THE HIGH COURT

Record No. 2014/94 EXT

Between

THE MINISTER FOR JUSTICE AND EQUALITY

Applicant

and

AISHA AHMED (ORSE GLORIA ANWULIKA)

Respondent

JUDGMENT of Ms. Justice Donnelly delivered on the 8th day of February, 2016.

1. The respondent's surrender is sought by Italy on foot of a European arrest warrant ("EAW") issued by the office of the State Prosecutor at the Court of Naples and dated 17th October, 2012. The EAW sets out that the respondent was convicted *in absentia* by the Court of Naples on 18th March, 2005 which was affirmed on appeal on 6th February, 2009. She is now wanted to serve a 20 year sentence of imprisonment imposed in relation to the offence listed in the EAW, namely a drugs offence of taking part in an association with the purpose of committing an indefinite number of crimes involving the importation, sale, distribution, trade and illicit possession of remarkable quantities of a narcotic substance of the cocaine type in several Italian provinces between September, 1999 and June, 2000. The EAW was endorsed on 16th May, 2014 and the respondent was duly arrested on foot thereof on 24th October, 2014. She was in custody for a lengthy period of time before being admitted to bail.

Section 16 of the European Arrest Warrant Act, as amended ("the Act of 2003")

Uncontroversial matters
Endorsement

2. I am satisfied that the EAW has been endorsed in accordance with s. 13 of the Act of 2003 for execution in this jurisdiction.

Identity

3. At the time of the arrest hearing, the respondent maintained that she was not the person named in the EAW. In her affidavit grounding her points of objection, the respondent appears to accept that she is the person named in the EAW. I am therefore satisfied, based on the information in the EAW, the additional documentation, the evidence given, including the affidavit of James Kirwan, member of An Garda Síochána that, the respondent is the person for whom the EAW has issued.

Jurisdiction

4. I am satisfied that the Minister for Foreign Affairs has, by the European Arrest Warrant Act 2003 (Designated Member States) (No.2) Order 2005 (S.I. No. 240 of 2005), designated Italy 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 ("2002 Framework Decision").

Section 38

5. The offence is described at point (e) of the EAW as "[the respondent] with the role of promoter, leader and organizer, took part in an association with the purpose of committing an indefinite number of crimes involving the importation, sale, distribution, trade and illicit possession of remarkable quantities of a narcotic substance of the cocaine type. Offences committed in Giugliano, Campania, Castelvolturno and elsewhere between September 1999 and June 2000". The issuing judicial authority has invoked Article 2, para. 2 of the 2002 Framework Decision by ticking the boxes entitled "participation in a criminal organisation" and "illicit trafficking in narcotic drugs and psychotropic substances". This Court is satisfied therefore that there is no manifest error in the ticking of the boxes. The offence is also one of the required minimum gravity. Therefore, the surrender of the respondent is not prohibited by the provisions of s. 38 of the Act of 2003.

Sections 21A, 22, 23, and 24 of the Act of 2003
6. 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.

Part 3 of the Act of 2003
7. Apart from further considerations of s. 37 and s. 45, 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.

Points of Objection
8. The following points are made in objection to the respondent's surrender, in that:

- The absence of an undertaking to provide the respondent with a retrial is contrary to s. 45 of the Act of 2003, as amended.

- The surrender of the respondent is prohibited by s. 37 of the Act of 2003 as it would be a breach of her rights to a fair trial under Article 6 of the European Convention on Human Rights ("ECHR") and a breach of her personal and family rights under Article 8 of the ECHR.

- The EAW is invalid as Italy availed of Article 32 of the 2002 Framework Decision, whereby alleged offences committed prior to 7th August, 2002 are excluded from the EAW procedure and the previous extradition arrangements remain in place.

Section 45 of the Act of 2003, as amended

The claim
9. In her claim of a breach of s. 45 of the Act of 2003, the respondent relied on the EAW and addendum, the respondent's affidavit,

and the further and additional information dated 5th and 29th June, 2015. The respondent contends that she was arrested in Italy and was represented by a lawyer at the time of that arrest. She was released without charge then left Italy and heard nothing further about any trial. She says that she is unaware of any lawyer acting on her behalf in such a trial and so could not have given him/her a mandate to represent her.

10. At the outset, counsel for the respondent referred to the nature of criminal proceedings in Italy and highlighted the distinction drawn between the first stage of preliminary examination, which took place in the respondent's case in March 2000, and the respondent leaving Italy shortly afterwards in April 2000 with a coercive measure issuing on 15th June, 2001, a decree of absence to avoid arrest made on 26th July, 2001 and the criminal proceedings being served on her lawyers in or around January 2002.

11. As a preliminary issue in light of the *Minister for Justice and Equality v. Palonka* [2015] IECA 69 case, it was submitted by counsel on behalf of the respondent that where a person was not present for his/her trial, one of the boxes under s. 45, namely points 3.1b, 3.2, 3.3 or 3.4 must be applied. Peart J. in *Palonka* stated that the appropriate box must be ticked to indicate which scenario applies in the particular case but no box has been ticked in the present case and so, on one reading of the EAW, it fails the s. 45 test.

