Neutral Citation Number: [2009] IEHC 342

THE HIGH COURT

2008 209 EXT

BETWEEN

MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

APPLICANT

AND

IGOR GRITUNIC

RESPONDENT

JUDGMENT of Mr. Justice Michael Peart delivered on the 30th day of June 2009

The application before the Court is one seeking the surrender of the respondent on foot of a European arrest warrant which was issued by a judicial authority in Paris, France on the 25th June, 2008 following the trial and conviction of the respondent on the 21st May 2008 in absentia for certain offences as set forth therein ("the second warrant"). There is some confusion said to exist by the respondent in this case as to exactly how many and/or what offences he was convicted for on that date, and I will come to that controversy in due course. But in any event he was sentenced to a term of five years' imprisonment.

At any rate that warrant was received by the Central Authority here on or about the 21st November, 2008, following which an application to endorse that warrant for execution was made to the High Court on the 25th November, 2008. The warrant was duly endorsed for execution on that date, and on the following day, the 26th November, 2008, the respondent was duly arrested on foot of it and was brought before the Court as required by s. 13 of the European Arrest Warrant Act 2002, as amended. He has been remanded in custody from time to time thereafter pending the hearing of the present application.

There is however a history to the present application which is important. On the 6th February, 2007, a European arrest warrant was issued by the same French judicial authority seeking the surrender of the respondent to face prosecution for the offences set out therein ("the first warrant"). That warrant was endorsed by the High Court for execution on the 4th June, 2008. The Court has been informed that this first warrant had been received by the Central Authority here on the 14th March 2007, but thereafter further information was sought by the Central Authority, hence the application for endorsement did not proceed until the 4th June 2008. I should at this point refer to the fact that the date on which this application for endorsement was made and granted post-dated the trial and conviction in absentia of the respondent on the 21st May 2008. That fact had not been communicated to the Central Authority here and therefore it is clear that the High Court was not appraised of the fact that the respondent could no longer be surrendered to face prosecution. An issue arises in relation to that which I will come to.

On the 14th July 2008, again in the absence of any knowledge on the part of the Central Authority or the Court the respondent had already been tried and convicted in his absence, the respondent was duly arrested on foot of the first warrant and brought before the Court and was thereafter remanded in custody from time to time pending the application on foot of that first warrant for his surrender. An application for bail was heard by the High Court and was refused following objection to bail being made. By November 2008 the respondent had learned that he had been tried and convicted in his absence on the 21st May 2008 and his solicitors so informed the Central Authority of this fact on the 20th November 2008. On the 25th November 2008 an application was made to this Court in the presence of the respondent (since he had been remanded to that date and was present before the Court) to withdraw the first warrant. That application was granted, and immediately following that withdrawal, the respondent's release from custody was ordered, and he was released. However, immediately thereafter the Applicant made the application to have the second warrant endorsed for execution, and a short time thereafter the respondent was re-arrested on foot of same and brought back to the High Court on foot thereof, and he was again remanded in custody pending the hearing of the present application for surrender on foot of the second warrant so that he can be surrendered to serve the sentence imposed on the 21st May 2008.

By the time the first warrant was withdrawn, the respondent had been in custody for a period of some nine months.

The number of offences:
Before addressing the points of objections raised by the respondent I should set out the differences in the two warrants and the actual conviction order of the French Court dated 21st May 2008 as to how many offences are involved in this case.

The first warrant:
In the first warrant, it is stated that the surrender of the respondent was being sought so that he could be prosecuted for "three offences" (my emphasis). In respect of these offences three separate boxes were marked with an 'x' in paragraph E.1. in order to indicate that all three offences were offences within the categories of offence set forth in Article 2.2 of the Framework Decision, and therefore ones in respect of which double criminality need not be verified. The first warrant sets out a recitation of facts giving rise to these offences as follows:

> *"In Paris on the national territory, since January 2006 and in the course of 2007, over 2005, 2006 and 2007 as perpetrator.*

Aggravated procuring (several victims, several perpetrators), understanding for the purpose of committing such a violation as aggravated procuring, possession of forged administrative documentation, facts provided for and repressed by sections 225-5, 225-7, 225-11, 225-20, 225-24, 225-21, 450-1, 441-3, 441-9, 441-10, 441-12 of Penal Code.

On 29th June 2006 the French Central Department for the Repression of the Trafficking of Human Beings (OCRTEH) recorded the complaint of a Brazilian person, Oliviera Juara Moreira. The young woman explained that upon her arrival over the French territory she had been forced into prostitution by two men, Sacha and Leon.

She added that Leon had beaten her up and raped repeatedly. Further to that complaint the police arrested Constantin Bardan who admitted he had approached the young woman in Brazil and stated that Sasha, whose real name would be Igor GRITUNIC, would reside in Ireland. He would use a forged Spanish passport no X50395 and ID no RE 008800019325 in the name of Suwwan de Filipe Karim, born 20th April 1980 in Brasilia (Brazil). His mobile number in Ireland would be 353 862 190 236."

I should add that additional information was provided to the Central Authority in the form of letters from the French judicial authority relating to the factual basis for these offences.

The three boxes marked with an 'x' in this first warrant were:

- Participation in a criminal organisation
- Sexual exploitation of children and child pornography
- Forgery of administrative documents and trafficking therein.

In the additional information provided, the French judicial authority stated that the box for 'Sexual exploitation of children and child pornography' was marked in error, and that the correct offence to be marked was 'trafficking in human beings'.

The conviction in absentia on 21st May 2008:
The order of the French Court made on the 21st May 2008 following the conviction in absentia of the respondent states that he was found guilty of the following offences:

"Aggravated Pimping: Victim engaged in prostitution since her arrival in France, offence committed from January 2006 until the 27th of April 2006 and for a period not under the statute of limitations, in Paris and on the whole national territory"

Aggravated Pimping: Multiple perpetrators and accomplices, offence committed from January 2006 until the 27th of April 2006 [mistakenly stated as 2007] and for a period not under the statute of limitations, in Paris and on the whole national territory.

