



**Finlay Geoghegan J.  
Peart J.  
Mahon J.**

**60/2014**

**IN THE MATTER OF  
THE EUROPEAN ARREST WARRANT ACTS 2003 AS AMENDED**

**BETWEEN:**

**MINISTER FOR JUSTICE AND EQUALITY**

**RESPONDENT**

**AND**

**SLAWOMIR PALONKA**

**APPELLANT**

**Judgment of Ms. Justice Finlay Geoghegan delivered on the 18th day of May 2015**

1. I agree with the judgment to be delivered by Mr. Justice Peart and wish to add some comments of my own in relation to the question of interpretation raised by the questions certified by the trial judge (Edwards J.) in the order made on the 20th November, 2014, for this Court's determination:

*"In light of the correlation between sections 16(1)(c) and section 45 of the European Arrest Warrant Act, 2003, as amended, and having regard to the form of the European Arrest Warrant as provided for in the Annex to the Framework Decision, as amended by Council Framework Decision 2009/299/JHA, and as set out in the Table to section 45 of the 2003 Act, as amended, is an Order for surrender under section 16(1) permitted in circumstances where the issuing judicial authority has purported to indicate the applicability of point 3.2 of section (d) of the European arrest warrant but has not provided any information at point no. 4 of the said section (d) where the Respondent has not raised any issue concerning the correctness of the matter certified at point 3.2?"*

2. On the 4th November, 2014, the trial judge had made an order pursuant to s. 16 of the European Arrest Warrant Act 2003, (as amended) (the Act of 2003) for the surrender of the appellant pursuant to a European Arrest Warrant issued by the Republic of Poland dated the 6th November, 2012. The reasons for the making of the order are set out in the written judgment delivered by the trial judge on the 4th November, 2014. As appears therefrom, the appellant was not present before the court at the hearing resulting in the sentence in respect of which the European Arrest Warrant issued. The issuing judicial authority from which the Annex to the European Arrest issued had ticked the box equivalent to point 3.2 in the form of warrant in the Annex to the Framework Decision, but had not provided any information at point 4.

3. The issue in controversy in the High Court in such circumstances was as to whether the High Court was precluded by s. 16(1) of the Act of 2003 as amended, from making an order for the surrender of the appellant.

4. The trial judge determined that he was not so precluded. Following a consideration of the statutory provisions referred to below and the Framework Decision, the trial judge accepted submissions made on behalf of the Minister and concluded that s. 16(1)(c) and s. 45 of the Act of 2003 as amended, do not oblige an issuing judicial authority to provide information at point 4 of point (d) of the form of warrant in the Annex to the Framework Decision as set out in the table to s. 45 of the Act of 2003. Further that on the facts of this application as the appellant had not raised any issue concerning the correctness of the matters certified at the paragraph corresponding to para. 3.2, in the said form of warrant that the paragraph corresponding 2.4 was redundant and no supplementary information was required in the circumstances of the case.

5. The numbering used by the issuing judicial authority in Poland differed from that in the form of warrant in the Annex to the Framework Decision and the trial judge determined that such irregularity represented a defect in a non substantial detail and that no injustice would be caused to the respondent by forgiving it. He made such determinations pursuant to s. 45C of the Act of 2003 and there is no appeal from that determination. This judgment uses the numbering in the Annex in the form of warrant to the Framework Decision as set out in the table to s. 45.

6. The submissions made on behalf of the parties on appeal are set out in the judgment of Peart J. and I do not propose repeating same. I have taken them fully into account in the conclusions which I have reached.

**Conclusions**

7. The question which was certified by the trial judge and requires determination by this Court is dependent upon the proper construction of ss. 16(1)(c) and 45, including its Table, of the European Arrest Warrant Act 2003, as amended by the European Arrest Warrant (Application to Third Countries and Amendment) and Extradition (Amendment) Act 2012. Section 16(1)(e) is also relevant. These provide respectively:

"16.—(1) Where a person does not consent to his or her surrender to the issuing state the High Court may, upon such date as is fixed under section 13 or such later date as it considers appropriate, make an order directing that the person be surrendered to such other person as is duly authorised by the issuing state to receive him or her, provided that—

(a) ... ;

(b) ... ;

(c) the European arrest warrant states, where appropriate, the matters required by section 45 (inserted by section 23 of the European Arrest Warrant (Application to Third Countries and Amendment) and Extradition (Amendment) Act 2012);

(d) ... and

(e) the surrender of the person is not prohibited by Part 3.”

