Neutral Citation Number: [2011] IEHC 513

THE HIGH COURT

2010 342 EXT

IN THE MATTER OF THE EUROPEAN ARREST WARRANT ACT, 2003

AS AMENDED

BETWEEN

THE MINISTER FOR JUSTICE AND EQUALITY

Applicant

AND

ANDREZJ ZACHWEIJA

Respondent

JUDGMENT of Mr. Justice Edwards delivered on the 23rd day of November 2011

Introduction

The respondent is the subject of a European arrest warrant issued by the Republic of Poland on the 7th July, 2010. The warrant was endorsed for execution by the High Court in this jurisdiction on the 3rd September, 2010. The respondent was arrested at No. 23, Pine Grove, Charlestown, Co Mayo on the 11th January, 2011 but does not consent to his surrender to the Republic of Poland. Accordingly, this Court is now being asked by the applicant to make an order pursuant to s. 16 of the European Arrest Warrant Act, 2003, as amended, (hereinafter referred to as "the Act of 2003") directing that the respondent be surrendered to such person as is duly authorised by the issuing state to receive him. In the circumstances the Court must enquire whether it is appropriate to do so having regard to the terms of s. 16 of the Act of 2003.

The respondent, as is his entitlement, does not concede that any of the requirements of s. 16 aforesaid are satisfied. Accordingly, as no admissions have been made, the Court is put on inquiry as to whether the requirements of s. 16 of the Act of 2003, both controversial and uncontroversial, have been satisfied and this Court's jurisdiction to make an order directing that the respondent be surrendered is dependant upon a judicial finding that they have been so satisfied. In addition, the Court is required to consider, in the particular circumstances of this case, the first of four points of objection to the respondent's surrender pleaded on behalf of the respondent, namely: -

> "1. The surrender of the respondent in respect of the matters the subject of the European arrest warrant herein that issued in Poland on 7th day of July 2010 is prohibited by the provisions of Part 3 of the European Arrest Warrant Act, 2003, as amended, and in particular his surrender is so prohibited by section 37 thereof on the grounds of the breach of his Constitutional and Convention Rights and in breach of s. 41 on the basis of double jeopardy and in breach of s. 45 on the basis that he was convicted *in absentia* within the context of that section."

The Court was informed that neither the double jeopardy argument, nor three further objections pleaded as grounds 2, 3, and 4 respectively in the points of objection document, were being proceeded with. Accordingly, only the specific objections in respect of ss. 37 and 45 are being maintained.

Uncontroversial Section 16 Issues

The Court has received an affidavit of Sergeant Richard Taheny sworn on the 25th October, 2011, and has also received and scrutinised a copy of the European arrest warrant in this case. Moreover, the Court has also inspected the original European arrest warrant, which is on the Court's file and which bears this Court's endorsement. The Court is satisfied following its consideration of this evidence and documentation that: -

> (a) the person before it is the person in respect of whom the European arrest warrant was issued;
>
> (b) the European arrest warrant has been endorsed for execution in accordance with s. 13 of the Act of 2003;
>
> (c) the European arrest warrant is in the correct form;
>
> (d) the High Court is not required, under ss. 21A, 22, 23, or 24 (as inserted by ss. 79, 80, 81 and 82 of the Criminal Justice (Terrorist Offences) Act 2005), to refuse to surrender the respondent under the Act of 2003.

The warrant is a sentence-type warrant and the respondent is wanted in the Republic of Poland to serve a composite sentence of 3 years and 4 months' imprisonment imposed upon him by the Regional Court in Lubin on the 26th November, 2007 in respect of five offences particularised in the warrant. The issuing judicial authority has invoked the procedure under paragraph 2 of Article 2 of the Framework Decision (Council Framework Decision of 13th June, 2002 on the European Arrest Warrant and the Surrender Procedures between Member States (2002/584/JHA)) in respect of two of the five offences in question, namely offences 2 and 5 respectively, as set out at Part E.2 of the warrant. In respect of both of those offences the box relating to "swindling" is ticked in Part E. I of the warrant. As a composite sentence of more than 3 years' imprisonment has been imposed, the minimum gravity requirements of s. 38 (1) (b) of the Act of 2003 are met in respect of these two offences, and accordingly, the ticked box procedure has been properly invoked and the Court does not need to concern itself with correspondence.

