the respondent might be proven against his uncle, and counsel for the prosecution further stated that the prosecution was aware that his uncle was "well-connected".

8. It appears that the trial judge having considered the material and information put forward on the respondent's behalf issued a bench warrant for the arrest of the respondent, which is the warrant on which the European arrest warrant was based when it was issued on the 18th August 2006. According to the affidavit sworn by the said solicitor, Nicholas John Melville, the judge held that he was not satisfied that the medical evidence adduced was entirely the reason for non-attendance, that he considered the alleged threats to be "vague and unsatisfactory", and that the respondent could resolve his fear by surrendering to the authorities. Mr Melville states that the respondent telephoned him later that evening and that he informed the respondent of what had happened.

9. Mr Melville has stated also that on the following day, the 12th January 2004, the Court was informed by the prosecution that the respondent had not been located, and that the case was put back to the 13th January 2005 for further mention, and that he informed the respondent of this fact in a further telephone conversation, and also explained to him all the implications of further failure to appear. He states also that the respondent instructed him to object strenuously on the 13th January 2005 to his trial proceeding in his absence on the basis of his health difficulties and the threats to his life, and further that he was not to represent him at any such trial in his absence, and that the respondent did not feel that he was in a fit state of mind to confirm his instructions or to provide any further instructions in relation to some additional evidence served by the prosecution on the 7th January 2005 or to instruct his lawyers in relation to the substantive issues that might arise during the course of the trial.

10. Mr Melville further avers that he and counsel appeared again before the Crown Court on the 13th January 2005, that the respondent again failed to appear and that relevant case law was opened to the court, and that submissions were made in relation to the respondent's fears and medical condition, and that there had been only two days allowed for locating the respondent, and that if a further adjournment was granted there was a realistic prospect of finding him. The Court was also informed of the difficulties in obtaining instructions in relation to the further evidence disclosed, and that it would be impossible to put forward evidence in relation to the positive defence to the charges based on the alleged confusion with the respondent's uncle as referred to already. However it appears that the trial judge concluded that there was insufficient evidence of the respondent's medical condition or of the threats alleged to have been made, and expressed his view that the respondent was deliberately absenting himself from his trial, and that it was in the interests of all the co-accused that they be tried together, and directed that the trial commence on the 19th January 2005, even if the respondent was absent. Thereupon, solicitor and counsel withdrew from the case, and the trial proceeded in the respondent's absence.

11. Finally, Mr Melville avers that prior to the trial of the respondent, he was served with notice of intention of HM Customs and Excise to apply to the Court for a confiscation order in the event that the respondent was convicted, and that it was their intention to have the confiscation hearing listed within six months of any conviction, and that such an order could result in a five year term of imprisonment being imposed on the respondent should he fail to pay whatever fine might be imposed on foot of any such Confiscation Order.

The Points of Objection

Breach of constitutional and Convention rights
12. It is submitted that the fact that the trial judge failed to adjourn the trial in the face of the medical evidence and the evidence of threats made to the respondent, and proceeded with the trial resulting in his conviction and sentence in his absence is a breach of his constitutional rights, and rights under the European Convention on Human Rights, and as such his surrender is prohibited by the provisions of s. 37(1)(a) and (b) of the Act. Those provisions provide:

> *"37.—(1) A person shall not be surrendered under this Act if—*
>
> *(a) his or her surrender would be incompatible with the State's obligations under—*
>
> *(i) the Convention, or*
>
> *(ii) the Protocols to the Convention,*
>
> *(b) his or her surrender would constitute a contravention of any provision of the Constitution (other than for the reason that the offence specified in the European arrest warrant is an offence to which section 38(1)(b) applies)*
>
> *(c) …….. "*
>
> *(d)*

13. In support of this submission the respondent has filed an affidavit sworn by Alexander Carlisle QC, who has considered the facts of this case as set forth in Mr Melville's affidavit. He states that there was no requirement that the respondent be sentenced in his absence, and that following conviction it was open to the trial judge to adjourn sentencing so that he could be arrested on foot of the warrant issued and brought before the court for sentencing. In such circumstances, it is stated that the respondent would have had the opportunity to put forward points in mitigation and to challenge the suggestion made that he was the principal actor in these offences.

14. In response to this affidavit the applicant has filed a very lengthy affidavit of James Robert Rae, a barrister who was one of the prosecution counsel engaged in this case. He sets out considerable detail in relation to the case made against the respondent in the trial. Since this Court is not concerned with the merits of the prosecution's case against the respondent it is unnecessary to set out what is stated in that regard. However, Mr Rae deals with the circumstances surrounding the respondent's attempts to have his trial adjourned on medical grounds and because of the respondent's fears for his safety arising from the alleged threats made against him. He sets out the considerable detail of the facts of the case in order to show the context in which the trial judge considered whether or not to accede to the respondent's application for adjournment. He states that at the time the medical note from the respondent's doctor was received around the 7th January 2005, there were a number of other accused persons with whom the respondent would have been tried arising out of these offences, and the point is made that some of the evidence in the case was in the nature of phone contacts between these other accused persons and the respondent, and other links which he outlines at paragraph 38 of his affidavit. He states that in this context the submission of what he describes as "a vague medical report" had the appearance of an attempt to over-rule a failed attempt to sever the respondent from the indictment which had been made in April 2004. In a second affidavit Mr Melville states in this regard that Mr Rae has misunderstood the nature of the severance application made by the respondent in April 2004, and that this application was not in fact one whereby the respondent sought to be tried separately from the other co-accused persons but rather was one for a separate trial on the charge of conspiracy to evade excise duty and the conspiracy to convert the proceeds of crime. He goes on to state that the basis of that application was that the length and complexity of the trial of both matters would be such that justice could not be done to any individual accused, and that it would be in the interests of proper trial management to hear each conspiracy charge separately, and he suggests that it is simply speculation on Mr Rae's part to state that this was the reason for the respondent's failure to appear at his trial.

No adequate remedy available to the respondent if surrendered
15. Lord Carlisle in his affidavit has stated that he has been asked to advise on what remedies are open to the respondent in the event that he is surrendered. His opinion is that while the respondent is entitled to apply for leave to appeal against his conviction and sentence, he is considerably out of time to do so since under the relevant legislation such an application must be made within twenty eight days. Given the lapse of time since conviction and sentence occurred the applicant will have considerable difficulty in this regard, and in his view the Court in exercising its discretion will have regard to the lapse of time which has occurred, and that the respondent will have a particular difficulty because of his non-attendance at his trial, and his failure to attend the medical examinations arranged for him on the 11th January 2005, since these failures will be regarded as deliberate on his part, and would be unlikely to allow the respondent to benefit from his own actions in this regard and conclude that the respondent was the author of his own misfortune. His view is that the Court of Appeal would be unlikely to interfere with the trial judge's exercise of his discretion, especially after submissions were made by both sides on the adjournment application, unless sit can be shown that such discretion was exercised contrary to the interests of justice. He also considers that it would be extremely unlikely that the Court of Appeal would certify that there is a point of law of public importance such as should be heard by the House of Lords, and accordingly that

any decision by the Court of Appeal in relation to an extension of time would be final.

