THE HIGH COURT

Record No. 2014/231 EXT

BETWEEN:

MINISTER FOR JUSTICE AND EQUALITY

Applicant

-and-
S.F.

Respondent

JUDGMENT of Ms. Justice Donnelly delivered on the 15th day of February, 2016.

1. A European Arrest Warrant ("EAW") has issued from France seeking the surrender of the respondent to serve a sentence in respect of three offences. This current EAW is the second one to have been issued by a judicial authority in France and endorsed by the High Court in relation to this respondent. The first EAW was issued on 25th June, 2012 by the Public Prosecutor's Office of the Regional Court of Lille, an issuing judicial authority in France. The surrender of the respondent was sought for the purposes of criminal prosecution. This EAW was endorsed by the High Court on 18th December, 2012 with the respondent's arrest executed by arrangement on 14th May, 2014. However, this EAW was subsequently withdrawn by the issuing judicial authority, the endorsement of the EAW was cancelled and the proceedings were struck out on 18th November, 2014.

2. The present EAW issued from the same issuing judicial authority on 3rd June, 2014. This is a conviction type EAW; it now refers to the enforceable judgment delivered on 30th January, 2014 in which a custodial sentence of three years imprisonment was imposed on the respondent. This EAW was endorsed by the High Court on 18th November, 2014. The respondent was arrested on that date and brought before the High Court and admitted to bail. The respondent's brother, D.F., was also sought by France on an identical EAW in identical circumstances. A separate judgment has been delivered in respect of Mr. D.F. dated February 8th, 2016. The cases had been heard together and counsel had adopted each other's submissions, save where the individual circumstances were different.

The Offences Set Out in the European Arrest Warrant

3. The EAW relates to three offences, the details of which are outlined in the EAW, in the additional information from the issuing judicial authority received on 12th and 29th October, 2015 and in the additional information provided by means of the judgment of the Court of Appeal convicting and sentencing the respondent. The legal categorisation of these offences are as follows:

> Offence 1: Complicity of smuggling of prohibited or heavily taxed goods as part of an organised group.
>
> Offence 2: Complicity of attempted undeclared exportation of prohibited or heavily taxed goods committed as part of an organised group.
>
> Offence 3: Participation in a conspiracy with the aim of preparing an offence punished by 10 years imprisonment.

4. Further details of the three offences are described in the following terms at point (e) of the EAWs:

> "On 5th March 2010, [J.P.B] was arrested in Veys while driving a lorry which transported 5 tons of smuggled cigarettes. He had loaded these goods in the region of Paris and headed for Cherbourg to embark to Ireland. He was not in possession of the customs documents provided for by the law. This driver, which was employed by [redacted], a company located at [redacted] (Ireland) and managed by S. and D.F., did not cooperate with the investigation and gave up several false and contradictory versions. The ferries had been reserved by his bosses who had stayed in contact with him during the transport carried out with a lorry belonging to the company. Heard by the Irish police, S. and D.F. declared not to know anything about these smuggled goods and having sent their driver to deliver apples and bring some cheese. However, certain contradictions and lies were highlighted in their version of the facts. S. and D.F. were both summoned by registered letter in order to be investigated in France. The letter explained to them that in case of non-appearance, they will be the target of a European arrest warrant. After having instructed a lawyer and made the date of appearance postponed for supposed health problems, the two F. brothers declared through an Irish lawyer that they refused to appear in France."

Points of Objection

5. The respondent's case was adjourned from time to time to enable him to obtain material in support of his points of objection. Initial points of objection were filed in March 2015 and an additional point of objection was filed in June 2015. These points of objection required further consideration by the central authority.

6. The respondent opposes his surrender on the following grounds which can be summarised as follows:

> a) Non compliance with s. 38 of the Act of 2003 regarding the ticking of the box pursuant to Article 2 para. 2 of the Framework Decision and the issue of correspondence of offences;
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> b) Non compliance with s. 11(1A)(f) of the Act of 2003
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> c) Non compliance with s. 44 of the Act of 2003 (extra territoriality)
>
> d) Abuse of process
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> e) Breach of Article 8 ECHR rights under s. 37 of the Act of 2003.
>
> f) Non compliance with s. 10 and s. 11 (1A)(e) of the Act of 2003 as the decision on which the EAW is based is not immediately enforceable.

Section 16 of the Act of 2003, as amended

Uncontroversial Issues

7. I am satisfied that the Minister for Foreign Affairs has, by the European Arrest Warrant Act 2003 (Designated Member States)

Order 2004 (S.I. No. 130 of 2004), designated France as a Member State that has, under its national law, given effect to the Framework Decision of 13th June, 2002 on the European Arrest Warrant and surrender procedures between Member States ("the 2002 Framework Decision").

8. I have scrutinised the EAW, the additional documentation and the affidavit of Sergeant Seán Fallon of An Garda Síochána and I am satisfied based on the information contained therein, that S.F. is the person in respect of whom the EAW has been issued.

9. I am satisfied that the EAW has been endorsed in accordance with s. 13 of the European Arrest Warrant Act 2003, as amended, ("the Act of 2003") for execution.

10. At point (d)(2) of the EAW, the issuing judicial authority has indicated that "no, the person did not appear in person at the trial resulting in the decision" and consistent with this, they have also ticked point (d)(3.4) indicating that the respondent, if surrendered, will have a right to a retrial or appeal. Point (d) of each EAW has therefore been duly completed. I am satisfied that the surrender of the respondent is not prohibited by s. 45 of the Act of 2003.

11. I am satisfied that I am not required to refuse the respondent's surrender under sections 21A, 22, 23 or 24 of the Act of 2003, as amended.

12. Apart from further considerations of s. 37, s. 38 and s. 44, I am satisfied that the respondent's surrender is not prohibited by any other section contained in Part 3 of the Act of 2003, as amended.

Section 38 of the Act of 2003
Article 2 Paragraph 2

13. In initial written submissions, the respondent claimed a lack of clarity about what, if any, offence was being relied upon by the issuing judicial authority. Under point (e) II of the EAW, which is headed "full description of the offence(s) not covered by section I above", it states that:

> "The possession, the transport and the exportation (or attempted exportation) of heavily taxed goods as cigarettes, without these goods being declared and taxes being settled, constitute the customs offence of smuggling. When the smuggling is committed as part of an organized group, the penalties imposed are 10 years of imprisonment. Becoming an accomplice, either through help and assistance or through issuing of instructions, is punished as the main offence."

14. By additional information, in response to a query by the central authority, the issuing judicial authority confirmed that the offence covered by the ticked box offence, namely that of participation in a criminal organisation was the third offence, *i.e.* the conspiracy offence. In oral submissions, it was accepted by counsel for the respondent that this resolved the issue under this particular heading.

15. In the course of drafting this judgment, the Court requested sight of the documentation regarding the first EAW. Extracts from this documentation had been cited in the submissions on behalf of the minister (under another heading). The fact of the previous EAW and the history of the proceedings were relied upon by the respondent. There was no objection to the Court seeing those documents nor, in the circumstances, could there have been. The earlier EAW was in almost identical format save as relevant to the fact that it was an EAW issued for the purpose of criminal prosecution.

16. The EAW was issued by the Deputy Public Prosecutor, a judicial authority in France. He later replied to the central authority saying that all the offences in the EAW were intended to be covered by "section e" of the warrant. That, of course did not settle the issue as all offences have to be covered by "section e" of the EAW. The issue is whether each, any or all offences are covered by "e I" or "e II". There was further communication which did not appear to resolve the matter. However, when the request was made with respect to the fresh EAW, the reply was clear and comprehensive. Any confusion that had existed was thereby clarified. I am satisfied that there is no manifest error in ticking this particular box and that it has been confirmed that this relates solely to the offence of conspiracy.

17. Minimum gravity is satisfied in accordance with s. 38 of the Act of 2003 in that each offence carries a maximum potential penalty of ten years and a sentence of three years has been imposed. Surrender is therefore not prohibited by the provisions of s. 38 in relation to the third offence listed in the EAW.

Correspondence

18. Counsel for the respondent submitted that no correspondence could be demonstrated in relation to the first two offences listed in the EAW. It is accepted that if no correspondence exists for either offence, surrender must be refused as a composite sentence has been imposed in respect of all three offences (as per the decision in *Minister for Justice v. Ferenca* [2008] IESC 52).

19. There was a marked divergence between the written and oral submissions of counsel for the respondent. In written submissions, there was a brief reference to lack of correspondence and this was premised on the basis that there was no evidence the respondent knew that [JPB] was transporting illicit goods and there is no piece of information showing that he was involved in organising or assisting in any way with its transport or exportation. They reserved the right to make further submissions depending on the offences nominated by the minister. It is appropriate to outline the minister's submissions.

20. Counsel for the minister in relying on s. 5 of the Act of 2003, referred to the reference of Fennelly J. at p. 13 in *Attorney General v. Dyer* [2004] IESC 1 to the *dictum* of Henchy J. in *Hanlon v. Fleming* [1981] IR 489 wherein it was stated that:

> *"it is a question of looking at the factual components of the offence specified in the warrant, regardless of the name given to it, and seeing if those factual components, in their entirety or near-entirety, would constitute an offence which, if committed in this State, could be said to be a corresponding offence of the required gravity."*

Counsel also relied upon the test for correspondence described by Denham J. at p. 7 in *Attorney General v. Hilton* [2004] IESC 51 as being one of "*the Court [looking] to the alleged acts of the person sought as stated on the warrant and [considering] whether they would constitute an offence in this jurisdiction…"*

21. As regards corresponding offences in this jurisdiction, counsel for the minister put forward s. 119 of the Finance Act, 2001, an indictable offence relating to the evasion of tax duty, sub-sections 1 and 2 of which provide:

"(1) It is an offence under this subsection for any person to take possession, custody or charge of, or to remove, transport, deposit or conceal, or to otherwise deal with, excisable products in respect of which any duty of excise is for the time being payable, with intent to defraud, either directly or indirectly, the State of such duty.

