THE HIGH COURT

[2017 No. 17 EXT]

BETWEEN

MINISTER FOR JUSTICE AND EQUALITY

APPLICANT

AND

DANIEL O'CONNELL

RESPONDENT

JUDGMENT of Ms. Justice Donnelly delivered on the 22nd day of February, 2019

Introduction
1. This is an application for the surrender of the respondent to the United Kingdom of Great Britain and Northern Ireland ("the UK") pursuant to a European Arrest Warrant ("EAW") dated 20th December, 2016 which was endorsed by the High Court on the 23rd January, 2017. The respondent was arrested on the 5th July, 2017 and has been remanded on bail. The main reason for the delay in hearing this case was awaiting the decision of the Supreme Court and ultimately the Court of Justice of the European Union ("CJEU") in respect of issues arising from the impending withdrawal of the UK from the European Union ("EU") as a result of its notification of withdrawal under Article 50 of the Treaty on European Union ("TEU"), ("the Brexit point").

2. The respondent is wanted by the UK to serve the remaining portion of a seven year sentence of imprisonment imposed in default of payment under a confiscation order made on 20th January, 2003. The imposition of this sentence relates to the conviction of the respondent in Middlesex Guildhall Crown Court on the 9th August, 2000 of five offences of being knowingly concerned in the fraudulent evasion of Value Added Tax ("VAT") between 1st August, 1996 and 25th March, 1999.

3. After conviction, an eight year sentence of imprisonment was imposed on the respondent. He was released on licence (with conditions) on the 24th March, 2003. The conditions on the respondent's licence expired on the 24th March, 2007. On the 20th January, 2003, the respondent was made subject to the confiscation order for which an additional seven year sentence of imprisonment in default of payment of the confiscation amount was imposed. According to the information in the EAW, under UK law, this additional sentence forms an integral part of the overall sentence imposed upon the respondent in respect of his five convictions for VAT evasion and this seven year sentence runs consecutively to the sentence imposed on the 9th August, 2000 in respect of the VAT evasion convictions.

4. The seven year default sentence of imprisonment imposed by the confiscation order was activated when the respondent failed to pay the confiscation order within the permitted time which expired on the 31st May, 2004. A warrant of committal was issued by Westminster Magistrates' Court on the 20th September, 2016 for non-payment of the confiscation order. As a result, the respondent is now sought by the requesting state so that he can serve the remaining part of the default sentence from the confiscation order.

5. In objecting to his surrender, the respondent raised three core arguments:

a) a Brexit point;

b) that a default sentence for a confiscation order was not a sentence or detention order within the meaning of the Council Framework Decision 2002/584/JHA of 13th June, 2002 on the European Arrest Warrant and the surrender procedures between member states ("the 2002 Framework Decision"), or the European Arrest Warrant Act 2003, as amended ("the Act of 2003"). A related argument was that to imprison him would amount to a breach of the respondent's fundamental rights under the European Convention on Human Rights ("ECHR") and Bunreacht na hÉireann.

c) a claim under s.37 of the Act of 2003 that surrender would violate his fundamental rights, based upon, inter alia, the delay in executing the warrant, his indigency and his personal and family rights.

6. As there are a number of conditions that must be satisfied prior to any surrender being permitted under the provisions of the Act of 2003, the Court will deal with those at the outset.

Uncontroversial Issues

A Member State that has given effect to the Framework Decision
7. The surrender provisions of the Act of 2003 apply to those Member States of the European Union that the Minister for Foreign Affairs has designated as having, under their national law, given effect to the Framework Decision of the 13 June, 2002 on the European arrest warrant and the surrender procedures between Member States ("the Framework Decision"). I am satisfied that by SI No. 4/2004 the Minister for Foreign Affairs has designated the UK as a Member State for the purposes of the Act of 2003

Identity
8. I am satisfied on the basis of the affidavit of Oliver Nevin, member of An Garda Síochána, the affidavit of the respondent, and the details set out in the EAW that the above named respondent who appears before me is the person in respect of whom the EAW has issued.

Endorsement
9. I am satisfied that the EAW has been endorsed in accordance with s. 13 for execution.

Sections 21A, 22, 23 and 24 of the Act of 2003 as amended
10. Having scrutinised the documentation before me, I am satisfied that I am not required to refuse his surrender under the above provisions of the Act of 2003 as amended.

Part 3 of the Act of 2003 as amended
11. Subject to further consideration of s. 37, s. 38 and s. 45 of the Act of 2003 as amended and having scrutinised the documentation before me, I am satisfied that I am not required to refuse the surrender of the respondent under any other section

contained in Part 3 of the said Act.

The provisions of s. 38
12. Section 38 of the Act of 2003 provides for the offences for which surrender may be ordered. If the offence is an offence set out in para. 2 Article 2 of the 2002 Framework Decision, then, provided the requirements of minimum gravity in terms of available sentencing powers have been met, there is no requirement to find correspondence (double criminality) for the offence for which the person is requested with an offence in this jurisdiction.

13. In the present case, the offences proven against the respondent are that he was knowingly concerned in the fraudulent evasion of Value Added Tax. The issuing judicial authority has ticked the box marked "fraud". That carries a sentence in excess of three years. In the circumstances, there is no manifestly incorrect reliance on Article 2 paragraph 2 of the Framework Decision.

14. The respondent is sought for the purpose of executing a custodial sentence of seven years. This was imposed upon him in default of not paying a confiscation order. The respondent contests that this type of default sentence can be subject to a European arrest warrant. For the purpose of s. 38, the term of seven years meets the minimum gravity requirement. I will deal with the substance of the respondent's submissions on the nature of the sentence imposed upon him later in this judgment.

15. Having regard to the provisions of s. 38, this Court is satisfied that the terms of the section do not prohibit his surrender.

Section 45
16. The issuing judicial authority has ticked the box at part D of the EAW stating that this respondent appeared in person at the trial resulting in the decision. It is clear from the details contained in the EAW that he was present at his trial, present at his sentence, present at the confiscation hearing leading to the confiscation order and the default sentence. He was also present at the enforcement proceedings initially but absented himself. He was represented by solicitors at that hearing.

17. I am satisfied that the provisions of s. 45 do not prohibit his surrender as he was present at the proceedings resulting in the sentence for which his surrender is sought.

The Brexit Point
18. In his points of objection, the respondent pleaded that no transitional provisions had been adopted in the UK to ensure that persons surrendered thereto under an EAW will continue to enjoy entitlements under the 2002 Framework Decision after the date of withdrawal. These lack of entitlements included access to the CJEU under Article 267 of the TFEU as well as other entitlements that EU law confers upon persons serving sentences.

19. Counsel for the respondent acknowledged that there were considerable difficulties in making this argument in light of the decision in *Minister for Justice and Equality v RO* (C-327/18 PPU) by the Court of Justice of the European Union. He submitted however, that *RO* could be distinguished on a number of grounds.