Not adjourning the sentence hearing
16. Michael O'Higgins SC for the respondent submits first of all that the Court should, for the purpose of his submission under this point of objection, consider that the entitlement of the respondent to be present must be seen as an entitlement to be present not only for his trial, but also for his sentence hearing.

17. Without prejudice to his submissions in relation to the refusal of the trial judge to adjourn the trial itself in the light of the medical evidence and evidence of threats before the Court in January 2005, the trial judge was obliged, in his submission, to ensure that the respondent was given a reasonable opportunity to attend at his sentence hearing before proceeding to sentence him in his absence. In the present case there was a gap of some months between the trial itself which commenced on the 19th January 2005 and the sentence hearing in June 2005, and he submits that there is no evidence that the respondent was ever notified of the date for his sentencing hearing, that he was not even represented at that sentence hearing. and refers to the evidence of Mr Melville to the effect that in January 2005, prior to the commencement of the trial, the respondent's legal team was discharged.

18. In such circumstances, it is submitted that in the absence of the respondent the only basis for the sentence imposed was the offences themselves, rather than on the basis of sentencing the particular convicted person for those offences. He submits that the respondent was denied the opportunity to put forward mitigating circumstances to be taken into account by the sentencing judge. He points to the fact also that the affidavit evidence makes it clear that the respondent was not even aware of the fact that he was convicted. He refers also to the fact that the trial judge specifically put back the hearing of the application for the Confiscation Order because he was of the view that the respondent needed to be present for it, and submits that it was all the more necessary that he be present for his sentence hearing given that this was likely to result in a prison sentence, unlike the Confiscation Order which could result in a fine.

Not adjourning the trial
19. In relation to the trial itself, Mr O'Higgins submits that even though there is a discretion in the trial judge to refuse to adjourn the trial having considered the evidence adduced for that application, it is completely unclear how the judge could have concluded that the medical evidence was "insufficient", and that there could be no basis for going against the doctor's clear statement that the respondent was unfit to travel. He points also to the fact that the respondent intended to put up a positive defence in the sense of asserting that he was being confused with his uncle of the same name, and that this is not a case to be equated to the circumstances of the case of *Bolger v. Haughton*, unreported, High Court, 28th October 2005, where only after all the evidence had been concluded at trial did the accused person absent himself from his trial, and where in that circumstance the trial judge refused to adjourn the trial in the face of a late medical certificate of the accused's unfitness to travel back from Ireland to the United Kingdom for the remainder of his trial, after a weekend intervened. In that case the trial continued to conviction and sentencing was put back for a couple of months, and proceeded in Mr Bolger's absence, but he continued to be represented at the sentencing hearing by solicitor and counsel.

20. Mr O'Higgins further submits that no reasonable opportunity was allowed or availed of by which the execution of the bench warrant which issued on the 11th January 2005 could have been achieved before the commencement of the trial. He submits that it must have been clear to the judge and the authorities that the respondent was by then in Northern Ireland, especially since medical appointments were arranged to take place in Craigavon or in Belfast, and that there is no evidence of what efforts were made in that jurisdiction to apprehend the respondent and return him to Liverpool Crown Court in custody to face his trial.

21. All of these circumstances are submitted to constitute a breach of the respondent's right to fair procedures and a fair hearing, particularly since, according to the evidence of Lord Carlisle, there is *no effective remedy* available to the respondent to address that breach, since the respondent is well out of time to appeal against his conviction and/or his sentence, and was not made aware of that conviction and sentence within the time during which an appeal could have been lodged. In such circumstances it is submitted that the only effective remedy available to the respondent is before this Court by way of resisting the application for his surrender, and only in this way can his constitutional and Convention rights be protected and vindicated. Mr O'Higgins has referred the Court to a judgment of the European Court of Human Rights in *Poitrimol v. France* [1993] 18 EHRR. 130. In that case the applicant had been notified of the date and place of an appeal hearing, and had applied in accordance with a procedure in that regard to be dealt with in his absence but represented by his lawyer. That application was refused by the Court of Appeal which stated that while a defendant could apply to be dealt with in his absence but represented by a lawyer under the Code of Criminal Procedure, "*this is a right which does not apply where, as in Mr Poitrimol's case, a warrant has been issued for the defendant's arrest and the defendant has absconded and is accordingly not entitled to instruct counsel to represent and defend him…*". Under the Code of Criminal Procedure there was no entitlement to apply to set aside such a judgment given in the accused's absence. The Court considered the question whether a person who had clearly expressed his wish not to attend the appeal but intended that he be represented by a lawyer, remains entitled to "legal assistance of his own choosing" within the meaning of Article 6.3 of the Convention. The Government argued that the applicant had been the author of his own misfortune by deciding not to be present, and argued also for a narrow interpretation of Article 6.3 in that it referred to a right to "legal assistance" and not to "legal representation", and further that if a person who had deliberately absented himself from a hearing could later have the decision set aside, "*criminal proceedings would never end and the victims would suffer by that*". The Court rejected that narrow interpretation, and stated that while the right was not an absolute right, "*the right of everyone charged with a criminal offence to be effectively defended by a lawyer … is one of the fundamental features of a fair trial*" and that "*a person charged with a criminal offence does not lose the benefit of this right merely on account of not being present at the trial…. In the instant case it must be determined whether [the Court of Appeal] was entitled under Article 411 of the Code of Criminal Procedure to deprive [the applicant] of this right, given that he had been summoned personally and had provided no excuse acknowledged as valid for not attending the hearing.*"

22. The Court recognised that the legislature must be entitled to discourage unjustified absences from trial but having already concluded that in the case of Poitrimol the suppression of the right to attend was disproportionate in the circumstances of that case, it concluded that the Code of Criminal Procedure "*deprived [the applicant], who was not entitled to apply to set aside its judgment and rehear the case, of his only chance of having arguments of law and fact presented at second instance in respect of the charge against him*".

23. The Court found that there had been a breach of Article 6 of the Convention.

24. Mr O'Higgins points to the fact that at least in the case of Poitrimol he had the opportunity to be present if he had wished to be present, but chose not to, but nevertheless wished to be allowed to be represented. He had under the applicable Code of Criminal Procedure no right to appeal against the decision rendered in absentia, and submits that in the present case, the respondent has no effective remedy or opportunity to apply for a rehearing of his sentence hearing, given the uncontroverted evidence of Lord Carlisle to the effect that while an application for an extension of time to appeal may be made, *there is no realistic chance of success*, and this

is against a background where in contradistinction to Poitrimol, the respondent was never even notified of the date and place for his sentencing hearing. In such circumstances he submits that the surrender of the respondent to the United kingdom must be seen as prohibited by the provisions of s. 37 of the Act since to do so " *would be incompatible with the State's obligations under the Convention*".

