Neutral Citation Number: [2012] IEHC 212

THE HIGH COURT

Record No. 2011 No. 64 EXT

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IN THE MATTER OF THE EUROPEAN ARREST WARRANT ACT, 2003

AS AMENDED

BETWEEN/

THE MINISTER FOR JUSTICE AND LAW REFORM

Applicant

- AND -

JAN PETRÁŠEK

Respondent

JUDGMENT of Mr Justice Edwards delivered on the 16th day of May, 2012.

Introduction:
The respondent is the subject of three European arrest warrants issued by the Czech Republic on the 31st December, 2010; the 18th January, 2011; and the 20th January, 2011, respectively. All three warrants were endorsed for execution by the High Court in this jurisdiction on the 9th February, 2011. The respondent was arrested in execution of all three warrants by Detective Garda Geraldine Daly on the 4th October, 2011, at Kyrls Street in Cork city. He was brought before the High Court on the following day, the 5th October, 2011, where, in accordance with s.13 of the European Arrest Warrant Act 2003 (hereinafter "the Act of 2003"), evidence of arrest was given, and a date was fixed for the purposes of s.16 of the Act of 2003. The matter was then adjourned from time to time before ultimately coming on for a s.16 hearing on the 15th February, 2012.

The respondent objects to his surrender in each case. The Court is therefore 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 so far as specific points of objection are concerned, the Court is required to consider a number of specific objections to the respondent's surrender on foot of each of the European arrest warrants. These objections are by and large case specific. In the circumstances it is proposed later in this judgment to consider the specific objections pleaded in respect of each warrant separately.

Uncontroversial matters
The Court has before it an affidavit of arrest sworn by Detective Garda Geraldine Daly and counsel for the respondent has confirmed that no issue is being raised in any case either as to arrest or as to identity.

The Court has also received and scrutinised copies of the three European arrest warrants in this case. In addition, the Court has also inspected the original European arrest warrants which are on the Court's files and notes that they each bear this Court's endorsement. The Court is satisfied following consideration of this evidence and documentation that:

> (a) All three European arrest warrants in question have been endorsed for execution in accordance with s.13 of the Act of 2003;
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> (b) All three European arrest warrants in question were duly executed and the person who was arrested and who was brought before the Court is the person in respect of whom those three European arrest warrants were issued;
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> (c) the Court is not required, under s.21A, 22, 23, or 24 (inserted by ss 79, 80, 81 and 82 of the Criminal Justice (Terrorist Offences) Act 2005), to refuse to surrender the respondent under the 2003 Act;

In addition the Court is satisfied to note the existence of the European Arrest Warrant Act 2003 (Designated Member States) Order 2005, (S.I. 27 of 2005) (hereinafter referred to as "the 2005 Designation Order"), and duly notes that by a combination of s.3(1) of the Act of 2003, and article 2 of, and the Schedule to, the 2005 Designation Order, the "Czech Republic" is designated for the purposes of the Act of 2003 as being a state that has under its national law given effect to the Council Framework Decision (2002/584/JHA) of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, O.J. L 190/1, 18.7.2002.

The order in which the warrants will be considered
For reasons that were not explained and which the Court didn't enquire into, but at the request of the applicant, submissions were received, and the warrants were considered, in the following non-chronological order: first, the warrant of the 20th January, 2011; then, the warrant of the 31st December, 2010, and finally, the warrant of the 18th January, 2011. For consistency, it is proposed to deal with them in the same order in this judgment.

The European arrest warrant dated the 20th January, 2011
This is a conviction or sentence type warrant based upon an enforceable judgment of the District Court in Český Krumlov dated the 18th January, 2006. The

respondent is wanted to serve a one year sentence of imprisonment, all of which remains to be served, in respect of the single offence particularised in this warrant.

Specific Objections

The following specific objections are raised in respect of this warrant. It is pleaded that:

> "2. The offence contained in the European Arrest Warrant does not correspond with any offence known to the law of the State. The surrender of the respondent is therefore prohibited by s. 38 of the European Arrest Warrant Act 2003 as amended.
>
> 3. The surrender of the respondent would constitute a breach of his rights under both the European Convention on Human Rights and the Constitution in circumstances where the warrant discloses that he was not present at the decision to impose the custodial sentence which had been previously suspended. The respondent has therefore been denied his Convention and Constitutional rights to fair procedures, a fair trial in due course of law and to make submissions in relation to a decision which has effectively resulted in him receiving a custodial sentence. It is also not apparent if he can appeal this decision. The surrender of the respondent is therefore prohibited by s. 37 of the European Arrest Warrant Act 2003 as amended.
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> 4. The surrender of the respondent would constitute a breach of his rights under both the European Convention on Human Rights and the Constitution in circumstances where the applicant was convicted in absentia of the further offence leading to the imposition of the previously suspended sentence. The respondent has therefore been denied his Convention and Constitutional rights to fair procedures, a fair trial in due course of law and to make submissions in respect of the allegation the subject matter of that conviction, which allegation has effectively resulted in him receiving a custodial sentence. The surrender of the respondent is therefore prohibited by s. 37 of the European Arrest Warrant Act 2003 as amended.
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> 5. The respondent's surrender was previously ordered on a previous warrant which related to the same subject matter as this warrant. The respondent spent a period in custody awaiting surrender on that warrant. Through no fault of his own the respondent was not ultimately surrendered. The respondent is thus unable to obtain the benefit of this period already spent in custody and, as such, his Constitutional and Convention rights will be violated in the event that he is surrendered on this warrant. Any surrender in these circumstances would not be in accordance with the Framework decision and is therefore prohibited by s. 10 of the Act."

Correspondence

The facts underlying the single offence to which this warrant relates are stated in Part E thereof to be that:

> "On the 13th August around 00.30, the accused Jan Petrášek, when he was tipsy, attacked the policemen verbally as well as physically in the town police station on the square in Český Krumlov. He did not react on the repeated legal challenges of the police officers, he called them foul names and then he attacked physically the police officer Luboš Foltýn. He attacked him by the hit of his forehead to the officer's nose. He caused him a bruised laceration on the bridge of the nose 3,5 cm long and the break of the nasal kernel with the move of fragments. This was an injury with the time of healing of at least ten days."

Although the year in which the offence was committed is omitted from the English translation it is clear from the Czech copy of this European arrest warrant that the year was 2005. The Court has been invited to find correspondence with either the offence of assault contrary to s.2 of the Non Fatal Offences Against the Person Act 1997, alternatively the offence of assault causing harm contrary to s.3 of the Non Fatal Offences Against the Person Act 1997. In the Court's view correspondence can be found with both suggested offences.

In so far as minimum gravity is concerned, the threshold is that set out in s.38(1)(a)(ii) of the Act of 2003, viz. that a term of imprisonment or detention of not less than four months has been imposed on the person in respect of the offence in the issuing state. As the respondent received a sentence of one year's imprisonment the requirements as to minimum gravity are comfortably satisfied in relation to this warrant.

The s. 37 objections.

The relevant provisions of s.37 of the Act of 2003 for the purposes of this case are subsections (1)(a) and (b), respectively, thereof, and these provide:

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

S.37(2) of the Act of 2003 provides that the reference in s.37(1) to "the Convention" and to "the Protocols to the Convention" are references to the European Convention on Human Rights and Fundamental Freedoms 1950 as amended and the various Protocols to that Convention.