Respondent's evidence
20. The respondent presented to the Court a legal opinion by Juliette Casey, an advocate at the Faculty of Advocates in Edinburgh, Scotland. She was requested by the respondent to set out the current position in the UK as regards the continuing application of the EAW system there. During the course of the hearing, counsel for the respondent told the Court that this opinion would be put before the Court on affidavit, but this has not yet been done. Despite this, the Court will deal with the submissions made on foot of the opinion.

21. This is a lengthy opinion but it is only necessary to refer to a number of aspects. In the first place, she said that the legal position in the UK up to June 2017 was explained in an affidavit sworn by Helen Malcolm, Q.C., in proceedings *Minister for Justice v. O'Connor* [2017] IEHC 518.

22. As regards the specific situation of European arrest warrants, Ms. Casey stated that the Framework Decision envisages states to which it applies being members of the EU, both when surrender is ordered and thereafter. This involves inter alia, Article 267 preliminary reference procedures being available and the EU Charter being cognizable by those states' courts and, thereby, oversight by the Court of Justice. Ms. Casey referred to para. 93 of the joint report from the negotiators of 8th September, 2017, which dealt with particular issues to be agreed for negotiations on withdrawal to continue states with regard to the Court of Justice which states, "*ongoing judicial procedures, both parties have agreed that the CJEU should remain competent for UK judicial proceedings registered at the CJEU at the date of withdrawal, and that those procedures should continue through to a binding judgment".*

23. Ms. Casey also referred to the UK Withdrawal Act 2018, which repeals the European Communities Act 1972. She said that the Act's main purpose is to preserve existing EU law as it applies to the UK when it leaves the EU by converting it into domestic law. The Act's central tenet is that, for the most part, EU law should continue to apply in the UK following its exit from the European Union. She described the parliamentary process for adopting the deal negotiated by the UK Government with the EU and the legal position as regards exiting on the 29th March, 2019 if that deal is not accepted by parliament.

24. As regards the relationship between the CJEU and the domestic courts, s. 6 of the UK Withdrawal Act provides a framework as to how this would work post Brexit. Ms. Casey stated that at this late stage in the Brexit process, it remains difficult to visualise what form of Brexit the political process will return and more remotely, the corresponding new legal order. In the short term, as things stand, the operation of the meaningful vote could result in anything from a crash out no deal Brexit to another version of the existing deal to the unilateral revocation of Article 50 to the necessity for a referendum or indeed a general election. She said it is, of course, possible that some entirely new arrangement might emerge in the next few months including the postponement of exit day. During this time, existing EU law will apply but a disorderly exit will result in the excision of all EU law and the negation of the central objective of the Withdrawal Act.

25. Ms. Casey stated that the mechanics of s. 13 of the Withdrawal Act make it possible that a no deal Brexit will not become a reality but she said a no deal outcome looms. While the pendulum may still be swinging back and forth from one side of the House of Commons to the other, the underlying reality is that the withdrawal agreement makes it clear that a failure to reach a final agreement means that a no deal Brexit on exit day will be the default position.

Submissions
26. The respondent's case in relation to Brexit is that by delivering the Article 50 TEU notice, there was a fundamental change of circumstances (as per the Vienna Convention on the Law of Treaties and Article 62 in particular) that invalidates the UK's designation as a member state for the purposes of the 2002 Framework Decision. From the respondent's point of view, the issue is one that there

is no longer a legal certainty about the position of the UK within the European Union.

27. The respondent's grounds for distinguishing *RO* is that the fundamental issue concerning the Vienna Convention was not dealt with in *RO*. He submitted that it was not referenced in the opinion of the Advocate General or in the Court of Justice decision in *RO*. He submitted that the recent decision of the Grand Chamber of the CJEU in *Wightman & Ors v Secretary of State for Exiting the European Union* (C-621/18) demonstrated the importance of the Vienna Convention. He referred to the decision of the Advocate General in that case which discussed the Vienna Convention as being central to resolving the legal issue. He referred to the decision of the Grand Chamber of the CJEU which referred to the autonomy of European law. However, he referred to para. 70 of the *Wightman & Ors* decision, where the CJEU stated that the conclusion was corroborated by the Vienna Convention. He submitted that if the CJEU were a common law court, the rule would be a point not argued is a point not decided. He submitted that the *RO* decision is *per incuriam* because it did not take into account the Vienna Convention.

28. As a second point, he submitted that *RO* appeared to have been decided in almost a factual vacuum. He submitted that Advocate General's opinion is startling in that he acknowledged that next to nothing was known about the future legal relationship. He submitted that the CJEU proceeded on the basis that an agreement would be reached.

29. The respondent stated that his case can be distinguished from *RO* on the basis the issue must be decided on the principle of legal certainty. He submitted that this point was never canvassed in *RO* and that there was no certainty that compliance can be monitored by the Court of Justice of the European Union.

30. Counsel for the minister submitted that the scope of the Vienna Convention was limited to treaties between states. In any event, even if it had some application, it was difficult to see how it would benefit this respondent. It was also difficult to see how it could be relied upon to persuade the Court of Justice that *RO* was wrongly decided.

31. It was submitted by the minister that the Vienna Convention had no relevance to the issue. Indeed, the *Wightman & Ors* case, when read in detail, showed that the decision was based upon the essential characteristics of EU Law. This is apparent from the conclusion reached by the court at para. 69:

> *"It follows from the foregoing that the notification by a Member State of its intention to withdraw does not lead inevitably to the withdrawal of that Member State from the European Union. On the contrary, a Member State that has reversed its decision to withdraw from the European Union is entitled to revoke that notification for as long as a withdrawal agreement concluded between that Member State and the European Union has not entered into force or, if no such agreement has been concluded, for as long as the two-year period laid down in Article 50(3) TEU, possibly extended in accordance with that provision, has not expired."*

32. Counsel for the minister submitted that the reference at para. 70 made clear that the above conclusion was corroborated by the provisions of the Vienna Convention which was taken into account in the preparatory work on the Treaty Establishing the Constitution for Europe. The only relevance of the Vienna Convention, therefore, was that it lent support to the Court's interpretation of Article 50.

33. Counsel for the minister also submitted that the High Court is obliged to apply EU law where it is supreme. The real test is whether there were substantial grounds for believing that the person will be deprived of his fundamental rights. This was in the context of the Act of 2003 providing the only grounds for prohibiting surrender. Those grounds included where there was a real risk of substantial grounds for believing that the person would be deprived of their fundamental rights.

34. It was telling, counsel for the minister submitted, that the respondent did not identify any fundamental right either under the EU Charter or the Framework Decision that he was at risk of being deprived, even in the event of a crash out no deal type Brexit. It was also submitted that he was sought to serve a sentence and not to face trial. Indeed, it was clear that he had already challenged that sentence in the UK courts before coming to this hearing. The respondent did not point to any right that he did not have.