25. In relation to the requirement that there be an effective remedy available to the respondent in this case, the Court has been referred also to the judgment of the European Court of Human Rights in *Sejdovic v. Italy* [2006] 42 EHRR 360. In the circumstances of that case the Court concluded that since the right which the applicant had under Italian law to apply for leave to appeal out of time, in circumstances where he had been convicted in absentia, had "*little prospect of success*", and was bound to fail, he was justified in not seeking to avail of that remedy. The Court stated that while Contracting States had a wide discretion as regards the choice of means calculated to ensure that their legal systems are in compliance with the provisions of Article 6 of the Convention, the Court's task was to determine whether the result called for by the Convention has been achieved, and that in particular the procedural means offered by domestic law and practice must be shown to be effective where a person charged with a criminal offence has neither waived his right to appear and to defend himself nor has sought to escape. It referred to the Court's caselaw that any waiver of the right must be established in an unequivocal manner, and that where a person charged with a criminal offence had not been notified in person, it could not be inferred merely from his status as a fugitive that he had waived his right to appear at the trial and defend himself. The Court was satisfied that it had not been established that the applicant had sufficient knowledge of his prosecution and of the charges against him, and thus could not be deemed, as he had been, an evader or someone who had waived his right to attend. The Court went on to determine whether the available court procedure rules were adequate to afford him "*with sufficient certainty the opportunity of appearing at a new trial*". It concluded, as I have set forth, that any application for leave to appeal out of time was bound to fail, and that a violation of Article 6 had occurred.

26. Mr O'Higgins submits that while there is a tension between the State's obligations to protect the human rights of a requested person as envisaged by s. 37 of the Act (where surrender "*shall be prohibited*" if his surrender would be incompatible with the State's obligations under the Convention, or the Protocols to the Convention, or if it would infringe the respondent's constitutional rights), and the State's international obligations to surrender a requested person to another state, it has been made clear by the European Court of Human Rights in *Soering v. The United Kingdom* [1989] EHRR. 14 that where a real risk of torture or inhuman or degrading treatment in the requesting state is established, the extradition of the person to that state would constitute a breach of Article 3 of the Convention. In *Soering* it was found that the extradition of the applicant to the State of Virginia, USA would constitute a violation of Article 3 of the Convention in circumstances where it was likely that the applicant, if convicted of murder would be exposed to "death row phenomenon", a regime found to constitute for him treatment beyond the threshold set by Article 3 of the Convention.

27. That judgment obviously preceded the adoption of the Framework Decision in June 2002, but Mr O'Higgins refers to the fact that Recital 12 thereto states that the Framework Decision "*respects fundamental rights and observes the principles recognised by Article 6 of the Treaty on European Union and reflected in the Charter of Fundamental Rights of the European Union …*", and that it was left to the Member States themselves to decide in what manner in its domestic legislation these fundamental rights were to be respected in the context of an application for surrender. He has referred to how different member states have done so in different ways, but that the Oireachtas has chosen, as it was entitled to do, to enact s. 37 of the Act for this purpose.

28. Specifically in relation to the failure to notify the respondent of the date and place of his sentencing hearing in June 2005, Mr O'Higgins has referred to the judgment of the European Court of Human Rights in *Colozza v. Italy* [1985] 7 EHRR 516. The Court was of the view that the attempts made to locate the applicant had been inadequate since they had searched at addresses which they ought to have known he was no longer living at those addresses since in other proceedings against the applicant his current whereabouts had become known, and could have located him for the purpose of notifying him of the date and place of his trial. The trial court had proceeded with his trial in absentia, the Court deeming him to have been notified by the filing of the notification on the court registry. In such circumstances the Court was of the view that the applicant had not waived his right to be present at his trial. It must be made clear that the Court stated that it was not in that case concerned with an accused person who had been notified in person and who, having been made aware of the charges against him, had expressly waived his right to appear and defend himself. It follows that this case must be relied upon principally in the present case in relation to the failure to notify the respondent of the sentencing hearing which had been put back from the conviction itself, in so far as this Court might conclude that the right to be notified extends beyond the actual trial itself and to any later sentencing hearing.

29. In *Colozza*, the Court was satisfied that the applicant had an entitlement to lodge a late appeal under Italian law, and had in fact done so, but that such a right was insufficient, and that neither the Court of Appeal nor the Court of Cassation had redressed the issue of notification since the former had confined itself to holding the appeal inadmissible, and the latter concluded that the applicant had wilfully evaded execution of the warrant for his arrest, that intention of evading justice being presumed by the Court under its case law where adequate searches by the police have been unsuccessful. It appears that the appeal court can deal with the merits of the case only if it first of all concludes that the accused person was not in fact evading justice.

30. At any rate, the European Court of Justice concluded that "*Mr Colozza's case was at the end of the day never heard, in his presence, by a 'tribunal' which was competent to determine all aspects of the matter.*"

31. In so far as the Government had argued that the applicant was the author of his own misfortune by failing to notify his change of address, or once declared to be an evader taking the initiative by supplying an address for service, the Court concluded that Colozza could not have done so since it was not established that he was aware in any way of the proceedings against him. I emphasis again that this case seems to be relevant only in relation to the failure of the Crown Court to notify the respondent of the date for his sentencing hearing, and in the context of the evidence referred to where there is submitted to be no avenue open to the respondent procedurally to seek to have the sentencing reheard.

32. Mr O'Higgins has referred to a number of other judgments of the European Court of Human Rights which touch upon the question of the opportunity given to an accused person to attend his trial, and again in the context of the present case their relevance is to the absence of the respondent from his sentencing hearing. In *F.C.B v. Italy* [1991] 14 EHRR. 90 where the applicant was in solitary confinement in prison on another matter in the Netherlands, and for that reason could not attend trial in Italy. His lawyers in Italy informed the court of this fact, but the court decided that there was no proof of the applicant's inability to attend, and proceeded with the trial in his absence on the basis that he was "unlawfully absent" since he had been notified of the date and place of his trial by his mother being given the notification at an address in Italy. The Court concluded that the decision to proceed in the absence of the applicant was "*disproportionate, having regard to the prominent place which the right to a fair trial holds in a democratic society within the meaning of the Convention*". The Court stated that even if the notification of the date of trial was in accordance with the provisions of Article 6, "*it does not appear that Mr FCB, whether expressly or at least in an unequivocal manner, intended to waive his right to appear at the trial and defend himself*". The Court stated also that it had to be borne in mind that the Dutch authorities had requested the cooperation of the Italian authorities thereby informing them that the applicant was in prison in the

Netherlands, that the Italian authorities had not drawn the necessary inferences as regards the proceedings pending against the applicant in Milan, and that "*that behaviour was scarcely compatible with the diligence which Contracting States must exercise in order to ensure that the rights guaranteed by Article 6 are enjoyed in an effective manner*".