(2) It is an offence under this subsection for any person to be concerned in the evasion or attempted evasion of a duty of excise on excisable products with intent to defraud either directly or indirectly the State of such duty."

22. Counsel also relied upon s. 97 of the Finance Act, 2001 which deems tobacco products (chargeable with the duty of excise imposed by s. 2 of the Finance (Excise Duty on Tobacco Products) Act, 1977 ("the Act of 1977") to be "excisable products". Section 2 of the Act of 1977 states that:

"…there shall be charged, levied and paid on …tobacco products that are manufactured or imported into the State…a duty of excise at such rates as may be specified from time to time by Act of the Oireachtas".

23. Counsel also relied upon s. 186 of the Customs Consolidation Act, 1876 ("the Act of 1876"), as amended, where it states that:

"[e]very person who…shall be in any way knowingly concerned in any fraudulent evasion or attempt at evasion of any duties or Customs…[shall be liable to a fine and/or imprisonment in accordance with this section]".

24. Counsel for the minister submitted what was found against the respondent was that he was part of a joint enterprise or common design as regards offences in France (by virtue of his complicity with his brother and JPB in the offence). The aim was to possess, transport or attempt to export five tons of smuggled cigarettes, smuggled cigarettes being cigarettes liable to tax in France but which was not paid. It was submitted that the description of the offences disclosed an intent to defraud, given the specific reference to the smuggled cigarettes and the role of the respondent in the offences.

25. Counsel for the respondent submitted that the issue was whether the conduct amounting to the offences included an element of intent or knowledge on the part of the respondent. It was submitted that even the offence under s. 186 of the Act of 1876 required an intention to defraud. Reliance was placed upon *Attorney General v. Deignan* [1946] I.R. 542 in which the Supreme Court held, relying on the case of *Frailey v. Charlton* [1920] 1 KB 147, that the offences under that section required an intent to defraud to be established. I accept that the offence under s. 186 must be committed with an intent to defraud. It is noted that in *Frailey v. Charlton*, one of the judges equated the concept of intention to defraud with knowingly being concerned in any fraudulent evasion of duties.

26. On behalf of the respondent, it was submitted that careful reading of the EAW, additional information and, in particular, the judgment of the Court of Appeal in Douai, did not demonstrate the required state of mind, namely intention to defraud, on the part of the respondent. It was submitted that the reference in the judgment to knowingly helping or assisting [JPB] in his preparation or consumption was a matter of French law and could not be relied upon to ground the requisite state of knowledge.

27. Counsel for the respondent referred to specific aspects of the judgment which referred to particular evidence against her client. It was further submitted that it was not enough to show the cigarettes were in the truck, there had to be control over them and in this case only the driver had such control. It was submitted that the court cannot infer intent or knowledge where it is not borne out by the facts. It was submitted that this was a case where no such inference could be drawn on the basis of the facts. It was submitted that there was no evidence of a joint enterprise and no evidence of any agreement either implicit or explicit. There was no evidence of the details of the SMS contacts between the parties as there were with regard to other persons who were adjudged guilty of offences in the same judgment. There was an over reliance on the respondent's evasive attitude and it was suggested that this was because there was not enough evidence.

Court's Analysis and Determination

28. In 'Criminal Law' by Charleton, McDermott & Bolger, there is a quotation from the decision of the Court of Criminal Appeal in *People (DPP) v. Malocco,* (Unreported, 23rd May, 1996), in which the decision of the House of Lords in *Welham v. DPP* [1960] 1 All ER 805 was cited with approval. In that case Lord Radcliffe stated that "*to defraud is to deprive by deceit"*. Lord Denning stated that:

> *"with intent to defraud means with intent to practise a fraud on someone or other. It need not be anyone in particular. Someone in general will suffice. If anyone may be prejudiced in any way by the fraud, that is enough."*

29. At the final paragraph in AG v. Dyer, Fennelly J. stated:

> *"[h]owever in the absence of any allegation, either express or to be implied, of intent to defraud, I do not believe the warrants in the present case satisfy the requirement of Part III of the Extradition Act 1965 in respect of correspondence of offences, I would, therefore, allow the appeal and substitute an order dismissing the application of the applicant."*
>
> This *dicta* establishes that an extradition warrant/EAW is not required expressly to state that an intent to defraud is part of the facts proven or to be proved against a requested person. If the intent can be implied from the facts set out, that is sufficient. It is also the case that as stated by the Supreme Court in *Minister for Justice v. Dolny* [2009] IESC 48, the Court must consider the totality of the EAW when assessing correspondence.

30. The process of establishing correspondence requires a careful exercise by the court of an analysis of the salient facts (including intention) either alleged or proven against the requested person as appropriate to the type of request. When a conviction is involved, this does not mean that the court can second guess the determination by the court in the issuing state as regards the inferences drawn from the evidence. A simple example is where a requested person has been convicted of theft but the factual description of the offence describes a situation where a lack of dishonesty was possibly demonstrated on those facts. In circumstances where the court in the issuing state has found as a fact that there was dishonesty, it is not for the executing state to reassess the evidence. On the other hand, if the conviction for theft (according to the law of the issuing state) was made in circumstances where the court in the issuing state accepted that there was in fact no dishonesty, then correspondence would not be made out.

31. In looking at the totality of the information contained in the EAW and additional information, what has been proven against the respondent in this case is that he is guilty of the charges laid against him. An assessment of the *evidence* by which the factual and mental elements of the offence have been *proven* is not a matter for the High Court, as an executing judicial authority, to second guess. To engage in any such assessment of evidence would be to violate the principles of mutual trust and mutual recognition which are the principles upon which the 2002 Framework Decision on the EAW system is based. The primary approach by the respondent in

this case to the issue of correspondence has been to attack the perceived inadequacies of the evidence without regard to the fundamental findings of the Court of Appeal or indeed the fundamental details of the offences as set out in the EAW and additional information.

32. It may be useful to contrast a statement of the essentials of an offence with the evidence used to prove it. A statement of the acts which are alleged to constitute murder could be given along the following lines: " X owed Y a drug debt but failed to pay it back to Y. As a result, between [two given dates] Y hired a gunman, Z, to kill X. On [a given date] Z, acting on the instructions of Y, went to X's house at …. and when the door opened Z shot X 3 times, fatally wounding him. Y is sought for the murder of X." That is a clear statement that Z carried out the killing at the request of Y. There is correspondence established with the offence of murder in this jurisdiction. It is not necessary to show the nature of the evidence establishing the above, it may be telephone contact, it may be that Z will give evidence against Y. There is a clear description of what Y is being sought for.

33. The essential nature of the offences proven against this respondent was set out in the EAW. Further and more precise details of the charges of which he was found guilty are described in the judgment of the Court of Appeal as follows:

> Charge 1: "Having, on the Irish territory, but in connection with offences committed on the national territory and within the jurisdiction of the specialized inter regional court of Lille, in February 2020 and March 2010, in any cases within a time period not covered under statutes of limitations, been the accomplice of the offence of possession and transportation in breach of legal and statutory provisions heavily taxed goods, in the present case approximately 5 tons of Richman branded smuggled cigarettes, with this circumstance that the facts were committed as part of an organized group, of which [JPB] is accused, by knowingly helping or assisting him in his preparation or his consumption and by giving instructions to commit the offence, in the present case by providing the combination of vehicles having served for the transport of smuggled goods and by giving instructions in his capacity as company manager to his employee, some facts provided for by [various provisions of the French Customs Code and punished by various provisions of the French Customs Code and in consideration of various articles of the French criminal code]".
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> Charge 2: [Similar to the above but related to attempted exportation].
>
> Charge 3: "Having, on the Irish territory, but in connection with offences committed on the national territory and within the jurisdiction of the specialized inter regional court of Lille, in February 2020 and March 2010, in any cases within a time period not covered under statutes of limitations, participated in an association that is formed or an agreement that is established for the purpose of preparing, as characterized by one or several material facts, one or several crimes or offences punished by ten years of imprisonment (possession, transport and attempted exportation of heavily taxed goods committed as part of an organized group), in the present cases and notable for multiple telephone contacts, repeated meetings with several protagonists of this case, with the recognized intent to prepare the abovementioned offences, some facts provided for [various provisions of the French Criminal Code and punished by various provisions of the French Criminal Code]".

34. Should there be any doubt as to the nature of the offences of which he was convicted, further information can be gleaned from the additional information from the issuing judicial authority dated 29th October, 2015. This states that:

> "The F. brothers were convicted as accomplice of transport and possession with the aim of smuggling prohibited or heavily taxed goods committed as part of an organized group as they were recognised as the two people who gave the orders and organised the traffic. [Same for the complicity of attempted exportation.]"

35. The issuing judicial authority also replied to a question about the circumstances in which the offence was committed that:

> "[a] lorry which transported five tons of smuggled cigarettes for [redacted], a company managed by S. and D. F. was intercepted in France. The investigations established the orders gave by the [redacted] in this traffic and the material organisation their company provided for this traffic."

36. The allegations of complicity which form the basis of these two offences have been particularised in the charges for which the respondent has been convicted. The complicity is that he knowingly helped in the preparation or consumption of the offence. The word consumption caused the Court some difficulty at first, as it is an unusual English word to use in such a context. The Court has looked at the French version of the judgment of the Court of Appeal which uses the word "consummation". The Court has taken the liberty of consulting a French legal dictionary, 'Lexique Des Termes Juridique 2015-2016' (Dalloz), which provides as follows:

> "Consommation de l'infraction
>
> [droit penal]
>
> Réalisation de l'infraction dans toutes ses composantes, et par la reunion de ses conditions préalables, et par l'accomplissement de ses elements constitutifs, et par la production de son résultat. L'infraction consommé se distinguee ainsi de l'infraction seulement tentée.
>
> C. pén. art. 121-4 and 121-5."
>
> That can be translated as follows:
>
> "Completion of the offence
>
> [criminal law]
>
> The carrying out of an offence in all its components, and by the coming together of its pre-requisites, and by the accomplishment of its constituent elements, and by the creation of its result. A completed offence is distinguished from a mere attempted offence."

