Neutral Citation [2015] IEHC 458

HIGH COURT

[2013 No. 194 EXT]

IN THE MATTER OF THE EUROPEAN ARREST WARRANT ACT 2003 AS AMENDED

BETWEEN

THE MINISTER FOR JUSTICE AND EQUALITY

APPLICANT

AND

A.P.L.

RESPONDENT

JUDGMENT of Ms. Justice Donnelly delivered the 17th day of June, 2015

1. The surrender of the respondent is sought by the Republic of Poland pursuant to a European Arrest Warrant ("EAW") dated 15th December, 2009. A central issue in these proceedings is whether his surrender is prohibited, either by section 45 or section 37 of the European Arrest Warrant Act, 2003 as amended ("the Act of 2003"), on the ground that his suspended sentence was reactivated in his absence by the domestic court.

The background to the EAW

2. On the 7th December, 1998, the respondent was sentenced in the Republic of Poland to 15 years imprisonment in relation to a total of 15 offences. These offences are set out at section (e) of the warrant. That sentence was appealed and by order dated the 21st September, 2000, the sentence was reduced to one of 10 years imprisonment. On the 20th September, 2004, the court ordered that the respondent be released on certain conditions. It is a fair characterisation to say that he was required to remain under the supervision of a probation officer.

3. At the time of release, a year remained of the sentence. The period for which the sentence was suspended was one of three years. The period of suspension was therefore due to last until September, 2007. On the 29th December, 2006, that conditional release was revoked in circumstances that will be discussed in more detail later in this judgment. The basis for the revocation can be described at this point as non-compliance with probation supervision. On the 16th January, 2007, that revocation of release was declared final and irrevocable.

4. On the 21st September, 2009, a national arrest warrant issued. In October of 2009, the regional prosecutor applied for an EAW. The EAW was issued by the Regional Court in Warsaw on the 15th December 2009. The EAW was received in this State on the 19th April, 2013. It was endorsed for execution on the 31st July, 2013, by the High Court.

5. In due course, the respondent's presence in this jurisdiction came to the attention of the relevant authorities when he was stopped in Waterford by a traffic corps Garda on 1st June, 2014. The respondent was arrested on the 2nd June, 2014 and was granted bail by this Court on the 5th June, 2014. Thereafter, he was remanded on bail from time to time until the determination of the s. 16 hearing into whether he should be surrendered to the Republic of Poland.

A Member State that has given effect to the Framework Decision

6. 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, under their national law, given effect to the Framework Decision of the 13th June, 2002 on the European arrest warrant and the surrender procedures between Member States ("the Framework Decision"). By the European Arrest Warrant Act 2003 (Designated Member States) (No. 3) Order 2004 (S.I. 206 of 2004), the Minister for Foreign Affairs has designated Poland (more correctly the Republic of Poland) as a Member State for the purposes of the Act of 2003.

Section 16(1) of the Act of 2003

7. Under the provisions of s. 16(1) of the Act of 2003, 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, or a true copy thereof, 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 sections 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

8. I am satisfied on the basis of the affidavit of Ciaran Casey, member of An Garda Síochána, the affidavit of the respondent, and the details set out in the EAW that the respondent, A.P.L., who appears before me is the person in respect of whom the EAW has issued.

Endorsement

9. I am satisfied that the EAW has been endorsed in accordance with s. 13 for execution.

Sections 21A, 22, 23 and 24 of the Act of 2003

10. Having scrutinised the documentation before me, I am satisfied that I am not required to refuse his surrender under the above provisions of the Act of 2003.

Part 3 of the Act of 2003

11. Subject to further consideration of s. 37, s. 38 and s. 45 of the Act of 2003 and having scrutinised the documentation 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.

The provisions of s. 38

12. The issuing judicial authority has not indicated that these are offences to which Article 2 para. 2 of the Framework Decision applies. Therefore, it is necessary to establish double criminality or correspondence of offences. Under the relevant part of s. 38(1)(a) of the Act of 2003 a person shall not be surrendered to an issuing state in respect of an offence unless (a) the offence corresponds to an offence under the law of the state, and (b) that a term of imprisonment of not less than four months has been imposed on the respondent in respect of the offence in Poland and that the respondent is required under the law of Poland to serve all or part of that term of imprisonment.

13. In this case, it is clear that the minimum gravity terms have been met insofar as a composite sentence of ten years has been imposed covering all the offences and the respondent is required to serve the remaining part of that term of imprisonment.

14. On the 8th January, 2015, pursuant to a practice direction issued by the High Court in relation to EAW matters, the Chief State Solicitor sent a letter to the solicitor for the respondent setting out the offences upon which it proposed to rely for establishing correspondence in the jurisdiction. It is not necessary to set out the details of each of the offences for which he is sought. In relation to 14 out of the 15 offences, it is uncontroverted and incontrovertible that the facts alleged in the warrant correspond with offences in this jurisdiction. Dealing with the offences in the order in which they are set out in the warrant, I find as follows:

Offence	Corresponding Offence
Offence 1	Assault contrary to s. 2 of the Non-Fatal Offences Against the Person Act, 1997 ("Section 2 assault")
Offence 2	Section 2 assault
Offence 3	Section 2 assault
Offence 4	Section 2 assault
Offence 5	Robbery pursuant to s. 14 of the Criminal Justice (Theft and Fraud Offences) Act, 2001
Offence 6	Section 2 assault
Offence 7	Section 2 assault
Offence 8	Section 2 assault
Offence 9	Section 2 assault
Offence 10	Section 2 assault
Offence 11	Section 2 assault
Offence 12	Section 2 assault
Offence 13	Section 2 assault
Offence 14	This is a matter which will be discussed in more detail below
Offence 15	Assault causing harm contrary to s. 3 of the Non-Fatal Offences Against the Person Act, 1997

15. In the EAW, count 14 was described in the following manner: "on 19th August, 1995, in Warsaw at crossroad of Grójecka and Kopinska Streets, he insulted a citizen of Zimbabwe – Leo Bhebhe using abusive language; it means an offence against article 216 – 1 penal code."

16. In his points of objection, the respondent objected to his surrender, *inter alia*, on the ground that this offence failed to comply with s. 5 and s. 11 of the Act of 2003 and Article 8 of the Council Framework decision, *i.e.* this offence did not correspond to an offence in this country. The Central Authority subsequently wrote to the Polish judicial authorities seeking further detail of the abusive language used by the respondent and the circumstances surrounding the incident, as well as the words used by the respondent and the effect on the victim.

17. The Regional Court in Warsaw replied on the 1st October, 2014 setting out full particulars as to the encounter on the public street between Mr. Bhebhe and his fiancée with a group of young people including the respondent. The respondent verbally racially abused Mr. Bhebhe, and while doing so attempted to hit him with a wooden truncheon he took out of his backpack. Mr. Bhebhe was able to duck and avoid being hit with the truncheon and he started to run away. The respondent threw his truncheon at him but missed and then with a number of his group, he followed Mr. Bhebhe and threw stones at him. Mr. Bhebhe, in trying to defend himself, was hit by one of the respondent's cohorts and he was forced to shield himself against a barrage of stones. Later that evening, Mr. Bhebhe was examined by a court-appointed doctor who recorded a variety of soft tissue injuries and abrasions on his scalp, on his eyelid, around his eye, along his nose and on his right palm, and he also had an injury to his right eyeball.