It is also appropriate at this stage to set out the provisions of Article 6 of the Convention, and Article 38 of the Constitution, as reliance is also placed on both of these.

> Article 6 of the Convention provides:

"1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgement shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3. Everyone charged with a criminal offence has the following minimum rights:

(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

(b) to have adequate time and the facilities for the preparation of his defence;

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court."

Further, Article 38.1 of the Constitution of Ireland provides:

"No person shall be tried on any criminal charge save in due course of law."

The objections pleaded at paragraphs 3 and 4, respectively of the Points of Objection relating to this warrant focus on the lifting, allegedly *in absentia*, of the suspension of the sentence the subject matter of this warrant, based upon the respondent's conviction for another offence, again *in absentia*. The respondent contends that for this Court to surrender him in such circumstances would be incompatible with the State's obligations under the Constitution or alternatively under the Convention.

Counsel for the respondent submitted that Article 6 of the Convention is engaged whenever a person is being sentenced, or for that matter whenever a Court is concerned with possibly lifting the suspension of a sentence, and that an accused has a right to be present and to be heard in such circumstances. It is contended that in the present case the respondent's right to be present and to be heard was denied to him.

Moreover, counsel submitted, it is also the case that under Irish law a person is entitled to be present when they are being sentenced. It was further submitted that this is an aspect of trial in due course of law as guaranteed under Article 38.1 of the Constitution. In support of this the Court was referred *The Minister for Justice, Equality and Law Reform v McCague* [2010] I.R. 456, and in particular to the following passages from the judgment of Peart J. (at paras. 51 and 52):

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

[52] A sentencing hearing is a hearing of a matter which has the gravest possible consequences for a person convicted of a serious criminal offence, namely the deprivation of that person's liberty for possibly a considerable period of time. It would follow in my view, and in the light of the case law which I have been referred to, particularly by way of the written submissions, that a court should be scrupulous to ensure, where it is proposed to sentence a person to imprisonment in his absence, that reasonable efforts are made to locate the person's up to date address, and to notify him in good time at that address of the date set for his sentencing, so that he can have a fair and reasonable opportunity to engage legal representation for that hearing. Failure to do so could, at least arguably, infringe a state's obligations under the Convention. Whether a person's fair hearing rights are protected in that regard to a greater or lesser degree under the Constitution than under the Convention is not something which needs to be determined."

Reliance was also placed on *People (Attorney General) v. Messitt* [1972] I.R. 204 wherein O'Dalaigh J. quoted with approval at p.201 from the judgment Lord Atkin in *Lawrence v. R.* [1933] A.C. 699 where he said at p.708 :

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

The Court was further referred to *Lawlor v. District Judge Hogan* [1993] I.L.R.M. 606 wherein Murphy J. stated the following propositions (at p.610):

"(1)That insofar as the judicial process in criminal matters expressly requires matters to be dealt with by or in relation to the individual accused, clearly he must be present to enable those functions to be performed.

(2)The right of an accused to be present and to follow the proceedings against him is a fundamental constitutional right of the accused which every court would be bound to protect and vindicate.

(3)If a trial judge is satisfied that the accused has consciously decided to absent himself from the trial (at a time when his presence is not essential to enable some particular procedure to be complied with) then the trial judge would be entitled in his discretion to proceed with the trial in the absence of the accused."

It was accepted by counsel for the respondent that he was certainly present when the sentence of one year's imprisonment was imposed upon him and conditionally suspended. The sentence was imposed in what is described in the warrant (at Part D thereof) as the condemning judgment of the18th January, 2006, which came into legal effect on the 28th February, 2006. Part D of the European arrest warrant makes it clear that among the conditions on foot of which the sentence was suspended were two specific requirements. The first was that he should submit to the supervision of a probation officer for the probationary period, and the second was that he should not engage in any further criminal activity during that period. The suspension of the sentence was lifted on the 26th November, 2008, for two stated reasons: (i) because he had failed to submit to the supervision of a probation officer for the probationary period; and (ii) because he had been convicted of another offence. The respondent's complaints, such as they are, are that he was not present when the suspension of the sentence was lifted because he had previously left the jurisdiction, and was not notified in person of the court hearing on the 26th November, 2008. Moreover, while he accepts that he was convicted of committing another offence during the period of his probation he complains that that conviction was rendered *in absentia* and that he had again not been notified in person of the relevant court hearing.

In this Court's view the s.37 (1) objections raised in respect of this warrant are not well founded. First, it should be stated that the respondent has put no evidence at all before the Court. He has filed no affidavit. That being the case the Court is entitled to take the contents of the warrant as being correct in so far as they go. The warrant expressly states that the respondent was in fact notified both of his trial in relation to the triggering offence, and of the hearing at which the suspension of earlier sentence was lifted. He was notified according to the requirements of Czech law i.e., the respondent was written to at the address that he himself had nominated. He failed to collect the letter because he had fled the jurisdiction. Moreover, although he was required to, in the words of the warrant, "announce his different address to the court" he failed to do so. Accordingly, in accordance with Czech law, after the letter remained uncollected at the relevant post office for ten days it was deemed delivered on the tenth day.

Whilst it is true that the respondent was not served personally, personal service is not required to be proven in this instance. Although the Supreme Court in *Minister for Justice, Equality and Law Reform v. Sliczynski* [2008] I.E.S.C. 73 (Unreported, Supreme Court, 19th December, 2008) has stated that the notice to which s.45 of the Act of 2003 refers is actual and not constructive notification, it was acknowledged that a lesser form of notification might be sufficient for the purposes of the law of an issuing state. In that regard Murray C.J. (as he then was) noted:

> "…s. 45(b)(i) must be interpreted and applied as a matter of Irish law.
>
> That specifies that the issuing Judicial Authority give an undertaking that the person will at least have an opportunity of being retried, if surrendered, if he was not present for the trial, which is undisputedly the case here, or he was not notified of the "time when, and place at which, he or she would be tried for the offence,".
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> The ordinary meaning of that language is that it is the person to be tried who must be notified. It must be actual notification and not any other notification. I cannot read into s. 45 a meaning that envisaged notification to a person's mother or other person being presumed sufficient, especially when there is no evidence that the person concerned received any notification. If it was intended that any other form of notification or some form of constructive notification, particularly where trial for a criminal offence is concerned, the Oireachtas would have expressly said so.
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> Under Polish law it may be sufficient, for the purpose of trying somebody in Poland in their absence, to give them notification by delivering it to some person at their place of residence and even that does not seem to have been done in this case but that is not the kind of notice to which s. 45 refers."