37. It can readily be seen that such an interpretation of the word "consummation" fits more easily into the scheme of things than the English word "consumption." It clarifies that what is meant in the warrant is that the respondent knowingly helped in the completion of the offence. No issue was taken by the parties with the use of the word "consumption" in the English translation and from the context it may well be that the parties understood that it must mean completion of the offence.

38. Even if there was issue to be taken with the liberty the Court has taken in providing its own translation from the original French document, there can be no complaint that this affects the meaning of the offence for the purpose of correspondence. The "consumption" of the offence is an alternative to the preparation. In the circumstances, the Court is quite satisfied that what has been proven is that there was knowing help or assistance in the preparation for the offence as well as complicity involving the giving of instructions to commit the offence.

39. The statement in the EAW and additional information establishes that, the respondent gave instructions to possess and transport smuggled cigarettes under the first offence and gave instructions to attempt the exportation of the smuggled cigarettes in the second offence. The offences refer to the commonly understood concept of smuggling, which said concept has been solidified as having a meaning that these were cigarettes liable to tax in France but which tax was unpaid. Tobacco is a product upon which there is charged a duty of excise. Any possession, custody or charge of, or the removing, transportation, depositing or concealment of these products with intent to defraud is a crime within this state. The first offence clearly alleged the transportation of these products. The second offence is an attempt to transport or to otherwise deal with the product. What they were doing was smuggling tobacco in the form of cigarettes.

40. In its ordinary meaning, the transportation, possession and attempted exportation of smuggled tobacco indicates an intent to practice a fraud on the French authorities by means of avoiding taxes. The element of fraud is bound up in the concept of the word "smuggling" and it is clear that these offences are alleged (indeed proven) to have been carried out in the knowledge that the goods were untaxed when they should have been and the aim of such activity is to avoid the payment of taxes to the French state, i.e. the aim was to smuggle the cigarettes. The perpetrators of these crimes were intent on smuggling tobacco, they had not made the proper declarations of the heavily taxed goods (the tobacco) and it is clear from all the papers that the reason for the transportation of smuggled cigarettes was to defraud the state of revenue. That establishes that the offences alleged, and now proven, involve an intention of practising a fraud on the French revenue. Such conduct with the same intention directed towards the Irish revenue is prohibited in this State.

41. The respondent has been convicted of giving the instructions to carry out these offences and of knowingly being involved in the preparation of these offences. The offences themselves are crimes which involved the element of intention to defraud. It is clear from the papers that the respondent was found guilty of complicity in these offences which involved the state of mind that he too had the intention to defraud the state of revenue. Therefore, although the words "intent to defraud" do not appear in the EAW or additional information, I am quite satisfied that the conduct found against this respondent by the French Court by unequivocal implication demonstrates the existence of just such an intention.

42. Correspondence has therefore been established with an offence contrary to s. 119(1) of the Act of 2001. It is not necessary to establish any further correspondence but it can be said that it is also clear that the offences correspond with an offence under s. 119(2) of the Act of 2001. They also constitute offences under s. 186 of the Act of 1976.

Section 11 (1A)(f)
43. The respondent claims the description of the circumstances surrounding the offences for which his surrender is sought does not satisfy the provisions of s.11(1A)(f) and therefore the EAW is not in accordance with the provisions of s. 10 of the Act of 2003, as amended. He submits that the description is void for uncertainty in that the said description does not provide adequate particulars and/or any adequate information about his alleged criminal conduct for the three offences on the warrant. He also submits that there is no information in particular to set out the time(s) during which the alleged offences were committed by him and/or the location(s) where he committed the alleged criminal acts as is required in specific terms by s. 11(1A)(f) of the Act of 2003.

44. Section 11(1A) provides that:

> "[s]ubject to subsection (2A), a European arrest warrant shall specify-…. (f) the circumstances in which the offence was committed or is alleged to have been committed, including the time and place of its commission or alleged commission, and the degree of involvement or alleged degree of involvement of the person in the commission of the offence …".

45. Counsel for the respondent relied on the case of *Minister for Justice, Equality and Law Reform v. Stafford* [2009] IESC 83 where Denham J. (as she then was) said at para. 15 that:

> *"[i]t is required that there be a description of the acts upon which the warrant is based. This is similar to the situation under the Extradition Act 1965, as amended, and indeed classically in extradition law. A description of the acts, or the acts alleged, are the facts upon which the executing judicial authority may apply the law. By describing the acts the facts are before the court and so a decision may be made as to whether there is, for example, double criminality."*

46. Denham J. also stated at para. 35 of *Minister for Justice, Equality and Law Reform v. Desjatnikovs* [2009] 1 I.R. 618 that:

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

47. In Minister for Justice v. Connolly [2014] IESC 34, the Supreme Court (Hardiman J.), cited the above approvingly and concurred at para. 54 that:

> *"[i]t is a mandatory requirement of the European Arrest Warrant procedure that there be unambiguous clarity about the number and nature of the offences for which the person sought is so sought.".*

He further stated at para. 56 that:

> *"I consider it to be an imperative duty of a court asked to order the compulsory delivery of a person for trial outside the State to ensure that it is affirmatively and unambiguously aware of the nature of the offences for which it is asked to have him forcibly delivered, and for which he may be tried abroad, and of the number of such offences.".*

48. Counsel also relied on *Minister for Justice v. Cahill* [2012] IEHC 315. Counsel further relied upon *Minister for Justice and Equality v.*

Herman [2015] IESC 49, which approved the comments in *Minister for Justice, Equality and Law Reform v. Rodnov* (Unreported, Supreme Court, 1st June, 2006) of Murray C.J., regarding the importance of information in a case being clear and precise.

49. Although the respondent accepts that the issuing judicial authority is not under any obligation to set out a *prima facie* and/or a strong case against him, it was submitted by counsel on his behalf that the EAW must provide clarity as to the preparatory acts or conduct of the respondent for each of the three offences. Arising from the law set down in these cases, counsel for the respondent contends that there is no clear and identifiable information in the EAW or additional information to set out the acts or conduct whereby the respondent was involved in these offences. Counsel observed that there is no information to show when the respondent gave any instructions to commit the offences in question or how indeed he did so. The additional information only refers to "orders" given to the driver of the lorry but does not identify when that was done, what those orders were, or how they were delivered and in this regard, counsel submitted that there is no specific information that the respondent knew what the driver of the lorry in question was doing at the relevant time.

50. Counsel made reference to the additional information which mentioned the respondent displaying an "evasive attitude" and the fact that he was responsible for his driver. However, counsel submitted in this regard that this does not show evidence of involvement in a criminal enterprise such as is outlined in the three offences for which the respondent is sought to serve a sentence and counsel stated that it is therefore difficult to avoid the conclusion that the respondent was sentenced on the basis that the driver was working for a company of which the respondent is a director and on the basis of a suggestion that the respondent was "evasive" towards the French investigation.

51. Counsel concluded in this regard that there is nothing to place the respondent as having carried out any positive acts for the three offences over and above his role as the lorry driver's employer. The times, dates and places where the respondent is alleged to have participated in the three offences are also not clear apart from the statement that he did so on the territory of Ireland.

The Court's Analysis and Determination
52. According to Edwards J. in *Cahill*, the requirement for a description of the circumstances in which the offences were committed has, according to Irish law, three broad objectives:

> "*The first is to enable the High Court, in its capacity as executing judicial authority, to be satisfied that it is appropriate to endorse the warrant for execution in this jurisdiction.* [Edwards J cited Peart J. in *Minister for Justice, Equality and Law Reform v. Hamilton* [2008] 1 I.R. 60 including the following "My view of the matter is that the purpose of the warrant is not simply that the respondent might be aware of why his extradition is requested, but that this court, when asked to endorse the warrant for execution, might be satisfied that there is an offence alleged in which the proposed respondent is implicated in some way. When the application for endorsement of the warrant is made initially under s. 13 of the Act, the court must be satisfied that the warrant is in the proper form before it can endorse it for execution. At that stage, the court itself must be in a position, from the manner in which the warrant is completed, to see in what way the offence alleged involves the person named therein."]
>
> *The second objective is to enable the executing judicial authority to be satisfied as to correspondence in cases in which double criminality is required to be demonstrated. In such cases, the Court must, per* Attorney General v. Dyer *[2004] 1 IR 40 (as approved in the European arrest warrant context in Minister for Justice, Equality and Law Reform v. Fil [2009] IEHC 120 (unreported, High Court, Peart J., 13th March, 2009), and applied in many subsequent cases) have regard to the underlying facts as disclosed in the warrant itself, and any additional information furnished, to see if the factual components of the offence specified in the warrant, in their entirety or in their near-entirety, would constitute an offence which, if committed in this State, could be said to be a corresponding offence of the required gravity. In the present case, this Court does not need to concern itself with correspondence in circumstances where the issuing judicial authority has invoked paragraph 2 of Article 2 of the Framework Decision.*
>
> *The third objective, and the critical one in the circumstances of the present case, is to enable the respondent to know precisely for what it is that his surrender is sought. A respondent is entitled to challenge his proposed surrender and in order to do so needs to have basic information about the offences to which the warrant relates. Among the issues that might be raised by a respondent are objections based upon the rule of specialty, the ne bis in idem principle and extra-territoriality to name but some. In order to evaluate his position, and determine whether or not he is in a position to put forward an objection that might legitimately be open to him to raise, he (and also his legal advisor in the event he is represented) needs to know, in respect of each offence to which the warrant relates, in what circumstances it is said the offence was committed, including the time, place, and degree of participation in the offence by the requested person."*

53. In the view of the Court, the factual situation that arose in *Stafford* was instructive. The appellant in that case complained that the EAW was vague. It did not show the precise circumstances in which the murder alleged against him had been committed. In that case no body had ever been recovered. The entire case against the appellant appeared to be a circumstantial one. The Supreme Court accepted that the description in the EAW was sufficient and stated that it was not for the court to consider the strength of the evidence.