18. The statutory test for the purposes of correspondence is set out at s. 5 of the Act of 2003. Section 5 states "for the purposes of this Act, an offence specified in a European arrest warrant 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 European arrest warrant is issued, constitute an offence under the law of the State."

19. In the case of the *Minister for Justice, Equality and Law Reform v. Szall* [2013] IESC 7, the Supreme Court (Clarke J.) stated at para. 4.17 "in Attorney General v. Dyer *[2004] 1 IR 40, Fennelly J. re-emphasised the principle, which can be traced back to State* (Furlong) v. Kelly *[1970] IR 132, to the effect that the comparison which requires to be conducted in order to determine correspondence is to be based on the acts or omissions which are said to constitute the offence."* After discussing the provisions of s. 5 of the Act of 2003, the Supreme Court also at para. 4.17 held *"there is not, therefore, any material difference, so far as correspondence is concerned, between the law as it stood under the 1965 Act and the law as it now stands under the 2003 Act."*

20. Therefore, correspondence is between the acts alleged against the respondent and an offence under the law of this State. Thus, the description of the offence in Polish law is not the defining criterion for correspondence, rather it is the act alleged, or in this case proven, against the respondent.

21. It is clear from the above description, paraphrased from the "Excerpt from the Statement of Reasons" provided by the Warsaw Regional Court, that these acts correspond to a number of offences in this jurisdiction. The most straightforward offence to which they correspond is assault contrary to s. 2 of the Non-Fatal Offences Against the Person Act, 1997. Insofar as the respondent could clearly be said to be acting in concert with his cohorts on the night, this is also an offence under s. 3 of the Non-Fatal Offences Against the Person Act, 1997. There are public order offences as well to which it corresponds.

22. Therefore, I am satisfied that there is correspondence between all of the offences outlined in the EAW with offences in this jurisdiction.

Section 45 of the Act of 2003 and related points of objection

23. The issue raised under s. 45 of the Act of 2003 is whether the phrase "did not appear in person at the proceedings resulting in the sentence or detention order" means the appearance of the person at the trial establishing guilt or innocence and/or at the sentence hearing following such a trial and/or at the hearing into any subsequent alteration with the terms of that sentence including revocation of conditions of release.

24. The respondent did not contest by evidence that he was present at his trial and at the imposition of his initial sentence of 15 years. He also made no complaint about the fact that when he appealed his initial sentence he was not present as he had been notified of the appeal and his lawyer was in attendance. His sentence was reduced to 10 years imprisonment. On the 20th September, 2004, he was conditionally released by the court. At the time of his release he had one year remaining of his sentence and he was released on probation for a period of 3 years which was to continue until the 20th September, 2007.

25. The respondent avers that he came to Ireland in July, 2006. On 29th December, 2006, his conditional release was revoked. From the information provided by the issuing judicial authority this was apparently on the basis of his failure to contact his probation officer, his change of residence and failure to notify the probation officer and the court of that change. The respondent takes issue with the reason for that revocation. He says he had to leave his address due to a breakdown in the relationship with his father. He says he had nowhere to live and could not get work. He had to look for a job because of the court order and that he looked for a job abroad. He says he told the probation officer his number. The subsequent lack of contact was caused by his search for a job. He arrived in Ireland in July, 2006.

26. It is agreed that the respondent was not present in court when the conditional release was revoked and the evidence is, unsurprisingly, that it was not possible to serve him with notice of the proceedings.

Objection to the fairness of the Polish procedures

27. The respondent made an initial objection to surrender on the basis of the manner in which the release was revoked. This is not an argument based upon s. 45. It arises from the circumstances of the revocation of the suspended portion of his sentence. Counsel for the respondent submitted that the decision of the Court in Warsaw dated the 29th December, 2006, which the respondent exhibited in his affidavit, says that the court considered that "not without significance is also the fact that the sentenced is also subject to a pending criminal proceedings [sic] with charges pursuant to article 62 paragraph 1 of the Act on Counteracting Drug Addiction…. in which a preventive measure in the form of provisional detention that was granted to the convicted was revoked." The respondent says he was never charged with these further criminal proceedings and there is no indication of an intention to charge him. Section (f) of the EAW states that penal proceedings opened against the respondent in relation to Article 62 resulting in the Court of Warsaw quashing the conditional release.

28. The Central Authority sought additional information concerning, *inter alia*, the reference to the penal proceedings in relation to Article 62. The additional information of the issuing judicial authority dated the 14th October, 2013 states that the Regional Court was unaware of the outcome of any proceedings under Article 62. The Regional Court said that the proceedings under Article 62 were only mentioned in the warrant and had no impact on the quashing of his parole. The parole was quashed "upon motion of the probation officer and as a result of his failure to contact the probation officer and the court of his new residence address." The additional information also states that the Regional Court "found that the convict has been evading the supervision by the probation officer and failed to abide by the terms of his parole, because his behaviour makes it impossible to verify the progress of his social rehabilitation after release". The Regional Court went on to say "[a]s the convict has not been fulfilling his obligations, and therefore grossly violated the law, the Court found the motion of the probation officer requesting that the parole be quashed, legitimate."

29. The respondent argues that this information is in conflict with the judicial decision of the court which refers to the drug proceedings under Article 62 as being "not without significance". The respondent also submitted that there was no residency condition imposed and this should not have been relied upon by the Polish court. Counsel submitted that the mutual recognition of criminal decisions requires this Court to give effect to that decision, *i.e.* the decision not to impose a residency condition. It was submitted that the basis for revoking the release of the respondent was fundamentally unfair.

30. The respondent submitted that the principle of mutual recognition requires this court to have regard to the domestic judicial decision of the 29th December, 2006 especially in this case as it was referred to in the EAW and the supporting documentation. This is not a correct view of the operation of the principle of mutual recognition. It is not for an executing judicial authority to pick and choose which criminal decision of an issuing state it should enforce. The focus of the executing judicial authority is to give effect to the EAW unless there are legal grounds for refusing surrender. The nature of those grounds is set out in the Act of 2003. Those grounds include the protection of constitutional rights and rights under the European Convention on Human Rights ("ECHR") may be considered where appropriate.

31. I take the respondent's submission as one that is more properly to be considered as an objection to surrender on the grounds of

unfair procedures and therefore a breach of his right to a fair trial. I do so notwithstanding that Article 6 of the ECHR is pleaded perhaps more restrictively, concentrating as it does on his absence at the appeal hearing.

32. For extradition to be permitted, there is no necessity for an identical set of procedures in another jurisdiction. It is not sufficient to establish a mere difference between legal systems. In *Minister for Justice and Equality v. Brennan* [2007] IESC 21, Murray C.J. stated at the penultimate paragraph *"[t]here may well be egregious circumstances, such as a clearly established and fundamental defect in the system of justice of a requesting State, where a refusal of an application for surrender may be necessary to protect such rights*". This is the "*flagrant denial*" of rights that must be established if a breach of Article 6 is to prevent extradition (see *Othman (Abu Qatada) v. United Kingdom* 8139/09 [2012] ECHR 56 (17 January 2012) [2012] ECHR 56, (2012) 55 EHRR 1, 32 BHRC 62). In accordance with well-established case law, there must be cogent evidence to establish that there are substantial grounds for believing that there is a real risk of such a flagrant denial of either constitutional or ECHR fair trial rights.