12. However, in this case, the respondent also claimed that the substance of the matters at the points in point (d) do not apply to her but the minister contended that s. 45 of the Act of 2003 has been complied with and the matters come down to an assessment of the state of mind of the respondent.

The information provided in the EAW and additional documentation

13. In the present case, the form of the EAW is that which is annexed to the 2002 Framework Decision and therefore does not contain the new format required by the 2009 Framework Decision and by s. 45 of the Act of 2003. A further point (d) was added as an addendum to this EAW. The body of the EAW records at point (d) under the heading "Decision rendered in absentia and:" an X against the following:

> "The person concerned has not been summoned in person or otherwise informed of the date and place of the hearing which led to the decision rendered in absentia but has the following legal guarantees after surrender to the Judicial Authorities (such guarantees can be given in advance):
>
> Specify the legal guarantees: TRIAL IN ABSENTIA. THE SENTENCED PERSON WAS PRIVATELY REPRESENTED BY A COUNSEL WHO FILED AN APPEAL, AND AN APPEAL BEFORE THE COURT OF CASSATION."

14. The addendum to the EAW is headed "Integration of the EAW of 17.10.2012" and refers to Ahmed Aisha and is signed by the Deputy Prosecutor of the Republic (the issuing judicial authority). Although this does not contain a full form (d) as set out under the 2009 Framework Decision, the wording of the answer is submitted by counsel for the minister to be a direct answer to what appear to be the relevant parts of that form. The addendum states:

> "Form (d) INDICATE IF THE PERSON APPEARED IN PERSON AT THE TRIAL RESULTING IN THE DECISION:
>
> The person was summoned in person of the date and place of the scheduled trial by means of notice to defence lawyer who represented her at the trial in terms of article 159 of the code of criminal procedure.
>
> The person concerned appointed the defence lawyer of choice and lodged an appeal within the terms laid down by law and appealed before the Court of Cassation through the appointed defence lawyer of choice."

15. It can readily be seen that the first reply does not accord with what is required by point (d) 3.1a as she was not summoned in person and no date and place of such summons is given. In so far as it purports to be point (d) 3.2, it is not in accordance with the wording set out in 3.2 of point (d); that wording refers to a person being aware of the scheduled trial, had given a mandate to a legal counsellor, who was either appointed by the person concerned or by the State, to defend them at trial and was indeed defended by the lawyer at the trial. Furthermore, there is no point (d) 4 giving further information as to how the condition was met.

16. The central authority sent a letter dated 2nd August, 2013 seeking an amended point (d) to the Framework Decision or to confirm which specific protections the persons will benefit from. The reply to that appears to have been to send again the "Integration of the EAW" addendum referred to above.

17. In this case, counsel for the minister has characterised the focus of the controversy as being on the state of knowledge of the respondent vis à vis the fact that she was represented by a privately retained lawyer. That in one sense is correct, as much of the respondent's submissions, both written and oral, centred on that issue. On the other hand, the submissions pointed to the fact that it was not clear which of the options regarding point (d) and contained in the Table to s. 45 that the issuing judicial authority was relying upon. Counsel for the respondent submitted that the High Court should require clear evidence of compliance with the notification provisions contained in the Act.

18. At an early stage of these proceedings, the High Court (McDermott J.) requested information pursuant to s. 20 of the Act of 2003. The central authority also sought further information from the issuing judicial authority.

19. The High Court requested the following information a) How was she summoned? and b) How did she come to be tried *in absentia* after the issuing of the summons? This was sent by letter dated 18th March, 2015. By letter dated 16th April, 2015, the central authority also sought further information. Of relevance to these issues were the following:

> "2. The Framework Decision as amended by Council Framework decision 2009/299/JHA requires the inclusion in the warrant of the table mandated by that amendment. It is stated in the related case of [the respondent's husband] that Italy did not implement Framework Decision 2009/299 JHA and therefore can you please confirm that what has been received by way of additional information is the table in accordance with the Framework decision? If not then can you please confirm that the information received which is entitled "Integration of the EAW 17.10.12" is sent by a competent issuing judicial authority in order to supply the information required.
>
> 3. Ms. Ahmed has sworn before the Irish Court that she was not aware of the trial and had not given any mandate to Counsel on her behalf. She claims that she was not summoned in person and did not instruct a lawyer in the proceedings in circumstances where she claims that she was released without charge by a Judge after spending 10 days in custody.
>
> Can you please set out any and all detail relating to how Ms. Ahmed was summoned?

Can you please set out full detail available regarding her instructing a lawyer? It is stated at Part D of the warrant that she was privately represented by a lawyer. Can you provide further detail regarding this where Ms. Ahmed denies she instructed any lawyer.

Can you please set out all and any detail regarding how it was established that the lawyer was representing Ms. Ahmed both in respect of the first trial and all subsequent appeals?"