54. In this case, the time period during which the offences were committed has been set out. It is a limited time frame between 1st February, 2010 and 31st March, 2010. The allegations have been set out in considerable detail. In short, the offences relate to the respondent's complicity with his brother and JPB, by way of knowing preparation and consumption (completion) in the offences and his giving of instructions to carry out the offences of transportation and possession with the aim of smuggling cigarettes (upon which the due tax had not been paid in France) and the attempted exportation of these smuggled cigarettes. The EAW sets out that the lorry driven by JPB was stopped on 5th March, 2010 in the Manche department with 5 tons of smuggled cigarettes on board with a value €1.7 million. The EAW details the employment of the driver by the respondent, his ownership of the vehicle in which the smuggled goods were transported, his giving of instructions in his capacity of company manager.

55. The respondent complains that there is no evidence of the nature and contents of any instructions given to the employee (except to the extent that JPB described contact with his employers as a mere formality and not related directly and precisely to the professional activities). It is also true to say that the French Court did seem to take account of what it considered was an evasive attitude by the respondent and his brother, and that this did not exonerate him from any responsibility. The reality, however, is that the French Court took a view that, on the available evidence before it, the respondent was guilty of the offences. It is not for this Court to engage with that evidence in order to see if it might come to a different conclusion.

56. The totality of the information set out in the EAW, the additional documentation and the judgment of the Court of Appeal

amounts to sufficient information as to the circumstances under which the offences were committed, including the date and time of the offence and the degree of involvement of the respondent. The details that have been furnished have enabled this Court to deal with the issue of endorsement of the EAW and to deal with the issue of correspondence. The details given are sufficient to let the respondent know the nature of the charges against him (for which he has been convicted). Should an issue of specialty arise, the details are sufficient. The details are sufficient should any issue of *ne bis in idem* arise (no allegation that such an issue already arises has been given). With respect to the issue of extraterritoriality, this is dealt with further in this judgment.

57. The complaint that there is no delineation of the information as regards the individual offences is not well founded. The nature of each individual offence is clearly set out in the EAW, additional documentation and judgment of the Court of Appeal. These are related offences and, in circumstances where the offences have been delineated, the mere fact that there is a composite narrative is not a bar to surrender. What is required is the description of the circumstances in which the offences have been committed. Where the offences arise from the same set of facts, a composite narrative will often be the most appropriate. This is particularly so where the EAW when read as a whole clearly delineates between the three offences (see in particular the nature and legal classification of the offences, point (e) II of the EAW and the judgment of the Court of Appeal).

Section 44 of the Act of 2003
58. The respondent claims that his surrender is not permitted by s. 44 of the Act of 2003 in that the EAW provides no information to show that his alleged actions or conduct would, if committed outside the territory of this State, constitute a criminal offence within this State. Alternatively, he claims that his surrender is not permitted by s. 44 of the Act of 2003 as the EAW fails to provide proof that s. 44 of the Act is inapplicable to his case. That latter point is related to the issue considered under s. 11(1A)(f) above.

59. As stated above, the additional information received from the issuing judicial authority asserts that the circumstances in which the offences were committed were:

> "[h]aving on the Irish territory, but in connection with offences committed on the national territory and within the jurisdiction of the Specialised Inter Regional Court in [Lille] in February 2010 and March 2010 in any case within a time period not covered under Statute of Limitation…".

Counsel submitted that these declarations are the sole pieces of information relating to the conduct of the respondent in relation to where the offences were committed.

60. Counsel for the respondent sought to distinguish the present case from that of the recent Supreme Court decision in *Minister for Justice v. Egharevba* [2015] IESC 55 in which s. 44 of the Act of 2003 was considered. In *Egharevba*, that respondent failed to show that the offence in question was committed outside of the territory of the issuing state, which was also France. However, it was submitted that this decision cannot apply to the present case as the issuing judicial authority in this instance places the location of the offences as being on the Irish territory. In *Egharevba*, the Supreme Court identified that the first issue was whether the offences were committed or alleged to have been committed in a place other than the issuing state, namely France, and that the requirements set out under s. 44 of the Act of 2003 are conjunctive.

61. Counsel for the respondent therefore submitted that *Egharevba* does not apply in the present case, as the description of the offences on the EAW shows that the respondent had acted on the Irish territory but that jurisdiction is being asserted by the issuing judicial authority over the offences as they were committed "in connection" with offences within the jurisdiction of the Regional Court of Lille. Counsel contended that that information is insufficient to take the three offences outside the first limb of s. 44 of the Act of 2003 and therefore the respondent's situation falls within the first limb of the section itself and that no information is available to enable the second limb to be met.

62. Counsel noted that the principles of mutual trust and recognition apply to the EAW request for surrender and stated therefore that it is for the issuing judicial authority to make it clear that s. 44 of the Act of 2003 does not apply, and that absent such clarity, the High Court cannot seek to interpret the information in a certain way when it is open to differing interpretations.

63. Counsel for the minister submitted that if the offences occurred in France or a part of France, then s. 44 of the Act of 2003 regarding the commission of the offences outside the issuing state is not engaged as it is to be read conjunctively as per *Minister for Justice v. Egharevba.* In the current proceedings, counsel submitted that it is not alleged that the respondent was physically in France where the smuggled cigarettes were located. She submitted that it was established that the substantive offences were committed in France and as the conviction of the respondent was in respect of complicity in these offences, it was clear that the offences were committed in France. Counsel proposed that even if the Court was not satisfied that the offences were committed in France, they are offences for which Ireland also exercises extraterritorial jurisdiction.

The Court's Analysis and Determination
64. The Supreme Court has dealt with s. 44 of the Act of 2003 on a number of occasions, in particular in the cases of *Minister for Justice and Equality v. Bailey* [2012] IESC 16 and in *Egharevba.* It is well settled that the section must be read conjunctively. Section 44 of the Act of 2003 provides:

> "A person shall not be surrendered under this Act if the offence specified in the European arrest warrant issued in respect of him or her was committed or is alleged to have been committed in a place other than the issuing state and the act or omission of which the offence consists does not, by virtue of having been committed in a place other than the State, constitute an offence under the law of the State".

The First Condition

65. Counsel for the respondent has submitted that the principles of mutual trust and recognition require that the issuing judicial authority must make clear that s. 44 does not apply and that absent clarity the High Court should not seek to interpret the information in a certain way when it is open to differing interpretations. In this case, no issue about lack of information arises because the issuing judicial authority has provided further information which deals with any potential issue of extraterritoriality that could arise. As stated above, the additional information received on 12th October, 2015 had particularised the charges that the respondent faced and indicated that these were committed on Irish territory in connection with the offences that were committed on the national territory of France. The respondent was complicit in the first two offences and participated in the conspiracy under the third offence.

66. Complicity in French law means "the giving of help or assistance or issuing instructions in order of (sic) committing offences", while conspiracy is defined as "criminal group organised with the aim of committing offences." From both the factual description of the offences set out in the body of the EAW and the judgment of the Court of Appeal, it is clear that the offences themselves of

transport and possession with the aim of smuggling or attempted exportation of prohibited or heavily taxed goods or the conspiracy by means of participation in a criminal organisation are offences that were carried out in France, but the acts of this respondent were carried out in Ireland (as found by the Court of Appeal).

67. I reject the respondent's attempt to distinguish *Egharevba* on the basis that a) the offences here are indicated by the French authorities as being committed in Ireland and that b) the EAW in *Egharevba* demonstrated a state of affairs entirely different to the present case. In *Egharevba*, the EAW stated "the offences of which she is accused were committed in Grenoble (Isere, France) on French national territory and on an indivisible basis in Nigeria and in Ireland." An analysis of the High Court judgment, affirmed by the Supreme Court, demonstrates that in that case:

> *"…the relevant feature is that the essence of the offending conduct is being a participant in an organised group that was engaged in money laundering activities (of which there were many), just some of which took place in France. These activities were perpetrated on behalf of the group by different members of the group at different times, in circumstances where the law of the issuing state allows all members of the group to be held jointly responsible for all of those activities.*
>
> *In those circumstances the act of one participant committed in France can be regarded as the act of all of the participants. It is alleged in this case that monies, the proceeds of prostitution and people trafficking, were collected in France by R.O. and transferred to a bank account held in Ireland by the respondent. The issuing state is attributing those actions of R.O. to the respondent because both parties are said to have been participants in the organised group which this activity was intended to benefit, and that is sufficient to ground the laundering charged preferred against the respondent as having occurred within the territory of France."*

68. In the present case, it is abundantly clear that the substantive offences of the smuggling of cigarettes and the attempted exportation of the cigarettes took place in France. French law permits those involved in the offence at the level of preparation or instruction to be held liable as an accomplice – "to be punished as the main offence". Indeed, in these cases, the accomplice, *i.e.* the respondent, received a higher sentence than the person who carried out the physical acts of smuggling the cigarettes. There is a clear joint responsibility for all those activities established on the papers before me.

69. In relation to the conspiracy offence, this had as its object the carrying out of the substantive offences in France. The law of France allows those who participate in the conspiracy to be held responsible for the offences which are carried out on the territory of France. In this case, it is clear that the substantive offences were carried out in France and that the complicity and participation of the respondent is in those offences. In those circumstances, the act or acts committed by one participant in France can be regarded as the act or acts of all the participants. Therefore, these offences occurred within the territory of France.

The Second Condition

70. Even if the Court had come to the view that these were not offences committed on French territory, counsel for the minister submitted that there would still be no bar to surrender pursuant to s. 44 of the Act of 2003 given the provisions of s. 71 of the Criminal Justice Act, 2006 (regarding the conspiracy offence) ("the Act of 2006") and s. 72 of the Act of 2006 and s. 7(1A) of the Criminal Law Act, 1997 as inserted by the Criminal Justice (Amendment) Act, 2009 (regarding aiding and abetting an indictable offence).

71. Section 7(1A) of the Criminal Law Act, 1997 (as inserted by s. 19(1) of the Criminal Justice (Amendment) Act, 2009) provides:

> "Any person who, outside the State, aids, abets, counsels or procures the commission of an indictable offence in the State shall be liable to be indicted, tried and punished as a principal offender if-
>
> (a) the person does so on board an Irish ship,
>
> (b) the person does so on an aircraft registered in the State,
>
> (c) the person is an Irish citizen, or
>
> (d) the person is ordinarily resident in the State."