33. From the foregoing it may be seen that extradition law recognises that different states may apply different criteria in assessing when a sentence should be revoked. It is only where such differences in sentence procedures would amount to an egregious breach of the rights of the particular requested person that extradition must be refused.

34. The height of the respondent's case is that the court in the issuing state had said that it was"[n]ot without significance … that [the respondent] is also subject to a pending criminal proceedings." However, the decision of the court relied upon by the respondent clarifies that the request of the probation officer to revoke the release was justified because of his failure to comply with the obligations imposed upon him which included, primarily, the requirement to be under the supervision of a probation officer. The respondent does not dispute that he did not contact his probation office but says this was for reasons beyond his control.

35. In circumstances where there is no doubt but that the issuing judicial authority, in revoking his suspended sentence, relied upon the breach by the respondent of a major condition of release by not being amenable to probation supervision, the respondent has failed to establish that such revocation constitutes an egregious breach of his constitutional or ECHR fair trial rights. In the context of this case it is therefore unnecessary to adjudicate on the specific issue of whether it might amount to an egregious breach of a fair trial for a court to take into account such matters as a possible charge or arrest. Moreover the fact that there may be a dispute as to how or why the respondent was not amenable to that supervision demonstrates how, in the usual course, these are matters which are more properly to be heard and determined by the courts of the issuing state.

The lack of notice of the revocation proceedings

36. The central issue relied upon by the respondent to resist surrender is a breach of s. 45 of the Act of 2003 and/or in the alternative, a breach of his Article 6 rights because of the failure to notify him of the revocation hearing. It is accepted by both parties that the new s. 45 covers the point at issue in these proceedings. This is in accordance with the decision in *Minister for Justice and Equality v. Surma* [2013] IEHC 618 which indicated that the changes s. 45 made were procedural and had retrospective effect. In light of the issues raised under s. 45, the Court sought written submissions from the parties.

37. Within the original part (d) of the warrant, the Polish judicial authority under 'Decision rendered *in absentia'*, marked "does not concern". This is a clear indication by the Polish judicial authority that the decision had not been rendered in absentia. A new part (d) was never filled out by the issuing judicial authority.

38. In addition to the original indication in the warrant, further information provided by the issuing judicial authority established that the respondent was present at the trial resulting in the decision of the 7th December, 1998. He was not present at the pronouncement of the appeal judgment which reduced his sentence from 15 years to 10 years. He had been notified about the date and time of the appeal and his lawyer attended for him.

39. Counsel for the Minister submitted that the first sentence of the new s. 45 must be interpreted in the light of the new Article 4a of the Council Framework Decision 2009/299/JHA of 26 February 2009 ("the 2009 Framework Decision"). Counsel submitted that the word "proceedings" must be interpreted by reference to the word "trial" as appears in the 2009 Framework Decision and 11 times in s. 45 immediately succeeding the sentence containing the word "proceedings".

40. Section 45 of the Act of 2003 as amended provides as follows:

> "A person shall not be surrendered under this Act if he or she did not appear in person at the proceedings resulting in the sentence or detention order in respect of which the European arrest warrant was issued, unless the European arrest warrant indicates the matters required by points 2, 3 and 4 of point (d) of the form of warrant in the Annex to the [Framework Decision on the European arrest warrant and the surrender procedures between Member State 2002/584/JHA)] as amended by [the 2009 Framework Decision], as set out in the table to this section.
>
> TABLE
>
> (d) Indicate if the person appeared in person at the trial resulting in the decision:
>
> 1. ❒Yes, the person appeared in person at the trial resulting in the decision.
>
> 2. ❒No, the person did not appear in person at the trial resulting in the decision.
>
> 3. If you have ticked the box under point 2, please confirm the existence of one of the following:
>
> ❒3.1a. the person was summoned in person on . . . (day/month/year) and thereby informed of the scheduled date and place of the trial which resulted in the decision and was informed that a decision may be handed down if he or she does not appear for the trial;
>
> OR
>
> ❒3.1b. the person was not summoned in person but by other means actually received official information of the scheduled date and place of the trial which resulted in the decision, in such a manner that it was unequivocally

established that he or she was aware of the scheduled trial, and was informed that a decision may be handed down if he or she does not appear for the trial;

OR

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

OR

❒3.3. the person was served with the decision on . . . (day/month/year) and was expressly informed about the right to a retrial or appeal, in which he or she has the right to participate and which allows the merits of the case, including fresh evidence, to be re-examined, and which may lead to the original decision being reversed, and

❒the person expressly stated that he or she does not contest the

decision,

OR

❒the person did not request a retrial or appeal within the applicable

time frame;

OR

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

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

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

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

4. If you have ticked the box under points 3.1b, 3.2 or 3.3 above, please provide information about how the relevant condition has been met:

.....

....."

41. The above "Table" mirrors the provisions of the new part "d" of the EAW form as set out in the annex to the 2009 Framework Decision.

42. The Minister referred to s. 45 as originally enacted which provided as follows:

"A person shall not be surrendered under this Act if –

(a) he or she was not present when he or she was tried for and convicted of the offence specified in the European arrest warrant, and

(b) (i) he or she was not notified of the time when, and place at which, he or she would be tried for the offence, or

(ii) he or she was not permitted to attend the trial in respect of the offence concerned,

unless the issuing judicial authority gives an undertaking in writing that the person will, upon being surrendered –

(I) Be retried for that offence or be given the opportunity of a retrial in respect of that offence,

(II) Be notified of the time when, and place at which any retrial in respect of the offence concerned will take place, and

(III) Be permitted to be present when any such retrial takes place."

43. For completeness, it should be noted that under the Criminal Justice (Miscellaneous Provisions) Act, 2009 ("the Act of 2009"), there was a substitution of section 45. The substituted provisions were in the same terms as the original. Other subsections to s. 45 were added by that Act but these are irrelevant to the point at issue.

44. Counsel for the Minister referred to the recitals of the original Framework Decision as well as those contained in the new Framework Decision. Counsel further relied upon the reference to "decisions rendered following a trial at which the person did not appear in person" and said that the *in absentia* matter was only concerned with the absence of a person "at the trial".

45. Reliance was placed, to the extent that they were relevant by analogy, on the earlier decisions of the High and Supreme Court on section 45. The first case relied upon by counsel for the Minister is the case of *Minister for Justice, Equality and Law Reform v. McCague* [2010] 1 IR 456. In that case, the High Court (Peart J.) held, albeit obiter, that the terms of s. 45 were very specific in that

they referred to being present for the trial of the offence and not to being present when sentenced for the offence. Peart J. related this to the terms of Article 5.1 of the Framework Decision. In his view, the right to be present for sentence did not come within section 45. It is relevant that Peart J. held at para. 51, again *obiter*, in considering whether it might breach ECHR or constitutional rights to be sentenced *in absentia* that he was "*prepared to conclude also (especially having had regard to the case law of the European Court of Human Rights….) 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*".