20. The issuing judicial authority replied on 8th June, 2015 (English translation) as follows:

"2. It is confirmed that it was sent the schedule provided for by the Framework Decision and the information entitled "Supplementary document for the MAE of 17th October 2012" were dispatched to the cognizant Judicial authority in order to give the information required:

3. Aisha Ahmed evaded the execution of the custody order issued against her with reference to the facts charged by the criminal proceedings, as she turned out to be unreachable at any search mad[e] by the investigative police delegate to enforce the custody order. Notifications (included those finalized to her subpoena) were received at the legal firm of her defending counsel, by the modalities provided for by the Italian Code of Criminal Procedure.

Aisha Ahmed is assisted by two hired counsels (Mr. Emilio Martino and Mr. Nicola Filippelli, who had defended her in all instances under a specific appointment for the defence. In this regard, we are enclosing: 1) a decree dated 24th January 2002 from the Investigating judge of Naples, related to the deposit notice of the custody order to the two hired counsels of Aisha Ahmed; 2) appeal to the Court of Cassation filed on 15th May 2009 by Mr. Emilio Martino, hired counsel for Aisha Ahmed."

21. The issuing judicial authority had been very slow in answering these requests and the central authority felt it necessary to involve Eurojust in the requesting of greater detail from the Italian authorities. On 19th June, 2015, a further reply was received. This stated that on 15th March, 2000, the respondent:

"…was arrested, flagrante delicto, during preliminary investigations together with other persons under investigation in the same proceeding during a police operation…[a]fter her arrest, during her examination before the Judge for Preliminary Investigations aimed at establishing if the precautionary requirement was met, Aisha appointed two defense counsels of her choosing,, Mr. Nicolla Filippelli and Mr. Emilio Martino who assisted her during the whole proceeding and its subsequent degrees up to the appeal before the Court of Cassation….[d]uring preliminary investigations a precautionary measure was then issued against, among the others, the aforesaid Aisha, which she avoided, although the numerous attempts to find her accomplished by the Judicial Police and the arrest of her accomplices, therefore she became technically "fugitive", this term being used to indicate a person who voluntarily avoid being arrested. For the Italian system a fugitive is represented in the trial by his/her defense counsel who receives all services on behalf of his/her client, in this case the defense counsels, appointed by the sentenced person were served personally or through a delegated person the relevant acts, as provided for by the in force rules; Since she continued to be fugitive during the first instance proceeding – and also during the subsequent phases – the defendant Aisha was summoned, as provided for by the Italian legislation upon the defense counsel appointed by her, in this case the above defense counsels of her choosing and it could not be otherwise since the woman was untraceable. The considerations made so far leave no doubt as to the fact that Aisha was informed of the criminal proceedings against her since she had been arrested for these facts and she was submitted to house search and was examined before the defense counsels of her choosing and during her examination she was charged with the content of wiretappings." (The transcript of the hearing confirming the arrest has been provided).

22. The transcript of the hearing refers to defense counsel of her choosing: "Nicola Filippelli – present and Emilio Martino – not present replaced by the former – any other appointment is revoked."

23. After hearing initial submissions in this case, I made a further request under s. 20 in respect of certain matters as follows:

a. Please provide the date that the mandate was given by Ms. Ahmed to her lawyer;

b. Please state the date upon which Ms. Ahmed was released from custody;

c. Please state the date upon which Ms. Ahmed was next in Court or before a Judge after being released from custody;

d. Please state the date of the decision to have a trial for Ms. Ahmed; and,

e. Please state the date upon which Ms. Ahmed was informed of the scheduled trial, and if she was not informed of the scheduled trial, please state the date that her lawyer was informed.

24. There was a prompt reply to this from the Italian judicial authority. It is necessary to set out the information. The reply did not contain paragraph numbers and read as follows:

" - The above sentenced person appointed the defense counsels of her choosing, Nicola Filippelli and Emilio Martino before the Judge for Preliminary Investigations during the hearing confirming her arrest dated 18 March 2000. Mr. Filippelli was present at that hearing also in place of Mr. Martino, absent (enclosed please find the transcript of the hearing confirming the arrest);

- Ms. Ahmed was released on 30 March 2000 (enclosed please find her prison legal position;

- Then, since she avoided her arrest in view of the execution of an order of preliminary custody in prison, issued, among others, against her on 15 June 2001 she was declared fugitive by an order dated 17 July 2001. In our legal system the term fugitive indicates a person who voluntarily avoid the execution of a precautionary measure issued against him/her by a judicial authority (enclosed please find the order declaring Ms. Aisha fugitive);

- Since then and during the trial against her, Ms. Aisha has made herself untraceable, nor has she appeared before a judge; therefore since her status of fugitive continued all the notices related to the trial were served on her defense counsels under Article 165 of the code of criminal procedure;

- The request for committing her to trial and the related order establishing preliminary hearing of 20 September 2002 were served on Mr. Filippelli and Martino in the hands of Mr. Mario Griffo, one of their colleagues of the law firm on 12 September 2002 at 5.20pm (enclosed please find the executions of service);

- At the end of preliminary hearing Ms. Ahmed was committed to trial before the first criminal division of the Court of Naples, panel A, for the hearing of 12 November 2002; the judge's order committing Ms. Ahmed to trial (together with the transcript of the hearing ordering that the trial be postponed at 14 January 2003) was served on her defense counsels under Article 165 of the Code of Criminal Procedure on 25 November 2002."