72. For the purpose of considering whether s. 44 applies, the Court must engage in an exercise of reversing the facts and asking itself whether a corresponding but hypothetical case of similar type conduct would be a crime in this jurisdiction. As Fennelly J. said in Minister for Justice v. Bailey:

> *"…where a state exercised the option, surrender will be prohibited where the executing state does not exercise extraterritorial jurisdiction in respect of offences of the type specified in the warrant in the same circumstances."*

Therefore, the Court must consider whether a French person, present in France while aiding and abetting an indictable offence in Ireland could be prosecuted here. Section 7(1A) only makes such a non-Irish national liable to be indicted, tried and punished in this jurisdiction if they are on board an Irish ship or on an aircraft registered in the State or are ordinarily resident in this State. None of these conditions apply to the facts alleged and to that extent, the Court is entitled to consider the absence of this qualifying material from the EAW. In those circumstances, this subsection does not mean that the second condition in s. 44 is satisfied under this particular provision.

73. Section 71 of the Criminal Justice Act, 2006, as amended, provides for extraterritoriality in a wide variety of ways, e.g. a conspiracy committed outside the State is an offence within this State if the offence, the subject of the conspiracy, was committed, or was intended to be committed, in the State or against a citizen of Ireland. In this case the offence, the subject matter of the conspiracy, would, for the purpose of considering extraterritoriality, have to be considered as an offence against taxation laws in Ireland. In those circumstances, there is reciprocity in Ireland as even the substantive offence was committed or intended to be committed in the State.

74. Although s. 71 was put forward as the comparator offence in terms of the conspiracy offence, it is appropriate to consider if such an offence could be put forward as a comparator offence in relation to the first two offences on each EAW. The Court has already found correspondence in relation to offences 1 and 2 on the EAW in that the respondent would be guilty of corresponding offences here. However, the Court is entitled to consider further whether the offence alleged against them, in addition to the substantive

offence, would also amount to a conspiracy. Conspiracy at common law in Ireland is an agreement between two or more persons to do an unlawful act. In this case, the allegation on offences 1 and 2 refer to "knowingly helping or assisting [JPB] in his preparation or his consumption and by giving instructions to commit the offence..." That amounts by necessary implication, to an allegation of conspiracy in Ireland, in particular as it refers to giving instructions to commit the offence, which said offence is then carried out by the person to whom the instructions have been given. There has been an agreement between the respondent and his brother and JPB to commit the crimes of possession and transportation of smuggled cigarettes and to attempt the exportation of such smuggled cigarettes.

75. In those circumstances, I am also satisfied that the respondent has not shown that the second condition of s. 44 has been met.

Abuse of process
76. The respondent claims that his surrender is prohibited in that to surrender him in respect of these offences would amount to an abuse of process. Such abuse of process arises, he submits, in the following circumstances:

> - Continued prosecution in the proceedings when the respondent's trial and sentencing had been finalised in the issuing state on 30th January, 2014.
>
> - Failure to disclose the onward progression of the proceedings against the respondent in France to trial and sentence him before or after 30th January, 2014.
>
> - The detrimental effect and prejudice to the respondent/or his family are by reason of the course of the original proceedings against them including the effect on the respondent's health and wellbeing, the stress and anxiety caused, the impact of the proceedings upon family members and the respondent's family life in general and the impact of the overall length of time concerned in those proceedings on the respondent and members of his family.

77. Counsel for the respondent submitted that the abuse of process claim stems from the first set of proceedings which was before the High Court from 14th May, 2014 (also the date of the arrest of the respondent on that EAW) to 18th November, 2014 during which time the respondent was remanded on bail. According to counsel for the respondent, the fact that the first set of proceedings has been overtaken by the respondent's sentence on 30th January, 2014 only became apparent from enquiries made by the respondent and not by any action of the issuing judicial authority.

78. Counsel submitted that this situation shows a lack of disclosure by the issuing judicial authority as to the circumstances of the respondent's case and undermines the principles of mutual trust and confidence which apply to the EAW procedure. Counsel acknowledged the fact that the respondent was on bail throughout the first set of proceedings and so the amount of prejudice suffered by him is somewhat less than if he had been held in custody. Nevertheless, his liberty was restricted during that time period when on bail and subject to certain conditions. In addition, counsel pointed to the respondent's reference in his affidavit to the anxiety caused to him by this first set of proceedings. As a result, counsel stated that the lack of disclosure in respect of those matters breaches fair procedures and vitiates the application in respect of these cases.

79. Counsel for the minister accepted that there was an earlier EAW which had to be withdrawn as it transpired that the respondent had been convicted and sentenced in his absence and was no longer sought for prosecution. This earlier EAW never proceeded to hearing and points of objection were never filed by the respondent.

80. Counsel for the minister set out a detailed time line of relevant procedural events of these cases. She submitted that, as appeared from the respondent's affidavit, he did indeed receive a summons issued by the issuing judicial authority for the prosecution hearing in France but he elected not to attend same. She noted that the only summons outlined in the additional information of 12th October, 2015 is as follows: "F.S. was summoned by bailiff's deed delivered at the public prosecutor's office on 16th December, 2013." She stated that the respondent now appears to be acknowledging that he was notified of the hearing taking place on 30th January, 2014 and elected not to attend (on the basis that the summons had no legal basis in this jurisdiction). However, she said that it remains unclear when the respondent became aware that he was convicted and sentenced in his absence.

81. Counsel pointed out that the respondent made reference in his first affidavit to the receipt of "a summons for first appearance" which he received in or around 17th February, 2012 and then he averred "following on-going enquiries by my French lawyer it transpired I had, in fact, been tried, convicted and sentenced *in absentia*…" and "I was never contacted or notified by the French authorities of the hearing date, the subsequent conviction and three year custodial sentence". Counsel submitted that this clashes with his seeming acknowledgement in his latest affidavit that he did receive the summons referred to in the additional information received on 12th October, 2015.

82. Counsel submitted that the respondent seeks to make something of the failure of the issuing judicial authority to inform this jurisdiction of the change in circumstances, i.e. the fact of conviction on 30th January, 2014. Counsel stated that it is clear that when a query was raised on 14th October, 2014 the issuing judicial authority immediately forthrightly stated the fact of conviction and appeared to be of the view that this was known to the central authority by reference to the EAW dated 3rd June, 2014 (the present EAW). It was implicit in what was said that the issuing judicial authority believed the central authority to be in possession of the EAW which would have alerted the central authority to the change in circumstance at an earlier stage. Counsel said that the issuing judicial authority clearly never intended to mislead or take advantage of the error.

83. Counsel submitted, however, that it was surprising that the respondent failed to discover in a timely fashion that fact of conviction in circumstances where he was seemingly unaware of the pending hearing in January 2014 as he had instructed a French lawyer, a Mr. Francois Dupont, on 20th March, 2012 in connection with the matter. Counsel pointed out that Mr. Dupont appears to work with ID Avocats, the very same firm from whom French legal advice was sought in May 2014 following the respondent's arrest on the first EAW. Counsel stated that it is unsurprising that an immediate enquiry could not have been made as to what had occurred in the French Court in January 2014 thereby shortening any potential stress to the respondent by virtue of the doomed EAW application, being as it was for prosecution rather than for conviction. The respondent gives no date as to the discovery by him of the fact that he was sentenced, whereas his brother D F. says that he was only made aware of the fact that he was sentenced in September 2014.

84. Counsel therefore submitted that there was no bar to the issue of a second EAW or the endorsement of same and that there would have been justified objection if the first EAW has not been withdrawn. Counsel stated that the second EAW is not procedurally flawed and that it represents the prevailing factual situation which is that the respondent has been convicted of the offences but will be informed of his right to a re-trial or appeal.

85. Counsel submitted that there was no attempt to avoid or evade the consequences of the fact that there has been a material change in circumstances and no attempt was made by the central authority or the issuing judicial authority to take any advantage of the situation.

The Court's Analysis and Determination
86. Counsel for the minister has referred the Court to the case of *Minister for Justice v. Tobin* [2012] 4 I.R. 147, in which the Supreme Court considered abuse of process in the context of an EAW. In that case, Denham J. (as she then was) at para. 45 stated:

> *"Thus, on the claim that this subsequent warrant is an abuse of process, I am satisfied that a second or subsequent warrant seeking the surrender of a person is not of itself an abuse of process. To establish abuse of process there would have to be additional factors."*

O'Donnell J. also in Tobin went on to say at para. 405 that:

> *"[t]he obvious difficulty for the argument on the appellant's behalf that the decision of the Supreme Court in Minister for Justice v. Tobin [2007] IEHC 15 & [2008] IESC 3, [2008] 4 I.R. 42 barred a further application for surrender even after the change in the relevant law, was the fact, readily acknowledged by counsel, that it was an established feature of the law of extradition, and of surrender under the European arrest warrant regime, that a decision refusing surrender or extradition on the grounds for example of a defect in the warrant, was not a bar to the issuance of a further warrant and a successful application thereon."*

At para. 407, O'Donnell J. also referred to the fact that:

> "[*i]t has been repeatedly decided that where there has been a prior refusal of extradition on grounds such as insufficient evidence (*Bolger v. *O'Toole (Unreported, Supreme Court, 2nd December, 2002)) or where proceedings were struck out on consent following identification of a defect in the warrant* (Minister for Justice v. O'Fallúin *[2010] IESC 37, [2011] 2 I.L.R.M. 1) there could nevertheless be further successful proceedings and an order for extradition of surrender made. The position is perhaps encapsulated in the ex tempore judgment delivered by Keane C.J. in* Attorney General v. Gibson *[2004] IESC 85, (Unreported, Supreme Court, 10th June, 2004), at pp. 4 and 5 :-*
>
> > "It is necessary to say at the outset, that, in my view, it is clear beyond argument that in extradition cases, the mere fact that a warrant has been issued and an application made arising out of the war rant to the court for an order or extradition, that a warrant has been issued on an earlier occasion arising out of precisely the same alleged offence, and has been adjudicated up on by the District Court or any court of competent jurisdiction, that fact does not, of itself and by itself, preclude a subsequent application to a court of competent jurisdiction. If there were any doubts that that is the state of the law they were, in my view, laid to rest by the decision of this court in Bolger v. O'Toole (Unreported, Supreme Court, 2nd December, 2002)."*"*

87. Thus, there is no doubt but, that a second or subsequent application for surrender for the same offence may be made. That is particularly so, as in this case, where the original application was withdrawn and no issue was ever finally determined between the parties on foot of the first EAW. Counsel for the respondent acknowledged that a second or subsequent EAW may be made, but submitted that in circumstances where the first EAW was withdrawn due to disclosures which were obtained on foot of the respondent's investigations and where the issuing judicial authority has never explained the matter, the Court must protect its own processes and ensure that any lack of disclosure does not go unchecked. It was submitted that it should do so by refusing the respondent's surrender.