Possession of several falsified administrative documents, offence committed from January 2005 until January 2007 and for a period not under the statute of limitations, in Paris and on the whole national territory.

Use of falsified administrative documents stating a right, an identity or a quality, offence committed from January 2005 until January 2007 and for a period not under the statute of limitations, in Paris and on the whole national territory."

This suggests that the respondent was convicted in respect of four offences whereas his surrender on foot of the first warrant was said to be for the purpose of prosecuting three offences as already set forth.

The second warrant:
This warrant seeks surrender so that he can serve the sentence of five years imprisonment imposed on the 21st May 2008 in respect of "two offences" (my emphasis). Paragraph c under the heading 'Violations', having referred to "two offences" states as follows as to the underlying facts:

"Facts committed in Paris, since January 2006 till 27 April 2006 within the provisions of the statutes of limitation as perpetrator.

"On 29 June 2006 the French National Vice Squad in charge of repressing procuring received a complaint from a Brazilian woman, Oliviera Juara MOREIRA. The young lady complained that upon her arrival in Paris she had been coerced in doing prostitution by two men, SACHA and LEON. She added that LEON had repeatedly raped and beaten her up. The investigation made it possible to arrest Constantin Bardan who admitted he had approached the girl in Brazil and added that SACHA, whose real name was Igor GRITUNIC, would reside in Ireland. He would use a forged Spanish passport no X 50395 and identification number RE 008800019325 in the name of Karim SUWWAN DE FILIPE, born 20 April 1980 in Brasilia (Brazil). It appeared he had opened a phone line under his alias and sent several money orders to Brazil between February and May 2006 to the benefit of Constantin BARDAN. He received Oliviera Juara MOREIRA at the Orly airport and brought her to the place where she would prostitute. In spite of the warrant of arrest he has not been arrested and should be seen as absconding and fleeing justice."

The two offences referred to in the second warrant are described in the warrant as being:

- Procuring with aggravated circumstances (several victims, several perpetrators)
- Possession and use of forged administrative documents

The two offences are marked in the warrant as being Article 2.2 offences, namely:

- Trafficking in human beings
- Forgery of administrative documents and trafficking therein

The Respondent's Points of Objection and Submissions:
A number of points of objection are raised against an order for surrender being made in this case.

1. Warrant void for uncertainty:
I have set forth the differences which appear in the first and second warrants and the French court order dated 21st May 2008 (conviction and sentence) as to the number and nature of the offences for which his surrender is now being sought. These differences form the basis for the respondent's submission that the second warrant should be regarded as void for uncertainty, or otherwise one on foot of which the respondent should not be surrendered.

In my view this issue should be determined by reference only to the second warrant and the contents of the court order since the first warrant is not the subject of this application. That warrant has been withdrawn. Mr O'Higgins submits that because his surrender is sought to serve a sentence of five years for two offences, yet the conviction and sentence of five years, according to the court order itself, is in respect of four offences as set forth therein, neither the respondent nor this Court can know with the necessary degree of certainty precisely what offences his surrender is in respect of.

Mr O'Higgins refers to the fact that a composite sentence of five years was imposed in respect of the four offences referred to in the court order dated 21st May 2008, and that this Court and the respondent cannot therefore work out or know how much of that five years sentence is referable to the two offences only for which his surrender is sought. It is submitted that if the sentence is imposed for four offences it cannot be the case that the same five years is attributable to only two offences. Article 27.2 of the Framework Decision is relevant to this objection. It provides:

> *"27.2: Except in the cases referred to in paragraphs 1 and 3, a person surrendered may not be prosecuted, sentenced or otherwise deprived of his or her liberty for an offence committed prior to his or her surrender other than that for which he or she was surrendered." (my emphasis)*

Accordingly it is submitted that if surrendered to serve this five year sentence, he will be deprived of his liberty not only in respect of the two offences for which his surrender is sought but also for the remaining offences for which his surrender has not been sought. It has been submitted also that in spite of the fact that these difficulties have been drawn to the attention of the issuing judicial authority, the differences and the resultant confusion has not been explained or clarified.

Shane Murphy SC for the respondent submits that the alleged confusion is more apparent than real when one reads the transcript of the court's decision dated the 21st May 2008. As I have already set forth, the two offences set out in the second warrant are described as:

- Procuring with aggravated circumstances (several victims, several perpetrators)
- Possession and use of forged administrative documents.

Mr Murphy submits that if one considers the contents of the court order dated 21st May 2008, the four offences for which he was convicted and sentenced to five years imprisonment are these offences, albeit that there are two convicted offences under each category of offence referred to in the warrant. He submits that the four offences for which he was sentenced are within the two offences set forth in the warrant and that there is no real confusion arising in this regard, and that the two "Aggravated Pimping" offences referred to in the conviction are a way of describing the first offence referred to in the Second European arrest warrant, and that the offences referred to in the conviction as "Possession of Several Falsified Administrative Documents" and "Use of Falsified Administrative Instruments Stating a Right, an Identity or a Quality" is a recitation of what the respondent was convicted for in respect of the second offence set forth in the warrant.

However, in addition, Mr Murphy has referred to the provisions of Article 27.2 of the Framework Decision which I have already set out, and he refers also to the provisions of s. 22 of the European Arrest Warrant Act 2002, as amended which puts in place a specialty rule for the purpose of the European arrest warrant arrangements under the Framework Decision. He refers to the presumption contained in s.22 (3) of the Act as follows:

> *"(3) It shall be presumed that, in relation to a person to whom a European arrest warrant applies, the issuing state does not intend to-*
>
> *(a) proceed against him or her,*

(b) sentence or detain him or her in his or her personal liberty,

in respect of an offence, unless the contrary is proved." (my emphasis)

Firstly, it is submitted that this Court must presume therefore, until the contrary is proved, that the respondent if surrendered, will not be required to serve a sentence for any offence not the subject of the second warrant, and that the respondent has failed to prove the contrary in spite of the fact that he has had legal advice available to him from a French lawyer who has sworn no affidavit in support of his point of objection in this regard.