37 Counsel for the minister stated that it was clear that the UK courts were still bound by the European Convention on Human Rights. It was also clear from the case law relied upon in the course of the respondent's submissions on the other points of objection, that the UK courts were conscientious in upholding those rights. Apart from fundamental rights there was also no indication in any of the information placed before the Court that rights such as the rule of speciality of the right not to be surrendered to another jurisdiction would not be respected. This Court has to implement the European Arrest Warrant Act 2003.

38. With respect to the distinguishing of *RO*, counsel for the minister submitted that it was difficult to see how the Vienna Convention was relevant. Counsel did not accept that it had been decided in a factual vacuum. He also submitted that it appeared that the CJEU had in fact decided the case on the basis that there would be no provisions in place.

39. In relation to the submission that this case was not about mutual trust but had to do with legal certainty, counsel for the minister submitted that it was everything to do with mutual trust. He was not sure what in fact the respondent meant by legal certainty. He submitted that there was no uncertainty in present case as the respondent was being sought to serve a sentence, and that if he was surrendered there was no uncertainty regarding any issue of European Law as regards that matter.

40. Counsel for the minister submitted that *RO* was applicable and he urged the Court to follow it and he said there was no basis for distinguishing it. Counsel also informed the Court about what had occurred in *Minister for Justice and Equality v O'Connor* [2018] IESC 47 after the submission of the referral in *RO* by the High Court. It should be recalled that the Supreme Court made a referral in *O'Connor*, but the case was not accepted by the CJEU under the urgent procedure. Thereafter, the High Court made a referral in the case of *RO* where the urgent procedure was adopted.

41. In *O'Connor* the Supreme Court was also urged to allow the referral to proceed. The Supreme Court examined the questions in *RO* and analysed the decision therein. It referred to a series of judgments that supported the view that surrender to be ordered unless there was a real risk of a violation of fundamental rights. They stated that the mere theoretical possibility of an impairment of rights was not sufficient to prohibit surrender.

Decision and Analysis

42. It is important to recall that the point upon which the respondent relies was also a point at issue in the case of *O'Connor*. The High Court rejected that point (see *Minister for Justice and Equality v O'Connor* [2017] IEHC 518). The Supreme Court, in *O'Connor* made a preliminary reference under Article 267 to the Court of Justice (see *Minister for Justice and Equality v O'Connor* [2018] IESC 19). Following the refusal of the Court of Justice to adopt the urgent procedure in *O'Connor*, the High Court decided to refer the *RO*

case to the CJEU as he was in custody and likely to be able to avail of the urgent procedure. The questions raised were the same. When the *RO* decision was given by the CJEU, the Supreme Court was asked in *Minister for Justice and Equality v O'Connor* [2018] IESC 47 to continue its own reference. In giving its judgment on that request, the Supreme Court stated that in substance, the answers given by the CJEU were unfavourable to the case made by the appellant Mr. O'Connor.

43. The Supreme Court in *O'Connor* gave careful consideration to the difficulties that may arise where there are two parallel cases involving the same or substantially the same issues but where the precise legal arguments are different. Having discussed those difficulties, the Supreme Court said there were two critical points to be taken into account in the particular circumstances of the case. The first was that the questions posed by the Court were identical to all intents and purposes to those posed and answered in *RO*. Secondly, the Supreme Court identified that it was an overriding fundamental principle identified in the jurisprudence of the CJEU in matters such as this is that surrender should be ordered by a requested State unless, after a proper examination by the courts of the requested State, there is a real risk that the rights of the individual concerned will not be respected, should surrender be ordered.

44. The Supreme Court referred to the decision in *Aranyosi* and *Caldararu* (C-404/15 and C-659/15 PPU), and the decision in LM (C‑216/18 PPU). The Supreme Court also referred to the decision of the CJEU in *RO* and the finding therein that:

> *"in the absence of substantial grounds to believe that the person who is the subject of that European arrest warrant is at risk of being deprived of rights recognised by the Charter and the Framework Decision following the withdrawal from the European Union of the issuing Member State, the executing Member State cannot refuse to execute that European arrest warrant while the issuing member State remains a member of the European Union."*

45. The Supreme Court also stated that "*a mere theoretical possibility of impairment of rights is not sufficient to override the obligation to surrender*". This statement echoes what the Supreme Court had earlier stated in the case of *Minister for Justice and Equality v Rettinger* [2010] IESC 45 concerning a claim of breach of the right not to be subjected to inhuman and degrading treatment.

46. In the present case, the respondent had not suggested any other form of question to be put to the CJEU and thus, if there was a referral it would be on the same basis as applied in *RO*. Moreover, similar arguments as to why a referral should be pursued in *O'Connor* i.e. the legal basis for his present contentions, were considered by the Supreme Court and rejected. In all the circumstances and in light of the decision of the Supreme Court in *O'Connor*, there is no basis for referring this case to the Court of Justice of the European Union.

47. Furthermore, the respondent has made no case whatsoever that there is a real risk that he will be deprived of any rights recognised by the EU Charter and/or the Framework Decision. He did not make the complaint about any specific right being breached. The respondent's complaint is aimed at the legality of the entire situation rather than a risk of a specific right being violated. In light of the repeated principles outlined by the CJEU and referred to by the Supreme Court, this Court is satisfied that there is no basis for refusing his surrender or referring his case further to the Court of Justice of the European Union.

48. In relation to the specific points he made distinguishing RO, I do not accept that the *Wightman & Ors* case changes anything. The CJEU relied upon an analysis of EU law; they had also made an analysis of EU law in *RO*. The reference to the Vienna Convention merely corroborated what was previously held in relation to EU law. In any event, the respondent has not persuaded this Court that the Vienna Convention would lend anything further to the determination that has been made on this point.

49. Finally, I reject the submission that the *RO* case was made in a factual vacuum. It was expressly contemplated in the judgment that there may be an absence of a relevant agreement between the EU and the UK. For example at para 60 the CJEU refers to the possibility that, in the absence of agreement, EU Charter rights would not be the subject of a reference to the CJEU for a preliminary ruling. The CJEU held that this did not alter the analysis that fundamental rights were protected in national law and there was no concrete evidence to suggest that *RO* would be deprived of those rights.

50. The decision of the CJEU was given in contemplation of the absence of a withdrawal agreement. The decision focussed on the protection of rights in the withdrawing state but held that in the absence of evidence of a real risk to the protection of those rights, surrender in accordance with the 2002 Framework Decision must proceed.