33. The Court has been referred also to a case *of Zana v. Turkey* [1997] 27 EHRR. 677.

34. In that case the applicant had on several occasions appeared before the first instance court in question and had refused to speak Turkish at those hearing, wishing instead to address the court in his mother tongue, namely Kurdish, and refused therefore to put forward any defence on the merits. That court deemed him to have waived his right in that regard. At a further hearing before the Diyarbakyr National Security Court was not present at that court, since he had not been requested to attend, but he was represented by his lawyers. He was sentenced to a term of imprisonment, and an appeal against that sentence was unsuccessful. At the European Court of Human Rights it was argued that his absence from the hearing had prevented him from defending himself effectively, and it was contended that if he had been present he would have been able to explain his motivation in relation to the matters for which he was convicted. While the Government had argued that by simply raising jurisdiction arguments at these court hearings and refusing to speak in Turkish he had deliberately waived his right to defend himself on the merits, the Court nevertheless concluded that there was a breach of Article 6 of the Convention, stating that "*the object and purpose of Article 6 of the Convention taken as a whole show that a person charged with a criminal offence is entitled to take part in the hearing…… and it is difficult to see how these rights could be exercised without the person being present*". In so stating the Court referred, inter alia, to its decision in Colozza.

35. The Court went on to state:

> *"Contrary to the Government's contention, the fact that the applicant raised procedural objections or wished to address the court in Kurdish, as he did at the hearing in the Aydyn Assize Court, in no way signifies that he implicitly waived his right to defend himself and to appear before the Diyarbakyr National Security Court. Waiver of the exercise of a right guaranteed by the Convention must be established in an unequivocal manner", again referencing the Colozza decision.*

36. It went on to state that:

> *"In view of what was at stake for Mr Zana, who had been sentenced to twelve months' imprisonment, the National Security Court could not, if the trial was to be fair, give judgment without a direct assessment of the applicant's evidence given in person…..If the applicant had been present at the hearing, he would have had an opportunity, in particular, to say what his intentions had been when he made his statement and in what circumstances the interview had taken place, to summon journalists as witnesses or to seek production of the recording".*

37. The interference of rights under Article 6 was found "regard being had to the prominent place held in a democratic society by the right to a fair trial within the meaning of the Convention".

38. Mr O'Higgins has referred also to the judgment of Fennelly J. in *Minister for Justice, Equality and Law Reform v. Stapleton*, unreported, Supreme Court, 26th July 2007. He refers to the fact that in that case it was found that the issue of delay was a matter which would more conveniently be debated in the United Kingdom since that is where all necessary witnesses resided and where all relevant documentation was available, and that there was a mechanism under United Kingdom law whereby the respondent in that case could argue the issue of delay ahead of his trial, and that in so far as there may be differences between the law in that regard in that country and that which exists in this country, any such differences would not be such as to constitute an infringement of the right to a fair trial, or any fundamental defect in the system of justice in the United Kingdom. However, he submits that it is evident from the judgment that there must be "*a clear and fundamental defect in the system of justice of the requesting state*" before a requested state might refuse under s. 37 of the Act to order surrender. It follows in his submission that the Court *can therefore consider whether such a breach of rights has occurred in the issuing state, and also whether there is available to the respondent a procedure which will enable him upon surrender to seek a remedy*. He goes on to submit that where there is no such remedy available, and he says that the present case is such a case given the evidence of Lord Carlisle in his affidavit, this Court cannot simply transfer the responsibility for resolving the alleged breach of rights to the issuing state, and must under the section refuse to make the order sought.

39. The Court was referred also to the judgment of the Chief Justice in *Minister for Justice, Equality and Law Reform v. Brennan* [2007] 1 ILRM. 241 where at p. 252 he stated:

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

40. Nuala Butler SC on behalf of the applicant relies heavily upon the Supreme Court's judgments in Brennan and Stapleton already referred to, and submits that it is no function of this Court on an application for surrender under s. 16 of the Act to second-guess decisions made by a Court in the issuing state in relation to whether in particular circumstances put forward for an adjournment of a trial, that application is or is not granted. She submits that this is a matter which is within the absolute discretion of that court, and that the principle of mutual recognition of judicial decisions and confidence which exists in the judicial system of the issuing state by virtue of its designation under s. 3 of the Act by the Minister for Foreign Affairs requires that this Court not interfere in the manner in which such a court reaches its decision. It is manifest in her submission that in the present case there are no egregious circumstances such as are envisaged by the Chief Justice to justify a refusal of surrender on foot of a European arrest warrant, that the Crown Court heard submissions from Counsel for the respondent in relation to the medical evidence and the alleged threats, and reached its decision on the basis of the case-law applicable. She accepts that it would have been open, following conviction of the respondent, to have had his sentencing hearing put back to a date and time when the respondent was present, but submits also that again this is a matter which was within the discretion of that court, and that there is no evidence which suggests that the respondent's fundamental rights were breached in any way. She submits that if the respondent feels aggrieved by the manner in which his trial and sentence proceeded in his absence, firstly he brought the situation upon himself and is therefore the author of his own misfortune, and secondly, he can ventilate those grievances appropriately in the UK courts upon surrender by way of application for a late appeal or otherwise, albeit that the circumstances of this case might, as is common case, make it unlikely that the Court of

appeal would extend the time for appealing either the conviction or the sentence. Ms. Butler submits that if the Court of Appeal found the manner in which the trial had proceeded in absentia to have breached the respondent's fundamental rights, it can be presumed that it would deal with the matter appropriately so as to afford the respondent redress.

41. It is submitted that the chances of success or otherwise in that regard are not matters which this Court is required to consider on an application under s. 16 of the Act.

42. Specifically in relation to the issue of notification to the respondent of the date of his sentencing hearing as opposed to his trial, Ms. Butler submits that the respondent has not in fact put forward any evidence that he was not notified of that hearing or that he was unaware of the date and place thereof. Mr O'Higgins has, in response to that suggestion, stated that the Amended Points of Objection filed by the respondent raise the point that he was not notified of the sentencing date, and that if the applicant having received these Amended Points of Objection had indicated its position that the respondent was aware of the date by way of notification or otherwise, the respondent would have had an opportunity of addressing that factual matter on affidavit. But Ms. Butler submits that merely raising the issue by way of objection cannot be taken as evidence of that matter, that there is no obligation under the Rules for the delivery of a "Reply to Points of Objection", and the Court should simply ignore the submission made in that regard on the basis that the respondent has not discharged the onus upon him to satisfy this Court by cogent evidence that he was not aware of the date or notified in relation to it. She points to the fact that the respondent himself has sworn no affidavit whatsoever on this application and that there are affidavits simply by lawyers and the Parish priest to which I have referred. Without prejudice to that submission, Ms. Butler submits that there is no legal basis for saying that the respondent must be notified of the date both of his trial and his sentence hearing, especially given that the respondent deliberately absented himself from his trial and chose to discharge his legal time.