The respondent is not in a position to rely upon s. 45 of the Act of 2003 in respect of the lifting of the suspension of his sentence. Accordingly, actual notification does not require to be demonstrated. It is sufficient if he was notified in accordance with Czech law. As was made plain by the former Chief Justice in *Minister for Justice, Equality and Law Reform v. Brennan* [2007] 3 I.R. 732 at p. 744:

> "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) (*sic*) of the Act"

Secondly, although the respondent may have been tried in absentia for the triggering offence there is nothing in either the Framework Decision, or in the Act of 2003, that says that such a conviction must be regarded as bad or invalid. While it is true to say that the Oireachtas has provided in s.45 of the Act of 2003 that a person who has been tried *in absentia* and who was not notified of the time when, and place at which, he or she would be tried, shall not be surrendered in the absence of an undertaking as to a re-trial, neither that provision, nor anything else in the legislation, or in the underlying Framework Decision, suggests that such a conviction is to be regarded as bad or invalid. On the contrary, this Court is obliged pursuant to the principle of mutual recognition to have due regard to it as an ostensibly legitimate basis for the lifting of the suspension of the respondent's earlier sentence. That said, a further aspect to the matter is the fact that the triggering conviction is the subject matter of the European arrest warrant dated the 31st December, 2010, in which it is acknowledged that the respondent was tried *in absentia* but in respect of which an undertaking as to a re-trial has been given. As it must be presumed in accordance with s.4A of the Act of 2003 that the issuing state will comply with the requirements of the Framework Decision and will respect the rights of the respondent in the event of him being surrendered on the present warrant, it may be anticipated that the issuing state will take appropriate account of the possibility of a re-trial. It will be a matter, however, for the courts of the issuing state to determine what action, if any, it might be appropriate to take in the light of those circumstances (*e.g.*possibly admitting the respondent to bail and postponing commencement of the activated sentence until the outcome of any re-trial for the triggering offence is known).

Thirdly, quite apart from the offence committed during the probation period the warrant asserts, and the respondent has not sought to adduce evidence to the contrary, that a second ground existed and was relied upon for the lifting of the suspension in question, namely the respondent's failure to submit to probation supervision.

Fourthly, the mere fact that the right to be present at a sentence hearing, or even arguably at a hearing to activate a suspended sentence, has been elevated in this jurisdiction to a constitutional right does imply that in the circumstances of this case the respondent ought not to be surrendered. It means no such thing. The right in Irish constitutional law to be present and to follow proceedings is an aspect of the right guaranteed under Article 38(1) of the Constitution to be afforded "trial in due course of law". However, as I have previously pointed out only recently in *Minister for Justice and Equality v. Marjasz*(Unreported, High Court, Edwards J, 27th April 2012) at p.30:

> "This Court does not regard Article 38 as being intended to have application to trials conducted, or to be conducted, in

countries other than Ireland, particularly where at the time of the trial the defendant is neither an Irish citizen nor a person resident in Ireland. Its principal focus of application is to trials of persons subject to Irish jurisdiction or of such other persons to whom Ireland has guaranteed trial in due course of law."

The view that I have taken is consistent with similar views expressed by Murray C.J. in *Brennan*, and accords with the general approach, commended by O'Donnell J. in *Nottinghamshire County Council v. B* [2011] I.E.S.C. 48 (Unreported, Supreme Court, 15th December, 2011), to the vexed question *viz*., to what extent is it legitimate to measure the laws of a foreign state against Irish constitutional norms. It may therefore be helpful to quote certain passages from the cases just referred to.

In Brennan Murray C.J stated the following at p. 743:

> "35 There is no doubt that the operation of the process for surrender as envisaged by the Act of 2003, as amended, is subject to scrutiny as to whether in any particular case it conforms with constitutional norms and in particular due process so that, for example, the respondent in such an application has an opportunity to be duly heard in the proceedings.
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> 36 However the argument of the respondent goes much further. He has contended that the sentencing provisions of the issuing state, in this case the United Kingdom, did not conform to the principles of Irish law, as constitutionally guaranteed, governing the sentencing of persons to imprisonment on conviction before our courts for a criminal offence.
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> 37 The effect of such an argument is that an order for surrender under the Act of 2003, and indeed any order for extradition, ought to be refused if the manner in which a trial in the requesting state including the manner in which a penal sanction is imposed, does not conform to the exigencies of our Constitution as if such a trial or sentence were to take place in this country. That can hardly have been the intention of the Oireachtas when it adopted s. 37(1) of the Act of 2003 since it would inevitably have the effect of ensuring that most requests for surrender or extradition would have to be refused. And indeed if that were the intent of the Framework Decision, which the Act of 2003 implements, and other countries applied such a test from their own perspective, few, if any, would extradite to this country.
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> 38 Indeed it may be said that generally extradition has always been subject to a proviso that an order for extradition, as with any order, should not be made if it would constitute a contravention of a provision of the Constitution. I am not aware of any authority for the principle that the extradition or surrender of a person to a foreign country would contravene the Constitution simply because their legal system and system of trial differed from ours as envisaged by the Constitution."

In *Nottinghamshire County Council v. B* [2011] I.E.S.C. 48 (Unreported, Supreme Court, 15th December, 2011) O'Donnell J. stated (at p 66):

> "…..the question also involves the nature and degree of the differences between the law of the requesting state and the law which it is asserted the Irish Constitution would permit or require in this jurisdiction, in a context where it is clear that the Constitution expects the legal systems of friendly nations will differ from that of Ireland. In that regard it is relevant whether what is asserted to be possible, probable or certain in the requesting jurisdiction is something which the Irish Constitution forbids absolutely or permits in certain circumstances, and in any case whether the difference asserted is one of degree, or one of fundamental principle. It is here that I consider that the origin of the Appellants may become relevant. It is fundamental to the structure of the Irish Constitution that its principal focus of application is to persons within its jurisdiction. It follows from the approach of Article 29 that the Constitution expects and recognises the same essential structure in other states. Therefore, the application, for example, of French law to French citizens, or to those who by residence in France have obtained the protection of the French state, is to be expected, and it is only in rare cases that the Constitution would require a court to seek to inhibit the application of such law."

Fifthly, and finally, in so far as it relies upon the Convention the s.37 objection is also not well founded because s.37 is intended to be forward looking. It is primarily concerned with whether the act of surrender itself would be incompatible with this State's obligation under the Convention, not with whether something which happened in the past in the issuing state breached the respondent's rights under the Convention. While this Court has recently expressed the view in an *obiter dictum* in *Marjasz* that a Court might theoretically have jurisdiction to refuse surrender on s.37(1) grounds where it is suggested that an extant conviction was the result of an unfair trial, the Court went on to state that it is likely that that jurisdiction would be exercised very sparingly indeed, and only in cases where it had been established by the clearest and most cogent evidence that there was a truly egregious unfairness in the circumstances of the underlying trial, and that all possible remedies / avenues of review / appeals in the issuing state had been tried without success and had been exhausted. Nothing of that sort arises in the present case.

In all the circumstances of this case I consider that the following approach adopted by the learned trial judge in the *McCague* case is both apposite and correct, and I propose to adopt it. Peart J. stated (at paras. 53 and 54):

> "[53] Under s. 37 of the Act of 2003, this court is required to refuse to order surrender if it would be "incompatible with the State's obligations" under the Convention. That is not to be confused with a situation contended by the respondent to be a past breach of his Convention rights in the issuing state. It clearly cannot mean that this court must examine what occurred in that issuing state regarding trial, conviction and sentence, and decide that the court there is guilty of breaching one or more of the respondent's rights under the Convention. It must be borne in mind that the section provides that it is the surrender which must be "incompatible with the State's obligations", and not anything which has already occurred in the issuing state. In other words, this court must act in accordance with this State's obligations under the Convention when carrying out its functions under the Framework Decision and the Act, and cannot order surrender if to do so would breach this State's obligations thereunder. It is difficult to envisage, absent some truly extraordinary, exceptional and egregious circumstance, in what way it would be incompatible with this State's obligations under the Convention to surrender a requested person to a member state of the European Union which has been designated pursuant to s. 3 of the Act of 2003, and which, on a reciprocal basis, enjoys recognition of its judicial decisions, and the trust and confidence of this State in its legal system and procedures thereunder. Equally, it would be difficult to envisage how such surrender "would constitute a contravention of any provision of the Constitution". No doubt this section was inserted by the Oireachtas to reflect recital (12) of the Preamble to the Framework Decision which states:-
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> > 'This Framework Decision respects fundamental rights and observes the principles recognised by Article 6 of the Treaty on European Union and reflected in the Charter of Fundamental Rights of the European Union (7), in

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

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

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

The order for surrender on foot of the earlier warrant.