51. In all the circumstances, I reject this ground of objection to his surrender on behalf of the respondent.

Sentence not within the Framework Decision

52. As stated above, the sentence in the present case involves a default sentence imposed in circumstances where the confiscation order imposed on the respondent has remained unpaid. The UK authorities stated in the EAW that: "*It is important to note that sentence in default is not ancillary, but integral to the overall sentence for the criminal offences".*

53. The respondent claims that this type of default sentence of imprisonment is not within the meaning of the Framework Decision. The respondent relies upon Article 1 of the Framework Decision which states that a European Arrest Warrant "*. . . is a judicial decision issued by a Member State with a view to the arrest and surrender by another Member State of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order*". The respondent also relies on Article 2, para. 1 of the Framework Decision which states that *"A European arrest warrant may be issued for acts punishable by the law of the issuing Member State by a custodial sentence or a detention order for a maximum period of at least 12 months or, where a sentence has been passed or a detention order has been made, for sentences of at least four months."*

54. It is also worth noting that the respondent has not challenged, by means of evidence, any of the statements as to the law in the UK that is set out in the European arrest warrant. The principle of mutual trust requires this Court to accept the relevant statements of law in so far as they relate to UK law. The Court must, therefore, decide the issue raised on the basis of that information in accordance with the provisions of the Act of 2003 which applies in this jurisdiction.

55. Counsel for the respondent submitted that this is not a custodial or detention order within the meaning of the Framework Decision; it is a contingent custodial sentence or detention order. Counsel submitted that the penalty is confiscation, but imprisonment is being imposed because the monetary payment has not been satisfied.

56. In particular, the respondent referred to that part of the EAW which states

> *"In the event that a confiscation order is made but not paid within the time period ordered by the sentencing court, the effect of the relevant legislation is such that orders are treated in the same way as fines. Where a Crown Court imposes*

a fine on any person, they may allow that person time to pay that fine, but they must make an order fixing a term of imprisonment which that person must serve if the sum they owe has not been paid or recovered".

Counsel submitted that this is therefore not a custodial sentence within the meaning of the Framework Decision.

57. In a related submission, counsel for the respondent submitted that this is akin to a situation where a starving person steals a loaf of bread and does not pay a fine and imprisonment is imposed. He submitted that surrender for such a situation is not within the scheme of surrender set out in the 2002 Framework Decision. He submitted that merely because a sentence is imposed for non-payment of a fine does not bring that situation within the Framework Decision. Counsel submitted that the principle requiring strict construction means that this does not come within the Framework Decision.

58. Finally, the respondent also relied upon a claim that this confiscation order was more in the nature of a civil order than a criminal order. Again the respondent never produced any evidence of laws from the UK to challenge the statement in the EAW that this was a sentence in the context of criminal proceedings. The respondent relied upon the case of *People (DPP) v. Gilligan* [2005] IESC 86 in which it was held that the Special Criminal Court had no jurisdiction to impose a confiscation order as it was not a part of the criminal process.

59. Counsel for the minister also relied on Articles 1 and 2 of the Framework Decision. Those articles refer to a situation where there is a judicial decision concerning a custodial sentence or detention order. In counsel's submission, the order and sentence imposed here fall fairly and squarely within those decisions. He referred to the number of times in the EAW that it is pointed out that this is an integral part of the sentence that was imposed upon him for these offences. He submitted that one does not need to look any further than the EAW itself.

60. In dealing with the issue of custodial sentence and detention order, counsel submitted that if necessary, the Court could look at the reference made in the 1957 Convention on Extradition to detention order. A detention order therein is defined as any order of deprivation of liberty in addition to or instead of sentence of imprisonment.

62. Counsel for the minister submitted that it is clear that this definition is to be afforded a wide definition. He relied upon the case, if necessary, of *Minister for Justice and Equality v. Murphy* [2010] IESC 17. In that case, the Supreme Court construed the meaning of 'detention order' and in particular to the reference in s. 10(d) of the Act of 2003 which refers to a sentence of imprisonment or detention. The Supreme Court held that the reference there meant that 'sentence' governs the phrase and applies to both imprisonment and detention. It clearly arises in criminal proceedings and covers a sentence of detention and they held that there was no ambiguity within that section. In the Supreme Court's view, a literal approach to the words of s. 10(d) of the Act of 2003 meant that it included a detention order. The Supreme Court stated that a detention order is limited by the terms of the Act of 2003 and the Framework Decision. The Supreme Court held that ".. *it applies only to a detention order which relates to extraditable offences and which have been the subject of the criminal process in the requesting country."*

64. The Supreme Court also referred to the definition of detention order in the 1957 Convention which had been included in a European Commission explanation of what was proposed to be introduced in the Framework Decision. While the Supreme Court said that definition was not of course a binding authority on the court in relation to s. 10(d) of the Act of 2003, it was helpful.

65. The Supreme Court ultimately defined a detention order under s. 10(d) *"as any order involving deprivation of liberty which has been made by a criminal court in addition to or instead of a prison sentence."*

66. Counsel for the minister also referred to a decision of the High Court, Queen's Bench Division Divisional Court in England and Wales in the case of *Hickman v. Governor of HMP Wayland* [2016] EWHC 719 (Admin). In that case, an EAW was issued by the UK authorities in respect of a default sentence for a confiscation order. The applicant in that case had been surrendered from Spain. On his surrender he challenged the validity of the surrender on the grounds that a default sentence did not come within the ambit of a European Arrest Warrant. The UK court accepted that default sentences for both fines and confiscation orders complied with the statutory requirements.

Decision on default order

67. The Supreme Court in *Murphy* dealt with the situation where after conviction the respondent had been sentenced in the UK to detention in a hospital under a hospital order with special restrictions. The Supreme Court recognised that sentencing laws were not identical in each member state but that did not prevent surrender. The Supreme Court held that it was not for the Irish courts to interpret or apply the law of the UK, but to apply Irish law. That law is contained in s. 10 of the Act of 2003 which states:

"Where a judicial authority in an issuing state issues a European arrest warrant in respect of a person-

(d) On whom a sentence of imprisonment or detention has been imposed in that state in respect of an offence to which the European arrest warrant relates, that person shall, subject to and in accordance with the provisions of this Act, be arrested and surrendered to the issuing state."

68. The Supreme Court held that on a literal interpretation of s. 10(d), it included a detention order. It is only detention orders that relate to extraditable offences and which have been the subject of the criminal process in the requesting state that come within the section. The principles identified are applicable to the present case.

69. I am satisfied that Article 1 and Article 2 of the Framework Decision, and, in particular s. 10(d) of the Act of 2003, provide for surrender in the case of sentences of imprisonment or detention imposed in criminal proceedings in excess of a four month period. This EAW states that this sentence was imposed as an integral part of the sentencing proceedings. It was therefore imposed by a criminal court after conviction. The EAW also states that this is a sentence that is immediately enforceable against him in the United Kingdom.

70. Counsel for the respondent referred to that part of the EAW that said that the effect of the default sentence in respect of the confiscation order was that the relevant legislation is such that orders are treated in the same way as fines. On the basis of the statements of principle set out in *Murphy* above, a default penalty imposed for non-payment of fine is also a sentence of imprisonment imposed in criminal proceedings. Where such a sentence is enforceable and was imposed for an extraditable offence, there is no basis for refusing surrender. Indeed, it is noteworthy that the respondent has not referred the Court to any authority from any member state which suggests that default sentences imposed for non-payment of fines do not come within the Framework Decision.