88. In *Minister for Justice v. Horvath* [2013] IEHC 534, Edwards J. examined the various decisions of the Supreme Court relating to abuse of process and extradition, including EAW procedures. He concluded as follows:

> *"78. […]It is certainly regrettable that the Irish Central Authority was not informed about the respondent's trial, conviction and sentence in absentia until long after it occurred. It should not have happened and, echoing what I said in Minister for Justice and Equality v. Gherine and Gherine [2012] IEHC 535, (Unreported, High Court, Edwards J., 30th November, 2012), I consider that if what has occurred in the present case were to be replicated it could potentially have implications for the trust and confidence which this Court currently has in relation to Hungary, its courts and institutions. Moreover, this Court has not been assisted by the Hungarian authorities failure to provide any explanation for the delay in informing the authorities in this case about the trial of the respondent in absentia before Veszprém County Court on the 3rd April, 2008, particularly after they were notified by the authorities in this country on the 24th September, 2008 that the respondent had been arrested here on foot of EAW No. 1. I do not agree, however, with the submission made on behalf of the respondent that bad faith must inevitably be inferred in the circumstances. I do not believe that a solid basis exists for the drawing of any such inference. What occurred may simply have been due to ineptitude and inefficiency on the apart of the authorities in Hungary, and a case of the right hand not knowing what the left hand was doing, rather than any bad faith. Moreover, the failure to provide an explanation may be due to an unwillingness to admit to such shortcomings, and perhaps even embarrassment concerning the shambles that this case has degenerated into procedurally.*
>
> *79. There are a number of important factors that have restrained this court from any rush to infer mala fides. It is, of course, the case that many aspects of Hungarian criminal procedure are entirely unfamiliar to us here in Ireland. A good example is this notion that you can be the subject of a "non-conclusive conviction" at first instance, another is the apparently routine occurrence of trials proceeding in absentia when defendants fail to turn up, and another is the idea that you can be represented and defended in your absence, and that an appeal can be lodged by, a lawyer that you have never met or instructed. Things may have happened in Hungary which are entirely normal within their procedures but which we would regard as strange and unusual. There may have been an unjustified assumption at the Hungarian end as to what our expectations were and as to what could be taken for granted, or taken as understood. In this Court's view it is far more likely that the breakdown occurred due to lack of appreciation (perhaps on both sides) of the other side's expectations due to unfamiliarity with each other's legal systems rather than as a result of any bad faith.*
>
> *80. Another important feature is that there was a different judicial authority concerned with EAW No. 1, than is concerned with EAW No. 2 and EAW No. 3. Even if there was bad faith on the part of the first judicial authority, and in the Court's view no such inference is justified on the available evidence, the only complaint that can be made with respect to the second judicial authority is that he has displayed some lack of sure-footedness concerning the correct form in which to present his warrant for the purposes of securing the respondent's return for trial at second instance.*

That is most certainly not evidence of mala fides, far from it in this Court's view. Indeed, the Court has been impressed in general terms with the engagement by the presently involved judicial authority in seeking to respond to most of the concerns raised by the applicant in this case and in swiftly addressing queries. True enough, the criticism can be levelled that there has been no engagement with the demand for an explanation concerning the delay in notifying the Irish authorities about the trial in absentia. Having said that, the actual default in respect of which the explanation was sought was that of the first judicial authority involved (i.e., Veszprém County Court) and not that of the present judicial authority (the High Court of Győr).

81. I think it is an important point that no set of proceedings has reached finality in this jurisdiction and so the respondent cannot contend that he has been the beneficiary of an ostensibly conclusive ruling in his favour. He was in fact the subject of just one order in the High Court heretofore, and that was an adverse order overall (he did persuade the Court that the minimum gravity had not been satisfied in the case of four out of seventeen offences, however he was surrendered on the majority of offences). This is not a case of repeated attempts to secure a conviction against him in the Henderson v. Henderson/Re Vantive Holdings sense. In the Courts view the fact that he is wanted to face a second instance trial which might have the effect of reversing the non-conclusive conviction at first instance is an important distinguishing feature.

82. This Court accepts that even if there has been no deliberate attempt to abuse the Court's process that is not automatically the end of the matter. It accepts that if the overall circumstances of a case are such as to oppress a respondent that can amount to an abuse of the process. There has certainly been significant delay in the present case, the respondent has been briefly deprived of his liberty, and no doubt the continuing uncertainty as to his fate has caused him much worry and anxiety. However, and in fairness to him, he makes very little of this in his affidavits. Moreover there is medical evidence whatever (sic) to suggest that he has been suffering stress and anxiety at a pathological level such as might justify this Court in concluding that the circumstances had reached the level of oppression. I have previously characterised the attempts made to extradite the respondent as a procedural shambles and that is very much to be regretted. While it must be accepted that this can only have added to the respondent's burden I do not believe that the evidence goes so far as to establish that he has been oppressed at a level that would justify a finding of abuse of the process.

83. In the circumstances I am not disposed to uphold the objection based upon abuse of process."

89. In the circumstances of the case herein, I do not accept there was any *mala fides* on the part of the issuing judicial authority. This is apparent from their response of 17th October, 2014. It can be inferred from that response that the issuing judicial authority was of the view that the EAW of 3rd June 2014 was already in the possession of the central authority. It is clear that the issuing judicial authority had issued the second, non-forwarded EAW in each case and had presumed these were made known to Ireland. That was an unfortunate error and it has no impact for the mutual trust which this Court has in the French issuing authority.

90. I may add that I do not accept the contention of the respondent that *Horvath* should be distinguished on the basis that, in *Horvath*, unlike the present case, a different judicial authority had been involved. That is not a decisive factor, and instead the Court must assess the history of the proceedings and the actions of the judicial authority or authorities in total. Moreover in this case, I do not consider that it can necessarily be said that the issuing judicial authority is the same. The title of the issuing judicial authority on 3rd June, 2014 is "Public Prosecutor's Office of the Regional Court of Lille" and it is signed by one VC, the Deputy Public Prosecutor. The original EAW of 25th June, 2012 did not give the official designation of the judicial authority but its representative is one CG, Deputy Public Prosecutor in charge of execution of sentences. They both have the same address but it is not necessarily clear that both are from the Public Prosecutor's Office at the Regional Court in Lille. Suffice to say that it was clearly two different people who dealt with each warrant. The letter of 17th October, 2014 had as its address the Court of Appeal of Douai, Regional Court of Lille (Public Prosecutor's Office) and was signed by the same person who issued the second EAW. Furthermore, unlike the Hungarian authority in *Horvath*, the French judicial authority responded within 3 days of the request being sent to them by the central authority querying the intervening conviction and sentence.

91. The respondent also suggests that it is somehow *mala fides* for the French courts to have continued with the prosecution of the respondent in circumstances where they had sought the respondent on an EAW. There is little if any support for this contention in case law or as a matter of first principle. As Edwards J. acknowledged in *Horvath*, different jurisdictions have different approaches to trials *in absentia*. The fact that a warrant has issued for the arrest of an accused does not appear to stop the trial in certain Member States of the European Union. Indeed, in this jurisdiction, a person who absconds mid trial may be the subject matter of an immediate bench warrant, but the trial may also continue in his or her absence. There is no reason in principle why trial proceedings may not continue against a person who has deliberately absented themselves from the process.

92. Proceeding with a trial is simply part and parcel of the operation of the differing laws of Members States which this Court must accept. Furthermore, I do not consider that it is *mala fides* not to tell this Court that proceedings may or indeed are continuing during the currency of the EAW proceedings. Indeed, the High Court, as executing judicial authority at this point can take judicial notice that in many jurisdictions, this is likely to occur. What of course should happen, is that the High Court be informed immediately, if the EAW on which the person's surrender is no longer effective or has been withdrawn and/or replaced. No person should be kept in custody or even on bail for any longer than is strictly necessary. However, failure to abide by such an entreaty may not be evidence *per se of mala fides* but, in certain circumstances it may amount to abuse of process. I do not consider the failure here to have occurred through *mala fides*. I accept that there was an error in informing the Irish authorities of the true position in France, where they in fact had issued a fresh EAW.

93. I must also consider however, whether in the absence of *mala fides* there has been an abuse of process. The facts in this case are very far from the severity of some of the situations that have been accepted as not constituting an abuse of process in this jurisdiction (e.g. *Horvath*) and are even further from the situation that pertained in *Minister for Justice and Equality v. Tobin* [2012] IESC 37.

94. In this case, the respondent was arrested but was granted bail. He had, as it were, the proceedings hanging over him but that of itself does not amount to an abuse of process which would justify the refusal to surrender on an otherwise good warrant. I am also not satisfied that a mix up in the French judicial authority over what had been communicated to the Irish authorities amounts to an abuse of process that means surrender must be refused. The issuing judicial authority responded immediately when asked about the situation and very shortly afterwards responded to a further request to forward the EAW of 3rd June, 2014. I note that the respondent had not filed points of objection to the original set of EAW. The facts of his case are set out in detail below. I note that the respondent has had medical problems some of which may at least have been exacerbated by the fact of these proceedings. However, I do not believe that the overall length of time between his arrest on 14th May, 2014 and his discharge on foot of that

warrant on 18th November, 2014 was a length of time that of itself or with any attendant stress is such as to amount to an abuse of process of the courts.