A further point of objection was raised by the respondent in reliance on the fact that his surrender was previously ordered on foot of an earlier European arrest warrant which related to the same subject matter as this warrant. The respondent spent a month approximately in custody awaiting surrender on that warrant. Through no fault of his own the respondent was not ultimately surrendered. It is claimed that the applicant is thus unable to obtain the benefit of this period already spent in custody and, as such, his Constitutional and Convention rights will be violated in the event that he is surrendered on this warrant. In particular, Article 26 of the Framework Decision provides:

"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."

It was argued that any surrender in the circumstances outlined would not be in accordance with the Framework decision, and in particular Article 26(1) thereof, and that it would therefore be prohibited by s.10 of the Act of 2003.

In the Court's view this submission is not well founded in the circumstances of this case. To justify non-surrender in such circumstances the Court would have to be satisfied that any departure from the policy evinced by Article 26 of the Framework Decision, i.e., that a respondent should receive credit for time spent on remand in connection with a European arrest warrant, was so serious and egregious that it would represent a disproportionate interference with his right to liberty to surrender him. In this particular case the respondent has spent a month in custody for which he may be unable to obtain credit. The Court considers that while he might, perhaps, and depending on the reasons for it, be able to pursue an action for damages for wrongful deprivation of liberty or trespass to the person, against the state or states responsible, the breach of his rights was not so serious as to cause this Court to regard the proposal to surrender him on foot of the present warrant as disproportionate.

The European arrest warrant dated the 31st December, 2010

This is a conviction type warrant and the respondent is wanted to serve a cumulative or composite sentence of eighteen months in respect of four offences which are the subject matter of the warrant.

Specific Objections

The following specific objections are raised in respect of this warrant. It is pleaded that:

"2. The offences contained in the European Arrest Warrant do not correspond with any offence known to the law of the State. The surrender of the respondent is therefore prohibited by s. 38 of the European Arrest Warrant Act 2003 as amended.

3. Without prejudice to the respondent's assertion that there is no correspondence as regards the offences contained in the warrant, the sentence purportedly imposed appears to be a composite sentence. In the event that this Honourable Court concludes that there is correspondence in respect of one or more of the offences the subject matter of the warrant, but not all the said offences, the said sentence is not severable and the respondent's surrender on that sentence remains prohibited by s. 38 of the Act as amended.

4. The surrender of the respondent would constitute a breach of his rights under both the European Convention on Human Rights and the Constitution in circumstances where the warrant discloses that he was not present at his trial and where the purported guarantees of an entitlement to a retrial are not sufficient and do not ensure that the respondent's entitlement to a full and fair trial in due course of law, both under the Constitution and the Convention, will be protected. The surrender of the respondent is therefore prohibited by ss. 37 and 45 of the European Arrest Warrant Act 2003 as amended.

5. The alleged offence of 'Defamation of nation, ethnical group, race and persuasion' defined as vilifying publicly 'some nation, its language, some ethnical group or race' or 'group of inhabitants of the republic for their political persuasion, or religion or for the reason they are without religion' constitutes an impermissibly broad intrusion on the right of freedom of expression contained in both the Constitution and the European Convention on Human Rights. The surrender of the respondent to face such a charge would therefore constitute a breach of his right to freedom of expression under the Convention and Constitution and is therefore prohibited by s. 37 of the European Arrest Warrant Act 2003 as amended.

6. The warrant the subject matter of these proceedings does not make sense on its face and is internally inconsistent. It

is not, therefore, a valid warrant within the meaning of the Act. The requirements of ss. 10 and 11 of the Act and the Framework Decision have not been complied with and the respondent's surrender on the warrant is therefore prohibited."

Correspondence, also alleged inconsistency

This warrant relates to four offences that are characterised under Czech law as

- violence against a group of inhabitants and against an individual pursuant to § 197a sec 1 of the Criminal Law;
- defamation of the nation, ethnical group, race and persuasion pursuant to § 198 sec. 1 lit a of the Criminal Law;
- assault on public official pursuant § 155 see. 1 lit. a) of the Criminal Law;
- riotous conduct pursuant pursuant § 201 sec. 1 of the Criminal Law.

The underlying facts are set out as follows:

"On April 30, 2007 at 19.10 to 19.40 the accused Jan Petrášek attacked verbally the Romany (gypsy) family. He scolded them and called black swines, Negro swines three women - Aneta Milůse and Marie Hlaváèová. He shouted at them that he would speak only with whites, he threatened them that be would kick them down and kill them. Subsequently he also attacked the called guard of the Municipal Police of Český Krumlov consisting of Libor Janeèek and Jaroslav Kvapil. At first the attack was verbal and later on, during his delivery to the station of the Town Police the attack was also a physical one. He opposed to police, he kicked their feet and be grabbed at their clothing. He caught Jaroslav Kvapil under the neck and knocked him down on the glassy window."

In Part E I of the warrant the box is ticked relating to Racism and Xenophobia. However, the warrant is ambiguous as to the invocation of paragraph 2 of article 2 of the Framework Decision because Part E II of warrant contains the entirety of the underlying facts. Counsel for the respondent contends that the warrant is bad on account of the ambiguity, and in support of his arguments he relies upon the decision of the Supreme Court in *Minister for Justice, Equality and Law Reform v. Tighe* [2010] I.E.S.C. 61 (Unreported, Supreme Court, 21st December, 2010), and in particular the judgment of Hardiman J. in that case. However, although the *Tighe*case did concern an ambiguity in the warrant as a result of a box being ticked in Part E I in respect of all offences to which the warrant related on the one hand, and Part E II of the warrant being completed in relation to all offences on the other hand, the actual decision in *Tighe* was not principally concerned with that ambiguity, not least because Peart J. in the High Court had decided to proceed on the basis that correspondence required to be demonstrated notwithstanding the ticking of any box.

Rather, the actual decision in *Tighe* was based on the fact that correspondence could not in any event be demonstrated as a matter of law in the particular circumstances of that case (particularly having regard to the inchoate nature of a conspiracy type offence, and the fact that notwithstanding the saver in s.32 of the Criminal Justice (Theft and Fraud Offences) Act 2001 there is no choate offence in Irish law of "cheating the public revenue, contrary to common law" that one could conspire to commit). *Tighe* is therefore readily distinguishable from the present case.

In any event, the Tighe "ambiguity"point raised in the pleadings has been overtaken by events in the present case in as much as the ambiguity created by the warrant was clarified, and the position has now been rendered unambiguous and certain, by additional information dated the 31st January, 2011, which indicates that the ticked box procedure is only being invoked in respect of the offence which is characterised in Czech law as "defamation of the nation, ethnical group, race and persuasion pursuant to § 198 sec. 1 lit a of the Criminal Law", and to which the following underlying facts relate:

> ".. Petrášek attacked verbally the Romany (gypsy) family. He scolded them and called black swines, Negro swines three women …….. . He shouted at them that he would speak only with whites."