46. In *Minister for Justice, Equality and Law Reform v. Ciechanowicz* [2011] IEHC 106, the respondent's suspended sentences had been revoked in his absence and he was not notified of the hearings. He argued that the provisions of the original s. 45 meant that trial had to be regarded as including the possible revocation of a previously suspended sentence. In that case, the High Court (Edwards J.) held in following *McCague*, that if the sentencing hearing did not come within the definition of trial, the revocation of a sentence could not.

47. In the *Minister for Justice and Equality v. Zachweija* [2011] IEHC 513, a respondent who failed to appear on the second day of his trial but was convicted on the third day contended that s. 45 prohibited surrender as he had not been notified of the date that judgment would be given. The High Court (Edwards J.) concluded "*the words 'tried for and convicted' in s. 45(1) of the Act of 2003 refer to one cumulative process, and not to two separate and distinct processes. In the Court's view s. 45 must be construed as not applying to a respondent unless he has been tried and convicted in totality in his absence*."

48. The case of *Minister for Justice and Law Reform v. Petrášek* [2012] IEHC 212 dealt with similar issues of lack of notification of the date of the revocation of the suspended element of a sentence. In circumstances where the respondent was not in a position to rely upon s. 45, he relied on a s. 37(1) point regarding the lack of notification. Edwards J. held that notification in accordance with domestic law was required and distinguished it from the actual notification that had been required by the Supreme Court in s. 45 situations in *Minister for Justice, Equality and Law Reform v. Sliczynski* [2008] IESC 73. In *Petrášek*, it was stated that it would only be in the rarest of cases where there was truly egregious unfairness in the circumstances of the underlying trial that surrender would be refused.

49. The Supreme Court in *Minister for Justice and Equality v. Tokarski* [2012] IESC 61 considered the requirements of section 45. In that case, the respondent had made a formal admission as to guilt and a formal acceptance of a particular sentence while in a police station. In accordance with Polish law he was not required to be present when this agreement was made an order of the court. The Supreme Court decided that "tried for and convicted" meant a judicial determination that the respondent should be convicted of the offence. On the facts of the case the Supreme Court held that the hearing at the Polish court was the point at which the respondent was tried and convicted.

50. In *Tokarski*, the Supreme Court did not feel it necessary to pronounce on the *dictum* of Peart J. in *McCague*. The Supreme Court noted, however, that in *McCague* and subsequent cases, the accused had been present or notified of the actual trial at which he was convicted. *Tokarsk*i is also authority for the proposition that although Article 5(1) is an optional rather than a mandatory ground on which a Member State may refuse to execute an EAW, the implementing provisions of national law may fall to be interpreted in light of the Framework Decision generally but also Article 5(1) specifically. This will be referred to further below.

51. Other decisions of the High Court also indicate the limited reach of the original section 45. The trial only refers to a trial at first instant and not to an appeal (*Minister for Justice and Equality v. Bartold* [2012] IEHC 108). In the Supreme Court in *Minister for Justice, Equality and Law Reform v. Marek (ex tempore* 5th February, 2009), Murray C.J. held that the undertaking for a re-trial under s. 45 meant "*a trial de novo, that is to say, a trial of the accused as if he was on trial for the first time for the offence or offences in question*."

52. Counsel for the Minister relied upon the analysis of Edwards J. in *Minister for Justice and Equality v. Surma* as regards the new s. 45 and noted how s. 45 incorporates the new point (d) as set out in the 2009 Framework Decision. The new point (d) is a form of certification by a judicial authority and the principle of mutual recognition requires that once those matters are so certified the executing judicial authority is required to surrender. However, all competence is not lost as it is clear that the scheme has a requirement to provide amplifying information. Edwards J. held at para. 65 that "*…at the end of the day the executing judicial authority retains competence to assess whether the proceedings conducted in absentia in the issuing member state complied with the standards mandated under the E.C.H.R., and in doing so, it must have due regard to the jurisprudence of the E.Ct.H.R.*".

53. Counsel for the Minister pointed to the wording of the new s. 45 and submitted that even if a respondent did not appear in the proceedings, surrender is not prohibited if the warrant indicated the matters specified in paragraph (d) of the prescribed form of warrant. The prohibition on surrender of a person who "did not appear in person at the proceedings resulting in the sentence or detention order" is modified by the all-important linking word, "unless". Therefore, if the warrant indicates the matters at points 2, 3, and 4 of point (d) of the new form of EAW set out in the annex to the Framework Decision surrender may be granted.

54. It was submitted on behalf of the Minister that the first sentence of the new s. 45 must be read in light of Article 4a of the 2002 Framework Decision as inserted by the 2009 Framework Decision. Counsel refers to the heading of Article 4a of the Framework Decision which refers to "decisions rendered following a trial at which the person did not appear in person". In the body of Article 4a, the phrase used refers to "the person who did not appear in person at the trial resulting in the decision".

55. In the Minister's written submissions, the phrase "the proceedings" (and in light of the word "trial" repeatedly set out in the Table in s. 45), must be limited "to the process by which guilt or innocence is determined and, if guilty, the appropriate sentence to be imposed thereafter and does not extend to any hearing that may or may not take place after the original determination of guilt and the original imposition of sentence." If the meaning of the new s. 45 were otherwise, counsel put forward a number of scenarios in which surrender would be prohibited without a right of retrial on all issues being granted. Many of these scenarios were held by the Superior Courts not to have been prohibited under the former section 45. Essentially, the Minister asked the Court to apply the jurisprudence which operated prior to the 2012 amendment.

56. Counsel for the respondent argued that there were certain factual matters that her client could have put forward to the Court if he had been notified of the hearing. She pointed to the 2009 Framework Decision as providing the context for the understanding of section 45. She submitted that Article 1 of the 2009 Framework Decision proclaims that one of its objectives is "to enhance the procedural rights of persons subject to criminal proceedings". She submitted that the Framework Decision refined the grounds for non-recognition of trial *in absentia* decisions. This was for the purposes of greater clarity and with a view to ensuring consistency of application in the various contexts in which *in absentia* decisions might not be recognised. She submitted there are extra safeguards for persons and she pointed to Recital 3 which provides that solutions under the existing Framework Decisions "are not satisfactory as regards cases where the person could not be informed of the proceedings."

57. Counsel contrasted the previous s. 45 with the emphasis on the trial date and the new s. 45 which relates to "proceedings resulting in the sentence or detention order." She referred to *Surma* and submitted that it is the right to take part in the hearing which was emphasised as part of the Article 6 fair trial rights. She referred to *Colozza v. Italy*, Judgment, ECHR, 12 February 1985, 9024/80, [1985] ECHR 1 in that regard.

58. Reference was made to *Minister for Justice and Equality v. Ciesielski* [2013] IEHC 101 which concerned the absence from trial at the "triggering" offence leading to the revocation of a suspended part of a sentence. The High Court held that s. 45 only applied to the offence for which surrender is sought. Counsel, however, said that the court had noted at para. 40 of the judgment that *"[i]t is clear that the respondent was aware of the proceedings to have the suspension of his sentence lifted."*

59. *Petrášek* was distinguished on the basis that there was no evidence before the court in that case that the respondent did not know of the hearing at which the suspension was lifted. Edwards J. held that the court was entitled to take the context of the warrant as correct. In the present case, counsel submitted that the evidence established that the respondent was not present at the revocation hearing.