43. In relation to the question raised by Mr O'Higgins as to the adequacy of any remedy available to the respondent if surrendered, Ms. Butler submits that there is no evidence that there is no remedy available to the respondent other than to apply for an extension of time to appeal against his conviction and/or his sentence. Lord Carlisle stated at the conclusion of his affidavit that he had not been requested to advise in relation to other grounds of appeal besides absence from trial since he had not been asked to review the transcript. In that regard, he stated:

> *"I say and believe therefore that in all the circumstances an application for leave to appeal out of time by the respondent in this case could not be said to be likely to succeed if founded on trial in the absence of the respondent. I cannot comment on his prospects of appeal on any other ground, as I have not been asked to review a transcript of the trial."*

44. But Ms. Butler submits that there is no evidence either that the respondent could not bring some form of application by way of judicial review or by way of application under the Human Rights Act, 1998. In any event she submits that the onus in this regard has not been discharged by the respondent and that this Court is entitled to presume that where a person upon surrender wishes to claim that his fundamental rights have been or will be infringed there will be a mechanism available to him in order to seek an appropriate remedy.

Conclusion

45. In this part of my judgment I am addressing only whether the respondent's surrender is prohibited by s. 37 of the Act, which for convenience I will again set out:

> *"37.—(1) A person shall not be surrendered under this Act if—*
>
> *(a) his or her surrender would be incompatible with the State's obligations under—*
>
> *(ii) the Convention, or*
>
> *(ii) the Protocols to the Convention,*
>
> *(b) his or her surrender would constitute a contravention of any provision of the Constitution (other than for the reason that the offence specified in the European arrest warrant is an offence to which section 38(1)(b) applies)*
>
> *(e) …….. "*

Trial in absentia:

46. The respondent was fully represented by both solicitor and Counsel when he sought an adjournment of his trial in January 2005 on the basis of some medical evidence submitted to the court of trial, as well as on the basis that his life was at risk as a result of the threats referred to. Those matters were fully ventilated before that court on that occasion. There was full legal argument in relation to the applicable case-law. The principle of mutual recognition, an important plank underpinning the Framework Decision on the European arrest warrant, means that this Court on hearing an application from an issuing judicial authority for surrender of a person tried and convicted in the issuing state, will be recognised on a reciprocal basis as being a decision lawfully reached in that state. It follows that this Court will not look behind the decision to refuse to adjourn the trial in order to be satisfied that the decision was properly reached in the light of the evidence available, or that the decision was one which this Court would have made by this Court had it been hearing the same application. Apart from that principle of mutual recognition of judicial decisions, the comity of courts must also be respected. The egregious circumstances referred to by the Chief Justice in Brennan will be such truly exceptional circumstances that it is hard at this point in time to even imagine what they might be. But it is safe to say that nothing in this case comes even near to constituting circumstances whereby this Court in order to protect the respondent's rights would be required to refuse an order of surrender to a member state of the European Union designated for the purpose of the Framework Decision by the Minister for Foreign Affairs pursuant to s. 3 of the Act. As in Stapleton, this Court cannot ignore the actions of the respondent in discharging his legal team before his trial commenced. He was aware of the fact that his trial was to commence shortly thereafter. Even if his medical condition was truly such that he felt so unwell that he could not travel to Liverpool for his trial, and even if his fear for his safety as a result of the alleged threats was genuine, it is hard to understand the purpose of discharging his lawyers. However this Court need not concern itself unduly with the respondent's motives. But at the very least it would have enabled the respondent to have been aware of the ultimate verdict and what was to occur in relation to any sentence hearing thereafter in the event that he was convicted.

47. There clearly was a discretion vested in the Crown Court to adjourn the trial or not as it might decide. Any number of different factors could come into play on such an application, and this Court cannot possibly regard itself as being in a better position that that

court to decide whether or not the application should have been granted. But if the respondent is of the view that his fundamental rights have been infringed by the manner in which the trial proceeded in his absence in January 2005, that is a matter which he can address before the courts in the United Kingdom. Again, the effectiveness of any remedy available to the respondent in that regard is not something which this Court is in a position to, or even should, consider on this application. Apart from the principle of mutual recognition of judicial decisions, another important plank which supports the Framework Decision is that of mutual trust and confidence in the judicial system of the issuing state. In other words, it is to be presumed that there are within the judicial system of an issuing state procedures available whereby the fundamental rights of citizens and others within that issuing state to seek to have their rights protected and vindicated, and further that the protections available meet at the least the minimum standards guaranteed under the Convention.

48. In the present case there is no evidence other than that the respondent by virtue of his own actions and inactions has produced a situation in relation to his trial, conviction and sentence whereby after such a long time, there will be an inevitable struggle to have the case re-opened. It is common case that there will be great difficulty in achieving an extension of time to appeal given that his trial took place three years ago. It would be just as difficult to do so in this jurisdiction after such a long time, regardless of the reasons for that delay. But that is not to say that the procedures available to such a person in an issuing state are such as to breach a person's fundamental rights. In fact to find otherwise would be to encourage absconding prior to the commencement of a trial, so that the longer time that passed following conviction, the greater were the chances of not being surrendered in reliance of that passage of time, on the basis that a late appeal would not be granted, or that any retrial after such a period of time could not be fair. That could not have been the intention of member States when they adopted this Framework Decision, or of the Oireachtas when it enacted the provisions of s. 37 of the Act.

49. I reject the respondent's submissions under s. 37 of the Act in so far as they relate to the fact that his adjournment application was refused and his trial proceeded in his absence, and the lack of any effective remedy in that regard.

Conclusion re: No notification of sentencing hearing:

50. Firstly, it is correct, as Ms. Butler has stated, that the respondent has failed to provide any *evidence* that he was not made aware by the prosecution, or was not otherwise aware of the date on which his sentencing hearing would take place. The respondent must substantiate his objections to surrender by cogent evidence. In this case he has not even provided a bare assertion of facts to support that point of objection. It is not sufficient simply to raise the point of objection by way of pleading, and then to say at the hearing that if the applicant was contending otherwise he ought to have made that known and it would have been addressed by providing evidence. That is in effect to reverse the onus of proof. Points of objection must be raised, and supported by evidence in so far as they do not consist solely of points of law. There is no provision in the applicable rules of procedure equating to a joinder of issue by the applicant in relation to factual matters in dispute, and for the admission of certain other matters not being put in issue, as one is accustomed to have in civil cases.

51. Strictly speaking, that is sufficient to dispose of the point raised by the respondent in relation to the failure to notify him of the date of his sentencing hearing. However, since the matter has been argued on the basis that he was not notified, and in deference to the very helpful written submissions provided in this case and which set out very usefully some significant case law from the European Court of Human Rights, I propose addressing the issue substantively, yet separately from the context of s. 45 of the Act and Article 5.1 of the Framework Decision which I will come to.