In the Court's view, subject to the issue of minimum gravity, paragraph 2 of article 2 is validly invoked in respect of the offence in question and correspondence does not require to be demonstrated. In so far as minimum gravity is concerned the threshold is that set out in article 38(1)(b) of the Act of 2003, namely that under the law of the issuing state the offence is punishable by imprisonment for a maximum period of not less than 3 years. The offence here attracts two potential penalties. The basic penalty is one of up to two years imprisonment (§ 198(1) of the Czech Criminal Law), but if it is committed with at least two other persons it can attract a penalty of up to three years imprisonment (§ 198(2) of the Czech Criminal Law). Counsel for the respondent submits that in the circumstances of this case the offence would only attract the lower penalty and that accordingly the minimum gravity threshold is not met. Counsel for the applicant has argued in response that all the applicant is required to do is to show that the offence is one that in any circumstance could attract three years. On balance, the Court is against counsel for the applicant in the particular circumstances of this case. The Court considers that her argument would be sound if the respondent had been charged under Czech law with an offence under § 198 (subsection unspecified) of the Czech Criminal Law. However, he was charged with an offence under § 198(1) of the Czech Criminal Law which can only attract the lower penalty. In the circumstances, the Court's conclusion is that paragraph 2 of article 2 has not been validly invoked in respect of the offence in question, and accordingly correspondence requires to be demonstrated.

In the alternative to relying on the ticked box counsel for applicant invited the Court to find correspondence with the offence in Irish law of incitement to hatred contrary to s.2 of the Prohibition on Incitement to Hatred Act 1989, alternatively s. 6 of the Criminal Justice (Public Order) Act 1994. Although the Court received submissions from counsel for the respondent seeking to suggest that the underlying facts do not satisfy various ingredients of the offences in Irish law, particularly in the case of the s.2 offence the ingredient relating to the place of commission, and the ingredient relating to intention, alternatively the likelihood, of stirring up hatred, the Court was not impressed with those submissions, and is satisfied to find correspondence with both offences. The conduct described speaks for itself in this Court's view, and an intention to stir up hatred in the case of the s.2 offence, or to cause a breach of the peace in the case of the s.6 offence; alternatively the creation of a likelihood that hatred would be stirred up in the case of the s.2 offence; or recklessness as to whether a breach of the peace would be caused in the case of the s.6 offence, can all be inferred from the description of the underlying facts provided. In addition the conduct complained of is stated in the additional information to have been committed in public.

As a composite sentence of eighteen months imprisonment was imposed, and as the minimum gravity threshold is that provided for in s.38(1)(a)(i) of the Act of 2003, namely four months, minimum gravity is also satisfied.

In regard to the other three offences covered by the statement of underlying facts counsel for the applicant invited the Court to find

correspondence with offences in Irish law of threatening to kill, contrary to s.5 of the Non Fatal Offences Against the Person Act 1997; assault contrary to s.2 of the Non Fatal Offences Against the Person Act 1997 and again s. 6 of the Criminal Justice (Public Order) Act 1994. No submissions were received from the respondent to dispute that correspondence can be found with the suggested offences in Irish law. Having carefully considered the particulars furnished the Court is satisfied to find the suggested correspondence in each instance.

The adequacy of the s.45 undertaking.

Within Part D of the European arrest warrant the following representations are made, and the applicant relies upon them as representing a sufficient undertaking as to a re-trial for the purposes of s.45 of the Act of 2003:

> " ….as he was condemned as he escaped in absentia, he has pursuant § 306a sec 2 of the Code of Criminal Procedure the possibility to suggest the cancellation of the condemning judgment. If he does it, the main trial before the court will take place again, including all the important proofs. If the condemned Jan Petrášek is delivered into the Czech Republic based on this European arrest warrant, it will be up to him if he expresses an approval to the verdict or if he does not apply for its cancellation and will be delivered for the sentence of imprisonment or if he applies for the cancellation of the verdict, this verdict will be cancelled obligatorily by the court and subsequently the whole proceedings before the court will be carried out again in his presence. In this connection , I refer to the provisions of § 306 of the Czech Code of Criminal Procedure which reads as follows:
>
> 1/ If the reasons of the proceedings against the escaped passed off, the criminal procedure is continued according to the general regulations. If the accused requires its, the proofs performed in the preceding court proceedings will be performed before the court again, if their character enables it or if any other serious circumstances does not impede this; in other case the records of performing these proofs shall be read to the accused and it will be enabled to him to express his standpoint to them,
>
> or
>
> 2/ if the proceedings against the escaped were finished by the legally effective condemning verdict and then the reasons passed for which the proceedings against the escaped were conducted, upon the suggestion of the condemned submitted within eight days from the delivery of the verdict the court of the 1st degree cancels such a verdict and in the scope determined in the section 1 the main trial is carried out again. The condemned will be instructed of the right to suggest cancelling of the legally effective condemning judgment in the moment of the judgment delivery. The court proceedings appropriately if the international contract by which the Czech Republic is bound sets this forth.
>
> 3/ In the new trial no change of the decision to the disadvantage of the accused may occur."

Counsel for the respondent contends that the representations in question do not constitute an adequate undertaking for the purposes of s. 45, and in that regard he relies upon certain remarks of Murray C.J. (as he then was) in an ex tempore judgment of the Supreme Court delivered the 5th February, 2009, in *Minister for Justice, Equality and Law Reform v. Marek*(Unreported, Supreme Court, 5th February, 2009). Murray C.J. stated at pp.1-2:

> "The issue which has arisen in this appeal is that the appellant contends that if returned he will not receive a fair trial and in particular a re-trial for the offences for which he has been convicted and by reason thereof he ought not to be returned to the Czech Republic since, *inter alia*, s. 45 provides that a person who was not present when he/she was tried and convicted or sentenced for an offence shall not be surrendered under the terms of the Act of 2003, unless the issuing Judicial Authority gives an undertaking in writing that the person will, upon being surrendered, be re-tried for that offence, or be given an opportunity of a re-trial in respect of that offence, as well as being notified of the date of the trial and being permitted to be present.
>
> In this case before making an Order for surrender the Court must, having regard to s. 45 be satisfied that the Judicial Authority has given the appropriate undertaking concerning a re-trial. There is an undertaking with the European Arrest Warrant which follows pro forma the requirements of the Act namely that the appellant, if surrendered, will be provided with a re-trial or the option of a re-trial. In deciding whether that is sufficient to comply with the terms of s. 45 the Court cannot ignore the material contained in page 2 of the European Arrest Warrant for the purpose of considering whether the appropriate undertaking has been given. The undertaking, as I have indicated, relates to a re-trial. That is what the provision of our Act says and a re-trial in its ordinary and natural meaning refers to a trial de novo, that is to say, a trial of the accused as if he was on trial for the first time for the offence or offences in question.
>
> The requesting Judicial Authority in drafting and setting out the terms of the European Arrest Warrant did state that there was a particular legal guarantee available to the appellant namely that he will after delivery have the right to a new trial in his presence. This right, it was stated, is guaranteed by s. 306A Part 2 of the Code of Criminal Procedure of the Czech Republic and it then proceeds to quote from that provision.What the judicial Authority means by a re-trial in that respect is indicated by s.s. 1 of that Code which in translation includes the following statement:
>
> *"That if the defendant so demands new evidence shall be admitted to the Court which had not been presented in previous proceedings whose character can allow it or which cannot be prevented by other relevant matters otherwise the statements of evidence will be read to the accused and he will have the possibility to comment on them."*
>
> That raises a question in the mind of the Court as to the meaning and effect and the interpretation to be given to the undertakings provided by the requesting Judicial Authority pursuant to s. 45. Simply reading statements of evidence rather than hearing witnesses does not suggest a re-trial.
>
> The Court is not satisfied that there is, in relation to the request for surrender founded on the European Arrest Warrant, sufficient documentation or information regarding the nature and form of the re-trial that will take place if the appellant is returned to it and therefore it does not consider that the Order for surrender made by the High Court was correctly made in the circumstances outlined."