25. It is perhaps noteworthy that the committal for trial of the Court of Naples dated 20th September, 2002 records that the respondent's counsel were not present and "the judge provides to name as defendant the law, Giulio Marchetti according to the art 97 Par 4th c.p.p. because of the absence of the Counsel."

The Court's analysis and determination

26. Section 45 provides:

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

TABLE

(d) Indicate if the person appeared in person at the trial resulting in the decision:

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

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

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

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

OR

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

OR

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

OR

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

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

OR

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

OR

❒ 3.4. the person was not personally served with the decision, but — the person will be personally served with this decision without delay after the surrender, and — when served with the decision, the person will be expressly informed of his or her right to a retrial or appeal, in which he or she has the right to participate and which allows the merits of the case, including fresh evidence, to be re-examined, and which may lead to the original decision being reversed, and — the person will be informed of the time frame within which he or she has to request a retrial or appeal, which will be . . . days.

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

.....

....."

27. In the course of the hearing, although submitting it was a matter for the Court, counsel for the minister effectively conceded, as she had to so concede, that the only section of the Table at s. 45 that could be relied upon was point (d) 3.2; that the respondent, being aware of the scheduled trial, gave a mandate to a lawyer to defend her.

28. The Court raised directly with counsel for the minister, the effect of the failure to provide the information in the new form (d) as provided for by the amended form of EAW provided for by the 2009 Framework Decision. Counsel replied that it was an important

factor but that the Court had to conduct an analysis to assess whether under the decision in *Palonka,* the defect (or lack of form) was of such a magnitude that s. 45C did not arise. Counsel submitted that the Court had to ask itself under s. 45C whether the Court would do any injustice to the respondent in accepting that point (d) 3.2 is the applicable provision under section 45. Counsel submitted that it had always been the Italian position that the respondent had instructed a lawyer to act on her behalf.

29. Thus, the minister's position is that the EAW is not in the correct format, but that is immaterial so long as the Court is satisfied that the information contained in the entirety of the EAW and the additional documentation sent by the Italian Court satisfies it that one of the conditions set out in the Table to s. 45 is met. The Court has considerable doubt about the propriety of such an approach in circumstances where there is an absence of a clear designation from an issuing judicial authority that a particular part of the Table is being relied upon. This is not a case where there is a simple absence of having the information conveyed in the type of format expressly laid out by the new point (d). An example of this may be where the issuing judicial authority says, under our law we cannot change the initial warrant to now include a point (d), but we wish to assure you that this is a situation where there was a trial in absentia but we certify that…(and so certify a ground that wholly corresponds with what is set out in the new point (d) 3.1a, or 3.1b or 3.2 or 3.3 and if necessary provide the information required at point (d) 4). On the contrary, this is a situation where the Italian judicial authority has never made any such clear designation.

30. Recital 6 of the 2009 Framework Decision provides:

> "The provisions of this Framework Decision amending other Framework Decisions set conditions under which the recognition and execution of a decision rendered following a trial at which the person concerned did not appear in person should not be refused. These are alternative conditions; when one of the conditions is satisfied, the issuing authority, by completing the corresponding section of the European arrest warrant or of the relevant certificate under the other Framework Decisions, gives the assurance that the requirements have been or will be met, which should be sufficient for the purpose of the execution of the decision on the basis of the principle of mutual recognition."

31. That recital demonstrates that, it is for the issuing judicial authority to give the assurance that the particular requirement has been met. In such circumstances, it would not appear to be appropriate for this Court to analyse the information provided for the purpose of assessing whether that assurance has been given. An assurance is either given or it is not. Indeed in this case, there is simply no direct statement that the respondent was aware of her scheduled trial when she gave a mandate to her lawyer. On the contrary, it appears that she was untraceable ("unfoundable") at the point at which she was committed for trial and the date of the scheduled trial was served on the lawyers who had represented her (at one point in the investigative process). While being aware of a scheduled trial can be distinguished from knowledge of the date and place of the trial (see *Minister v. Fiszer* [2015] IEHC 664), there was simply no direct answer to the question of the date on which the respondent was informed of the *scheduled* trial (emphasis added).

32. There is a fundamental difference between what is being urged on the Court in this case and the principle established in both *Minister for Justice v. Surma* [2013] IEHC 618 and *Palonka.* In those cases, it was held that point (d) 4 provides a mechanism by which the executing judicial authority can assess whether the assurance is properly relied upon. In this case, there has been no assurance so the question of assessing that assurance does not arise. Furthermore, as Peart J. said in *Palonka*, the absence of the information required to be provided in point (d) 4 is not an insubstantial nature that has no potential to cause an injustice. A *fortiori*, a failure to provide a clear assurance in the terms set out in the form of the EAW as amended by the 2009 Framework Decision cannot be described as of an insubstantial nature that has no potential to cause an injustice. Therefore, as there has been no compliance with s. 45 and as the matter does not come within s. 45C, surrender must be refused.