Secondly, it has been submitted by Mr Murphy that this Court must proceed on the basis, in any event, that if it was intended to imprison him in respect of any matter not covered by the warrant, that this would not occur before the French judicial authority had obtained the consent of he High Court here, as provided for in s. 22 of the Act.

Thirdly, it is submitted that this Court is entitled and obliged to presume, on the basis of the principle of mutual trust and confidence between Member States that the French judicial authority and/or the French State will comply with its obligations under the Framework Decision, and that these obligations include that upon surrender the respondent will not be imprisoned for any offence not the subject of the second warrant.

Conclusion:
The respondent has adduced in evidence a copy of the transcript of the French court's conviction and sentence dated 21st May 2008 in an effort to prove that he was sentenced for offences other than those set forth in the warrant and submits therefore that if he is surrendered to serve the composite sentence of five years imposed, he will in effect be detained for offences not covered by the second warrant. I agree that the confusion between what is stated in the warrant as to "two offences" and the reference to four offences for which he was convicted in the order dated 21st May 2008 is more apparent than real, when one examines the transcript adduced in evidence by the respondent. It certainly does not dislodge the presumption contained in s. 22 (3) of the Act. If this Court had before it only the second warrant, and was considering the contents of the warrant as to the offences to which it refers, it would have seen that two offences were covered by the warrant, that the facts giving rise to those offences are set forth in paragraph c of the warrant, that two categories of offence are marked in the list of offences in the warrant for the purpose of Article 2.2 of the Framework Decision, and finally that a total of five years imprisonment has been imposed, all of which remains to be served. The court can also see that the offences are said to be in contravention of quite a large number of different provisions of the French Penal Code as set forth.

Even though the original purpose of the respondent obtaining and delivering to the Central Authority here a copy of the transcript dated 21st May 2008 was to demonstrate while in custody on foot of the first warrant that in fact he had already been tried and convicted for the offences for which his surrender was at that time being sought for prosecution, it is of course open to him to refer to this transcript now to try and dislodge the presumption that the sentence covers offences not covered by the second warrant, in my view it does not do so. It is clear for example that while the judicial authority in France has stated the "Nature and Legal Classification" of one of the offences is "Possession and use of Forged Administrative Documents" (see page 3 of second warrant), that offence has two elements, namely possession and use, and two of the offences for which his conviction is recorded in the transcript for the 21st May 2008 are "Possession of Several Falsified Administrative Documents" and "Use of Falsified Administrative Instruments Stating a Right, an Identity or a Quality", as already referred to. In my view the matter is clear. The issuing judicial authority has completed paragraph c of the warrant by giving the two categories of offence for which five years imprisonment was imposed. Facts giving rise to the matters for which he was sentenced are contained, necessarily in summary form, in this warrant.

While it would have been possible to complete the warrant differently and in a way which made reference precisely to the four offences referred to in the conviction order itself, the fact that it is done in the way it has been does not in my view invalidate the warrant.

The important thing is that the respondent has been convicted for offences, all of which are within Article 2.2 of the Framework Decision. This is not a case where some difficulty might arise in the event that one or other of the offences does not correspond, and where as a result it may not be possible to say how much of the sentence imposed refers to the offence which does not correspond and those for which there is no such difficulty.

The Court must also accord to the issuing judicial authority the trust and confidence underpinning these new arrangements for surrender between Member States, being arrangements intended to remove the delays and complexities perceived to have previously existed under former treaty arrangements. It must operate on the basis of judicial cooperation, albeit that the necessary formalities must be properly fulfilled and completed. Nevertheless, this Court must not be too concerned with the sort of alleged ambiguities or lack of clarity submitted in this case, which are necessarily on occasion going to appear given the differences between the criminal systems and codes of different member states. The new arrangements are intended to reasonably accommodate these inevitable differences. Nevertheless matters must be done properly in accordance with what the Framework Decision and the Act here require, but a margin of appreciation must be allowed to take account of the differences to which I have referred and to the difficulties sometimes encountered with translated documents. In my view, as I have stated, this second warrant is completed sufficiently to cover the offences for which the respondent was convicted on the 21st May 2008 and for which the sentence of five years was imposed. In addition, I do not have any doubt but that the respondent is fully aware of the matters for which he has been sentenced since he himself has obtained the transcript in question.

A further matter of some comfort, though not of itself determinative, is that under the arrangements of the Framework Decision, the respondent, if surrendered, has the right to be retried on the offences for which he was tried and convicted in his absence, being the offences for which his surrender is now sought however they are categorised or set out in the warrant. I will come in due course to the point of objection raised in relation to the absence of an undertaking under s. 45 of the Act regarding a retrial.

2. Warrant fails to provide sufficient information for the purpose of s. 11 of the Act:
Under this heading of objection, the respondent submits that necessary details are absent from the warrant as regards the particular provisions of the French Penal Code alleged to have been infringed, and that a copy of those provisions of the French Penal Code and relevant provisions of the French Code of Penal Procedure have not been provided.

Secondly it is submitted that there is a lack of clarity as to the acts and conduct of the respondent which are said to have given rise to the offences, and/or when and where they were committed.