95. I also note that the respondent says does not say when he knew of the decision in France but his brother D.F. says he knew in September 2014. Given they are brothers and have the same solicitors it is more likely than not that the respondent knew of it in or around that time. It is also not clear to me why they did not anticipate that such a matter could happen, given that they had instructed a French lawyer to represent them at least at the early stages of the proceedings. From September 2015 at the latest, I find that, as a matter of probability, any real stress the respondent felt was not with the previous EAW proceedings, but with the fact that he had been convicted in France and was likely to face surrender to serve a sentence. I do not believe that the circumstances in this case, either individually or when taken together, amount to an amount of process.

Article 8

96. The respondent claims his surrender is prohibited under s. 37 of the Act of 2003 as it would be a disproportionate interference with his enjoyment of his private life and family life under Article 41 of the Constitution and Article 8 of the European Convention on Human Rights. The respondent sets out his particular circumstances on affidavit. He stated that he has substantial debts from the haulage business, that he and his family suffered stress and anxiety in relation to the first proceedings and that attending court and having to instruct French lawyers disrupted his family life.

97. The respondent claims the legal arguments being made by the issuing judicial authority for his surrender could have been made during the first set of proceedings and now he must endure two sets of proceedings on the same matter, where the first set took almost six months to resolve. The respondent states that he never spent time in prison for criminal offences and that any surrender to, and incarceration in, France would cause severe stress to him and that even if he were granted bail in France, he would be under severe strain with worries about his family's wellbeing and future and his own position would be difficult to tolerate. He said that his family may not be able to visit him there due to severe financial pressures.

98. The respondent stated that he has four children, three of whom are dependents. He said that his wife does not work outside the home and therefore he is the sole source of income for the household. He said that his eldest son aged 17 has suffered depression for the past two years and is under medical care and attending local psychiatric services. He said that his youngest son, aged 5 years, suffered severe complications after contracting chicken pox and had lost motor function in his arms and legs, was treated in hospital and still requires ongoing speech therapy.

99. The respondent also stated that he himself is under the care of Mr. Martin Donnelly, consultant otolaryngologist surgeon and having ongoing assessments regarding possible surgery. He stated that he attended an appointment with Mr. Donnelly on 12th November, 2015 and was re-assessed by him and stated that his condition continues to deteriorate. He exhibited a medical opinion from Mr. Donnelly in which it was outlined that the respondent has a chronic infection in both ears and needs operations on both ears most likely and that the consultant would anticipate operating on the worst of the two before Christmas. Mr. Donnelly outlined that this is a major operation and would require an overnight stay in hospital and an initial recovery period of three to four weeks. Mr. Donnelly stated that if such procedures were not carried out or significantly delayed, there is a risk that these chronic infections would lead to infections spreading to the brain.

100. The respondent filed an additional affidavit outlining how he was rushed to hospital on 22nd November, 2015 after encountering severe chest pain and a stent was inserted and that he was told afterwards that he had had a massive heart attack. He said that he was prescribed life long medication as a result and that the previously proposed surgical procedure may well be delayed by six months due to the cardiac episode. After the hearing and before delivery of judgment, a further report was received on behalf of the respondent. This was a report of Dr. Niall Colwell, Consultant Cardiologist and Physician. The minister neither objected nor consented to the receipt of this report. This confirmed an anterior full blown myocardial infraction with primary percutaneous coronary intervention being performed. He requires repeat fractural flow reserve and optical coherence tomography to the left anterior descending around March 2016. His cardiologist does not think it "absolutely safe" that he should travel, at least until he is reviewed by the doctor who carried out the procedure on him. What is stated is that the precipitants for the heart attack included smoking but other issues showed there was a calcified nodule in the proximal left anterior descending.

The Court's Analysis and Determination

101. As was stated in Minister for Justice and Equality v. E.P. [2015] IEHC 662:

> *"The case law establishes that while there are general points of principle, the consideration of an Article 8 point is fact specific to each case. The conclusion a court reached in an earlier case as to where the balance lay is not a precedent which can bind another court assessing individual and particular facts of the case at hand. While there is a strong public interest in general in the extradition of a person who is wanted for criminal prosecution or to serve a sentence, the actual level of public interest may vary depending on such factors as the nature of the alleged or committed crime and the delay in seeking extradition. There are also all manner of variables that may arise in a requested person's private and family life."*

102. Some features in these cases are common to both; in particular the assessment of the public interest in the surrender of the respondents for the offences set out in the EAW. The offences for which the respondent now stands convicted in France (subject to retrial) are offences related to the evasion of taxes/customs duties on a reasonably large scale, concerning as they do the smuggling of five tons of smuggled cigarettes. From the EAW and the judgment of the Douai Court of Appeal, these were offences which involved participation in a criminal organisation. The sentence imposed on the respondent is three years imprisonment which is well in excess of the minimum sentence necessary for surrender. The offences are relatively recent and had been under investigation or prosecution by the French authorities from an early stage. It is clear from the history of the proceedings that the French authorities have shown a consistent interest in the pursuit of this respondent for these offences. In all those circumstances, I am of the view that there is a high public interest in the surrender of this respondent on these offences.

103. The respondent's debts do not appear to be related to these charges but more importantly any financial hardship to him and his family on account of surrender has not been demonstrated to amount to an exceptional consequence. The surrender or imprisonment of any person who is the breadwinner in a family, will have an impact on the financial circumstances of that family. That is a usual consequence of imprisonment or surrender. His complaints regarding the inability of his family to visit him because of financial pressures are an unfortunate consequence of surrender but when measured against the high public interest in his surrender do make it disproportionate to imprison him. Similarly, his complaints of stress for himself and worries about his family are no more than the usual consequences of surrender.

104. The respondent has particular issues with two of his children, one of whom suffers from depression and the other of which

requires ongoing speech therapy. Apart from a very brief referral note for his eldest son, there is no medical or psychological evidence before the Court as to the effect of surrender on the children. While I must have regard to the best interests of the children, there is nothing in his case that shows that the surrender of the respondent would be a disproportionate interference with his personal or family rights or indeed the rights of his family.

105. The respondent has had a history of ill-health in recent times. He is 56 years old at present. His initial case under Article 8 was based on the fact that he was due for surgery in relation to his ears, however his medical situation became acute in November 2015 when he had a heart attack and had a stent inserted. His G.P. says it is necessary for him to cease smoking and also to keep stress to a minimum. He also appears to be on a lot of medication and is being treated for Chronic Obstructive Pulmonary Disease. His G.P. feels the extreme stress that he has been under in the last few months was a contributory factor to the cause of his heart attack. It is noted that the heart attack occurred less than 2 weeks after the hearing in the High Court of the application for his surrender. On the other hand, his cardiologist has not put forward the stress of the case as a precipitant for the heart attack.

106. It is undoubtedly the case that the respondent's personal circumstances are greatly different from that of his brother. Unfortunately for him, he has had a serious health scare and one which requires ongoing review and treatment. The issue for this Court is whether these particular circumstances on their own or in combination with his other circumstances would make it disproportionate to surrender him to France. There is no evidence to say that he cannot be cared for in France or even in the French penal system. While it has been established that he is on medication for a number of matters, there is nothing apparent from his medical reports or other evidence demonstrating show any particularly harmful or injurious consequences to him should he be surrendered, apart from the reference to his suitability for travel at present. His cardiologist's report says as regards evaluating his suitability or otherwise for travel "it would probably be best to err on the side of caution and await review by Dr. McFadden with repeat FFR on OCT prior to considering him for any travel abroad."

107. Finally, on the morning of this judgment, the Court received a further medical report from his G.P. dated 10th February, 2016. This confirmed that he had a "drop attack" which precipitated his attendance at A. & E. on 8th February, 2016 and for which he required sutures for a head injury. The G.P. said his medical condition was unstable and "I feel he is not fit to leave Ireland due to the precarious nature of his illness." The Court invited brief submissions from counsel on this medical report. The Court notes that this is far from a firm medical opinion as to his fitness to travel and does not explain precisely why he is not fit to travel. However, the Court accepts that he is a person who has suffered a recent major medical emergency which has not yet settled.

108. I am satisfied that any issue with regard to his suitability for travel is one which can be dealt with, to the extent necessary, under the humanitarian provisions of section 18 of the Act of 2003. A present potential restriction on travel is not a matter that would make it disproportionate to order his surrender in the circumstances. In this case, where the public interest in the extradition is high, the balancing between those public interests and the totality of the private interests of the respondent, do not reveal a disproportional interference in his private (or family) life by his surrender on this EAW.

Judgment Not Enforceable

109. Under this heading, the respondent claims that the EAW does not comply with s. 10 and/or s. 11(1A)(e) of the Act of 2003, because the domestic conviction, sentence or detention orders in the issuing state are not immediately enforceable against the respondent if he was surrendered to the issuing state. The respondent obtained a report from a French lawyer, Mr. Damian Lezan dated 25th March, 2015. No verifying affidavit was filed in relation to same due to the circumstances arising and as set out in the affidavit of the respondent's solicitor, Mr. Eamonn Hayes. These involved a difficulty with the swearing of the affidavit in accordance with the provisions of Order 40 of the RSC. There had been various difficulties organising a meeting between Mr. Lezan and a representative of the Irish Embassy in Paris for the purpose of swearing the affidavit. I am prepared to consider the report in this particular case but undoubtedly the respondents are at risk that their evidence will be inadmissible unless compliance with the Rules has been reached or there is agreement on all sides that the evidence should be accepted by the court.

110. The respondent submits that the effect of the opinion of Mr. Lezan is that the sentence imposed on the respondent is not immediately enforceable as a further procedure has to occur under French law should the respondent be surrendered. Mr. Lezan refers to the present EAW and to the fact that it states that the decision on which it is based is the original arrest warrant, the effects of which "were maintained by the sentence of the criminal court of Lille" dated 30th January, 2014. The EAW also points to the enforceable judgment being the aforesaid judgment whereby each respondent was sentenced to 3 years imprisonment.