Section 37 of the Act of 2003 - Article 6 & 8 ECHR / Delay

33. Under these points of objection, the respondent claims that by reason of the delay in seeking her surrender, she was tried in her absence despite having been living openly in this jurisdiction since that period. It is claimed that it would be a breach of her rights to a fair trial pursuant to Article 6 ECHR and/or her personal and family rights pursuant to Article 8 of the ECHR to surrender her now.

34. According to her affidavit, the respondent moved to the Netherlands and then to Ireland in April 2000 and has resided here ever since, by reason of a Stamp 4 permission granted after the birth of her first Irish citizen child in January 2001. She says that she has lived openly in this jurisdiction, worked part time and registered for taxes in respect of same, claimed social welfare and/or housing benefits and complied with the requirements of the Minister for Justice in relation to her immigration status. It is also stated that since in or around 2012, she has been naturalised as an Irish citizen. She does not say at any time why she used the particular name she did in Italy and the Court does not accept that a person who has been the subject matter of police and indeed court attention in one country under a particular name is living openly in this country when they are using a different name unless there is a good and valid explanation for that state of affairs.

35. As regards work and training, the respondent declared that she attended Greenhills College to study pre-nursing and has worked briefly in Woodies and Interlogic and she noted that she believed those jobs were subject to PAYE and that there would be revenue records of same placing her in this jurisdiction. Other than these periods of work and training, the respondent stated that she has been claiming social welfare and child benefit and that she is housed in local authority housing and that as a result, and she is well known to the social welfare authorities.

36. The respondent, therefore, averred that in all the circumstances, she has been living openly in this jurisdiction throughout the alleged period and at no time was she ever informed of any trial, appeal or other matters. She said that she is a stranger to the allegation that a lawyer was privately retained on her behalf.

37. She also indicated that considerable undue hardship would fall upon her and her children but this was said in the context of her husband also being sought for surrender. His surrender has been refused. The respondent did not illustrate this any further.

Submissions

38. Counsel on behalf of the respondent referred to the above facts in submitting that to surrender her to the issuing state would be unduly oppressive. Counsel stated that the minister seeks to have the respondent sent to Italy to serve a sentence for a crime that she did not commit, had no opportunity to contest at trial and in respect of which, in support of the Article 32 point maintained, she could not have been surrendered until 2009, at which time the trial had been concluded.

39. Counsel noted that while the committal warrant issued on 30th November, 2011, Italy only sought the respondent's surrender on or about 17th October, 2012 and that the EAW has taken a further two years to execute, although this could perhaps be explained by the reason of the fact that the issuing judicial authority are claiming that her name is Aisha Ahmed rather than Gloria Anwulika.

40. Counsel for the respondent submitted, therefore, that the delay in issuing the EAW and/or failure to inform the respondent of the trial constitutes a breach of her right to a fair trial pursuant to Article 6 ECHR and/or her personal and family rights pursuant to Article 8 ECHR.

41. Counsel referred the Court to the case of *Minster for Justice, Equality and Law Reform v. Poul John Aamand* [2006] IEHC 382. Counsel submitted in this context that there could be no greater prejudice to the right to a fair trial than the fact that the respondent was tried in *absentia* and is not being permitted a retrial. Counsel stated that if she is surrendered, approximately fifteen to sixteen years after the alleged offences, which she could not have been surrendered until 2009, six years after 2009, to face a twenty year sentence, having established herself in this jurisdiction, it cannot be said that her fundamental rights to a fair trial and/or family life have been respected.

42. As regards whether delay is relevant to this Court's consideration of whether there would be a breach of Article 6 or 8 of the ECHR, counsel for the minister submitted that the jurisprudence of the High Court is well developed in this regard to how delay in the issue of an EAW is to be assessed. Counsel referred to the additional information dated 5th June, 2015 where the issuing state has confirmed that the guilty verdict became final in November 2011 and information available provides that the judgment of the Court of Naples was delivered on 18th March, 2005 and affirmed on 6th February, 2009, the Court of Cassation dismissed an appeal on 11th November, 2011 with the order for the respondent's incarceration made on 30th November, 2011.

43. Counsel for the minister submitted, therefore, that there has been no relevant period of delay in the issuing of this EAW in the circumstance where the EAW issued in early course after the conclusion of defence-instituted appeals. She submitted that, if the Court finds that there was a delay, that the respondent has acknowledged that she left the issuing state, having been questioned in regards to the commission of the offence in the EAW, and subsequently sought citizenship in Ireland using an alias and in so far as the respondent avers to living openly in Ireland, she doing so under an alias does not amount to open living.