Mr O'Higgins has submitted that contrary to what is required by s. 11 (1)(f) of the Act the second warrant fails to provide clear and specific information to link the respondent to the offences referred to in the warrant. He has referred to the judgment of Denham J. in *Minister for Justice, Equality and Law Reform v. Desjatnikovs,* (Unreported, Supreme Court, 31st July, 2008) where at paragraph 21 of her judgment, she stated:

> *"The fact that there is a precise description of the facts of the case is important, even though the issue of double criminality is not required to be considered. It is important that there be a good description of the facts. An arrested person is entitled to be informed of the reasons for his arrest and of any charge against him in plain language which he can understand. Also, in view of the specialty rule, the facts upon which a warrant is based should be clearly stated."*

Mr O'Higgins submits that there is a paucity of information about what actions or conduct of the respondent are said to have given rise to the offences in the warrant, and in particular that there is little if any detail of when or where these offences were committed, and that there ought to have been no difficulty in setting out more adequate detail especially given the fact that his trial has taken place and the evidence is therefore known. He submits also that this absence of information is particularly important in the present case given the facts already referred to as to the difference between the number of offences (two) referred to in the warrant, and the number (four) for which he was convicted on the 21st May 2008.

Mr Murphy has submitted on behalf of the applicant that the warrant contains sufficient information to satisfy the requirements of s. 11 of the Act. He refers to the fact that page 2 of the warrant states that the offences were committed in Paris between January 2006 and 27th April 2006. He submits that the recitation of facts in the warrant shows that the offences were committed during this period and shows in a general but clear way what the respondent is said to have done. He refers also to the clear statement as to the provisions of the French Penal Code which have been offended against as set forth in page 3 of the warrant. He submits that it is not required that copies of those provisions be attached to the warrant or provided to the respondent. He has referred to a judgment of my own in *Minister for Justice, Equality and Law Reform v. Dimitrovas,* (Unreported, High Court, 13th February, 2007) when I stated at page 4 thereof:

> *"…. The warrant is in compliance with the section. The Framework Decision itself of and the Act provide a specimen of the form of warrant to be used for a European arrest warrant. Its purpose is to ensure that a person arrested has the necessary basic information upon arrest as to the offences for which his surrender is sought. It is not a document designed or intended to provide him with every piece of information which he might wish to have for the purpose of his trial, but he is entitled to know in a general way what offence is alleged and the provision of the criminal law of the issuing state he is said to have infringed, and of course the potential penalty he might face if convicted. This Court also requires a certain minimum of detail if it is required to determine the question of correspondence and minimum gravity. That is another purpose fulfilled by a correct completion of the warrant."*

Mr Murphy submits that the respondent can be in no doubt as to the offences for which his surrender is sought and the sentence which he faces if surrendered, and he refers to the very detailed setting out of the provisions of the French Penal Code which were infringed by him. In this particular case he refers also to the fact that the respondent has in any event been provided with a copy of the court's detailed consideration of the evidence against him in the transcript dated 21st May 2008, and that he cannot with any sincerity state that he is not fully aware of the facts which gave rise to his conviction.

In all these circumstances he submits that the requirements of s. 11 are satisfied.

I am satisfied that there is sufficient information in the warrant to fulfil in a reasonable way the requirements of s. 11 of the Act, even if it may clearly have been possible to insert a much more expansive recitation of the facts which emerged from his trial in absentia. The respondent can be sufficiently appraised from such detail as is contained in this warrant to know in at least a general way, and in some respects a specific way, as to what he was convicted for and what sentence was imposed, and what provisions of the French Penal Code he has offended against. That suffices for the purpose of a European arrest warrant, subject of course in an appropriate for that information to enable the Court to reach a conclusion as to double criminality. But that does not apply in the present case. It is noteworthy, though not itself determinative, that the respondent has not sworn any affidavit to state that he is unclear or unaware of what these offences refer to.

3. Applicant is not entitled to avail of Article 2.2 of the Framework Decision in relation to the offences marked.
The respondent's submissions under this heading of objection relay to an extent on previous submissions as to the lack of precise information in the warrant. But at the heart of the submission is the fact that in respect of the forgery and use of forged documents offences the issuing judicial authority has, for the purpose of Article 2.2 of the Framework Decision, marked the box "*Forgery of administrative documents and trafficking therein*".

Mr O'Higgins has submitted that there is nothing in the warrant to indicate that the respondent has been convicted in respect of trafficking in such documents and that the two elements of the category of offence must be read conjunctively. In other words, he is submitting that before this box can be marked the offence alleged against the respondent must be not only the forgery of the documents but also trafficking therein, and that in the present case it is only forgery of documents that is alleged. In fact Mr O'Higgins has gone further and has referred to some additional information which has come from the issuing judicial authority to the effect that under French law there is in fact no such offence as trafficking in such documents. Mr O'Higgins acknowledges that in the cases *Minister for Justice, Equality and Law Reform v. Desjatnikovs,* and *Minister for Justice, Equality and Law Reform v. Ferenca*, the Supreme Court has stated that it is for the issuing state to mark the relevant box as being applicable to the offence as it is defined under the law of the issuing state, and that it is not the role of this Court to engage in an analysis of the law of the issuing state as to whether the offence is one which can be so marked as being an Article 2.2 offence. Nevertheless he submits that there is

nothing in the warrant to suggest that the respondent either forged such documents or trafficked them.

I am satisfied that this point of objection fails. Firstly there is clear reference in the recitation of facts in this warrant to the use of a forged passport and use of other false documents i.e. opening a phone line under an alias. The offence is described in the warrant as being "possession and use of forged administrative documents". But in any event it is for the issuing judicial authority to mark the box if it considers that under its laws the conduct of the respondent comes within an offence on this list. This Court must, barring some obvious and manifest error, accept the marking of the box as precluding any need for verification of double criminality.

The only question is whether or not there must be alleged a trafficking in such documents before this box can be ticked. I believe not. If one looks at the list of offences coming within Article 2.2 of the Framework Decision it is clear that in several instances on this list more than one element exists. See for example "*Illicit trafficking in weapons, munitions, and explosives*". Let us suppose that a person was sought to face prosecution in respect of trafficking guns, could it be rationally suggested that because he/she was not charged with trafficking munitions or explosives in addition to guns this box could not be appropriately ticked? I think not. Another example is "*Sexual exploitation of children and child pornography*" and the same conclusion must be obvious. There are other similar categories which can be pointed to. It would be completely contrary to the spirit of the Framework Decision and the purpose of setting out these categories of offences for which double criminality is not required to be verified to conclude otherwise.