In so far as the remaining three offences (which are identified in Part E.II of the warrant as offences not covered by the ticked box procedure) are concerned, the Court must be satisfied both as to correspondence and minimum gravity. The offences in question are offences 1, 3 and 4 as set out at Part E.2 of the warrant.

The Court has considered offence no. 1 and has been invited by the applicant to find correspondence with all or any of the following offences, viz theft contrary to s. 4 of the Criminal Justice (Theft and Fraud Offences) Act 2001; criminal damage contrary to s. 2 of the Criminal Damage Act 1991; unlawful taking of a motor vehicle, contrary to s. 112 of the Road Traffic Act 1961 (as amended) and interference with a vehicle contrary to s. 113 of the Road Traffic Act 1961 (as amended). The Court is satisfied to find correspondence on all of the bases suggested.

The Court has considered offence no. 3, the facts of which are very similar to offence no. 1, and again, the Court has been invited to find, and does find, correspondence with the offences of theft contrary to s. 4 of the Criminal Justice (Theft and Fraud Offences) Act 2001; criminal damage contrary to s. 2 of the Criminal Damage Act 1991; unlawful taking of a motor vehicle, contrary to s. 112 of the Road Traffic Act 1961 (as amended) and interference with a vehicle contrary to s. 113 of the Road Traffic Act 1961 (as amended).

As regards offence no. 4, the applicant has invited the Court to find correspondence with an offence of theft contrary to s. 4 of the Criminal Justice (Theft and Fraud Offences) Act 2001. The Court agrees with this suggestion and is satisfied to find correspondence on that basis.

Moving to the issue of minimum gravity, the Court is further satisfied, in circumstances where a composite sentence of 3 years and 4 months was imposed, that the requirements of s. 38(1) (a) (ii) are met in respect of each of the offences in question.

In addition, the Court is satisfied to note the existence of the European Arrest Warrant Act 2003 (Designated Member States) (No. 3) Order 2004, S.I. No. 206/2004 (hereinafter referred to as "the 2004 Designation Order"), and duly notes that by a combination of s. 3(1) of the Act of 2003, and Article 2 and the Schedule to the 2004 Designation Order, "Poland" (or more correctly the Republic of Poland) is designated for the purposes of the Act of 2003 as being a State that has under its national law given effect to the Framework Decision.

Important Additional Information
The European arrest warrant itself did not make clear that the conviction of the respondent was a conviction following a retrial, in circumstances where the respondent had been previously tried and acquitted, but where his acquittal was quashed upon appeal and a retrial was directed. These details are, however, set out in further information provided by the issuing judicial authority dated the 2nd June, 2011. The letter containing additional information stated: -

> *"With reference to your letter of 24th of May 2011, our District Court in Legnica III Criminal Department, informs you as follows:*
>
> *Andrzej Zachweija was present, together with his defender, for trials held on 21 July 2005, 21st Sept 2005, 9 Jan 2006. He was not present for the trial held on 9 Nov 2005. And the convict's defender appeared on 23rd Nov 2005, 6th March 2006 and 3 April 2006.*
>
> *Both the convict's defender and the very convict were not present when the judgement was announced on 10th April 2006. The judgement [sic] passed by the Regional Court in Lubin on 10th April 2006 concerning this matter was quashed, and the matter was directed to be retried by virtue of the judgement passed by District Court in Legnica on 27th July 2006, case file No IV Ka 492/06. Andrzej Zachweija was not present for the appeal trial, only his defender was there.*
>
> *Next, a retrial took place before Regional Court in Lubin. Andrzej Zachweija was present for the trial held on 20th Nov 2006 (he agreed to carry out the trial in absence of the defender) on the 11th Dec 2006, 21st Feb 2007, 10th Sept 2007, 22nd Oct 2007. Being at the trial held on the 22nd Oct 2007, Andrzej Zachweija was informed of a successive term of the trial to be on the 19th Nov 2007, when the judicial proceedings was closed. He was not for the trial held on 22nd Jan 2007, 28th March 2007, 19th Nov 2007.*
>
> *The convict did not appear on 26th Nov 2007 when the judgement [sic] was announced. That judgement [sic] sentenced him to an aggregate penalty of 3 years and 4 months of imprisonment.*
>
> *Regional Court in Lubin is the first instance court. Means of appeal from Regional Court of Lubin are tried by District Court in Legnica."*

Evidence Adduced by the Respondent
The respondent has sworn two affidavits in these proceedings, on the 12th April, 2011, and on 25th October, 2011, respectively. The Court has given detailed consideration to both of these affidavits, as well as to the documents exhibited therein.