71. On the other hand, it appears from case law emanating from the UK that default sentences for unpaid confiscation orders have

been held to be extraditable. The decision in *Hickman* is not binding on this Court, but it is persuasive authority from another jurisdiction as to how this issue should be interpreted. In the case of Murphy, the Supreme Court referred to a judgment of the Finnish Supreme Court to demonstrate that a similar analysis had been made in that jurisdiction. The Supreme Court went on to state that

> *"it also illustrates the benefit which would be obtained for the Member States if there was a centralised site where judgments of the courts of Member States and European Arrest Warrants would be available. Similar issues must arrive constantly before the courts of the Member States and it would be of assistance to see the interpretation of the framework decision given by the courts of the other Member States."*

The analysis of the UK court supports the analysis of this Court (following the Supreme Court) as to the concept of a detention order or indeed a sentence, which is that it refers to a sentence or detention order that has been made by a criminal court after conviction. That is what has occurred in the respondent's case in the United Kingdom.

72. In respect of the respondent's example of a poor person stealing a loaf of bread, this is entirely irrelevant to the legal issue of whether a default sentence for non-payment of a fine or a confiscation order can be enforced through the EAW proceedings. In the first place, the assessment of fines and the default period in respect of non-payment of such a fine is a matter for the domestic legal system. The question of whether it is appropriate and/or lawful to impose a default penalty in respect of a person who cannot pay is a matter for the national court. If human rights are breached because such a situation has arisen, that is a matter to be remedied within the national legal system. It would only be in the case of egregious circumstances such as a defect in the system of justice in the issuing state, that surrender to that state would not be permitted on a fundamental rights basis.

73. There is no evidence in the present case that there is an egregious defect in the system of justice in the UK whereby it does not allow for the protection of human rights in the course of sentencing. The Court cannot refuse his surrender in circumstances where the respondent has not established, *in accordance with the applicable legal principles*, that surrender would violate his fundamental rights.

74. Moreover, in the present case, there is a clear statement of law that the respondent's rights were protected in the issuing state as a defendant has the option to pay the confiscation order at any time and, *if his assets are insufficient to meet the confiscation order,* he may apply to the High Court for a certificate of inadequacy. If such a certificate is granted, he may then apply to the Crown Court to reduce the amount of the confiscation order.

75. The respondent's evidence by way of affidavit was not entirely clear as to his application for a certificate of inadequacy. The implication, however, from para 11 of his affidavit of the 9th January, 2019, is that he did not seek such an order. He stated that due to the lack of a receiver appointed by the CPS "*I was not in a position to get the necessary information from those jurisdictions which could assist me in obtaining an "Inadequacy Order" which, in turn, would assist in my applying for a discharge from the confiscation order."* At the very least however, this is an acknowledgement by the respondent that obtaining a certificate of inadequacy provides relief from the confiscation order. He said earlier in that paragraph that he co-operated fully with the CPS signing over all monies that were available to him.

76. It is therefore probably not coincidental that he has given no affidavit of laws to show that such a certificate of inadequacy would not ameliorate the position his counsel urged upon the Court; that there was an unfairness in the case whereby a rich person could pay this penalty and not go to prison, and a person such as his client where he had no money, was being sent to prison. At most the case made on affidavit by the respondent is that, because of inaction by one state actor, namely the CPS, he was unable to obtain the information that would assist in obtaining the certificate. Furthermore, he made a complaint that the magistrate did not afford him a means test which he believed is the norm in these situations. He made a general claim that he signed over all monies available to him.

77. It is not for this Court, as executing judicial authority, to adjudicate on whether or not the CPS were inadequate in their dealings with him. Nor is it for this Court to assess or adjudicate upon the apparent failure of the UK magistrate to afford him a means test or indeed to assess his means at the relevant time. This is precisely the type of adjudication that must be carried out in the courts of the issuing state. The courts in the issuing state are in the best position to deal with any such claim. It is also noteworthy that the respondent has not provided any evidence that he had no chance of challenging the actions of the CPS in the application for a certificate of inadequacy or in any other proceedings such as a judicial review application. He has also not provided any evidence that he could not challenge the magistrate's failure to give him a means test.

78. The High Court, as executing judicial authority, may only refuse to surrender where there is a real risk that his rights cannot be protected or were not protected in the issuing state because of a defect in the system of justice there such that it would be egregious to surrender him. No such evidence has been put forward in the present case. The Court therefore rejects his objection that his impecuniosity or, any lack of assistance from the CPS, requires the Court to refuse to surrender him under s. 37 of the Act of 2003.

79. I also reject the respondent's submission that the *Gilligan* case is determinative of the issue that this is a civil jurisdiction and not a criminal one. The *Gilligan* decision was based upon a consideration of particular provisions of Irish law contained in the Proceeds of Crime Act 1996, the Criminal Justice Act 1994 and the Offences Against the State Act 1939. In that case, McCracken J, *nem diss*, stated that he did not consider that the present case could be distinguished from a prior decision about the Proceeds of Crime Act or earlies cases that he cited. He stated that the Criminal Justice Act, 1994 did not provide for the trial of any person on a criminal charge and therefore did not offend against Article 38 of the Constitution. Ultimately, the Supreme Court held that the relevant provisions of the Criminal Justice Act, 1994 did not provide a jurisdiction for the Special Criminal Court to make those orders. The primary jurisdiction of the Special Criminal Court is under s. 43 of the Offences Against the State Act 1939 is *"to try and convict or acquit any person lawfully brought before that court for trial under this Act."*

80. The finding of the Supreme Court in *Gilligan* is not in any way determinative that these kind of confiscation provisions cannot be considered criminal either in this jurisdiction under appropriately drafted legislation or, more pertinent to the present proceedings, under legal provisions in other jurisdictions. The respondent referred in a general way to articles in legal periodicals questioning whether these matters are civil or criminal. The only evidence before the Court is that UK law views them as an integral part of the sentence in UK criminal proceedings. In terms of authority from other jurisdictions or courts, the respondent has not produced any case law that supports that contention. On the contrary, the case law produced to this Court demonstrates that these types of confiscation orders may be viewed as part of the original criminal process. An example is that of *Phillips v UK* [2001] ECHR 437 where the European Court of Human Rights ("ECtHR") held that confiscation procedures after conviction did not amount to being charged with an additional offence.

81. This Court is satisfied that the view that the Irish courts take of their own confiscation procedures, as to whether they are civil, criminal or a hybrid, does not affect the legal position with regard to other jurisdictions. As stated by the Court of Appeal in *Minister for Justice and Equality v Mangan* [2017] IECA 329 "*Ireland does not export its Constitution*". That statement was based upon the Court of Appeal's understanding of the decision of the Supreme Court in *Balmer v Minister for Justice and Equality* [2016] IESC 25.