“45. A person shall not be surrendered under this Act if he or she did not appear in person at the proceedings resulting in the sentence or detention order in respect of which the European arrest warrant was issued, unless the European arrest warrant indicates the matters required by points 2, 3 and 4 of point (d) of the form of warrant in the Annex to the Framework Decision as amended by Council Framework Decision 2009/299/JHA, as set out in the table to this section.

#### TABLE

(d) Indicate if the person appeared in person at the trial

resulting in the decision:

1. ☐ Yes, the person appeared in person at the trial resulting in the decision.

2. ☐ No, the person did not appear in person at the trial resulting in the decision.

3. If you have ticked the box under point 2, please confirm the existence of one of the following:

☐ 3.1a. the person was summoned in person on . . . (day/month/year) and thereby informed of the scheduled date and place of the trial which resulted in the decision and was informed that a decision may be handed down if he or she does not appear for the trial;

OR

☐ 3.1b. the person was not summoned in person but by other means actually received official information of the scheduled date and place of the trial which resulted in the decision, in such a manner that it was unequivocally established that he or she was aware of the scheduled trial, and was informed that a decision may be handed down if he or she does not appear for the trial;

OR

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

OR

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

☐ the person expressly stated that he or she does not contest this decision,

OR

☐ the person did not request a retrial or appeal within the applicable time frame;

OR

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

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

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

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

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

.....

.....”.

8. The above sections are amongst the sections of the Act of 2003, as amended by the Act of 2012 which had been enacted to give effect to the Council Framework Decisions adopted under the Treaty on European Union insofar as is relevant last amended by Council Framework Decision 2009/299/JHA of 26th February, 2009. The principles to be applied in interpreting s. 16(1) and s. 45 are not in dispute. The starting point is the well established principle that Acts of the Oireachtas should be construed according to the intention

expressed in the Acts themselves giving to the words used their ordinary and natural sense. *Howard v. Commissioners of Public Works* [1994] 1 I.R. 101 per Blayney J. at p. 151 and Denham J. at p. 162, where she stated:

"Statutes should be construed according to the intention expressed in the legislation. The words used in the statute best declare the intent of the Act. Where the language of the statute is clear we must give effect to it, applying the basic meaning of the words."

9. As the sections in question were to implement the Framework Decisions to this must be added the principle of conforming interpretation with the limitations determined by the Supreme Court for this jurisdiction consistent with the judgment of the Court of Justice of the European Communities in *Pupino* (Case C-105/03) [2005] E.C.R. I-05285.

10. In *The Minister for Justice, Equality and Law Reform v. Altaravicius* [2006] 3 I.R. 148 at 156, in the Supreme Court Murray C.J. put it thus:

"When applying and interpreting national provisions giving effect to a framework decision the courts 'must do so as far as possible in this light of the wording and purpose of the Framework Decision in order to attain the result which it pursues' (see Criminal proceedings against *Pupino* (Case C-105/03) [2005] E.C.R. I-05285). The principle of conforming interpretation is limited, as the Court of Justice has pointed out in *Pupino* and other cases, to the extent that it is possible to give such an interpretation. It does not require a national court to interpret national legislation *contra legem*. If national legislation, having been interpreted as far as possible in conformity with community legislation to which it purports to give effect, but still falls short of what is required by the latter, a national court must, as a general principle, apply that legislation as interpreted although there may be other consequences for a member state which has failed to fully implement a directive or framework decision."

11. In *Dundon v. Governor of Cloverhill Prison* [2006] 1 I.R. 518, Fennelly J. at p. 547, explained it as follows:

". . . These courts are bound to apply provisions of Acts of the Oireachtas. The framework decision does not have direct effect. Where a provision of an Act of the Oireachtas conflicts directly with a provision of a framework decision, this court must give preference to the former. To do otherwise would, to cite the language of the Court of Justice in Criminal Proceedings against *Pupino* (Case C-105/03) [2006] Q.B. 83, be *contra legem*."