52. On strictly constitutional grounds and Convention grounds, the right to a fair hearing includes a right to be notified of the date, time and place of that hearing, since without an opportunity to be present at trial, the right to defend against a criminal charge before an independent and impartial tribunal is set at nought. For the purpose of the present case I am prepared to conclude also (especially having had regard to the case-law of the European Court of Human Rights which I am required to take account of by virtue of s. 4 of the European Convention on Human Rights Act, 2003) that the right to be notified extends, particularly where sentencing does not follow immediately upon the conclusion of the trial and conviction, to being notified of the date, time and place of that sentencing hearing.

53. A sentencing hearing is a hearing of a matter which has the gravest possible consequences for a person convicted of a serious criminal offence, namely the deprivation of that person's liberty for possibly a considerable period of time. It would follow in my view, and in the light of the case-law which I have been referred to, particularly by way of the written submissions, that a court should be scrupulous to ensure, where it is proposed to sentence a person to imprisonment in his absence, that reasonable efforts are made to locate the person's up to date address, and to notify him in good time at that address of the date set for his sentencing, so that he can have a fair and reasonable opportunity to engage legal representation for that hearing. Failure to do so could, at least arguably, infringe a state's obligations under the Convention. Whether a person's fair hearing rights are protected in that regard to a greater or lesser degree under the Constitution than under the Convention is not something which needs to be determined. There clearly are circumstances in this jurisdiction where a person will be tried in absentia. A court will be cautious before doing so. It may in this jurisdiction be even more unusual that a person will be sentenced in absentia, preference appearing to be shown for the issue of a bench warrant for that person to be brought back before the court for sentencing. Nevertheless it can and does happen. But it will be a matter in any individual case for a court to consider, if it arises for consideration, whether and to what extent a constitutionally protected right or a right guaranteed by the Convention has been breached in the process.

54. Under s. 37 of the Act, this Court is required to refuse to order surrender if it would be "*incompatible with the State's obligations*" under the Convention. That is not to be confused with a situation contended by the respondent to be a past breach of his Convention rights in the issuing state. It clearly cannot mean that this Court must examine what occurred in that issuing state regarding trial, conviction and sentence, and decide that the court there is guilty of breaching one or more of the respondent's rights under the Convention. It must be borne in mind that the section provides that it is *the surrender* which must be "*incompatible with the State's obligations*", and not anything which has already occurred in the issuing state. In other words, this Court must act in accordance with this State's obligations under the Convention when carrying out its functions under the Framework Decision and the Act, and cannot order surrender if to do so would breach this State's obligations thereunder. It is 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 which has been designated pursuant to s. 3 of the Act, and which, on a reciprocal basis, enjoys recognition of its judicial decisions, and the trust and confidence of this State in its legal system and procedures thereunder. Equally, it would be difficult to envisage how such *surrender* "*would constitute a contravention of any provision of the Constitution*". No doubt this section was inserted by the Oireachtas to reflect Recital (12) of the Preamble to the Framework Decision which states;

> "*(12) This Framework Decision respects fundamental rights and observes the principles recognised by Article 6 of the Treaty on European Union and reflected in the Charter of Fundamental Rights of the European Union(1), in particular*

Chapter VI thereof. Nothing in this Framework Decision may be interpreted as prohibiting refusal to surrender a person for whom a European arrest warrant has been issued when there are reasons to believe, on the basis of objective elements, that the said arrest warrant has been issued for the purpose of prosecuting or punishing a person on the grounds of his or her sex, race, religion, ethnic origin, nationality, language, political opinions or sexual orientation, or that that person's position may be prejudiced for any of these reasons.

This Framework Decision does not prevent a Member State from applying its constitutional rules relating to due process, freedom of association, freedom of the press and freedom of expression in other media."

55. In the present case, it is contended that the failure of the Crown Court to notify the respondent of his sentence hearing has denied to him a fair hearing in that regard, that his Convention and constitutional rights have been infringed, and further that he has no opportunity to seek redress in that regard other than to resist his surrender on this application, since the evidence of Lord Carlisle is to the effect that his chances of obtaining an extension of time to appeal at this stage are slight to say the least. The respondent may well be entitled to hold the view, based on the case-law of the European Court of Human Rights which has been referred to, that it could be concluded therefrom that his Article 6 rights have been breached by the United Kingdom. It is entirely another thing to say that this Court must reach a conclusion in that regard rather than a court in the United Kingdom or, indeed, the European Court of Human Rights.

56. There is no evidence that the respondent while in the United Kingdom following his surrender from this State cannot bring some appropriate application above and beyond an application for an extension of time to appeal against his conviction and sentence, whereby any alleged breach of human rights can be determined. The respondent has not gone as far as to seek to adduce such evidence before this Court. Lord Carlisle's advice was sought on a very discreet issue, namely what are the chances of success on an application for an extension of time to appeal. He has not addressed, because he was not asked to, what other grounds of appeal may emerge from the transcript of the trial, and he has obviously not been asked to address his mind to any redress above and beyond an extension of time to appeal, such as bringing a claim in the UK courts under their Human Rights Act, 1998. It is worth noting the following provisions:

"6. Acts of public authorities

(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.

(2) Subsection (1) does not apply to an act if—

(a) as the result of one or more provisions of primary legislation, the authority could not have acted differently; or

(b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions.

(3) In this section "public authority" includes—

(a) a court or tribunal, and

(b) any person certain of whose functions are functions of a public nature,

but does not include either House of Parliament or a person exercising functions in connection with proceedings in Parliament.

7. Proceedings

(1) A person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by section 6(1) may—

(a) bring proceedings against the authority under this Act in the appropriate court or tribunal, or

(b) rely on the Convention right or rights concerned in any legal proceedings,

but only if he is (or would be) a victim of the unlawful act."

57. Clearly the respondent feels that he is such a person in relation to the failure to notify him of his sentence hearing and being sentenced in his absence. He has referred to specific case-law which he says supports his contention in this regard. The Convention (Article 13) requires that a person has an effective remedy. That remedy must not be seen as confined to an application for a late appeal, since there are clearly remedies under the Human Rights Act, 1998 which can be availed of, and which must be exhausted before any recourse can be had to the European Court of Human Rights. That requirement to exhaust all domestic remedies is further reason to support the finding in this case that the forum in which the respondent must argue his human rights claim is that in the United Kingdom. A pre-emptive strike in that regard by way of resisting his surrender is not permitted. There is clearly a remedy available to the respondent in the United Kingdom, which if successful, will redress the alleged breach in an appropriate manner. If unsuccessful there can be further recourse. But it is not for this Court to guess how successful or otherwise any such claim may be. That is a matter entirely for the courts in the United Kingdom to determine should the respondent wish to bring such a claim.

Section 45 undertaking

58. Related to these submissions, but one which must be dealt with quite separately, is one to the effect that since the sentencing hearing must be seen as a separate hearing to the trial itself, there was an obligation on the authorities in the United Kingdom to notify him of the date, time and place of that hearing, and that in the clear absence of that notification of the date of the sentencing hearing, an undertaking is required to be given by the issuing judicial authority by virtue of the provisions of s. 45 of the Act before this Court is permitted to order surrender, and that no such undertaking has been provided.