82. In other words, if this jurisdiction chooses to implement confiscation procedures in one way, namely by deeming them civil proceedings, that does not affect how this Court must view the legislation in another jurisdiction. Thus, even if it can be said that our Constitution would not allow for such confiscation orders and the manner in which they are obtained to be considered part and parcel of the criminal process arising out of the original trial of the offences (and such a determination is by no means certain), this does not affect the ability to surrender the respondent to a jurisdiction where they are considered part of the criminal process. It would only be in egregious circumstances that surrender would be prevented; those egregious circumstances have not been shown to exist here.

83. In the present case, the statement in the EAW that the confiscation order is an integral part of the UK sentencing process, remains unchallenged. Furthermore, it is clear that the decision in Phillips and the decision in *Woolley v UK* [2011] ECHR 103 from the ECtHR establish that these types of processes, being part of the criminal trial do not fall foul of the European Convention on Human Rights.

84. In all the circumstances, this Court rejects the respondent's objection to surrender grounded upon a claim that this type of default sentence does not come within the type of sentences for which surrender may be ordered under the 2002 Framework Decision. On the contrary, the provisions of the 2002 Framework Decision, the provisions of the Act of 2003 and all relevant case law demonstrate the contrary position; this type of default sentence comes within the type of sentences for which surrender may be ordered.

Section 37 – Fundamental Rights

Article 8, Article 6, delay and proportionality
85. The respondent objected to his surrender on a number of grounds which fall under the umbrella of alleged breach of fundamental rights. He made these objections as individual points of objections, but concentrated mainly upon them as cumulative grounds upon which his surrender should be prohibited. In particular, the objection based upon Article 8 was argued on the basis of these cumulative factors. The Court will deal with them individually and together. The main ground upon which the objection as based was the nature of the sentence he was facing, the history of the proceedings in the UK and in particular their length, and his own personal circumstances. The Court will outline at the beginning the evidence he placed before the Court as to his personal circumstances.

Personal circumstances of the respondent
86. The respondent swore three separate affidavits in these proceedings. In his first affidavit dated the 24th July, 2017, he stated that he had been arrested in 1999, refused bail and when his trial was concluded in 2000 he had already served eighteen months. He said he was released on licence in or around mid – 2003. He applied for and was granted permission to serve his license period in Ireland from October, 2003.

87. Since that time, he has lived in the state. He lived with his wife until her death in 2007. From then he lived with his two children from that marriage who are now adults. He said he has a new partner and they have a nine-year-old daughter and he is active in her domestic life.

88. In that affidavit, he said he had been advised by lawyers in the UK that bankruptcy is not a defence to confiscation proceedings and that there is a power to increase the custodial portion of the sentence at issue. He said that he was advised that the UK authorities believed that there are funds in his name in other countries, but despite that, to the best of his knowledge, no effort had been made to carry out those inquiries or appoint receivers or seek mutual assistance from any of the countries that they believe have assets belonging to him. He said it was an impossible task for him to disprove the nonexistence of those purported assets. He said that he did not have any such assets and had no ability to pay the sum demanded of him.

89. In his affidavit sworn the 14th February, 2018, the respondent put forward a chronology of events that he said took place in the UK. This included that in June 2004 and June 2005 the CPS wrote to his former solicitors in England who had replied on each occasion saying they no longer had instructions. He said that it appeared later in June 2005 that the enforcement task force of HMCE was notified that he had been released to a particular address in the UK. A letter dated August 2005 from the Irish Probation Service to their UK counterparts had stated that he had completed his period of voluntary supervision by that service in Ireland. He said that he had made no secret of his whereabouts although the Irish Probation Service had not visited him at his home in Ballybrack, Co. Clare.

90. The respondent said that over the years such efforts, if any, that were made to locate him were ineffective. He said that he was classed as being "missing" from the 29th August, 2006. He said that no attempt was made by the prosecuting or Irish authorities to contact him at his address where a search warrant had been executed in June, 1999. He said that attempts were made to find the assets by international letters of request transmitted to Ireland as well as several other jurisdictions between 2007 and 2014 without result. He said a domestic warrant was issued on the 5th March, 2010 and reissued on 8th March, 2011 and 6th March, 2012 at the request of the prosecuting authority. He said that the domestic warrant was executed in the UK on the 4th August, 2016.

91. He said that he brought proceedings in the UK to challenge the delay in the bringing of committal proceedings against him. He referred to an outline chronology as the steps taken by the issuing state on the foot of the confiscation order. This demonstrated that enquiries were made with Irish and United States authorities and financial intelligence checks were being undertaken in 2008. The task force in 2009 confirmed to the Revenue and Customs that there was no trace of the respondent. In April, 2010 he was circulated as being "wanted" and a letter was sent to him at a UK address stating that he was at risk of arrest. In July, 2010 the Joint Border Force confirmed that there was no trace of him inside or outside of the UK. A marker was put on the police national computer and other systems and in March of 2011 a warrant without bail was reissued.

92. That warrant was reissued each year over the following years. In February 2013, the Irish authorities said there was no trace of him. It was stated that in 2014, there were further inquiries made with the Criminal Assets Bureau which showed no trace of him at the address provided at HMP Ford, the Irish address agency could not trace him either.

93. It appears that the respondent was arrested when he travelled to the United Kingdom. He also exhibited a chronology that was prepared by the Crown Prosecution Service ("CPS") for the purpose of the judicial review proceedings. The respondent stated that he does not believe it contradicts the chronology advanced on his behalf but it itemises the actions taken by the issuing state on foot of his convictions. He referred to the fact that at various stages as early as the 29th August, 2006 the CPS was of the view that he was possibly in Ireland or in 2007 thought to be in Éire or in March 2009, the suspicion was that he was in the Republic of Ireland.

94. Finally, on the 9th January, 2019, shortly before the hearing, the respondent swore another affidavit. It is of note that he said that in December 2009 a named Garda applied to issue a summons to him in respect of a road traffic offence and that was directed to his address at Ballybrack, Co. Clare. He said that the CPS's assertion that they did not know where he was could not be correct as he was given permission to return to Ireland and complete his parole here. He said that he was granted a driving licence during the period of time he was in prison and that showed his address as Ballybrack, Cloonlara, Co. Clare. A copy was kept on file in the prison.

95. The respondent also said that the detective who arrested him on foot of the EAW was the same detective who attended at his home in Ballybrack in 2007 when his wife died. He said he lived openly at the address, as anyone who knows him will attest.

96. The respondent said that the CPS supported his application for leave to appeal in the Supreme Court of the United Kingdom. He did not produce the agreed note that he stated in the affidavit would be produced.

97. The respondent said that when he was released from prison in March, 2003 he had a temporary address in Middlesex for six months before being granted permission to return to Ireland. An address in the UK was a requirement for parole. He said that he had not seen his wife and child for over four years. His wife had health issues and would not travel to the UK. He said when he returned to Ireland it was difficult reconnecting with his family after such a long time, but eventually everything worked out until his wife died in 2007.