4. Breach of fundamental rights arising from the withdrawal of the first warrant, breach of fair procedures, and abuse of process

I have already set out the history of events following the arrest of the respondent on foot of the first warrant, following which after the respondent had spent some nine months in custody, that warrant was withdrawn, and that immediately upon his release from that warrant he was re-arrested on foot of the second warrant which had in fact been issued in France on the 25th June 2008 (but not transmitted to the Central Authority here) before the respondent was first arrested on foot of the first warrant on the 14th July 2008. Indeed, that first warrant was not even endorsed for execution until the 4th June 2008, which post-dated the trial and conviction on the 21st May 2008. Mr O'Higgins has laid emphasis also on the fact that it was not until the respondent himself learned that he had in fact already been convicted in his absence on the 21st May 2008 and brought this to the attention of the Central Authority here that the first warrant was withdrawn by the French judicial authority, since it sought surrender for the purpose of prosecution. Mr O'Higgins submits that at all times it was incumbent upon the issuing judicial authority to keep the Central Authority here informed of relevant events, and in particular that by April 2008 it had been known to the French Court that the trial of the respondent was to take place, and after the 21st May 2008 that he had actually been tried and convicted in his absence. He refers also to the fact that it is clear that even in July 2008 additional information arrived from the issuing judicial authority in relation to a bail application by the respondent following his arrest on the first warrant, and that the French Court therefore was aware that the respondent had been arrested on foot of that warrant which sought his surrender for the purpose of prosecution and knew by then that he had in fact already been tried and convicted, and yet failed to inform the Central Authority here or this Court that this was the case.

He refers also to the fact that the second warrant, though issued in France on the 25th June 2008, was not in fact transmitted here until the 21st November 2008 so that it could be available for endorsement here immediately after the respondent was to be released following the application to withdraw the first warrant, and that this delay has caused the respondent to be in custody longer than he would have been had the second warrant been acted upon immediately it became known that the first warrant had ceased to be a correct basis for seeking surrender.

This series of events is submitted to constitute such a breach of the respondent's fundamental right, including that of fair procedures, to amount to such egregious circumstances as to prohibit his surrender under s. 37 of the Act, and that it amounts to an abuse of process generally.

Mr Murphy submits that there is no evidence in the present case that what happened amounts to such egregious circumstances as to require this Court to refuse to order surrender on foot of the second warrant. He contrasts the facts and circumstances of this case with the circumstances existing in the case of *Trimbole v. Governor of Mountjoy Prison* [1985] I.R. 550 where there was shown to have existed a planned operation to hold the person in custody while extradition arrangements were being entered into between this State and Australia. He submits that the facts of the present case fall well short of demonstrating any conscious and premeditated plan on the part of France to keep the respondent in custody on foot of the first warrant until it could be withdrawn and he could be re-arrested on foot of the second warrant. He refers also to the need to accord mutual respect and a high level of confidence in the judicial authorities in France under the Framework Decision, and that the respondent has not discharged the heavy onus upon him to show that there has been an abuse of process by the French judicial authority.

There is no doubt in my mind that the manner in which the French court proceeded to try and convict the respondent in his absence where it must be taken as being aware that his surrender had been sought on foot a European arrest warrant for the purpose of prosecution, and without keeping the Central Authority here appraised of these developments is unsatisfactory and should not have happened. It led to a situation whereby the respondent was arrested on foot of the first warrant, it having been endorsed for execution here on the 4th June 2008, which was after the respondent had been convicted and sentenced in his absence. It seems clear from the information received by the respondent's solicitor that even by the 9th April 2008 the French court had listed the case for trial on the 21st May 2008. The first warrant was endorsed for execution by the High Court on the 4th June 2008 after which on the 14th July 2008 the respondent was arrested. It must be presumed that the Central Authority would have kept the issuing judicial authority appraised of these developments. In fact there is evidence to show that at the end of July 2008 the issuing judicial authority has provided additional information to the Central Authority here in relation to opposing an application for bail being brought by the respondent, and yet no information about his in absentia trial and conviction was communicated. That is unsatisfactory to say the least. In fact, to make matters worse, it is clear that even by the 25th June 2008 the second warrant had been issued by the same judicial authority, and that was before the respondent had been arrested on foot of the first warrant. For some reason that second warrant was not transmitted to the Central Authority here until the end of November 2008.

What occurred in this case as outlined above ought not to have happened in the way they did. Clearly, the French judicial authority ought to have informed the Central Authority here, at least shortly after the 9th April 2008 when the respondent's trial was listed for hearing on the 21st May 2008 that it wished to withdraw the first warrant (it having not been endorsed for execution by that date) to await the outcome of the trial, which would have permitted it to send over a second warrant in the event that surrender was thereafter being sought for the purpose serving any sentence imposed

upon the respondent. That would have avoided the respondent being arrested and held in custody here needlessly on foot of the first warrant.

Despite these criticisms which I consider justifiable in relation to how this matter was dealt with, and of course I make no criticism whatever of the Central Authority here who are blameless, it is another matter altogether to conclude that as a result the surrender of the respondent must be prohibited on the basis of a past breach of fundamental rights and/or an abuse of process. Section 37 (1)(a) and (b) of the Act provide that:

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

I cannot conclude that his surrender would be prohibited under this provision because of the events which occurred. The only scope for refusing to order surrender might be where the Court concluded that there had been so gross or egregious an abuse of process on the part of the issuing judicial authority as to require this Court to refuse to act upon the second warrant. There is no such compelling evidence in this case. The farthest this Court can go in my view is to say that matters were not dealt with as efficiently or as appropriately as they ought to have been, and that this is to be regretted. That however is an insufficient basis for refusing to order surrender.