12. Apart from point (d) in the form of the Annex to the European Arrest Warrant, specified by Article 2.3 of Framework Decision 2009/299/JHA and set out in the Table to s. 45 of the Act of 2003 above, the only relevant provision of the Framework Decisions relied upon in the submission was Article 4a of Framework Decision 2002/584/JHA as inserted by Article 2.1 of the Framework Decision 2009/299/JHA. Insofar as relevant to this Article 4a provides:

**"4a. Decisions rendered following a trial at which the person did not appear in person**

1. The executing judicial authority may also refuse to execute the European Arrest Warrant issued for the purpose of executing custodial sentence or a detention order if the person did not appear in person at the trial resulting in the decision, unless the European Arrest Warrant states that the person, in accordance with further procedural requirements defined in the national law of the issuing Member State:

(a) . or

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

(c) . or

(d) . . ."

13. The trial judge in his judgment, as already stated, agreed with submissions made by counsel for the Minister. He appears to have accepted a submission that there were two interpretations of the relevant provisions of the Act of 2003, as amended, which were open. I respectfully disagree with that view. Sections 16(1)(c) and 45, including its Table, when construed in accordance with the above principles are only capable of one meaning and do not, in my view, create any uncertainty.

14. The first question is the meaning to be attributed to s. 16(1)(c) insofar as it requires that the European Arrest Warrant state "*where appropriate*" the matters required by s. 45. I consider that this simply means that when, on the facts, s. 45 applies to the application then the European Arrest Warrant must state the matters required by that section. Section 45 in its terms prohibits surrender under the Act if the person concerned "*did not appear in person at the proceedings resulting in the sentence or detention order in respect of which the European Arrest Warrant was issued unless . . .*".

15. To put it another way if the European Arrest Warrant discloses that the person, whose surrender is sought did not appear in person at the proceedings resulting in the sentence or detention order in respect of which the European Arrest Warrant was issued then s. 16(1)(c) does not permit a surrender unless the European Arrest Warrant indicates the matters required by s. 45.

16. This interpretation, in my view, is the only interpretation permitted by the words used by the Oireachtas in s. 16(1)(c) and s. 45 and is consistent with and confirmed by s. 16(1)(e) of the Act of 2003 as amended. As appears, this is a further and distinct condition which must be met in accordance with the proviso in s. 16(1). A person may only be surrendered provided that "*the surrender of the person is not prohibited by Part 3*". Section 45 of the 2003 Act falls within Part 3 of the Act. Hence s.16(1)(e) as amended also prohibits the surrender of a person to whom s.45 applies i.e. who has not appeared in person at the proceedings resulting in the sentence or detention order in respect of which the European Arrest Warrant was issued, unless there is compliance with s.45 i.e. the European Arrest Warrant indicates the matters required by the section. The absence of the words "*where appropriate*" in s. 16(1)(e) in my judgment precludes any other construction of section 16(1)(c).

17. It is perhaps relevant to note that there is a similar absolute prohibition against the Court surrendering a person in s. 15(1)(d) of the Act of 2003, as amended, even where the person concerned consents to surrender.

18. The above construction of s.16 (1)(c) is also consistent with the relevant provision in the Framework Decision namely, Article 4a

as amended. As appears it expressly permits the Member States to provide that an executing judicial authority may refuse to execute the European Arrest Warrant issued if the person did not appear in person at the trial resulting in the decision unless the European Arrest Warrant states certain matters.

19. The second question is what s. 45 of the Act of 2003 requires the European arrest warrant to state where the person concerned did not appear at the relevant proceedings in the issuing state. Starting with s. 45 itself, it expressly prohibits the surrender **unless** *"the European arrest warrant indicates the matters required by points 2, 3 and 4 of point (d) of the form of warrant in the Annex to the Framework Decision as amended by the Council Framework Decision 2009/299/JHA, as set out in the Table"* to the section. By the wording used in s. 45 the Oireachtas have clearly decided that the European arrest warrant must contain the matters required by points 2, 3 and 4 of the point (d) in the form of warrant set out in the Table.

20. This leads to the final question of construction as to what those points require to be included in the form of warrant set out in the Table. It must be recalled that this is a form of warrant specified in the Framework Decisions and to be used by all Member States. The wording of the Annex is in the form of directions to the relevant authorities completing the form. As put by counsel for the appellant it uses in part polite diplomatic language. The question for this Court is whether or not point 4 of point (d) contains a mandatory or permissive requirement where the issuing authority has ticked box 3.2 as was done in this instance (albeit by reference to different numbers which the trial judge considered to be a technicality he could overlook pursuant to s. 45C of the Act of 2003 and against which there was no appeal).