98. The respondent detailed how he put his sons through school and college. He said that he now has a second relationship and has a ten-year-old daughter. He said that after his wife's death, he spent the next year as a carer for his mother who died over a year later. He said he was means tested by the Department of Social Welfare during that period, and had an approved carer's allowance as he had no means.

99. The respondent said that he travelled to the UK a number of times since his release from prison and was shocked when he was arrested in 2016. He contacted his former solicitor and he agreed to handle the case as he was familiar with it. He said he had lived openly in Ireland and got on with his life.

100. He then indicated that he developed a heart condition in October, 2017 and that treatment is ongoing and he referred to a copy of a consultant cardiologist's report. This report showed that in 2009 he had an angiogram which revealed modest coronary artery disease. He said that he developed further chest pain in October, 2017 that demonstrated severe progression of coronary artery disease and he required the insertion of a number of stents in what was a complex procedure. The doctor says that he has done relatively well since then. He does get irregular heartbeats and ventricular ectopics. He also has a tendency towards hypertension. He is on some medication. It is said that he is doing relatively well but he will need ongoing cardiac care.

101. He said that the UK authorities could have easily located him by contacting his probation officer. He said he believed that it would be wholly unjust to put him back in prison nearly twenty years after he originally went to prison. He said this is especially so given that with interest the amount that he is required to pay under the confiscation order now exceeds £13,000,000 GBP. He said that he can never repay the smallest fraction of that sum.

102. Finally, he said in or about mid – 2007 he entered into the second relationship with his partner. He did so on the basis that he would not be required to return to the UK to serve any further period in prison. He said thereafter they decided to have a child. He then stated that had he known that she would be left without a father in the state in her formative years because of the failure of the UK authorities to pursue the matter of the confiscation order in a timely fashion, they would not have had this child.

Article 6 and delay

103. The respondent objected to his surrender on the grounds that the delay, namely the 17 year gap between conviction and arrest on this EAW, was such that it would breach his Article 6 rights to surrender him. It appeared to be accepted that his point under Article 6 alone would not necessarily be a good ground, but when combined with his Article 8 rights and with Article 49(3) of the EU Charter, which says that penalties should not be disproportionate, his surrender should be refused. I will deal with this as an individual ground in the following paragraphs.

104. The respondent referred to the fact that he had brought judicial review proceedings in the UK to prohibit the enforcement of the sentence on the grounds of a breach of Article 6 of the European Convention on Human Rights. Indeed, at an early stage of these proceedings, he sought adjournments of the hearing of this EAW application on the basis of those proceedings. As stated above these proceedings were ultimately adjourned for a period of time because of the existence of the *O'Connor* and subsequently the *RO* cases in terms of the so called Brexit point. This Court was informed in November 2017, that his application for leave to appeal the refusal of his application at the High Court was refused by the Supreme Court in the UK.

105. The Court was informed that no decision had been made as to whether to apply to the ECtHR in respect of that final decision. It was submitted that the respondent was concentrating on these proceedings. The Court was informed that he had, through his solicitor, given copies of the relevant orders and decisions of the UK courts to the Chief State Solicitor. When counsel for the minister sought to place those before this Court, counsel for the respondent objected. It appears that this objection was based upon the form in which they would be put before this Court. Ultimately, this Court ordered that the Chief State Solicitor should put the orders before the Court by way of affidavit stating their origin.

106. An affidavit of Thomas O'Rourke, solicitor of the Chief State Solicitor's Office was then filed after the hearing. In this affidavit Mr. O'Rourke indicated that the document entitled "*HM Courts & Tribunal Services to D.O'C*" was provided by the respondent's solicitor by letter dated 13 October, 2017. This document amounts to a set of instructions concerning the judicial review proceedings including an indication of the date for hearing. A further document entitled "*Application for Appeal Certificate*" had been provided by the respondent's lawyers at the listing of this case in Court on the 29 January, 2018.

107. Mr. O'Rourke said that the "*Order*" and the "*Approved Judgment*" were provided to the central authority of this state by the issuing judicial authority via email on 8th December, 2017. All of the documents were therefore documents that the Court was entitled to receive and should receive. The documents from the issuing state (sent via its central authority) amount to additional information that should and must be forwarded to the High Court as executing judicial authority under the provisions of the Act of 2003. The Court raised the different statements as to source of the documents with the parties. The Court was told that there appears to have been multiple sources of the documents as the Order and Approved Judgment may also have been handed over to the representative of the minister during one of the Court listings. Neither side availed of the opportunity that this Court gave to make submissions based upon the source of the documents as set out in the affidavit of Mr. O'Rourke.

108. The provenance of the documents may have some bearing on how a court is entitled to use them. The respondent presumably

provided this information to establish that he was genuinely engaged in challenging the existing sentence in the United Kingdom. The material provided by the issuing state is additional information that has been transmitted by the central authority of the UK for the purposes of the Act.

109. The Court is not required for the purpose of these proceedings to consider whether these documents, especially the judgment, is evidence of the truth of its contents. The Court notes however that in many cases this Court is specifically provided with judicial decisions as evidence of the truth of their contents for the purpose of establishing facts so that correspondence of offences or double criminality can be assessed. The judgment is however evidence of the fact that a particular application was before the UK court and that a certain decision was made. It should also be noted that insofar as the judgment is being placed before the court as legal authority from another jurisdiction, it is not a binding authority. This Court must make its own decision in terms of the law in this jurisdiction.

110. It is not in any way disputed, and indeed it is the evidence of the respondent, that he made an application to the UK courts to prohibit the enforcement of any sentence against him. It is also not contested that he relied on Article 6 ECHR in making that challenge. The respondent does not contest that this was considered by the UK court and was rejected. In the view of this Court, it is established that he had an opportunity to argue and make his case on Article 6 before the UK courts. Moreover, in this case, the respondent, through his counsel presented to this Court a number of UK decisions which demonstrate that the UK courts take into account delay in the context of the enforcement of confiscation orders.

111. It is well-established law in this jurisdiction, set out in numerous decisions by the Supreme Court (in particular *Minister for Justice and Equality v. Stapleton* [2007] IESC 30, *Minister for Justice and Equality v. Hall* [2009] IESC 40) that issues in terms of fair trial rights, including delay, should be dealt with in the issuing state. It would only be where there was an egregious defect in the system of justice in the issuing state that the Court would consider refusing surrender. It is demonstrably clear in the present case that there is no basis for any claim that his surrender is prohibited on the basis of real risk of a breach of Article 6 of the European Convention on Human Rights.

Article 6, indigency and proportionality

112. In relation to the question of proportionality, the respondent's principal assertion was that imprisonment of seven years for this type of confiscation order in addition to the eight years he had already served, was disproportionate to the crime. He further added that it was disproportionate in circumstances where his client was indigent and unable to pay.