In the circumstances the Supreme Court then dealt with the matter in following way at p.3:

> "Having come to the conclusion that because of, at the very least, an ambiguity in respect of the undertakings given

having regard to what is contained in page 2 of the European Arrest Warrant the Court, as I have indicated, feels it should set aside the Order of the High Court, it having been incorrectly made, and considers that the matter should be remitted to the High Court in order that the High Court can, pursuant to s. 20 of the Act, require the issuing Judicial Authority to provide it with such additional documentation or information as will enable it to determine the nature and form of the re-trial which the requesting Judicial Authority says may take place, and will if the appellant so requests, on his return to the Czech Republic, should that Order eventually be made."

In the present case counsel for the respondent has submitted that the form of undertaking that has been given contains the same or similar wording to that which the Supreme Court had concerns about in *Marek*, namely it consists of a simple rehearsal of the law in the issuing state. A secondary aspect of the matter is the suggestion that if evidence is incapable of being re-heard it will simply be read from the record. It is suggested that the Supreme Court had reservations about whether such a proceeding could, in truth, be characterised as a re-trial, though it is conceded by counsel that the Supreme Court's position on that has been clarified somewhat in the judgment of Fennelly J in *Minister for Justice, Equality and Law Reform v. Gheorge*[2009] I.E.S.C. 76 (Unreported, Supreme Court, 18th November, 2009). Fennelly J said in *Gheorge*at para. 45:

"It is important to recall that what section 45 requires is that the person surrendered should have the benefit of an undertaking that he or she will be *retried for the offence* of which he or she has been convicted *in absentia*. It is axiomatic that the retrial will take place in accordance with the rules of criminal law and procedure of the issuing state. The statement of the Chief Justice upon which reliance is placed should not be read, in itself, as if it were a section of the statute. Clearly, the Chief Justice did not intend to add words to the statute. The notion that the retrial should take place *as if he was on trial for the first time for the offence or offences in question* could not mean that the first trial had been obliterated from history. Even in our law, there are circumstances in which the evidence at a previous trial may be referred to. The provision of article 405.2 to the effect that the prosecution may use again evidence that was *"prepared during the first trial"* does not take away the character of a retrial."

In response to counsel for the respondent's submissions, counsel asked the Court to consider what ultimately happened in *Marek's* case. In that case Peart J. in fact made two s.20 requests to the Czech authorities for additional information following the Supreme Court's judgment. It was necessary to make the second s.20 request because the initial clarification provided on the issue that had been of concern to the Supreme Court was anything but clear. The circumstances giving rise to the second s. 20 request, the terms of it, and the response received to it, are set out in the following extract from the judgment of Peart J. in *Minister for Justice, Equality and Law Reform v. Marek* [2010] I.E.H.C. 198 (Unreported, High Court, Peart J, 3rd February 2010):

"….the Central Authority wrote again to the issuing judicial authority seeking further clarifications, since, in the meantime, the matter had come back before this court on 30th June 2009 for consideration and submissions.

On that occasion, I was of the view that some uncertainty or ambiguity still remained, and so the matter was again adjourned so that the matter could be clarified. The letter written by the Central Authority dated 30th June 2009 describes this in the following way and requests information as set forth:

'Judge Peart was of the view that the responses provided in the letter of 31 March 2009 meant that all witnesses that gave evidence at the respondent's trial in absentia would give evidence again at the new trial, subject to their availability.

However, if they were unavailable, then records of their evidence would be read to the respondent and he could comment upon such records of evidence. Judge Peart felt that this was not a "de novo" trial.

In these circumstances, and pursuant to section 20 of the EAW Act, he directed that we (the Central Authority) seek the following additional information:

"1. Confirmation that all witnesses who gave evidence at the respondent's trial in absentia will be available to give evidence and be cross examined the new trial.

2. If witnesses are not available, then confirmation that their previous evidence will not form part of the respondent's new trial, i.e. their previous evidence will not be read from transcripts."

To these questions the following answers were received by letter dated 15th July 2009:

"1. In the "de novo" trial all the witnesses that gave evidence in the previous trial will give evidence in the new trial.

2. If witnesses are not available the court will proceed in accordance with ***section 211, subsection 1 of the Code of Criminal Procedure****, which reads as follows:*

'Instead of the witness's interrogation in the trial it is possible to read the statement of his/her testimony, if the court does not consider his/her personal interrogation necessary, and if the Public Prosecutor and the Accused agree with it. If the accused person, who had been summoned for the trial does not appear without an excuse or if he leaves the courtroom without any serious reason, the consent of the accused to read the statement is not necessary and the consent of the Public Prosecutor shall suffice. The accused must however be informed of such facts in the summons.'

With respect to the above it is clear that in the new trial the statements of the witnesses' testimonies may not be read without the consent of the accused person."

I take this latest information to mean, first of all, that in any retrial, all the witnesses who gave evidence at the previous trial will be called to give evidence in the new trial; and secondly, that if one or more witnesses who gave evidence at the first trial are not available to give evidence at the retrial, the statement of his/her evidence at the first trial may be read out at the retrial if the court considers that personal interrogation is on necessary, but then only if both the Public Prosecutor and the accused agree to that happening. The penultimate paragraph of the issuing judicial authority's letter dated 15th July 2009 seems to emphasise that this is the position. The issuing judicial authority has itself underlined the words "and the Accused agree with it".' [Emphasis original]

Peart J. concluded:

> "The information which has been obtained now from the issuing judicial authority and which I have set forth above, seems to me to put the position beyond any doubt and, in spite of what is said by [the respondent's expert], confirms that all witnesses who gave evidence at the first trial will be required to give evidence at any retrial, but that where any such witness is unavailable, and the court considers that such witnesses evidence is required, the statement of the evidence given by that witness at the first trial can be presented at any retrial by being read out, but only if, *inter alios*, the accused agrees to this being done. The provisions of section 211 of the Code of Criminal Procedure has been set for by the issuing judicial authority in its letter dated 15th July 2009. I appreciate that [the respondent's expert] has expressed his views in relation to this procedure on any retrial, but, as Mr. Collins has pointed out, he does not address specifically the provisions of Section 211, and he certainly had an opportunity of doing so. It is this question of whether, at a retrial, evidence from the previous trial can simply be read into the record of the retrial with only an opportunity for the accused to comment upon it, that gave rise to the possibility that such a retrial would not be a trial de novo. I am satisfied that, while such a possibility exists, it only exists if both the Public Prosecutor and, importantly, the accused agree.
>
> This requirement that at any retrial the respondent must consent to the admission into evidence of any statement of evidence given at the earlier trial by any unavailable witness, before such statement evidence can be presented, is sufficient in my view to guarantee a retrial which is a trial *de novo*.
>
> I am satisfied therefore that the undertaking which has been provided by the issuing judicial authority pursuant to section 45 of the Act is an undertaking which meets the requirements of that section and is sufficient to guarantee to the respondent a retrial to which he is entitled under the Framework Decision." [Emphasis original]