Court's analysis and determination

44. With respect to the protection of rights under Article 8, this Court will repeat what it has stated on previous occasions. The tests that the Court must apply in this regard have been well ventilated by the High Court in cases such as *Minister for Justice and Equality v. P.G.* [2013] IEHC 54 and *Minister for Justice and Equality v. T.E.* [2013] IEHC 323 and further discussed in cases such as *Minister for Justice and Equality v. E.P.* [2015] IEHC 662 and *Minister for Justice and Equality v. D.S.* [2015] IEHC 459. The issue is whether there is an interference with Article 8 rights and whether that interference, being for the purpose of the prevention of disorder and crime through the operation of an extradition process, is necessary in the interests of a democratic society. In calculating the necessity for the surrender in the circumstances of the particular case, the court must assess the pressing social need for the surrender.

45. It is for the court in each case to assess on the particular facts where the balance between the public interest in the surrender and the private interests of the respondent lies. Any lapse of time comes into the calculation of the public interest. With regard to the private rights of the individual, the focus is on the consequences to them of the proposed surrender. It is a question thereafter whether the interference with rights is disproportionate to the necessity for the surrender.

46. In this case, there is a very serious offence regarding drug trafficking in which a very high sentence has been imposed. The respondent played a leadership role in the offence. As against that, there has been a lapse of time between the offence and the issue of the EAW. This is undoubtedly a case where the respondent has in large measure contributed to the lapse of time. From all the papers before me, I am not satisfied of the truth of her statement that she was told by the Judge that she was being released without charge (in the sense of having no further proceedings against her). That is not apparent on any of the voluminous court documents that have been furnished to this Court. The Court also takes into account that the respondent left Italy and appears to have changed her name (or at the very least used a name different to that used in Italy). Therefore, I am satisfied that she left the jurisdiction at a time when she was aware that there were preliminary proceedings against her. Knowledge of preliminary proceedings is not the same as knowledge of a scheduled trial. In this case, the decree committing her for trial was made on 20th September, 2002 at the end of the preliminary hearing. Thus, while she had knowledge of the proceedings, she did not have knowledge of a scheduled trial as no such committal for trial had taken place.

47. The fact that the respondent changed her name is not explained by her. The fact that she challenged her identity when initially arrested confirms that this was a woman who was evading the Italian authorities. It can be noted that there appears to have been a large lapse of time between the offences and the final disposition of the proceedings with the rejection of the appeal to the Court of Cassation. There is also a lapse of time between the final appeal and the issue of the EAW. It has not been made entirely clear by the Italian authorities as to why she was sought by EAW in the intervening time. However, I am entitled to reach a conclusion on the basis of the information before me. In this case, I reject the claim that the respondent was living openly in this jurisdiction. She was not living openly here. She was living under a name that was not the name that she was living under in Italy (the Court of Naples transcript records that she gave her name to the Court as Aisha Ahmed and that she resided in a particular location in Italy). She has not explained this difference.

48. In light of all the circumstances of this particular case, I am satisfied that the lapse of time is not indicative of a lack of public interest in her surrender. She was a fugitive from Italian justice in the sense that despite knowing that there were proceedings in being, she left that jurisdiction and lived under another name in this jurisdiction (and possibly under another name in the Netherlands). There is a clear public interest in bringing fugitives to justice. In light of all the facts in this case, there is a high public interest in her surrender.

49. In relation to her own circumstances, I consider that the consequences she would suffer do not extend beyond what is the norm where a parent is being surrendered to a country which is not their home. While I must take into account the best interests of the children, this does not mean that surrender cannot be ordered where there are underage children. There is no evidence to indicate any particular effect on these children. They would have their father's support and company as he is no longer under any risk of surrender.

50. In balancing the public interest in surrender with the interference to her personal and family rights, I am quite satisfied that to order surrender would not be a disproportionate interference with her Article 8 ECHR rights.

51. In so far as the claim regarding Article 6, I am quite satisfied that the respondent is a person who had been arrested and was aware of some procedure in being against her. There is simply no basis to say that she did not have a fair trial because of the *delay*. Indeed, as she was absent from the trial and has not sought to put forward any basis as to why delay affected it, the reason for such submission is not easily apparent.

52. In so far as the respondent seeks to submit that this delay will result in an unfair trial should she be returned, this submission is unsustainable. There will be no trial as she has been convicted of this offence and would not be entitled to a retrial in the event of surrender being ordered. Most importantly, the decisions in *Minister for Justice, Equality and Law Reform v. Stapleton* [2008] 1 I.R. 669 and *Minister for Justice, Equality and Law Reform v. Brennan* [2007] 3 I.R. 732 provides that for an argument to succeed with regard to a potential risk of a breach of Article 6 rights, it would have to be established on substantial grounds that there was a real risk of a flagrant denial of rights. These judgments now set out the law in this regard and the continued value of the *Aamand* decision with regard to the question of both delay and Article 6 (and indeed Article 8) is questionable.