It is to be noted also that Article 26 of the Framework Decision provides that:

> "*Article 26* **Deduction of the period of detention served in the executing Member State**
>
> 1. The issuing Member State shall deduct all periods of detention arising from the execution of a European arrest warrant from the total period of detention to be served in the issuing Member State as a result of a custodial sentence or detention order being passed.
>
> 2. To that end, all information concerning the duration of the detention of the requested person on the basis of the European arrest warrant shall be transmitted by the executing judicial authority or the central authority designated under Article 7 to the issuing judicial authority at the time of the surrender."

In so far as the respondent was in custody here on foot of the first warrant for the period of question, it appears that the French state is obliged to deduct "all periods of detention arising from the execution of a European arrest warrant" from any period the respondent may serve upon surrender. In the following point of objection, Mr O'Higgins seeks to cast doubt as to whether this Article imposes the obligation to deduct only in respect of a period spent in detention in relation to the warrant before the Court now (i.e. the second warrant) and I will come to that. I just refer to that Article now in the context of the abuse of process point. In a case of a conviction and sentence case it is relevant. It may not be of much use to another respondent who is held in custody here on foot of a warrant which seeks his surrender for prosecution and which is subsequently withdrawn and replaced by a second warrant, since such a person may ultimately be acquitted at trial, and there would be no sentence from which the period of detention could be deducted. However, I need not speculate what consequences might flow from such an occurrence. For present purposes, it is not relevant.

5. No guarantee that time spent in custody on foot of the first warrant will be deducted from any sentence required to be served by the respondent:
It is submitted that in circumstances where the respondent has already spent some nine months in prison here following his arrest on foot of the first warrant the obligation upon the French authorities under Article 26 of the Framework Decision to deduct from any period of the sentence to be served following surrender on foot of the second warrant is not certain, and that the respondent may suffer prejudice as a result. Mr O'Higgins has characterised that obligation as one to deduct any period of detention spent by the respondent on foot of the warrant before the Court, namely the second warrant. I do not accept that this is a proper interpretation of the obligation identified in Article 26 which is already set forth above. It explicitly states that "*the issuing Member State shall deduct <u>all periods of detention arising from the execution of a European arrest warrant</u> from the total period of detention to be served in the issuing Member State as a result of a custodial sentence or detention order being passed"*. (my emphasis)

There are many occasions when a person is arrested on foot of two warrants and is surrendered on foot of both, and the obligation clearly covers that situation because it refers to "a European arrest warrant". But there is no basis for concluding that simply because an early warrant has been withdrawn and is replaced by a second warrant, that a period of detention spent in relation to the earlier warrant is excluded. Article 26 is clear in this regard, and it is to be presumed that the French state will honour its obligations under the Framework Decision. I have no doubt but that the Central Authority here will in due course, and in the normal way, provide the French authorities with all information regarding all periods of time spent by the respondent on foot of both the first and the second warrant to enable that obligation to be fulfilled upon any surrender ordered.

6. No sufficient undertaking under s. 45 of the Act (guarantee of retrial) has been provided:
It is uncontested in this case that his trial, conviction and sentence took place in absentia and in circumstances where he was not notified of the date, time and place of that trial. The provisions of Section 45 of the Act are therefore engaged on this application. That section provides:

45.—A person shall not be surrendered under this Act if—

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

(a) (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

(i) 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." (my emphasis)

The respondent submits that the warrant does not contain any guarantee or undertaking by the issuing judicial authority that upon surrender the respondent will be retried or given the opportunity of a retrial in respect of the offences for which he has been convicted and sentenced in his absence.

The warrant states in paragraph b. dealing with a "decision passed in absentia" the judicial authority states in the English translation under the heading "state the nature of the guarantees":

"may enjoy the benefit of a new trial if the above judgment is set aside".

I should perhaps refer to the warrant in the French language (i.e. the original) and to what is stated in relation to the "guarantee. It states:

"Peut bénéficier d'un nouveau process s'il forme opposition".

Mr Murphy has referred to these words and submits that this means that the respondent will be entitled to a new trial if he enters an opposition to the charges, and that this is sufficient for the purpose of s. 45 of the Act.

The English translation does not appear to me to precisely reflect the wording in the French language. Nevertheless, the English translation is marked as an official translation, and I am entitled to accept the translation as reflecting the entitlement as set out. The use of the word "*may*" falls short of a guarantee, and the reference to "*if the above judgment is set aside"* suggests a measure of discretion on the part of a judge on an application to set aside the judgment.

A letter from the issuing judicial authority dated 24th November 2008 to the Central Authority provides some further information about this. It states:

"If GRITUNIC Igor is surrendered to the French authorities, the warrant for arrest will be executed according to the following way: The judgment will be notified to him and he will have the possibility to file a petition to have the judgment set aside in order to stand for trial while being totally present with the assistance of a lawyer if he so requests, the initial judgment being quashed. Awaiting a new trial, the judge in charge of liberty and detention will decide, after having heard all parties involved, whether he should be released under probation or put in detention pending trial." (my emphasis)

Mr Murphy for the applicant has referred to this statement and submits that the French language version of the "guarantee" read in conjunction with this letter removes any ambiguity which might be seen to exist from the English version of the "guarantee". He has submitted also that if the Court has any doubts about the nature of the guarantee contained in the warrant it should exercise its powers under s. 20 of the Act to seek additional information to clarify the matter.