In this Court's view it is appropriate to take the same approach in the present case. It is clear to me, having considered in detail the judgments in *Georghe*, and *Marek*respectively, and taking judicial notice of the additional information supplied in response to the second s.20 request in *Marek*concerning the same provision of Czech law that we are concerned with in this case, *viz* .§ 306.1 of the Czech Code of Criminal Procedure, that the Court can safely rely upon the statement in the warrant to the effect that if the respondent *"applies for the cancellation of the verdict, this verdict will be cancelled obligatorily by the court and subsequently the whole proceedings before the court will be carried out again in his presence.".* It is further clear that in so far as § 306.1 of the Czech Code of Criminal Procedure suggests that in some circumstances the possibility exists that evidence given in the previous trial might be read into the record that provision must be read in conjunction with § 211.1 of the same code, and that it can only occur with the consent of both the public prosecutor and the accused.In those circumstances the undertaking provided is adequate for the purposes of s. 45 in my view.

The Freedom of Expression s.37 point

Although not expressly withdrawn, the Court received no specific submissions on this point from the respondent and in the circumstances is treating this point as having been abandoned.

The European arrest warrant dated the 18th January, 2011

This is a conviction type warrant about which the Court will say more in a moment, and in respect of which a number of specific objections are raised.

Specific Objections

In so far as specific objections are concerned the only points of objection on which the Court received case specific submissions were points 3, 4 and 6 in the Points of Objection document. Points 3 and 4, respectively, deal with alleged ambiguities, uncertainties and inconsistencies. These plead:

> "3. The applicant is not someone who comes within the terms of s. 10 of the Act in respect of this warrant and his surrender on this warrant is therefore prohibited.
>
> 4. The warrant the subject matter of these proceedings does not make sense on its face and is internally inconsistent. It is not, therefore, a valid warrant within the meaning of the Act. The requirements of ss. 10 and 11 of the Act and the Framework Decision have not been complied with and the respondent's surrender on the warrant is therefore prohibited."

The further point of objection at point 6 is also, in the Court's view, de facto based upon alleged ambiguities/uncertainties/ inconsistencies in the warrant but it is couched in terms of a Part 3 objection, and specific reliance is placed on s.37 and s.45. In that regard it is pleaded that:

> "6. The surrender of the respondent would constitute a breach of his rights under both the European Convention on Human Rights and the Constitution in circumstances where the warrant discloses that he may be subjected to a greater sentence than that originally purportedly imposed by the courts in the requesting state. The surrender of the respondent is therefore prohibited by ss. 37 and 45 of the European Arrest Warrant Act 2003 as amended."

No case specific submission was received in respect of a further point pleaded at point 7 which is in terms that:

> "7. The surrender of the respondent would constitute a breach of his rights under both the European Convention on Human Rights and the Constitution in circumstances where the applicant was convicted in absentia of the further offence leading to the purported imposition of the apparently previously suspended sentence. The respondent has therefore been denied his Convention and Constitutional rights to fair procedures, a fair trial in due course of law and to make submissions in respect of the allegation the subject matter of that conviction, which allegation may effectively result in him receiving a custodial sentence. The surrender of the respondent is therefore prohibited by s. 37 of the European Arrest Warrant Act 2003 as amended."

However, as this point is shared in common with, and also appears in the pleadings relating to, the warrant dated the 20th January, 2011, the Court understands that submissions on this ground addressed to the Court in relation to that warrant are to be adopted and regarded as applying to this warrant also. Applying that approach it is sufficient to state that the Court's decision on this ground as set out above in relation to the warrant dated the 20th January, 2011, applies mutatis mutandis to this warrant.

Alleged ambiguities / uncertainties / inconsistencies in the warrant

In this case there is, at first glance, a certain lack of clarity in the European arrest warrant concerning the nature of it, and in particular whether it relates to a pending prosecution, or a conviction matter. In regard to that, the respondent again raises a *Tighe*ambiguity point. However, the Court considers this argument to be misconceived, certainly in regard to whether the warrant is a prosecution or conviction type warrant, as the position becomes clear when the document is considered in detail and as a whole.

The Court is satisfied that the position is that the respondent was convicted by the District Court in Český Krumlov of the two offences (one of which is a multi act offence involving two instances of criminal contact) the subject matter of the warrant, and that by a judgment of the 22nd February, 2007, which became final on the 24th March, 2007, he received a sentence of 28 months imprisonment which was conditionally suspended for three and a half years during which time he was required to submit to a regime of supervision by a probation officer and also to stay out of trouble. The European arrest warrant, which is based upon a domestic arrest warrant issued by the District Court in Český Krumlov on the 14th January, 2011, now seeks the return of the respondent for the purposes of securing his attendance at a hearing to consider whether the suspension of his aforementioned sentence of 28 months imprisonment should be lifted, and the sentence activated, in circumstances where it is alleged that he failed to comply with the conditions on foot of which the sentence was suspended, both by allegedly obstructing the supervision of the probation officer and committing further offences during the probation period.

It has been further suggested by the respondent that because Part C of the warrant refers to a potential sentence of eight years imprisonment, and does not refer to the fact that a sentence of 28 months has already been imposed and conditionally suspended; and further because Part B 2 suggests that the warrant is *"non-applicable"* to an enforceable judgment the respondent *"may be subjected to a greater sentence than that originally purportedly imposed by the courts in the requesting state".* The Court regards this proposition as fanciful and divorced from reality.

The first thing to be said in that context is that Part B 2 is technically correct and therefore unobjectionable. It is technically correct because the domestic judicial decision being relied upon for the purposes of grounding the European arrest warrant is not an enforceable judgment but rather a domestic arrest warrant. Moreover, it would not have been possible to rely on an enforceable judgment because, strictly speaking, the suspended sentence will only become enforceable if, and when, the suspension is lifted.

Secondly, while there are admittedly inconsistencies and ambiguities in the warrant, particularly in Part C relating to penalties, and in Part E relating to whether, and if so to what extent, the ticked box procedure is being invoked, there can be no uncertainty as to what the warrant relates to once the warrant document, and a letter dated the 31st January, 2011, containing additional information, are read together as a whole. On the contrary, the position is entirely clear and certain in this Court's view. Accordingly, I do not consider that there is any risk of an increased sentence being imposed on the respondent if he is surrendered on this warrant. The only risk he faces is that the suspension of the 28 month sentence imposed upon him might be lifted, and he is properly on notice of that. In the circumstances no issue arises in this context such as would cause me to consider that the respondent's surrender on foot of this warrant would be incompatible with this State's obligations under the Convention, or that it would contravene any provision of the Constitution.

Thirdly, as the respondent cannot on any credible view or construction of the warrant be regarded as being wanted to serve a sentence imposed upon him following a trial *in absentia*, no question of a s.45 undertaking can arise.