60. Counsel relied upon that part of *McCague* in which Peart J. held that a right to be present for sentence was to be found in the case law. She relied upon this to show that the terms of the new s. 45 were deliberately chosen by the Oireachtas. This ensures that the surrender of the person for a sentence when such sentence order was rendered *in absentia* is subject to the same procedural safeguards as envisaged by the Framework Decision. Therefore, it was submitted that a finding that the amended s. 45 does not apply to *in absentia* sentence hearings would render the amendments and distinct wording within the section meaningless.

61. According to counsel for the respondent, the word 'trial' in the new s. 45 must be read in the context of its meaning in Irish law. She refers to *People (Attorney General) v. Messitt* [1972] 1 I.R. 204 where at p. 210 Kenny J. quoted with approval from the judgment of Lord Atkin in *Lawrence v. R* [1933] AC 699:

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

62. Further reference is made to the centrality of sentencing in our criminal justice system as indicated by Hogan J. in *McCabe v. Ireland* [2014] IEHC 435. She also refers to the Supreme Court decision in *Dowling v. Minister for Justice, Equality and Law Reform* [2003] 2 I.R. 535. That case concerned a decision to revoke temporary release and that a prisoner's entitlement to be notified before his release was to be terminated.

The Court's analysis

63. During the hearing of a separate case in the time between the hearing of this case and delivery of judgment, my attention was drawn to an *ex tempore* decision dated 27th May, 2014 of the High Court (Edwards J.) in *Minister for Justice and Equality v. Obst.* In *Obst*, a similar situation arose: that respondent was not present at the proceedings resulting in the revocation of her suspended sentence. Edwards J. held that the court was not required to refuse surrender in those circumstances.

64. What was produced to the Court by counsel for the Minister in that separate case was a transcript of the ex tempore judgment in Obst. It appears that the Minister engages the services of a stenographer on a permanent basis to cover all EAW and extradition matters heard in the High Court. Subsequently, in light of the circumstances set out below, this Court obtained a transcript made up from the Digital Audio Recording and this transcript was circulated to the parties.

65. As per the transcript of the Digital Audio Recording in Obst, Edwards J. held with regard to s. 45, that *"the critical point is that the proceedings at which your guilt or innocence is at issue insofar as this Court is concerned and, that is the view that I take because if you go on and look at the table, the very first question is:"… indicated that [sic] the person appeared in person at the trial resulting in the decision." And of course it is the decision to impose a sentence for criminal conduct. And that is my view and it's consistent with the previous jurisprudence of this Court. It's consistent with the previous form of section 45, though the Act has now been amended but there's nothing before me to suggest that the Oireachtas intended, in a substantive way, to change the… the grounds on which a person might be surrendered."*

66. Edwards J. also went on to confirm that the whole thrust of the judgment in Surma, which stated that the effect of the 2012 amendments was retrospective, was that the changes effected were procedural rather than substantive. He went on to say *"[i]f it had been the intention of the Oireachtas to expand the grounds on which non surrender might be granted, then there would have been, in my view, clear indicators that that was their intention."*

67. Moreover, Edwards J. observed that if there was to be an expansion of grounds for non-surrender, it would be highly questionable whether it would be lawful so to do. He referred to the case of *Melloni v. Ministerio Fiscal* [2013] 2 CMLR 43, a decision of the European Court of Justice ("ECJ"). In that case, the ECJ held at para. 63 that: *"…allowing a Member State to avail itself of Article 53 of the Charter to make the surrender of a person convicted in absentia conditional upon the conviction being open to review in the issuing Member State, a possibility not provided for under Framework Decision 2009/299, in order to avoid an adverse effect on the right to a fair trial and the rights of the defence guaranteed by the constitution of the executing Member State, by casting doubt on the uniformity of the standard of protection of fundamental rights as defined in that framework decision, would undermine the principles of mutual trust and recognition which that decision purports to uphold and would, therefore, compromise the efficacy of that framework decision."*

68. The judgment in *Obst* having been produced to me, I considered that counsel in the present case be given an opportunity to address it. I requested, through the Court Registrar, that a copy of the transcript be made available to the legal representatives of the respondent. Surprisingly, the Chief State Solicitor replied that it would not be appropriate to forward the transcript as a) copyright lay with the stenographer and b) the transcript had been sent to Mr. Justice Edwards for approval and was awaited. I then requested that the various cases in which this point was being considered be listed before me. Counsel representing the Minister in each case stated there was no longer any issue with regard to copyright and that copies could be made available. Counsel also said that the Minister was seeking to rely upon the decision notwithstanding that the transcript had been sent to Mr. Justice Edwards for approval.

69. At the end of the hearing, it remained unclear to me why the Chief State Solicitor had replied to my request in the terms as set out. That *Obst* judgment had been given in open court although not subsequently published on the Courts Service website. Crucially, a transcript of the judgment had been handed to this Court as authority for a legal proposition having already been made available to the other party to that case. It is unsatisfactory that this Court was handed a transcript in one case but was later told that it could

not be made available to parties in other cases dealing with the same issue. That was particularly unsatisfactory where the Court was being asked to rely upon the *ex tempore* decision contained therein.

70. Counsel for the respondent in this case took the opportunity to make further submissions regarding the *Obst* decision. She submitted that *Obst* should not be followed as (a) it was not a finding that was clearly arrived at through a review of all relevant authorities and (b) was not based on forming a judgment having heard evenly based argument. Counsel relied upon the statement of Geoghegan J. in the case of *O'Brien v. Mirror Group Newspapers Ltd.* [2001] 1 IR 1 that *"[i]t is unfortunate that the transcript of the ex tempore ruling remains unapproved and it would therefore not be appropriate to cite passages from it…"* However, in his judgment Geoghegan J. makes reference to the clarity of the *ex tempore* decision which supported the point he was making. For the sake of completion, it should be noted that the other members of the Supreme Court in *O'Brien* did not make any reference to the case to which Geoghegan J. referred.

71. It was acknowledged by counsel for the respondent that, in general, a previous decision of the High Court should be followed. Indeed, the importance of the principle that a judge of first instance should usually follow another judge of first instance has been frequently affirmed by the Superior Courts in recent years. A good example of this is in *A.G. v. Residential Institutions Redress Board* [2012] IEHC 492, where Hogan J. said as follows at para. 38:

> *"The earlier decisions in* JOB *and* MG *were fully argued and there is no suggestion that any relevant authorities or arguments were overlooked. In these circumstances, I propose to follow the approach enunciated by Clarke J. in* Re Worldport Ltd. *[2005] IEHC 189 with regard to stare decisis in the High Court:-*
>
> > It is well established that, as a matter of judicial comity, a judge of first instance ought usually follow the decision of another judge of the same court unless there are substantial reasons for believing that the initial judgment was wrong. *Huddersfield Police Authority v. Watson* [1947] K.B. 842 at 848, *Re Howard's Will Trusts, Leven & Bradley* [1961] Ch. 507 at 523. Amongst the circumstances where it may be appropriate for a court to come to a different view would be where it was clear that the initial decision was not based upon a review of significant relevant authority, where there is a clear error in the judgment, or where the judgment sought to be revisited was delivered a sufficiently lengthy period in the past so that the jurisprudence of the court in the relevant area might be said to have advanced in the intervening period. In the absence of such additional circumstances it seems to me that the virtue of consistency requires that a judge of this court should not seek to second guess a recent determination of the court which was clearly arrived at after a thorough review of all of the relevant authorities and which was, as was noted by Kearns J., based on forming a judgment between evenly balanced argument. If each time such a point were to arise again a judge were free to form his or her own view without proper regard to the fact that the point had already been determined, the level of uncertainty that would be introduced would be disproportionate to any perceived advantage in the matter being reconsidered.'
>
> *Indeed, the Supreme Court has recently confirmed that this approach is the appropriate one, with Clarke J. urging that earlier High Court decisions should be followed unless there are compelling reasons to the contrary: see* Kadri v. Governor of Cloverhill Prison *[2012] IESC 27."*