In his affidavit sworn on 12th April, 2011, the respondent deposed to the following matters of fact (inter alia, and to the extent relevant): -

> *"3. The five offences the subject matter of the warrant concern conduct that took place in August 2001 and January/February 2002 some nine years ago. It is further alleged in the warrant that I was not convicted in my absence and that by minutes of a trial held on 19th November 2007 I was summonsed to appear seven days later, 26th November 2007, when a sentence of three years and four months was purportedly imposed on me. I dispute this. I did not attend any court on 19th November 2007 and I was not notified of any court session on 26th November 2007.*
>
> *4. I have been living in Ireland since October 2007. Prior to coming here I lived in Germany and whilst living in Germany I travelled to and from Poland to attend court cases in relation to matters the subject matter of the European arrest warrant. I understood all matters to have been dealt with by the time I came to Ireland.*
>
> *5. I believe I have previously been tried and acquitted in relation to the offences the subject of the European arrest warrant (Decision of Lubin District Court of 10th of April 2006 exhibited "AZ -- 1".)"*

It should be stated here that, for reasons that will become apparent later, counsel for the applicant places considerable significance upon a statement contained within this exhibit to the effect that Lubin District Court awarded the costs of this trial in favour of the defendant (i.e. the present respondent) and against the prosecutor (i.e. the Polish State). The affidavit continues: -

> *"6. I am now well settled in Ireland and my family life is here. I am not working myself but my partner Barbara Masaczak*

is working at Aras Attracta Nursing Home in Swinford. We have two children and four-year-old and a one-year-old (named in the affidavit) whom we are raising together and whom I look after it when my wife is working. I have at all times been law-abiding in Ireland (letter from local Garda Sgt confirming that exhibited " AZ -- 2").

7. I believe that pursuing me by means of the European arrest warrant the subject matter of the within proceedings for matters that occurred so long ago is both inappropriate and disproportionate. I believe my whereabouts in Ireland was well known to the authorities in Poland and in this State and I cannot understand why they have waited so long to proceed against me particularly given the background to the matter has already referred to."

Further, in his supplemental affidavit sworn on the 25th October, 2011 the respondent deposed to the following additional matters of fact (inter alia, and to the extent relevant): -

"3. Further to my previous affidavit I believe I was acquitted of the charges the subject of the European arrest warrant pursuant to decision of Lubin District Court dated 10th April 2006. However it is my understanding that the prosecutor claims that this acquittal was quashed after an appeal brought by the prosecutor to Legnica. I understand that the quashing of my acquittal is purported to have occurred on 27th July 2006, however, I was not present for that event.

4. I accept I was aware it was intended to retry me and I attended the Court on a number of dates after July 2006. Each time I attended I was told of various excuses for the case not going on such as someone was sick or the case was not ready. There was no jury involved and I get with this case in the same way as I had the time I was acquitted except this time I did not have any legal representation. I was not legally represented because I could not afford to pay again for legal representation and I believe that after my previous reasoned acquittal I would be found "not guilty" again. I was not aware and I was not advised that I was in jeopardy or that I could have legal representation assigned to me and paid for by the government. I did not "agree" to carry out the trial in the absence of a lawyer and I would have accepted such representation had I known or had it been offered.

5. I accept I was in the courts for the trial on 22nd October 2007 but I was not aware of the scheduled trial on 19th November 2007. I was not informed about that date or time of a Court on 19th November and I was not informed or so aware in relation to the purported trial on 26th of November 2007.