In relation to that submission it is relevant to state that in relation to this issue raised by the respondent, the Central Authority here, according to evidence before me, attempted by letter to the issuing judicial authority to obtain an actual undertaking for the purpose of s. 45 of the Act. In a letter dated 27th March 2009 the Central Authority sought such an undertaking and actually attached to its letter a form of undertaking mirroring that specified in the section. I am told that no response was received from the issuing judicial authority, and, as I understand it, in spite of reminders. In order to resolve this unsatisfactory situation the Central Authority wrote to Eurojust in order to seek assistance in trying to clarify exactly what form of guarantee exists as to e retrial. A letter was received from Eurojust which indicated that this body had received some information from the issuing judicial authority and it communicated that information by letter to the Central Authority by way of assistance. Upon objection by Mr O'Higgins to the admissibility of this information, through a third party, and therefore necessarily hearsay, I concluded that the letter from Eurojust should not be admitted as evidence of what procedures exist under the French Penal Code of Criminal Procedure, as information gained from Eurojust does not appear to be contemplated by s. 20 as a source of information which may be sought and obtained either by the Central Authority or this Court. It does not seem to me that this second-hand information could constitute the necessary undertaking or even guarantee that the respondent will have the opportunity for a retrial if surrendered. I therefore did not read it and handed back the letter to the representative from the Chief State Solicitor's office who was in attendance at the hearing.

Section 45 of the Act was one of the issues which arose for consideration by the Chief Justice in his judgment in *Minister*

for Justice, Equality and Law Reform v. Sliczynski, (Unreported, Supreme Court, 19th December, 2008). While the issue in that case was whether or not the notification to the respondent was sufficient not to invoke the provisions of s. 45, nevertheless, in relation to the meaning of s. 45 the learned Chief Justice stated at page 18:

> *"The section is very specific. It requires that "… the issuing judicial authority gives an undertaking in writing" that the person surrendered will be retried for the offence or be given an opportunity of a retrial in respect of the offence. The section does not require proof that the law of the requesting State provides for a retrial of the offence, or provides for the surrendered person to have an opportunity of a retrial, (and in any event Polish law appears to provide for a review of sentence only on appeal, if taken within time) but requires the Judicial Authority to give a written undertaking. The absence of an undertaking is a fatal flaw in the request concerning the fourth offence."*

In his judgment in *Minister for Justice, Equality and Law Reform v. Marek*, (Unreported, Supreme Court, 5th February, 2009), the Chief Justice considered the nature of the retrial which was referred to in the undertaking provided by the judicial authority in that case, and in the light of some additional information provided as to the nature of that retrial, and concluded that there was insufficient information from which the Court could conclude that the respondent would receive a retrial of a kind which could be regarded as a trial de novo – "*a trial as if he was on trial for the first time for the offence or offences in question*".

As I have said, Mr Murphy places reliance on the contents of the letter dated 24th November 2008 which I have set forth already. He submits that this clarifies the position and that it constitutes a sufficient guarantee that the respondent will be retried if he applies for a retrial upon surrender.

I do not read the letter as guaranteeing that he will receive a retrial if he applies for one. It simply states that "*he will have the possibility to file a petition to have the judgment set aside in order to stand for trial while being totally present with the assistance of a lawyer if he so requests, the initial judgment being quashed*". Since this letter is only to clarify what is contained in the warrant and not itself an undertaking, I cannot ignore the fact that in the warrant it clearly states that the respondent "*may enjoy the benefit of a new trial if the above judgment is set aside*".

It is a great pity that the issuing judicial authority did not reply to the letter in March 2009 from the Central Authority which appended an undertaking in the form required by s. 45 of the Act. One might infer, but perhaps wrongly, that the failure to provide it meant that the judicial authority was not in a position to provide such a clear and unequivocal undertaking required by s. 45 of the Act. The question remained whether, before deciding that the respondent's surrender could not be ordered because there is no undertaking provided, this Court should, as the Central Authority has attempted to do, again seek such an undertaking under the provisions of s. 20 of the Act.

Given the spirit of the Framework Decision which is a system of surrender between judicial authorities in Member States and based on the principle of mutual recognition and a high level of confidence between Member States, it seemed to me to be appropriate for this Court or the Central Authority at the Court's request, to once again communicate with the issuing judicial authority to the effect that this Court has concluded that absent an undertaking which satisfies the requirements of s.45 of the Act, the Court is not in a position to order the surrender of the respondent pursuant to this warrant. A limited time should be allowed for the receipt of such an undertaking, particularly since the respondent is in custody awaiting the Court's decision.

I therefore adjourned the matter further and remanded the respondent in custody for a further period to allow time for an appropriate undertaking to be sought and obtained.

Further correspondence with the French authority:
By letter dated 25th May 2009, the Central Authority wrote to the issuing judicial authority stating that under Irish law a formal guarantee as to the right to a retrial must be given and that a statement to that effect, as provided previously, does not suffice. The French authority was informed that the matter had been adjourned so that this guarantee could be provided in the form of the specimen guarantee previously supplied, and a further copy of that form of undertaking was attached to this letter.

In response to this letter the issuing authority replied by letter dated 5th June 2009, not by completing the pro forma undertaking in the form provided, but as follows:

> *"UNDERTAKING in compliance with Article 5(1) of the Framework Decision of the 13th of June 2002*
>
> *I, the undersigned, Nicole Blondet, Magistrate of the Judiciary, Deputy Public Prosecutor to the Paris County Court, Legal Authority for issuing a European Arrest Warrant issued against Igor Gritunic, born, April 18, 1980 in Rautel (Moldavia) authorise:*
>
> *GRITUNIC Igor, sentenced on 21 May 2008 by the 14th chamber of the Paris County Court to 5 years imprisonment for gravely living off immoral earnings, that following his handing over, will be retried for the events at the origin of the European Arrest Warrant and will have the possibility of a new trial with the assistance of a lawyer.*
>
> *And that GRITUNIC Igor be informed of the date, the time and place where his new trial will take place and be permitted to attend his own trial.*
>
> *I emphasise that all these guarantees have been given in my previous correspondence."*

While the French authority wrote in this form rather than by mere completion of the pro forma undertaking supplied, the letter does confirm the matters contained in the form of undertaking provided, and which reflects the provisions of s. 45

of the Act. If that was where matters remained, this Court would not have had to consider the matter further. However, it is not so simple because, though unsolicited by the Central Authority, a further faxed document was received by the Central Authority on the 9th June 2009, not from Madame Blondet but rather from a Vice Procureur named F. Chaponneaux. That fax is in fact the form of undertaking provided by the Central Authority, and which has been signed by him but only after he made certain hand-written alterations to the form. That undertaking, taking account of these alterations, undertakes that the respondent will be retried for the offences set out on the European arrest warrant or be given the opportunity of a retrial in respect of those offences if he wants a new trial. The form concludes with the words "*this matter is already in the European Warrant*".