72. Counsel for the respondent submitted that the case of *B.M.J.L. v. M.J.E.L.R.* [2012] IEHC 74 was a good indication of where the High Court decided not to follow a relevant High Court decision. In that case, Cross J. did not follow a previous decision of the High Court that had held that the time limits for judicial review contained in the Rules of the Superior Courts did not apply in circumstances where the time limit imposed under the Illegal Immigrant (Trafficking) Act, 2000 for challenging a ministerial decision under s. 17 of the Refugee Act, 1996 was held to be invalid. In doing so, Cross J. acknowledged that he had been advised that legal authorities had been opened to the High Court in the previous case but he remarked that no such authorities were cited in the judgment. Cross J. referred to two High Court cases which he said *"indicate clear authority supporting the view that the time limitation in O.84, r.21(1) remains extant notwithstanding the enactment of s. 5(2)(a) of the 2000 Act."*

73. In reliance on *B.J.M.L.*,counsel for the respondent said that *Obst* should not be followed as Edwards J. did not refer to the authorities (other than *Surma*) and the decision was not based upon a review of significant relevant authorities. Counsel submitted that in the present case, both the Minister and the respondent have made submissions on the relevance of many cases including, importantly, the reasoning in the judgment of *McCague* in which it was stated that the right to be present included the right to be present at a sentencing hearing which does not immediately follow the trial and conviction.

74. In the case in which the judgment in *Obst* was first produced to me, counsel for that respondent argued that I should not follow *Obst* as it was not clear that all the arguments had been made and considered in that case. It was also suggested that as it was an *ex tempore* judgment it need not be given as much weight as a considered judgment. Reference was made to how the matter was dealt with in three pages of the transcript. It was further submitted by counsel that the level of detailed argument before me was not reflected in that judgment. It was submitted that the reference to "sentence or detention order" does not appear in the judgment. Counsel also pointed to the fact that the marginal note reference to "[p]ersons convicted in absentia" in s. 45 of both the Act of 2003 and the Act of 2009 had been removed entirely by the Act of 2012. Counsel submitted this was of relevance where the court has to consider an ambiguous matter. In reply, counsel for the Minister informed the court that she had been counsel in *Obst* and that although it was an *ex tempore* decision, it was an issue that was exhaustively argued before the court.

75. I have considered all of the above submissions prior to giving this judgment. Although Geoghegan J. in *O'Brien* said it would be inappropriate to cite a transcript, I have decided to do so in circumstances where the Court obtained the transcript via the Digital Audio Recording system and was therefore in a position to stand over the transcript. Furthermore, Geoghegan J. did not say that an *ex tempore* decision was not to be followed - rather the issue was with the certification of the transcript. Indeed, it must be acknowledged that the principle of *stare decisis* does not distinguish between *ex tempore* judgments and reserved judgments. The distinction is between judgments that are clearly wrong or are arrived at without proper consideration of relevant case law. In the *Obst* case, it is clear from the transcript that the judgment did not immediately follow on from the hearing. Rather, although *ex tempore*, considerable care had been given to the judgment and to the question of whether it was necessary to give a reserved judgment.

76. Although no authorities other than *Surma* were cited in the judgment, I am assured by counsel for the Minister that there was substantial argument before the High Court in *Obst* as to the meaning of section 45. I take the view that if this was a situation like *B.M.J.L.* where there was other "clear authority" which indicated that the decision in *Obst* was wrongly decided, the fact that the judgment did not cite authorities would mean that I should not follow it even if it appeared on its face to be the most relevant precedent. In this case, however, the respondent cannot point to any other clear authority indicating that *Obst* was wrongly decided. To borrow the words of Clarke J. in *Kadr*i, there are no "strong reasons" to show that the decision of Edwards J. was incorrect. On

the contrary, Edwards J. considered that the new wording of s. 45 did not change the original meaning and application of the section. He did so having considered his own judgment in *Surma* in which he had given a lengthy considered judgment in concluding that the new s. 45 merely effected a procedural change.

77. Moreover, I do not consider that the references in *McCague* to being present at a sentencing hearing which does not follow immediately upon the conclusion of the trial and conviction, assists in the interpretation of the new section 45. The reason why the Act of 2012 was enacted was to implement the provisions of the 2009 Framework Decision – that is apparent from the long title to the said Act. It was not enacted to address any specific lacuna that may have otherwise been identified. Most importantly, the decision in *Surma* held at para. 116 that, in enacting either version of s. 45, the Oireachtas "*has not at any stage purported to create a substantive personal right to non-surrender where a person had been tried in their absence in the issuing state.*" In circumstances where the section dealt with matters of procedure, the new s. 45 therefore had retrospective effect. Finally, I do not consider that the references in *Petrasek* and *Ciesielski* to knowledge or otherwise of the revocation proceedings by those respondents had any relevance to the interpretation of the then section 45.

78. In the interim between hearing counsel again on this issue and the date of this judgment, the Court of Appeal gave its decision in the case of *Minister for Justice and Equality v. Palonka* [2015] IECA 69 concerning the interpretation of an aspect of section 45. In light of the reasons set out hereunder, not least of which was the method of interpretation contended for by counsel for the respondent in this case and in the original case in which *Obst* was produced, I took the view that it was unnecessary to call counsel back for the purpose of further argument.

79. In *Palonka,* Peart J., with whom Finlay Geoghegan J. agreed in her concurring judgment (Mahon J. agreeing with both), held at para. 28 that *"when considering whether surrender is prohibited, the Court is required to do so by reference to the provisions of the Act alone, and insofar as there may be some conflict between the provisions of the Act on a literal interpretation, and an interpretation which conforms to the objectives of the Framework Decision, the latter interpretation would be contra legem."*

80. The Court of Appeal in *Palonka* emphasised the requirement under s. 45 that information be provided where the issuing judicial authority certified that although the person had not appeared at trial the other conditions set out in the new form (d) of the warrant had been met. A respondent did not have to provide cogent evidence contradicting the issuing judicial authority's certification before the High Court was obliged to concern itself with the failure to provide the information required. It was for the High Court to be satisfied that the conditions of s. 45 did not prohibit surrender.