59. Mr O'Higgins refers to the provisions of Article 5.1 of the Framework Decision which provides:

"5. The execution of the European arrest warrant by the executing judicial authority may, by the law of the executing

Member State, be subject to the following conditions:

> *1. where the European arrest warrant has been issued for the purposes of executing a sentence or a detention order imposed by a decision rendered and if the person concerned has not been summoned in person or otherwise informed of the date and place of the hearing which led to the decision rendered in absentia, surrender may be subject to the condition that the issuing judicial authority gives an assurance deemed adequate to guarantee the person who is the subject of the European arrest warrant that he or she will have an opportunity to apply for a retrial of the case in the issuing Member State and to be present at the judgment;*
>
> *2. ……"*

60. In that context, Mr O'Higgins submits that the reference in this Article to "*the date and place of the hearing which led to the decision rendered in absentia*" must refer to the sentence hearing since it refers back to "*where the European arrest warrant has been issued for the purposes of executing a sentence*", and that the reference to an opportunity for a retrial must equally include a rehearing of that sentence hearing which led to the decision rendered in absentia, namely the sentence which the European arrest warrant seeks to enforce. In so far as s. 45 of the Act has given effect to this Article, he submits that there is no real distinction between s. 45 of the Act and Article 5.1 of the Framework Decision, and that s. 45 must therefore be seen as requiring an undertaking to be given at least in respect of the sentencing hearing, in circumstances where it is common case that the respondent was never separately notified of the date, time and place at which his sentencing hearing would take place.

61. Mr O'Higgins has referred also to the fact that in many civil law countries, a person whose trial or sentence has taken place in absentia will be given the opportunity of a retrial upon surrender to the court, and in that way such a person's rights are protected, whereas such protection has been shown to be absent in the present case where no such rehearing realistically will take place, and no other or adequate remedy is available to the respondent, other than to resist the application for his surrender.

62. Section 45 of the Act provides:

> *45.— A person shall not be surrendered under this Act if—*
>
> > *(a) he or she was not present when he or she was tried for and convicted of the offence specified in the European arrest warrant, and*
> >
> > > *(i) he or she was not notified of the time when, and place at which, he or she would be tried for the offence,*
> > >
> > > *or*
> > >
> > > *(ii) he or she was not permitted to attend the trial in respect of the offence concerned,*
> >
> > *unless the issuing judicial authority gives an undertaking in writing that the person will, upon being surrendered—*
> >
> > > *(i) be retried for that offence or be given the opportunity of a retrial in respect of that offence,*
> > >
> > > *(ii) be notified of the time when, and place at which any retrial in respect of the offence concerned will take place, and*
> > >
> > > *(iii) be permitted to be present when any such retrial takes place."*

63. Reference has been made to the fact that while Article 5.1 of the Framework Decision provides that *where a sentence has been passed in absentia* in the issuing state, surrender *may* be subject to the condition that the issuing judicial authority gives an assurance deemed adequate regarding a retrial of the case, the Oireachtas when giving effect to the Framework Decision has chosen to enact s. 45 of the Act, and that it need not have done so either in the way it has done, or at all.

64. It is submitted that there are two material differences between what is provided in Article 5 and what appears in s. 45 of the Act. Firstly, the High Court under s. 45 is required to consider not simply whether the respondent was "*summoned in person or otherwise informed of the date and place of the hearing which led to the decision rendered in absentia*", but also as appears in s. 45 (b) (ii) of the Act, whether he was "*not permitted to attend the trial in respect of the offence*".

65. While Mr O'Higgins accepts that it is not clear what precisely is meant by the "not permitted to attend", he submits that being notified of the date and place of the trial has little meaning if the respondent is not given an opportunity to attend. In the present case, he submits that the refusal of the adjournment of the trial in the circumstances in which it was made amounts to a denial of a reasonable opportunity to attend, and that this offends against s. 45 (b) (ii) of the Act, in the absence of any undertaking required by the section.

66. Despite these distinctions, he submits that the provisions of s. 45 of the Act and of Article 5 of the Framework Decision each recognise the fundamental right of an accused person to be present both at his trial and at any sentencing hearing which might follow upon it in the event of conviction. It follows, in his submission, that this Court must consider whether the respondent had no reasonable excuse for not attending his trial, and that in the present case it is clear from the medical evidence that he was deemed unfit to travel to Liverpool for his trial, and had received threats to his life if he did so, both being reasonable excuses for not attending.

67. In respect of the sentencing hearing, he submits that the absence of any notification of when and where that was to take place must be seen as a reasonable excuse, and he cannot be deemed to have waived his right in that regard, since he did not do so in an unequivocal manner, and that the Act should be interpreted as requiring an undertaking in respect of a new sentence hearing in these circumstances, and that none has been provided.

68. Ms. Butler submits that there can be no question of any undertaking being required in this case under s. 45 of the Act since it is clear that the respondent was made aware of the date and place of his trial, and chose to absent himself and his legal team from that trial. She submits that Article 5.1 of the Framework Decision itself confers no rights upon the respondent since it has no direct effect, and she refers to the fact also that it merely provided that each member state could, if it so decided, provide that an assurance deemed adequate regarding the opportunity of a re-trial should be given on an application for surrender. She refers to the fact that

the Oireachtas has chosen to do so but only in the manner appearing from the words used in s. 45 of the Act. In that regard it is clear that the Oireachtas has decided that where a person has not been notified of the date and place of trial (not sentence) that an undertaking must be given. She submits that this must be seen as the deliberate decision of the Oireachtas, particularly since Article 5.1 of the Framework Decision refers specifically to a warrant to execute a sentence of imprisonment. She submits that s. 45 of the Act simply does not apply in the case of a person who was not notified of the date of his sentence hearing, and that this is clear from the plain and ordinary meaning of the words of the section.

Conclusion
69. In my view the terms of s.45 of the Act are very specific and unambiguous. It refers to not being present for the *trial* of the offence and not to being present when *sentenced* for the offence. Given the terms of Article 5.1 of the Framework Decision this cannot even be seen as an accidental omission. In any event, there was no requirement that legislative effect be given to Article 5.1 at all. It is an optional provision for any member state to make provision for in its domestic legislation giving effect to the Framework Decision. On the facts of this case no undertaking is required in respect of a re-trial given that the defendant was notified of the date and place of his trial, and thereafter chose to be absent. In view of the clear words used in this section, the right to be present at a sentence hearing, separate from the right to present at trial, as referred to in relation to the respondent's arguments under s. 37 of the Act, does not come into play under this point of objection under s. 45 of the Act.