53. Finally, in so far as the submission of the respondent appears to also be based upon a contention that the trial *in absentia* amounts to a denial of rights, the respondent has put forward no evidence of any such egregious defect in the system for the protection of fundamental rights in the issuing state. Instead, she has relied upon mere assertion that the trial *in absentia* demonstrates a denial of rights. A trial *in absentia* is not necessarily a trial that is prohibited by Article 6. For example, if the conditions for trial *in absentia* that are outlined in the new form of EAW set out in the 2009 Framework Decision are met, such a trial would not amount to an unfair trial. In light of the decision under s. 45, it is unnecessary to consider further the issue of whether the respondent's previous trial in her absence amounted to a violation of Article 6. That, it should be emphasised, is a different argument to the submission that because of delay she had no fair trial. The Court is quite clear that delay has not been demonstrated as playing any part in the issue of her right to a fair trial.

Article 32 of the 2002 Framework Decision
54. Article 32 of the 2002 Framework Decision provides:

> "Extradition requests received before 1 January 2004 will continue to be governed by existing instruments relating to extradition. Requests received after that date will be governed by the rules adopted by Member States pursuant to the Framework Decision. However, any member State may, at the time of the adoption of this Framework Decision by the Council, make a statement indicating that as executing Members State it will continue to deal with requests relating to acts committed before a date which it specifies in accordance with the extradition system applicable before 1 January 2004. The date in questions may not be later than 7 August 2002. The said statement will be published in the Official journal of the European Communities. It may be withdrawn at any time."

55. In relation to Article 32 of the 2002 Framework Decision, the Republic of Italy stated that "Italy will continue to deal in accordance with the extradition rules in force with all requests relating to acts committed before the date of entry into force of the framework decision on the European arrest warrant, as provided for in Article 32 thereof." (emphasis added)

56. The respondent claims that the Republic of Italy availed of the provision of Article 32 of the 2002 Framework Decision whereby all alleged offences committed prior to 7th August, 2002 are excluded from the EAW procedure and the previous extradition arrangements remain in place. As the EAW in this case deals with an alleged offence taking place between September 1999 and June 2000, counsel submitted that this alleged offence ought to have been addressed by way of the pre-2002 extradition arrangements in place between Ireland and Italy.

57. In this context, counsel for the respondent submitted that the Act of 2003 appeared to have originally disallowed pre-2002 extradition requests from Italy by reason of section 4(2). However, as s. 4(2) was repealed by s. 5 of the Criminal Justice (Miscellaneous Provisions) Act, 2009, it was not contended that there is any domestic prohibition on the execution of an Italian request for an alleged offence that pre-dates 2002, but it was submitted that such execution would be contrary to the 2002 Framework Decision. Counsel stated that although the 2002 Framework Decision itself does not have direct effect, it is nevertheless an inherent part of the statute and so the legislation must be interpreted in that light.

58. Counsel for the respondent submitted that while it may be a literal interpretation of Article 32 that the "opt out" only applies to requests made to an executing member state, there are a number of significant points that suggest that this is not the position. In the first place, counsel pointed to the reference to "all requests" in Italy's statement and submitted that this suggests that the intention of Italy was to only deal with the EAW system from the commencement of the 2002 Framework Decision. Secondly, counsel submitted that the principle of reciprocity applies in EU law and referred to the case of *Flaminio Costa v. E.N.E.L.* [1964] E.C.R. 585 in which is was sad that *"the integration into the laws of each Member State of provisions which derive from the Community, and more generally the terms and the spirit of the treaty, make it impossible for the states, as a corollary, to accord precedence to a unilateral and subsequent measure over a legal system accepted by them on a basis of reciprocity. Such a measure cannot therefore be inconsistent with that legal system . the executive force of Community law cannot vary from one State to another in deference to subsequent domestic laws, without jeopardizing the attainment of the objectives of the Treaty set out in Article 5 (2) and giving rise to the discrimination prohibited by article 7."*

59. Counsel for the respondent therefore submitted that the removal of s. 4(2) would appear to be a domestic piece of legislation that unilaterally revokes a provision which seeks to ensure reciprocity between Ireland and Italy. Counsel submitted that given that the Charter of Fundamental Rights of the European Union ensures that member states of the EU have regard not just to other member states but also to their citizens, and that a citizen is entitled pursuant to Article 41 of same to a right to good administration, to surrender the respondent herein based on a pre-2002 alleged offence would amount to a breach of the principle of reciprocity.

60. Counsel continued by submitting that pursuant to the doctrine of equivalence, there should not be a domestic right or procedure which is subjected to more favourable rules than the EU right or procedure. He submitted that by introducing s. 4(2), the Oireachtas was simply recognising the necessity to have equivalence between the Act of 2003 and the 2002 Framework Decision and that by removing same, they have allowed the minister to act in a manner more favourable than the Framework Decision requires, or indeed more favourably.

61. It was also submitted on behalf of the respondent that the interpretation of the repeal would mean than between 2002 and 2009, the EAW procedure could not be applied but it now can, where the alleged trial and one of the alleged appeals took place during this period, where the alleged offence (involvement in a criminal organisation) is one which did not exist in Irish law until 2005. To interpret the Act and the Framework Decision as allowing pre-2002 alleged offences to be the subject of surrender requests creates an utterly incomprehensible system whereby after 2009, pre-2002 requests can be made but up to that point they could not be.