6. For the sake of certainty I say the 22nd day of October was the last day I was in the court in Poland. I received a job offer two weeks later in Ireland and I jumped at the chance as it offered me hope and certainty. I resolve to manage with my case like I did when I was in Germany. I had asked family members to let me know if any news came through in relation to further adjourned dates. I had been so notified in the past and I was in a position to balance all my affairs in conjunction with the court case. Family members had notified me in the past, but this time I believe my family members heard nothing, they had no news for me and were unable to inform me of the situation.

7. I went on to Poland for Christmas 2007 and I enquired of my mother whether there was any news for me and I was informed that a letter had arrived from the Court and I noted it was a letter to pay the costs of the case. It was not a fine and it contained no details of any conviction or of any penalty. I went to the Court office to enquire about my case and I was informed by a lady there that it looks like this case was finished, but she didn't know anything about the details. I then went to see a person whom I understood to be the President of the Court and I sought clarification. He indicated he could not help me. I was simply told I would need a lawyer.

8. I then contacted my old lawyer, Beata Matysek, who defended me when I was acquitted. She told me that she would look into it and having done so she came back to me and informed me she could not locate any record of my case and could not find out anything regarding the outcome and in the circumstances saw no impediment to my return to Ireland.

9. For the sake of certainty I categorically state I was not then and I am not running away from justice. Whereas standing back and looking at the dates I can now see how somebody might think otherwise, I say I most genuinely was not aware of any trial date in November 2007 or thereafter.

10. I had no legal representation and I never for one second thought I would be convicted. If I had any concern about a conviction I would not have ran away. I was always committed to defending myself and never had trouble doing so, even when I was living outside of Poland."

Submissions on Behalf of the Respondent.

In the course of his submissions, counsel for the respondent, Mr. Kieran Kelly B.L., relied upon s. 45 of the Act of 2003 which states: -

"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

(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.",

Relying upon that provision, counsel contended that his client should not be surrendered, and that indeed his surrender was prohibited

because, in counsel's submission, the evidence before the Court establishes that he was, in the words of the section, *"not present when he or she was tried for and convicted of the offence specified in the European arrest warrant" and that he was "not notified of the time when, and place at which, he or she would be tried for the offence"* and no undertaking as to a retrial has been provided.

Counsel for the respondent has urged upon the Court, in effect, that it should adopt a narrow and strict interpretation of what is meant by the word "trial" in s. 45 of the Act of 2003, and that the Court should interpret it as being confined to only the date or dates on which the Regional Court in Lubin was engaged in a hearing by way of retrial, and considering the substantive issue as to the respondent's guilt or otherwise of the offences with which he was charged. Further, while counsel for the respondent concedes that his client may have been present on some dates on which the case was mentioned solely for procedural purposes, counsel contends that on any dates on which the matter was mentioned solely in connection with some procedural aspect of the case the Court should regard his client as not having been on trial.

He has further urged it is not possible on the available information for this Court to say precisely when the trial of his client commenced, but that it is clear that he was at trial on the 19th November, 2007, and was not present, and also that judgment was announced on the 26th November, 2007 when, again, he was not present. Further, the respondent's own evidence, which is not engaged with or contradicted, is to the effect that although he was present on the 22nd October, 2007 this was the last date on which he attended court and he was not notified or made aware either that his trial would take place on the 19th November, 2007, or that a decision would be announced on the 26th November, 2007.

It should be stated that counsel for the applicant, Ms. Cathleen Noctor B.L., disputes Mr. Kelly's view of the evidence and the correctness of his submission as to the facts, and the Court will deal with Ms. Noctor's counter contentions later in this judgment.