81. In *Palonka*, the Court of Appeal's conclusion as to application of the literal interpretation of s. 45 could appear at variance with the view of the Supreme Court in *Tokarski* as to the manner in which the previous s. 45 was to be interpreted. *Tokarski* was not mentioned in either judgment of the Court of Appeal in *Palonka* but *Tokarski* concerned the Act of 2003 as it was prior to the amendments made by the Act of 2012. It was the particular amendments to s. 16 and s. 10 of the Act of 2003 by the deletion therein of direct reference to "the Framework Decision" that lead the Court of Appeal to conclude that the principle of conforming interpretation in accordance with *Criminal Proceedings against Pupino (Case C-105/03)* [2005] E.C.R. I-5285 could not apply where the literal interpretation of s. 45 was clear.

82. It may also be observed that in her judgment in *Palonka*, Finlay Geoghegan J., although in agreement with the judgment delivered by Peart J., appeared to place a slightly different emphasis on the interpretation of legislation that implements a Framework Decision. After quoting from *Howard v. Commissioners of Public Works* [1994] 1 I.R. 101 that the well-established principle that Acts should be constructed according to the intention expressed therein giving to the words used their ordinary and natural sense, Finlay Geoghegan J. went on to say at para. 9 that *"[a]s the sections in questions were to implement the Framework Decisions to this must be added the principle of conforming interpretation with the limitations determined by the Supreme Court for this jurisdiction consistent with the judgment of the Court of Justice of the European Communities* in Pupino..." Whereas from this it may appear that the principle of conforming interpretation is an additional tool for interpretation of statutes which implement Framework Decisions, the judgment of Peart J. clarifies that where a literal interpretation conflicts with a conforming interpretation, the former is to be adopted over the latter.

83. In *Surma*, Edwards J. had relied at least in part on a conforming interpretation of s. 45 to hold that the section was retrospective in effect. In *Obst*, he relied on *Surma* and on the decision in *Melloni* referred to above in stating that if the Oireachtas had intended to expand the grounds of non-surrender, there would have to be clear indicators to the contrary.

84. In so far as the decision in *Obst* is concerned I consider that, absent the decision in *Palonka*, I would be bound to follow it for the reasons set out above. However, in circumstances where that decision was at least in part based on the principle of conforming interpretation it is necessary to seek to apply a literal interpretation to the provisions of section 45. If the provisions are clear and the literal interpretation is in conflict with a conforming interpretation the Court is obliged to apply the literal interpretation to the section.

85. In *Palonka* the Court of Appeal was concerned with the interpretation of another part of section 45. Finlay Geoghegan J. stated that the only interpretation of the relevant sections in the Act of 2003 was that section 16(1)(c) did not permit surrender unless the EAW indicated the matter required by s. 45 where the person whose surrender is sought did not appear in person at the proceedings resulting in the sentence or detention order in respect of which the EAW was issued. That statement of Finlay Geoghegan J. was highly relevant to the context of the interpretation of that part of s. 45 at issue in that case. However, the decision in *Palonka* does not assist in the interpretation of the meaning of "the proceedings resulting in the sentence or detention order" or in the meaning of "trial" in the section or in the meaning of "appear in person".

86. In her submissions regarding the interpretation of s. 45, counsel for the respondent relied upon the 2009 Framework Decision and what she saw as "extra safeguards" for persons who are the subject of imprisonment decisions made *in absentia*. She also relied upon the decision in *Surma* to say that s. 45 was retrospective. Counsel submitted that the amendment of s. 45 relating to "proceedings resulting in the sentence or detention order" must also be seen as a deliberate decision by the Oireachtas. Counsel submitted "[t]his amended section can ensure that the surrender of a person for a sentence when such sentence order was rendered *in absentia*, is subject to the same procedural safeguards as envisaged by the framework decision." Counsel in the other case referred to the terms of s. 45 as "ambiguous".

87. In light of the above, it can be seen that counsel for the respondent in each case before me never suggested a literal interpretation of section 45. The role of the High Court, as indeed reaffirmed by *Palonka*, is to ensure that the requirements of the Act are fulfilled by the warrant and to do so independently of the parties. Therefore, it is necessary for this Court to decipher whether a literal interpretation would mean that surrender should be refused in this case. As neither party contended for a literal interpretation of s. 45, it is appropriate for the Court to proceed without further submissions from counsel.

88. The first paragraph of s. 45 uses the phrase "proceedings resulting in the sentence or detention order" whereas the Table refers to "trial resulting in the decision". Are "proceedings" to be read as "trial"? Or is "trial" to encompass "proceedings"? Are they proceedings or trial as understood in an Irish criminal procedural context or as defined by the law of the issuing Member State? What does "appear in person" actually mean? There is also a potential ambiguity in the phrase "appear in person at the proceedings". At what stage of the proceedings must the person appear? At all stages or at any stage?

89. If the person appeared ***at any stage*** in the proceedings is the first part of s. 45 inapplicable? Is it therefore the intention of the Oireachtas that the prohibition on surrender does not include a person who appeared at any stage in the proceedings but was never told of the actual scheduled date of the trial which determined guilt or innocence? That of course depends on the interpretation of the word "proceedings" and the phrase "appear at the proceedings". That brings the question of interpretation of those phrases full circle to the questions raised above.

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

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

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

Form of Warrant

93. Counsel submitted that the warrant is not in the correct form. She argued that *Surma* suggested that if the appropriate matters were not certified in the EAW, the position can be remedied by seeking additional information. However, this would have to confirm the matters set out in the Table.

94. I have considered the issue of the form of the warrant in this case. No section (d) in the new form is filled in. I note that in *Surma* and in *Obst*, a further section (d) was sent by way of additional information. The import of all the documentation in this case is that the Polish authorities were of the view that the issue in section (d) of the EAW was a matter that "does not concern" as he was present for his trial. I note also that information was sought in this case and it confirms unequivocally that the respondent was present at the hearing and the original sentencing as set out in detail above. The respondent has never contested that by evidence or in submission – he preferred not to address it at all in his affidavit. He is not required to do so as the onus is on the court to be satisfied that the conditions set out in s. 45 have been met. It has long been established in the case law that the court should take the statements set out in an EAW and additional documentation at face value.

95. In this case, it is abundantly clear that he was present at his trial (even giving that phrase a wide meaning to include the original sentence hearing). I have no hesitation in finding that the EAW and additional documentation give the clearest possible indication that the respondent "appeared in person at the trial resulting in the decision". Is this finding to be set aside by a failure to conform with the new rules applicable to part (d) of the EAW form, *i.e*. by the failure to complete the new form as required under section 45?

96. Section 45 (c) requires consideration and it provides as follows:

> "For the avoidance of doubt, an application for surrender under section 16 shall not be refused if the Court is satisfied that no injustice would be caused to the person even if—
>
> (a) there is a defect in, or an omission of, a non-substantial detail in the European arrest warrant or any accompanying document grounding the application,
>
> (b) there is a variance between any such document and the evidence adduced on the part of the applicant at the hearing of the application, so long as the Court is satisfied that the variance is explained by the evidence, or
>
> (c) there has been a technical failure to comply with a provision of this Act, so long as the Court is satisfied that the failure does not impinge on the merits of the application."

97. In *Palonka*, the Court of Appeal held that the failure to provide the information at para. (d) 4 was not a breach that could be excused under this section of the Act of 2003. That was in circumstances where the information was vital to an understanding of the certification under (d) 3 given by the issuing judicial authority where it was already certified that the requested person had not appeared at the trial. The information at para. (d) 4 only has to be given where the box has been ticked that the requested person was not present at the trial. No such information is required where the issuing judicial authority has indicated that the person appeared at the trial.