However, it can be seen clearly from the faxed form sent that M. Chaponneaux has put a line through the two sentences on the form provided which would have undertaken *"(ii) that the respondent would be notified of the time when, and place at which any retrial in respect of the offences concerned will take place, and (iii) be permitted to be present when any such retrial takes place*" – these latter two matters being required to be undertaken for the purpose of s. 45 of the Act.

Understandably, the receipt of this further fax from the French authority, albeit from a different person there, caused concern to the Central Authority here, as it appears to dilute the undertaking given by M. Blondet dated 5th June 2009 already received. Therefore by letter dated 15th June 2009, The Central Authority wrote again, referring to the document received on the 9th June 2009 by fax and asked:

> *"Could you confirm in writing (by fax) that the document previously transmitted on the 05/06/09 is the "real" undertaking & the most recent one (09/06/09) was sent by mistake."*

M. Chaponneaux replied by letter dated 17th June 2009 stating at the outset that he could not understand the request made of him as above. He goes on to refer to the initial request contained in the letter from the Central Authority dated 25th May 2009 for a guarantee that the respondent would receive a new trial, and states that such a commitment was given by letter dated 5th June 2009 by Madame Blondet, and he refers to the fact that she was informed on that occasion that because of the urgency of the request it was unnecessary for her to provide a translation of that undertaking. He then refers to a letter dated 9th June 2009 from the Central Authority (which I have not seen as yet) in which it would appear that a translation was requested. He goes on:

> *"In order to comply as soon as practicable, my colleague being unavailable, I filled in the form by hand and enclosed it with a previous correspondence. Admittedly the result is not perfect but what matters is the contents and not the form. It is therefore not a mistake but the desire to expedite things quickly.*
>
> *Please advise me if you prefer a translation of the correspondence of 5 June 2009.*
>
> *I should add, for your own information and that of the court, that requesting such commitment is offensive insofar as it comes down to suspecting that a magistrate will not comply with his own law.*
>
> *Indeed, as already stated, a person subjected to an EAW and to a judgment in absentia will be brought before a magistrate of the Prosecution Department who will notify the EAW to her and enquire whether she will petition to have said judgment to be set aside and if yes, she will be summoned to court. The person will be brought with the assistance of an attorney or a public defender free of charge before the Judge in charge of Freedom and Detention who will decide whether or not she should be committed. This procedure is imposed by the Code of Penal procedure. It is therefore impossible that a magistrate who has taken the oath "to fully and faithfully meet the obligations of his functions, strictly protect the confidentiality of consultations of judges and in all occasions behave as a loyal and respectable magistrate" should disregard the law. And obviously in France the accused enjoys the assistance of a lawyer before the court."*

That was the state of play when the matter came back before me for further consideration on the adjourned date, namely the 17th June 2009, and having received this further correspondence and having heard some brief submissions in relation thereto, I adjourned same to today's date so that I could consider the sufficiency of the information in the context of s. 45 of the Act. I indicated on that occasion that if the matter was confined to what was contained in the undertaking signed by M. Blondet on 5th June 2009, and without reference to the further document received from M. Chapponneaux on the 9th June 2009, I would have in all probability have been satisfied as to this matter, but I would have to consider the matter in the light of all correspondence received. I adjourned the matter to today for that purpose, indicating that if any further letter was received in the matter from the French authority I should be supplied with same in the intervening period.

Since that date I have been furnished by the Central Authority with the following letter dated 25th June 2009 which is signed by Madame Blondet:

> *"Answering your last letter, I confirm that my letter dated 5th June 2009 sets out the true position in accordance with French law in relation to the right of a retrial following surrender where there has been conviction in absentia."*

One must make all due allowance for the fact that legal systems differ as between this State and France and indeed all other Member State of the European Union, and further difficulties can arise simply because of translation difficulties. But I must say that it seems to have been an extraordinarily difficult and time-consuming matter to receive an undertaking in the form required by s. 45 of the Act. I must emphatically state that there is absolutely no suggestion emanating from this Court or the Central Authority that a magistrate in France would not comply with its own law, and certainly no offence was intended by attempting to seek clarification as to what that law actually is as far as the right to a retrial is concerned. This Court must satisfy itself under Irish law that the undertaking by the French authority meets the very specific requirements of s. 45 of the Act, which gave effect here to Article 5.1 of the Framework Decision. That is an optional article, and the Oireachtas has opted to make it a requirement that an undertaking as to a retrial is provided in the terms set forth in s. 45 of the Act. I have no doubt that the French authorities respect that law just as this Country

respects French law. This Court is required under Irish law to be satisfied in this regard, and I formed the view that as contained in the European arrest warrant itself the position was not sufficiently clear to satisfy the requirement for an undertaking in the form provided to the French authority.

The fact now is that by Undertaking dated 5th June 2009 the necessary undertaking has been given. The later communication received by fax on the 9th June 2009 from M. Chaponneaux, while obviously intended to assist matters, served only to again "muddy the waters" so to speak. It was appropriate to clarify the matter once again, and Madame Blondet has done that by her letter dated 25th June 2009. I am satisfied that the undertaking dated 5th June 2009 from her satisfies the requirements of s. 45 of the Act.

For all these reasons, I am satisfied that an order for the surrender of the respondent can and must be made, and I will so order.