As regards the law, counsel for respondent has drawn the Court's attention to a decision of Kearns P. in the High Court in a case entitled *Jason O'Brien v District Judge John Coughlan and the Director of Public Prosecutions* [2011] I.E.H.C. 330 (Unreported, High Court, Kearns P, 29thJuly, 2011). That case concerned an application for an order of certiorari to quash a conviction and penalty imposed on the applicant *in absentia* by the first named respondent. The facts were that the applicant was before the District Court for sentencing in a no insurance case. Although his solicitor was in attendance, the applicant himself was absent and no explanation for his absence was provided. The applicant's solicitor applied for an adjournment which was refused. He then submitted to the first named respondent that he should issue a bench warrant rather than proceed in the applicant's absence. That suggestion was also rejected. The first named respondent then proceeded to summarily convict and sentence the applicant *in absentia*. The applicant had 54 previous convictions for related road traffic offences, and in all the circumstances the District Judge imposed a sentence of five months' imprisonment and disqualified the applicant from driving for forty years. Kearns P. granted certiorari on the following basis: -

> *"It is regrettable aspect of the administration of justice in modern times that both prosecuting authorities and the courts are expected to at every juncture to facilitate defendants who themselves neglect or decline to co-operate in the procedural requirements which require to be observed by both prosecution and defence so as to permit the criminal justice system to function effectively. It is thus by no means uncommon to hear that members of An Garda Síochána are required to devote a great deal of time and energy to the execution of bench warrants where persons remanded on bail fail to turn up for designated sittings or simply ignore the process altogether. It is often later argued or contended that it was an injustice for the court to proceed further in the absence of the person accused or charged with a particular offence.*
>
> *The applicant in this case was present in court on the date when his trial date was fixed. I therefore reject the purported explanation offered now in the context of the present application to explain non-attendance.*
>
> *I think in the circumstances the District Judge was entitled to proceed with the trial and reach a conclusion as to guilt or innocence.*
>
> *However, I am satisfied a different consideration must arise where the District Judge then intends to impose a custodial sentence which is something more than a short term custodial sentence. A sentence of five months imprisonment must be considered as a sentence of substance. That being so, this Court is constrained to follow the decision of the Supreme Court in Brennan v. Windle [2003] 3 I.R. 494 which stated firmly that where the sentencing judge has in mind to impose a prison sentence of some length in circumstances where the offence in question would not invariably attract a prison sentence, the failure to at least to ascertain if there is a bona fide reason for non-attendance or to make some effort to secure the attendance of the applicant and hear him before proceeding to impose the sentence does amount to a breach of fair procedures and a breach of the requirements of constitutional justice.*
>
> *While a brief custodial sentence may not give rise to such a requirement, I believe such a requirement does arise in this case because of the significant sentence the District Judge had in mind to impose. Accordingly, I would uphold the applicant's submission in that, having found the applicant guilty, the respondent should, prior to the imposition of sentence, have either adjourned the case or issued a bench warrant to compel the presence of the applicant before imposing sentence."*

Arguing by analogy, counsel for the respondent in the present case has submitted that it is precisely because it would be a breach of fair procedures and a breach of the requirements of constitutional justice for a court to impose a lengthy prison sentence on an accused *in absentia*, in circumstances where he has not been notified of, and is unaware of the court hearing in question, that the framers of the Framework Decision, and in particular Article 5.1 thereof, and also the Oireachtas in drafting s.45 of Act of 2003 to give effect to Article 5.1 of the Framework Decision in Irish domestic law, have required that before a person is surrendered to serve a sentence imposed upon him/her *in absentia* it must be established that he/she was notified of the time when, and place at which, he or she would be tried for the offence, alternatively that the issuing state should provide an undertaking as to a retrial.

Counsel for the respondent has submitted that what is being sought in this case is to have the respondent surrendered to the issuing state in circumstances where he was tried and convicted *in absentia* in circumstances that amounted to a breach of fair procedures and a breach of constitutional justice, and that for those reasons his surrender should be refused both under ss.37 and 45 (which appears within Part 3 of the Act of 2003), in circumstances where there is no undertaking as to a retrial.

Counsel for the respondent also places reliance on the fact that he was not legally represented at the retrial as a further basis for contending that he was tried and convicted in circumstances that amounted to a breach of fair procedures and a breach of constitutional justice

Submissions on Behalf of the Applicant.
In response to counsel for the respondent's submissions, counsel for the applicant has urged upon the Court that regard should be had in the first instance to the provisions of s. 45(a) of the Act of 2003, and that it is only in circumstances where a respondent satisfies the requirements of s.45(a) that it is then necessary to move on and consider whether the requirements of s.45(b) (i) [or s. 45(b)(ii)if relevant, which it is not in this instance] are satisfied. Ms. Noctor contends that, contrary to Mr Kelly's submission, the requirements of s. 45(a) are not in fact satisfied in the present case.