No fair trial possible in respect of the third offence
70. It is submitted by Mr O'Higgins that because the respondent has already found to be a fugitive when the Crown Court issued its bench warrant on 11th January 2005, he cannot receive a fair trial on the third charge referred to in the warrant, namely of failing to answer his bail. This question of whether there can be a fair trial on that charge is a matter for the courts of the United Kingdom to determine and not for this Court to pronounce upon for the reasons already given in another context, namely the comity of courts. It is made quite clear by the judgments of the Supreme Court in Stapleton and Brennan, for example, that it is no function of this Court when considering the application for surrender under s. 16 of the Act, to examine the legal system, its principles, case-law and procedures to see whether they equate to those in operation in this country. I refer to the presumption contained in s. 4A of the Act whereby it is presumed until the contrary is shown, that the issuing state will following surrender comply with its own obligations under the Framework Decision, one of which by virtue, inter alia, of Article 6 TEU is to respect fundamental rights. This Court is entitled to presume that no trial will be held other than a trial which meets minimum standards of fairness guaranteed under the Convention. The respondent has not rebutted this presumption simply by referring to the fact that a bench warrant has already issued.

Lack of clarity in the warrant regarding the offence of failing to surrender to the custody of the court, and the circumstances in which the offence is alleged to have been committed
71. There is no factual or legal basis for these points of objection. The respondent has stated in points of objection that it is not clear from the terms of the warrant whether this offence is one punishable summarily or as a criminal contempt. The warrant does not need to go into that sort of detail. It is quite clear the nature of the offence being charged and the possible penalty which may be imposed. That possible penalty meets the minimum gravity requirement of twelve months imprisonment.

72. As to a lack of clarity as to the factual basis for the charge, this submission simply does not get off the ground at all. There can be no doubt from the terms of the warrant exactly what it is that the respondent is alleged to have done. He knows that it is alleged against him that he failed to answer his bail by not attending court as required on the 11th January 2005. Nothing further is required.

Correspondence
73. I am satisfied that the offence of failing to surrender to the custody of the Court is one, which if committed in this jurisdiction on the facts of this case would be an offence under s. 13 of the Criminal Justice Act, 1984. The other offences for which he has already been sentenced are so-called 'ticked' offences, being among the offences in respect of which double criminality/correspondence is not required to be verified.

Exposure to further sentence of five years following the Confiscation Order application – s. 22 presumption rebutted re: specialty
74. This point of objection arises according to the respondent as a result of him having been served prior to his trial with a notice indicating that the prosecution would seek a Confiscation order in respect of the benefits of the crimes of which he has by now been convicted. It is contended that in so far as the failure by the respondent to pay any fine imposed on foot of such a confiscation order could result in a further term of imprisonment of up to five years, this constitutes a breach of what is known as the rule of specialty. That rule in the past has meant that where a warrant seeks the extradition/surrender of a person to face either prosecution or a sentence of imprisonment in respect of offences referred to in the warrant, and an order for extradition/surrender is made in respect thereof, the respondent may not be prosecuted for other offences upon his return to the issuing state. In the present case it is submitted that there can be no doubt that this respondent will be exposed to a sentence above and beyond any in respect of which his surrender is sought, since it has already been stated that a confiscation order will be sought. The trial judge apparently adjourned the question of making a confiscation order until such time as the respondent was again before the court.

75. Ms. Butler has referred to the provisions of s. 22 of the Act, as amended, and to the fact that for the purpose of that section an offence is defined as:

> *"… an offence (other than an offence specified in the European arrest warrant in respect of which the person's surrender is ordered under this Act) under the law of the issuing state committed before the person's surrender, but shall not include an offence consisting, in whole, of acts or omissions of which the offence specified in the European arrest warrant consists in whole or in part."*

76. S. 22(5) of the Act provides:

> *"(5) The surrender of a person under this Act shall not be refused under subsection (2) if it is intended to impose in the issuing state a penalty (other than a penalty consisting of the restriction of the person's liberty) including a financial penalty in respect of an offence of which the person claimed has been convicted, notwithstanding that where such person fails or refuses to pay the penalty concerned (or, in the case of a penalty that is not a financial penalty, fails or refuses to submit to any measure or comply with any requirements of which the penalty consists) he or she may, under the law of the issuing state be detained or otherwise deprived of his or her personal liberty."*

77. In addition, s.4A of the Act as amended provides for a presumption that the issuing state will comply with the requirements of the Framework Decision, unless the contrary is shown. Mr O'Higgins submits that this presumption must be seen as rebutted in circumstances where the prosecution in the issuing state has already confirmed that it will be seeking a confiscation order

consequent upon conviction and sentence.

78. First of all, I take the view that the application for a confiscation order in respect of the benefits of these crimes for which the respondent has been convicted and sentenced is not to be equated with a prosecution of an offence other than those referred to in the warrant. It must be seen as a measure imposed up-on the respondent consequent upon his conviction, but does not amount to a prosecution. If made, the order constitutes a financial penalty, which can result, in the event of failure to pay, in the imprisonment of the respondent. It seems to me that it is likely that such a financial penalty is akin to the penalty referred to in s. 22(5) of the Act, and one therefore which does not require this Court to refuse an order of surrender.

79. Section 22 (5) gives effect to Article 27.3 of the Framework Decision which provides:

> *"3. Paragraph 2 does not apply in the following cases:*
>
> *(a) when the person having had an opportunity to leave the territory of the Member State to which he or she has been surrendered has not done so within 45 days of his or her final discharge, or has returned to that territory after leaving it;*
>
> *(b) the offence is not punishable by a custodial sentence or detention order;*
>
> *(c) the criminal proceedings do not give rise to the application of a measure restricting personal liberty;*
>
> (d) *when the person could be liable to a penalty or a measure not involving the deprivation of liberty, in particular a financial penalty or a measure in lieu thereof, even if the penalty or measure may give rise to a restriction of his or her personal liberty;"*(my emphasis)

80. It is paragraph (d) which is relevant.

81. If I am wrong, and it is to be seen as a period of imprisonment in respect of an offence other than one for an offence referred to in the warrant, the provisions of s. 22 (6) would appear to be applicable. That subsection provides:

> *"(6) The surrender of a person under this Act shall not be refused if the High Court—*
>
> *(a) is satisfied that-*
>
> *(i) proceedings will not brought against the person in respect of an offence, of which the person claimed has been convicted,*
>
> *(ii) a penalty will not be imposed on the person in respect of an offence, and*
>
> *(iii) the person will not be detained or otherwise restricted in his or her personal liberty for the purposes of an offence,*
>
> *without the issuing judicial authority first obtaining the consent thereto of the High Court…"*

82. This Court is entitled to presume that the issuing state will comply with its obligations under the Framework Decision. In that regard, it is to be presumed that if the confiscation order application constitutes the prosecution of the respondent for an additional offence, which I believe it does not, then the issuing judicial authority will comply with its obligation under the Framework Decision to obtain the consent of the High Court before doing so.

83. One way or another I am satisfied that this point of objection is not made out, and this Court is not required to refuse to order surrender on account of it.

84. For all these reasons I am satisfied that the Court is required to make the order sought for the surrender of the respondent to the issuing state.