62. Counsel for the respondent indicated that while the proceedings are not criminal in nature, they concern proceedings of an EU nature which will ultimately tie into the criminal process. He submitted that Articles 47, 48 and 49 of the Charter of Fundamental Rights, which govern the right to a criminal trial, the presumption of innocence, non-retrospectivity, etc. ought to be applied to this case. As the Charter of Fundamental Rights governs EU decisions rather than domestic criminal legislation, to find that the Charter has no application to the Framework Decision would render those articles otiose. In those circumstances, it is stated that the

respondent contends that she has been denied her right to a fair trial in circumstances where the trial took place at a time when she could not be surrendered and if the interpretation of the 2009 amendment is that she can be surrendered, she will face a sentence rather than have an opportunity to defend her innocence.

63. Counsel for the minister accepted that s. 4 of the Act of 2003 as originally enacted appeared incorrect as it did not reflect the declarations actually made by Italy, Austria and France. She stated that the originally enacted s. 4(2) and s. 4(3) of the Act of 2003 created an exception in relation to Austria, Italy and France in relation to crimes committed before the specified dates.

64. Counsel for the minister submitted that the actual declarations made by Austria, Italy and France applied only to situations where they were the executing states, i.e. where they were receiving extradition requests. In this context, counsel referred to the statements provided by Italy in the 2002 Framework Decision in relation to Article 32 and laid emphasis on the reference to "requests" in same. She stated, however, that subsections (2) and (3) disapplied the Act in relation to all offences committed prior to the dates in question, including those offences where Austria, Italy and France were making the extradition request and therefore subsections (2) and (3) were subsequently deleted.

The Court's analysis and determination

65. Counsel for the respondent's characterisation of Article 32 as excluding offences committed prior to 7th August, 2002 and permitting previous extradition arrangements to remain in place is incorrect. Article 32 permitted member states to make a statement indicating that "as executing Member State it will continue to deal with requests relating to acts committed before a date [to be specified by the Member State]."

66. I agree with the submission of counsel for the minister that the original s. 4(2) referring to issuing judicial authorities in Austria and Italy appears to have been an incorrect interpretation of Article 32 and the statements made by those countries. It is not of any importance, however, because at the time of the issue and endorsement of this EAW, no such provision is in place. Therefore, there is nothing on the face of the Act of 2003, as amended, which prohibits this Court from surrendering a person to Italy merely on the ground that the offence pre-dated 7th August, 2002.

67. Counsel for the respondent with admirable candour accepted that his argument on this point was a difficult one. While the point may be interesting, it is unsustainable. His reliance on the statement of Italy which covers "all requests" clearly refers to "all requests" received by Italy. Indeed, given that Italy has issued this EAW, it must be presumed that Italian law provides for the issue of an EAW in these circumstances.

68. As for the argument on reciprocity, it is similarly unsustainable. The 2002 Framework Decision represents the agreement between the member states. It provides for a new system of simplified surrender but entitles member states to opt for the continuation of the former extradition procedures with respect to requests for extradition for offences pre-dating 7th August, 2002. This is not a situation of the "executive force of Community law…vary[ing] from one State to another in deference to subsequent domestic laws." Counsel's reliance on the doctrine of equivalence is similarly misguided.

69. In so far as the respondent raises an issue with regard to delay and the effect on her rights because of the repeal of s. 4(2) of the Act of 2003, this is an argument that must also be rejected *in limine* as there is no factual basis for the claims made. No request was made for surrender at that time and there is no suggestion that such a request was contemplated by Italy but not made because of the existence of the original s. 4(2) of the Act of 2003, as amended.

70. It is also without foundation to submit that the respondent has been denied a right to a fair trial because of the delay. The existence of this subsection did not in any way interfere with her right to a fair trial. The respondent has simply raised this at a level of assertion but has not given any factual basis for the claim of the breach of a right to a fair trial. The assertion seems to be on the basis that the conviction took place in 2005, affirmed by the Court of Appeal of Naples in February 2009 at a time when s. 4(2) prohibited the application to requests originating in Italy. Her appeal was only dismissed by the Court of Cassation in November 2011. There is nothing to suggest that the existence of s. 4(2) interfered with her right to be present at trial in any way. Finally, it can be said that no right had accrued to this respondent prior to the repeal of s. 4(2) and there is consequently no bar to her surrender under this heading.

Conclusion

71. For the reasons set out above, I have rejected the respondent's point of objection that her Article 6 or Article 8 ECHR rights have been violated due to delay. I also reject her argument that Article 32 impels the Court to refuse surrender in light of the statement made by Italy under that Article with regards to requests concerning acts committed prior to 7th August, 2002. In the circumstances of this case, where no point (d) in accordance with the amended form of the EAW set out in the Annex to the 2002 Framework Decision as amended by the 2009 Framework Decision has been completed either in form or in substance by the issuing judicial authority, surrender is prohibited by the terms of s. 45 of the Act of 2003, as amended.