Section 45 (a) requires that the respondent should not have been present when he *"was tried for and convicted of the offence specified in the European arrest warrant."* Counsel for the applicant submits that the words "tried for and convicted" must be their clear and literal meaning and thus read as referring to one cumulative process, and not as two separate and distinct processes. In counsel's submission, if the Oireachtas had intended the latter, the provision would have read *"tried for or convicted"*. Accordingly, she contends that unless a respondent has been tried and convicted (the court's emphasis) in totality in his absence he is not a person to whom s. 45 applies.

Counsel for the respondent contends that it is indisputable from the information before the Court that the retrial of the respondent before the Regional Court in Lubin was concluded on the 19th November, 2007 and that the respondent was convicted on the 26th November, 2007 when the Court announced its decision. However, she relies upon the passage within the additional information dated the 2nd June, 2011 where it states: -

> *"Being at the trial held on the 22nd Oct 2007, Andrzej Zachweija was informed of a successive term of the trial to be on the 19th Nov 2007, when the judicial proceedings was closed."*

In counsel for the applicant's submission, this clearly indicates that on the 22nd October, 2007, on which date according to the issuing judicial authority, and indeed on his own admission, the respondent was present, the trial was underway and, further, that it was adjourned part heard from that date to the 19th November, 2007 for the purpose of being concluded. The reference *to "a successive term of the trial to be on the 19th Nov 2007"* clearly imports an intention to resume a case at hearing on that date. The respondent was present on the 22nd October, 2007 when the date for resumption of the part heard trial was set, and accordingly he was notified in person of the relevant date on which the substantive hearing was concluded. The fact that he was not present when the decision was announced on the 26th November, 2007 is irrelevant, says Ms. Noctor, in circumstances where he was present for that part of the substantive hearing that occurred on the 22nd October, and he was notified in person concerning when it would be concluded by virtue of being present in court at the material time.

As regards the issued raised about the absence of legal representation during the respondent's retrial, counsel for the applicant makes the further point that it is mere assertion on the part of the respondent that he was not informed about his right to a state appointed lawyer, and also that he was unable to afford to engage a lawyer privately. It was urged upon the court that it should view these mere assertions sceptically in circumstances where no cogent supporting or corroborative evidence had been adduced, and particularly where a document exhibited by the respondent in one of his affidavits established that he was in fact privately represented at his first trial and that following his acquittal he was awarded the costs of that trial against the Polish State. It is suggested that in such circumstances, his contention that he was unable to afford to engage a private lawyer for his retrial lacks credibility.

The Court's Decision
The Court has considered the evidence in this case and the parties' respective submissions with respect to the specific objections raised by the respondent. The Court is in agreement with counsel for the applicant that the words *"tried for and convicted"* in s. 45(a) 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. That said, the Court accepts that the concept of a trial imports or connotes that part of a criminal proceeding where the Court is seized of the issue as to whether the accused is guilty or otherwise of the charge(s) preferred against him, and that it does not refer to mentions solely in connection with some procedural aspect of the case. In the present case the Court is satisfied on the totality of the evidence before it, and with particular reliance upon the additional information dated the 2nd June, 2011, that on the 22nd October, 2007, on which date the respondent was present, the trial was underway and, further, that it was adjourned on a part-heard basis from that date to the 19th November, 2007 for the purpose of being concluded. Accordingly, he was not tried and convicted in totality in his absence and so s. 45 does not apply in his case. Moreover, although it is perhaps no longer of specific relevance in the light of the finding just made, the Court is also satisfied that the respondent was in any event present in Court on the 22nd of October, 2007 when arrangements for resumption of the trial were made, and accordingly, the Court is satisfied that the respondent was notified in person of the relevant date, place and time at which the substantive hearing was to be concluded. In arriving at this conclusion the Court relies, *inter alia*, upon the presumption that the issuing State has respected, and will continue to respect, the fundamental rights of the respondent, including his right to fair procedures and constitutional justice. As the respondent has failed to adduce cogent evidence suggesting the contrary, the presumption in question has not been displaced. In that regard the respondent's mere and unsupported assertions are insufficient to displace the presumption and do not amount to evidence of sufficient cogency to put the Court upon its enquiry and to cause it to seek to look behind the statements contained in the warrant and the additional information dated the 2nd of June 2011. In addition to relying on the presumption, the Court also accepts the point made by counsel for the applicant that aspects of the respondent's evidence lacks credibility and should on that account be regarded with scepticism.