Fourthly, although it was suggested by counsel for the respondent that, having regard to ambiguities / uncertainties / inconsistencies in the warrant, it is impossible for someone in his client's position to know on what basis the European arrest warrant was issued against him i.e., whether he is a person who comes with s.10(a), or s.10(b) or s.10(c) or s.10(d) of the Act of 2003, this is manifestly not the case in my view. It is quite clear that his client comes within s.10(d). The case has long since passed the point of proceedings being under consideration, or proceedings being pending, or of the respondent having been convicted but not yet sentenced. He has been both convicted and sentenced and so there can be no doubt but that he is a person who comes within s.10(d). The fact that his sentence was suspended is irrelevant to what category he comes within. The fact that he is now wanted to secure his attendance at a hearing at which the possible lifting of that suspension will be considered is also irrelevant in terms of the category that he comes within for the purposes of s.10. This is because the planned sentence review hearing does not constitute new proceedings.

Fifthly, in so far as some ambiguities / uncertainties / inconsistencies do exist in the warrant , the Court is completely satisfied that any such deficiencies, whether as to substance or as to form, or the omission of a detail or details, are non-substantial and are capable of being overlooked under s.45 C of the Act of 2003. Furthermore, in so far as it is contended that in consequence of those deficiencies *the requirements of ss. 10 and 11 of the Act and the Framework Decision have not been complied with",* the Court is completely satisfied that such non-compliance (if any – the Court having already expressed its view in relation to the s.10 based complaints) is technical in nature and not such as would impinge on the merits of the application. In any event neither the deficiencies in the warrant, nor the alleged non compliance with the Act of 2003 and the underlying Framework Decision, are such as are likely to cause an injustice to the respondent in the circumstances of this case. That being the case the Court, by virtue of s.45C of the Act of 2003 (as inserted by s.20 of the Criminal Justice (Miscellaneous Provisions) Act 2009) is not entitled to refuse to surrender the respondent.

Correspondence and minimum gravity

As previously stated the warrant ostensibly relates to three incidents of criminal activity charged as two offences. Accordingly, one offence is a multi-act offence covering two out of the three incidents. The underlying facts are described in Part E of the warrant as follows:

> "The named Jan Petrášek
>
> 1) On 26.1.2006 in the evening, he forced the injured person Milan Pihal together with two other culprits under the threat of the violence to get into the car and be took him to a remote place outside the town. Here he forced him to sign a bill of exchange for the sum of CZK 60,000.-, which is the triple of the sum which the injured person owed to another person. As the injured men did not want to sign the bill of exchange at the beginning, he was dragged out of the car. Here he was kicked by the accused Jan Petrášek by the foot into his head and was threatened by throwing into the water of the pond. After the injured person had signed the bill of exchange, the accused Jan Petrášek (together with both culprits) wanted from him the issue of the electronics and the car mark Škoda Favorit. After the injured person announced them that the car does not belong to him but to another person, the accused Jan Petrášek hit him by the fist into the head. After the arrival into Český Krumlov the accused Jan Petrášek(together with both culprits) dragged the injured men out of the car, one of the accomplices knocked him down to the ground, he kneeled on him, pushed his head into the snow and forced

him to repeat the words "I will get the money by tomorrow also if I should steal it". After taking the injured person into the place of his residence, the accused Jan Petrášek pushed the injured person into the lift, he drove him up to his flat and required the issue of the electronics. He threatened to the injured person by violence and hinted that also his minor son could be involved. The injured person issued for fear to the accused the radio cassette + CD player, mark Panasonic in the value of CZX 2,500,- and he handed over to culprits also the required car mark Škoda Favorit in the value of CZK 5,000.

2) on 28.6.2006 around 00,45 on the square of Náměsti Svornosti in Český Krumlov in drunkenness he beat into the parked service car of the town police by the promotion board. Then he repeatedly jumped by his hind part of the body on the front bonnet of this car. Hereby he caused a damage of CZK 12,794,-."

Moving then to a consideration of Part E.I of the warrant the court notes that a box relating to "racketeering and extortion" is ticked. However, when Part E II is then considered it is further noted that the entirety of the underlying facts recited above is again set out. The warrant itself is therefore ambiguous (a) as to whether paragraph 2 of Article 2 of the Framework Decision is in fact being invoked; and (b) if so, in respect of what offence or offences it is being invoked. This ambiguity was capable of being dealt with in one of two ways. First, adopting a conservative approach the Court could simply insist on correspondence being demonstrated in respect of all offences covered by the warrant regardless of whether or not the issuing judicial authority had intended to avail of the tick box procedure in respect of all or any of the offences. The second, and alternative course, would be to request clarification (which might or might not be adequate) from the issuing judicial authority concerning what had been their actual intention.

In the present case the Central Authority, on its own initiative, requested clarification from the issuing judicial authority. This was provided in a letter dated the 31st January, 2011, in which it is stated (*inter alia*):

"In the section E I the stated criminal act of racketeering and enforcing money for protection is ticked off. To this criminal act, the act of 26.1.2006 corresponds which is described in the section 1/. In the section E II the act of 28.6.2006 shall be stated correctly which is described in the section 2/. This is the criminal act of riotous conduct and damaging a foreign thing."

While the language and idiom of the clarification is somewhat cumbersome there can be no doubting the effect of it. This Court has been clearly given to understand (a) that the issuing judicial authority intended to avail of the ticked box procedure in respect of the single offence described in section 1 of the narrative of underlying facts *viz* the offence of 26.1.2006; (b) that it was not intended to avail of a ticked box in respect of the offence described in section 2 of the narrative of underlying facts *viz* the multi-act offence of 28.6.2006; and (c) that Part E II should only have contained that part of the narrative of underlying facts described in section 2, *viz* the part of the narrative relating to the multi-act offence of 28.6.2006. In circumstances where the Court has what it regards as full clarity with respect to the intentions of the issuing judicial authority it can proceed accordingly.

In circumstances where a box relating to racketeering and extortion is ticked, and it is clear to what offence it relates, the Court does not require to be concerned with correspondence providing that the requirements of s.38(1)(b) of the Act of 2003 with respect to minimum gravity are met. A single composite or aggregate sentence of up to eight years imprisonment was capable of being imposed in respect of the various offences covered by this warrant. S.38(1)(b) requires that under the law of the issuing state the offence is punishable by imprisonment for a maximum period of not less than 3 years. In circumstances where a penalty of up to eight years imprisonment could potentially have been imposed the requirements as to minimum gravity are satisfied.

In regard to the multi-act offence described in section 2 of the narrative of underlying facts, correspondence must be demonstrated with an offence or offences in Irish law, and the requirements of s.38(1)(a)(ii) of the Act of 2003 with respect to minimum gravity must also be satisfied.

The Court has been invited to find correspondence with (i) the offence of criminal damage contrary to s.2 of the Criminal Damage Act 1991, and (ii) with engaging in disorderly conduct in a public place, contrary to s.5 of the Criminal Justice (Public Order) Act 1994. The respondent has not sought to dispute or contest the suggested correspondences. In circumstances where the warrant describes a single, albeit multi-act, offence in section 2, it would, in the Court's view, be sufficient if correspondence could be demonstrated with any one of the two suggested correspondences. However, having considered the underlying facts in detail, the Court is satisfied that correspondence can in fact be found with both suggested offences under Irish law.

Turning finally to the issue of minimum gravity, the threshold is that set out in s.38(1)(a)(ii) of the Act of 2003, i.e., that a term of imprisonment or detention of not less than four months has been imposed on the person in respect of the offence in the issuing state. As the respondent received a sentence of 28 months imprisonment (albeit conditionally suspended) the threshold is met.

Conclusion
The Court is disposed to make s.16 Orders and to surrender the respondent to the issuing state on foot of all three European arrest warrants.