21. As appears in the Table set out above, point (d) commences with the direction to the person completing the form *"Indicate if the person appeared in person at the trial resulting in the decision:"*, obviously a mandatory requirement which was not in dispute. Point 2 then contains the relevant box which indicates if ticked *"no, the person did not appear in person at the trial resulting in the decision"*.

22. Point 3 then gives the next direction *"If you have ticked the box under point 2, please confirm the existence of one of the following:"*. This again can only be construed as a mandatory requirement to confirm the existence of one of the circumstances which are set out as four alternatives Nos. 3.1a, 3.1b, 3.2 and 3.3. They follow in substance the matters referred to in Article 4a.1.(a),(b), (c) and (d) of Framework Decision 2002/584/JHA as amended.

23. Point 4 then states *"if you have ticked the box under point 3.1b, 3.2 and 3.3 above, please provide information about how the relevant condition has been met:"*. Point 4 in its terms only applies if one of the three specified options was confirmed under point 3 and not 3.1a. The phrase *"please provide information"* rather than *"indicate"* or *"please confirm the existence of one of"*, being the phrases used in the preceding paragraphs cannot in my view be construed as indicating that if as in this instance 3.2 was the box ticked that the issuing authority was not required in the sense of being obliged to provide the information about how the relevant condition has been met. Point 4 itself indicates when the information about how the relevant condition has been met must be provided; it is when the issuing authority has ticked the box under one of points 3.1b, 3.2 or 3.3. If the issuing authority had ticked the box under 3.1a then no information would have to be provided under point 4.

24. I have considered the submission that the provision of the information is not mandatory in reliance upon Article 4a of the Framework Decision as amended. Whilst Article 4a.1 does not expressly in terms require the information required at point 4 of point (d) in the Annex to the European Arrest Warrant as it does in sub-paragraphs (a),(b),(c) and (d) in relation to point 3 nevertheless it does not preclude a requirement by a Member State to provide the information. Also it requires by its opening paragraph that the European arrest warrant state that *"the person in accordance with further procedural requirements defined in the national law of the issuing Member State"* came within one of the circumstances specified sub-paragraphs (a),(b),(c) and (d) i.e. those set out in point 3 of point (d) in the Annex.

25. Furthermore the Council in the very same Article 2 of the Framework Decision 2009/299/JHA in which it amended Article 4a also specified the form of Annex to the European arrest warrant which is now set out in the Table to section 45 of the Act of 2003. There is nothing in the form of Annex when construed in accordance with Article 4a which requires this Court (even if it were permissible to do so and having regard to the fact that it is now incorporated in s. 45) to construe point 4 of point (d) in the annex as being only permissive and not mandatory in circumstances where a box in point 3.1b, 3.2 or 3.3 has been ticked.

26. The trial judge in his earlier decision in *Minister for Justice and Equality v. Pawel Surma* [2013] IEHC 618 indicated a clear purpose for the information which is required at point 4 of point (d) of the annex to the European Arrest Warrant. Section 15(1)(d) of the Act also specifies that this is information which must be available to the court in Ireland even in circumstances in which a person may have consented to his surrender. The provision of the information about how a ticked condition at points 3.1b, 3.2 or 3.3 has been met is an obligation imposed on an issuing judicial authority which predates and is independent of any issue being raised by a respondent to a European arrest warrant application.

27. Accordingly I have concluded that point 4 of point (d) of the Annex to the European arrest warrant contains a mandatory requirement to provide information about how the condition was met where, as on the facts herein, the issuing authority has ticked the equivalent to box 3.2. Hence s. 45 required the European arrest warrant issued by the Republic of Poland in respect of the appellant to state the information required by point 4 of point (d) in the Annex to the European arrest warrant. As it did not do so the High Court was precluded by ss. 16(1)(c) and (e) from making an order for surrender.

28. I agree that the Court should allow the appeal, answer the question contained in the schedule attached to the High Court order of the 20th November, 2014, in the negative and vacate the order for surrender dated the 4th November, 2014. It also follows that the Court must now discharge the respondent.