The Court does not consider that respondent's reliance on the decision in Jason O'Brien v District Judge *John Coughlan and the Director of Public Prosecutions* [2011] I.E.H.C. 330 (Unreported, High Court, Kearns P., 29th July, 2011) is apposite in the circumstances of the present case. Certiorari was granted in the O'Brien case not because the applicant in that case was convicted *in absentia*, but because the District Judge, having convicted him, proceeded to then sentence him *in absentia* and to impose a substantial prison sentence upon him, without either adjourning the case to facilitate, or issuing a bench warrant to compel, the presence of the applicant before imposing sentence. However, that case has no direct application to a request for surrender on foot of a European arrest warrant. Neither does it provide a rationale for the s. 45 requirement by analogy, as counsel for the respondent suggests it does. It does not do so because that case concerned a sentencing hearing and it has been held by Peart J. in *Minister for Justice, Equality & Law Reform v McCague* [2010] 1 I.R. 456 that s. 45 of the Act of 2003 does not apply to a sentencing hearing as opposed to a trial hearing. In the course of his judgment Peart J stated at p.485: -

> *"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 (sic) 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."

Messrs Farrell & O'Hanrahan in their excellent work entitled "The European Arrest Warrant in Ireland" (Clarus Press, 2011) have recorded in a footnote on p.209 of their work that Peart J's judgment in *McCague* was subsequently affirmed ex tempore by the Supreme Court.

In so far as "Part 3" issues generally are concerned, the issue for the Court is whether surrender of the respondent in the particular circumstances of the case would be incompatible with the State's obligations under the Constitution or the European Convention on Human Rights and Fundamental Freedoms. The Court is required to be forward-looking, and it is not entitled to look behind, or to review, or to act as a court of appeal from, a decision of a court in the issuing state. In so far as the respondent contends that his retrial was unfair by virtue of the fact that he was unrepresented, this is a matter he should have pursued, or, if he is not out of time, should still attempt to pursue before the courts of the issuing state. The availability of a remedy before the courts of the issuing state is to be presumed by virtue of the general presumption that the issuing State has respected, and will continue to respect, the fundamental rights of the respondent. While the Court considers the respondent's assertions concerning the absence of legal representation during his retrial, and the reasons for that, lack credibility in any event; even if that were not so, this Court would not be justified in intervening where, as here, the complaint relates to the alleged unfairness of a trial that has already taken place in the issuing state. The Supreme Court, per Murray C.J., as he then was, in *Minister for Justice Equality and Law Reform v Brennan* [2007] 3. I.R.732 stated at pp. 743 - 744: -

"[39] The manner, procedure and mechanisms according to which fundamental rights are protected in different countries will vary according to national laws and constitutional traditions. The checks and balances in national systems may vary even though they may have the same objective, such as ensuring a fair trial. There may be few, if any, legal systems which wholly comply with the precise exigencies of our Constitution with regard to these matters. Not all for example will provide a right to trial by jury in exactly the same circumstances as our Constitution does in respect of a trial for a non-minor offence. Rules of evidence may differ. The fact that a person would be tried before a judge and jury in this country for a particular offence could not in my view, be a basis for refusing to make an order for surrender solely on the grounds that in the requesting state he or she would not be tried before a jury. The exceptions which we have to the jury requirement, as in trials before the Special Criminal Court, acknowledges that a fair trial can take place without a jury even though it is constitutionally guaranteed for most trials in this country.

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

This Court has no evidence in this case as to the existence of the type of egregious circumstances spoken of by the former Chief Justice.

In all the circumstances of the case, the Court is not disposed to uphold the specific objections raised by the respondent, and the Court will make an order for the respondent's surrender to such person as is duly authorised by the issuing state to receive him.