98. In my view, the lack of the new form section (d) in the EAW is clearly a technical failure to comply with a provision of the Act. I am satisfied that its failure does not impinge on the merits of the application. The new s. 45 would not require any further information than that which has already been given in this case. I am also satisfied that no injustice has been caused by this technical failure to

comply with the provisions of the Act. Therefore, I am satisfied that the technical failure to comply with the form requirements under s. 45 is not a bar to surrender where all the information required by s. 45 has been provided to this Court.

Section 37 of the Act of 2003

99. The respondent also relied upon the provisions of s. 37 (1) of the Act of 2003 to say that his surrender would be incompatible with the State's obligations under the ECHR and Protocols thereto and that his surrender would constitute a contravention of the Constitution.

Breach of fair trial rights under Article 6

100. The respondent submitted that irrespective of the s. 45 point, it would be a breach of his rights to surrender him to serve a sentence in circumstances where he was not given notice of the application for revocation. It is necessary to establish by cogent evidence that there are substantial grounds for believing that there is a real risk of a flagrant denial of fair trial rights if surrender is ordered.

101. In all of the ECtHR cases referred to in submissions, there is no suggestion that a person who has been duly convicted and sentenced in their presence, cannot have that sentence revoked in their absence in circumstances where they have failed to comply with probation conditions, in particular residency conditions and notification provisions. Furthermore, and similar to the position in McCague, the respondent has not given any indication to the Court that he has no remedy regarding potential human rights breaches in Poland.

102. In all those circumstances, I am not satisfied that the respondent has established on substantial grounds that to return him to Poland would amount to a real risk that he will be exposed to a flagrant denial of his Article 6 ECHR rights.

Article 8 and delay

103. The respondent claimed that to surrender him now would amount to a failure to respect his right to family life under Article 8 of the ECHR. He does so in circumstances set out in his affidavit. He says that he arrived in Ireland in July 2006 and initially worked and resided in Navan, Co. Meath as a tattoo artist. He has always worked since arriving in Ireland and never claimed social welfare. He met his partner in 2008 and they moved to Enniscorthy, Co. Wexford. They have two young children aged four years and one year. His partner has full-time employment and he is self-employed. He rents a business premises. He says that his family life is now very much within Ireland. He has no other family here. They have a tenancy agreement and his elder child started school in September 2014. He says due to his partner's working hours, he cares for the children during the day.

104. Counsel for the respondent relied upon the decision in *Minister for Justice and Equality v. Ciecko* (unreported, High Court, Edwards J., 18th December 2013). The respondent pointed to the delay in this case and in particular to the 20 years since the offences in 1995 were committed and the fact that he was 17 years old at the time. Counsel submitted that the respondent is a changed man and has rehabilitated now.

105. The issue for determination under this heading is whether it would constitute a disproportionate measure for this Court to surrender the respondent to Poland having regard to his right to respect for his family life, guaranteed under Article 8 of the ECHR and the rights of his partner and child. Edwards J. has given a number of decisions in this court regarding the manner in which this court should approach Article 8 issues. The most significant of those are the cases of *Minister for Justice and Equality v. T.E.* [2013] IEHC 323 and *Minister for Justice and Equality v. R.P.G.* [2013] IEHC 54. In those judgments, Edwards J. set out twenty-two principles for application by the court.

106. In *Ciecko,* Edwards J. summarised that what was required *"is a balancing of the public interest in extradition against private law considerations relevant to the particular circumstances of the request person. The exercise is case specific. The evidence will obviously differ in every case. The starting point is to determine what the public interest in extradition is in the particular case."*

107. There is a public interest in extradition in every case. It is of importance that those alleged to have committed crime or those convicted of crime should not be permitted to evade justice. Fugitives are to be located and returned to face trial or sentence as the case may be. The High Court has held that the public interest is not the same in every case. Some allegations are more serious than others. The sentences imposed or liable to be imposed may also vary. In a sentencing case, the court has the benefit of knowing how the court in the domestic state has treated the matter.

108. In the present case, the offences are inherently serious in that they are offences of what can only be described as serious assault. The offences appear to have culminated in the respondent's joint participation in a vicious assault on the 21st August, 1995 which culminated in the death of a man. This is categorised as an offence against life and health in the Polish penal code. For this, the Polish courts imposed a 10 year sentence on him. That is a significant sentence and in particular is a significant sentence for a 17 year old. In this sense, there is no comparison with the Ciecko decision.

109. The respondent served part of his sentence. He was released but remained subject to certain conditions. In July 2006, he moved to Ireland and took himself outside the supervision of the Probation Officer.

110. On 29th December, 2006, the Regional Court in Warsaw quashed his parole and ordered him to serve the outstanding sentence. It became final and non-appealable in January 2007. It was impossible to serve him with writs. The judicial authority explained that the procedure was commenced to have him placed in prison after the decision to release him was reversed. In September 2007, a national arrest warrant was issued with respect to him. There were negative findings as to his whereabouts in Poland and the police were informed he was living abroad. In October 2009, a request for a European Arrest Warrant was made and in December 2009 the EAW issued. As his address was not known, a regular international search procedure was implemented. Once Interpol/Europol established he was residing in Ireland, the documents were sent to Ireland. They also note that the Polish Europol office was in March 2012 informed about negative findings made back in 2010 by the Irish police which showed his place of residence was unknown.

111. From the foregoing, it appears that the Polish authorities were continually looking for the respondent. Their own procedures require a search for the person to be sent to prison and then a national warrant, a search and then an international search. It is clear that they were making enquiries abroad. I find that, although it appears that information is not readily available between Member States as to the residence of particular individuals, it is clear that the Polish authorities were in pursuit of him. I therefore find that there is a significant public interest in the surrender of this man to finish the sentence imposed upon him. There is indeed a pressing social need for his extradition in the circumstances which I have found.

112. On the other side, I have to balance his own particular circumstances. I do not have to find his circumstances exceptional for a disproportionate interference with his family life to be found. I have considered his family circumstances and I note that he has two young children. I have their best interests at the forefront of my mind throughout this consideration. It would certainly be the case that his presence here will be helpful to the maintenance of their family life. Undoubtedly, things will be more difficult to manage in his absence. However, the best interests of the children are not the sole consideration here and I must also weigh the public interest in the circumstances of this case in the extradition of this respondent to serve the balance of a sentence for, amongst other offences, a particularly serious crime.

113. In my view, the balance lies in favour of surrender. This was particularly serious offending for which a significant sentence was imposed. The respondent had been given a chance at rehabilitation on conditions that the Polish courts imposed. He spurned the Polish terms and deliberately left there and came to Ireland. It is not for this Court to say that he has rehabilitated himself here. That was a matter between him, the Polish probation service and ultimately the Polish courts. The Polish authorities have sought his extradition and there was no unexplained delay in that. I am satisfied that, even though he has changed his circumstances and now has family responsibilities, there is no disproportionate interference with his private and family life in ordering his surrender.

Conclusion

114. In all the circumstances and for the reasons set out above, I am satisfied that, in accordance with the provisions of s. 16(1) of the Act of 2003, I may make an order directing the surrender of the respondent to such person as is duly authorised by the Republic of Poland to receive him.