111. It is perhaps worth quoting the opinion of Mr. Lezan in full:

> "The use of the word "maintained" comes from the Judgment itself. When it comes to national warrant by a judge in charge of investigation, the Courts that sentence the accused always use this wording ("the effects of the warrant are maintained").
>
> Nevertheless regarding European warrant, the wording above could be questioned as far as the second European warrant states '3.4 The person [convict] was not personally served with the decision, but the person will be personally served with this decision without delay after the surrender.'
>
> This part of the second European warrant means that the Judgment is not enforceable.
>
> Under French law (article 499 of the French Code of Criminal Procedure) the time limit for an appeal (10 days) only begins which the judgment is by default when it has been notified (by a bailiff).
>
> Consequently, if the Judgment has not been notified it is not enforceable (appeal is suspensory).
>
> This is very remarkable as far as article 695-13 above stipulates that the European warrant has to state the enforceable decision on which the warrant is based.
>
> The article 695-13 specifies that the enforceable decision can be a judgment (enforceable), a warrant or any other judicial decision that would have the same effect.
>
> In our case the last European warrant refers to:
>
> 1. the first national warrant (June 22nd 2012)
>
> 2. the Judgment January 30th 2014

> It is clear that the Judgment January 30th 2014 is not enforceable.
>
> Regarding the first national warrant (June 22nd 2012), my own opinion would be that within the meaning of article 695-13 of the French Code of Criminal Procedure a judgment that his not enforceable cannot "maintain" the effect or (sic) a warrant that was sent before the trial by a judge in charge of investigation.
>
> To me this kind of warrant should only be enforceable before the trial.
>
> Nevertheless, the French Supreme Court has decided otherwise and states that a warrant issued upstream by a judge in charge of investigation is still enforceable even after the trail as soon as it has not been cancelled or replaced by another judicial decision (in this case – Crim. 29th September 1992 – a Judgment by default had maintained the effect of the warrant; despite this non-enforceable Judge, the Supreme Court decided that the warrant from the judge in charge of investigation was still enforceable).
>
> In summary, the last European warrant is based on two judicial decisions, the most recent one is not a valid ground (non-enforceable decision) but the oldest is still valid within the meaning of article 695-13 of the French Code of Criminal Procedure if we consider the decision of the French Supreme Court 29th September 1992.
>
> As the decision of the French Supreme Court seems to me quite controversial, I would advise that we try to challenge the warrant using those two arguments:
>
> 1. The Judgement 30th January 2014 has not been notified consequently it is not enforceable (appear is suspensory under French law)
>
> We do not have a copy of the warrant 22 June 2012 and the French authorities does not justify that it would still be enforceable."

112. Therefore, counsel for the respondent contends that the sentence is not enforceable against the respondent at the present time and in the very least it is asserted, that there is difficulty in the enforcement of this EAW for the reasons outlined by Mr. Lezan.

113. Counsel for the minister, in referring the Court to point (b) of the EAW, submitted that it is clear that the EAW is based on two decisions, namely the arrest warrant issued on 22nd June, 2012 of which the effects were maintained by the sentence of the Criminal Court of Lille (9th Chamber) dated 30th January, 2014 and the judgment tendered by default by the Criminal Court of Lille (9th Chamber) on 30th January, 2014 having sentenced the person concerned to three years of imprisonment. Counsel submitted that no affidavit has been filed in support of this ground, only a report of ID Avocats was received. If such report was admitted into evidence, it establishes that according to the French Supreme Court the EAW issued on 22nd June, 2012 remains enforceable.

114. Counsel submitted that Mr. Lezan does not state that pending expiry of the time limit for the appeal that the judgment is not enforceable and that he does not avert to the fact that the requested person has a right to a "retrial or appeal" and does not consider how this may potentially affect matters.

115. As the issuing judicial authority has indicated that there are two decisions underlying the EAW, counsel on behalf of the minister contended that at least one of those decisions is immediately enforceable and s. 11(1A)(e) of the Act of 2003 has accordingly been complied with. That sub-section provides as follows:

> "Subject to subsection (2A), a European arrest warrant shall specify- …..(e) that a conviction, sentence or detention order is immediately enforceable against the person, or that a warrant for his or her arrest, or to the order of a judicial authority in the issuing state having the same effect, has been issued in respect of one of the offences to which the European arrest warrant relates."

The Court's Analysis and Determination

116. As stated by Murray C.J. in Minister for Justice v. Altaravicius [2005] 2 I.R. 265:

> "*When applying and interpreting national provisions giving effect to a Framework decision the courts:* "…must do so as far as possible in the light of the wording and purpose of the Framework Decision in order to attain the result which it pursues…" (C-105/03 Pupino E.C.J. June 16, 2005)

117. 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.

118. A strict literal interpretation of s. 11(1A)(e) might require every EAW, in which a person is sought for execution of a sentence or detention order, to make an express statement that the conviction, sentence or detention order is "immediately enforceable". Section 11 (1) of the Act of 2003 provides that:

> "[a] European arrest warrant shall, in so far as is practicable, be in the form set out in the Annex to the Framework Decision as amended by Counsel Framework Decision 2009/299/JHA."

It is perhaps noteworthy that the form set out in the Annex does not refer to an "immediately enforceable" sentence or detention order rather it refers to "enforceable judgment". Indeed, the heading to the form of EAW set out in the Annex, refers to arrest and surrender for "the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order." The Framework Decision itself refers at Article 1, para. 1 to "executing a custodial sentence or detention order." Article 2, para. 1 references to "where a sentence has been passed or a detention order made, for sentences or at least four months."

119. A requirement to have an express statement that the convictions, sentence or order of detention is "immediately enforceable" would be an additional requirement by the Irish legislature. It is fair to say that this additional statement is not present in the vast majority of EAWs presented to the High Court, if indeed it has been present in any such EAWs presented over the 12 years of

operation of the Act of 2003. If it is literally a requirement to so state that the conviction, sentence or detention is immediately enforceable but an EAW does not so state expressly, then it is quite probable that, subject to the court being satisfied as to the enforceable conviction, sentence or detention order, the court would apply the provision of s. 45C of the Act of 2003, inserted by s. 24 of the European Arrest Warrant (Application to Third Countries and Amendment) and Extradition (Amendment) Act, 2012, and hold that the technical failure to comply with a provision of the Act did not impinge on the merits of the application and was therefore no bar to surrender.

120. In the view of the Court however, s. 11(1A)(e) has to be read in conjunction with s. 11 (1) which requires the form of the EAW to be that set out in the Annex to the Framework Decision. In those circumstances, the requirement under ss. (e) of s. 11(1A) that the EAW specify that the conviction, sentence or detention order be immediately enforceable is satisfied if the issuing judicial authority has indicated that there is an enforceable judgment by following the format set out in the form of the EAW contained in the annex to the Framework Decision. To read the reference in s. 11(1A)(e) in the context of the section as a whole is to apply Irish canons of statutory interpretation.

121. Furthermore, if one is to read the sub-section in accordance with the wording and purpose of the 2002 Framework Decision, it is also clear that the statements required by s. 11(1A)(e) are the statements required to be made in the form of the EAW set out in the Annex. Thus the requirements of the Act are satisfied if the EAW is in the form set out in the Annex to the 2002 Framework Decision as amended.

122. What must be stated, therefore, if an issuing judicial authority is seeking surrender to serve a custodial sentence or order of detention, is that such sentence or order be enforceable against a requested person. In the present case, the French authorities have stated that the EAW is based upon the arrest warrants issued at the investigation stage which have been maintained by the sentencing court. They have then also relied upon the enforceable judgment of the sentencing court. Such a process is clearly acceptable in France and Mr. Lezan's view that it is a controversial decision is entirely his own opinion and not evidence of French law. On the contrary, he is confirming that French law since 1992 has established that the warrant of the judge in charge of the investigation is still enforceable. The judgment of the Court of Appeal of Douai expressly orders the continuance of that warrant.

123. The respondent has sought to turn Mr. Lezan's opinion into a statement of evidence of French law that because the respondent has not been personally served with the judgment, that the specific sentencing judgment is not enforceable. From the last paragraph of the lengthy opinion of Mr. Lezan, it is clear his entire opinion is based on his view of the controversy regarding this French decision. The operation of the 2002 Framework Decision depends on mutual trust and mutual recognition of judgments from criminal courts. If the High Court, as an executing judicial authority, is being asked to refuse surrender on the basis of an interpretation of the law of the issuing state, contrary to an assertion in the EAW, the evidence of such interpretation must be cogent, clear and convincing. This "evidence" is none of those things. Therefore, even accepting in evidence the opinion of Mr. Lezan, there is no evidence before this Court to support the contention that the judgment referred to in the EAW is not "immediately enforceable" against the respondents.

124. I should add that counsel for the applicant also referred the Court to the case of *Minister for Justice, Equality and Law Reform v. Odstrcilik* [2010] IEHC 315. I am not of the view that it is necessary to rely on this case, as the evidence here does not reach a threshold level. It is also appropriate to observe that the argument made in that case was somewhat different to that which was made here. However, it is apposite to recall that Peart J. was of the view that a person is:

> *"still required by the law of the issuing state to serve the sentence imposed, even if there is some procedural step to be taken in that regard. The present situation whereby the judgment has not been served is insufficient to trigger the prohibition against surrender provided for in that section, and I believe that to so interpret the section is in conformity with a clear objective of Framework decision, namely that lawfully imposed sentences of imprisonment in excess of four months be executed."*

125. In all the circumstances, I am satisfied that the surrender of the respondent is not prohibited by breach of s. 11(1A)(e) on its own (or indeed when taken with the provisions of s. 10 of the Act of 2003, as amended).

Conclusion

126. For the reasons set out above, I am satisfied that the surrender of the respondent is not prohibited by any section of the Act of 2003, as amended, or because of an abuse of process and I therefore may make an Order for the surrender of the respondent to such other person as is duly authorised by the issuing state to receive him.