113. The Court is satisfied that the issue of the proportionality of a sentence that has been imposed, is not a question for the issuing state. That was established in *Minister for Justice and Equality v Ostrowski* [2013] IESC 24, a case to which the respondent referred. Any issue of proportionality has to be considered within the context of Article 8 and whether it would be disproportionate to surrender a person in all the circumstances.

114. Moreover, this Court is quite satisfied that in the context of a multimillion pound Sterling fraud of which this respondent had been convicted and in light of the value of the confiscation order itself, it is not disproportionate for such a lengthy sentence to be imposed.

115. The respondent's other main contention in terms of proportionality and in terms of Article 6 was his impecunious status. The respondent had not raised this initially in his oral submissions as a standalone ground, although it appears to have formed part of a ground to the effect that his s. 37 fundamental rights under the Convention or Bunreacht na hÉireann were violated. In that ground, he pleaded that imprisonment of a person for non-payment of a sum without proof of contempt of court or the wilful refusal to pay violates a person's right to a fair trial and/or their personal rights pursuant to Article 30 of the Constitution.

116. The respondent also submitted that a breach arises, where a person who seeks to discharge or reduce the term of imprisonment on the grounds of inadequacy or inability to pay, must bring such proceedings himself. He also relied upon the fact that he cannot avail of bankruptcy or insolvency protection in respect of the order and he is faced with a criminal procedure which is impossible and/or unduly onerous to defend. The respondent, as has been stated above, never filed any affidavit of laws with regard to the situation in the United Kingdom. One would have expected detailed evidence as to the law in the UK to be placed before the Court. It does however appear from the EAW that he was entitled to seek a certificate of inadequacy in the High Court. As referred to above, he appeared to accept that statement in paragraph 11 of his affidavit of the 9th January, 2019. There is no evidential conflict on that statement. I therefore accept that the position in the UK is that he could have sought a certificate of inadequacy which would have ameliorated his situation if he was truly impecunious.

117. The respondent relied on the rule in *Brown v. Dunn* (1893) 6 R. 67 that there was no contradictory evidence as to his impecunious status or that the evidence he gave was not put in issue. In reply to that submission, counsel for the minister referred to his initial submission where he pointed to issues with regard to the respondent's credibility. In the view of this Court, there is no need to make any assessment as to the respondent's credibility because of the nature of the exercise that this Court must engage in when considering whether his surrender is prohibited by the provisions of the Act of 2003. The issue as to whether his surrender is prohibited under s. 37 must be addressed in accordance with the applicable legal principles.

118. It seems the respondent made a number of separate claims under this general heading of his lack of financial means. With respect to his claim of violation of rights because he would have to bring his own proceedings concerning a certificate of inadequacy, I am not satisfied that the requirement that a person has to make a claim for a certificate of inadequacy in order to set aside a confiscation order amounts to a breach of rights under the Constitution. In the circumstances pertaining to this case, there has been a criminal process and a finding of guilt concerning tax fraud. The confiscation of assets order only occurred after that finding of fraud. On the basis of the information before me, I do not accept that a situation where there is protection against imprisonment for failing to pay that order on grounds of inadequate means amounts to a breach of constitutional rights merely because there is an onus on the convicted and sentenced person to seek such relief his or herself.

119. Such a system provides protection for an individual sentenced person, but it also protects the integrity of a system of justice. The person has been found guilty of an offence and the assets have been confiscated. The confiscation order arises from the conviction which concerns a fraud but there is a protection from having to serve an order where there are inadequate funds. It is not unduly onerous to put a burden on the person to take steps to demonstrate the inadequacy of funds.

120. More importantly however, in light of the decisions of the Supreme Court in *Stapleton* and in particular in *Balmer*, even if this Court was incorrect and such a procedure was a breach of constitutional rights, that does not of itself prohibit surrender. The law is well-established, it is not for this jurisdiction to impose its constitutional norms in another jurisdiction. Indeed, the respondent accepted this principle, insofar as he has relied upon and handed into court, an article from the Common Market Law Review written

by Koen Lenaerts, the President of the CJEU, writing in his personal capacity. In that article it is argued that it is only where the order would violate EU norms rather than violating national domestic norms, that surrender can be prohibited. That principle is also established in the case law of the Court of Justice of the European Union.

121. The respondent has not placed before this Court any information or case law to suggest that this type of order, together with this process for dealing with a person of impecunious means, would be contrary to fundamental rights in terms of EU law or in terms of European Convention law. I therefore reject that point as a standalone argument.

122. The respondent also makes the case that he is indigent at present and should not be surrendered to serve a penalty where a rich person would not. This submission is related to the previous argument concerning the default sentence which was dealt with and rejected at paragraphs 67 to 84 above. The submission made by the respondent is simplistic and for that reason may appear superficially attractive: Poor persons should not be punished simply because of poverty. That argument does not engage with the reality of the decision making process as regards requests for surrender under the Act of 2003. The Act includes protections where it is established on cogent evidence that there are reasonable grounds for believing that there is a real risk that fundamental rights have been violated or will be violated by surrender. Those protections are set out in s.37 of the Act of 2003 and the cases, many of which have been referred to above, which provide for the principles to apply when claims are made under that section.

123. In so far as there is a claim that this would violate his Article 6 rights, then the respondent may only be successful where he demonstrates an egregious breach of the system of justice in the issuing state. In short and without dealing with the case law in detail, there must be something in the nature of a flagrant denial of justice in the issuing state. The respondent has not produced an iota of evidence to demonstrate such a flagrant denial of justice.

124. This confiscation order including the default sentence was only made after a finding of guilt in relation to tax evasion offence. He was present and represented at the trial and the confiscation hearing. He was also represented at the enforcement hearing and he was in a position to challenge those proceedings as a breach of Article 6 rights (even if he did so on another ground). He had the opportunity to seek a certificate of inadequacy which would ameliorate his sentence but he chose not to do so because he says that he was not in a position to get information from other jurisdictions to assist him due to inaction by the Crown Prosecution Service. He did not seek to challenge that inaction. He has not placed any evidence before the Court that the laws in the UK prevented him from making the case about his inability to obtain information as to his means.

125. It is not for this Court to retry his sentence hearing or to try the issue as to his means. The respondent was tried and sentenced in the issuing state. Absent a flagrant denial of justice, this Court as executing judicial authority may not refuse to surrender him if the EAW is otherwise valid and there exists no other ground for prohibiting surrender. There is no flagrant denial of justice to surrender the respondent in all the circumstances of this case. This point of objection is therefore rejected.

Article 8

126. Counsel for the respondent referred to the above factual situation in support of his case that surrender would amount to a failure to respect his private and family rights. In relation to Article 8, counsel referred the Court to a decision of the UK High Court, *Camara v Director of Public Prosecutions* [2003] EWHC 2737 (Admin), which indicates the present approach of the UK courts to Article 8. He also relied on a judgment of this Court in a decision called *Minister for Justice and Equality v. DS* [2015] IEHC 459 He also relied upon the Supreme Court decision in *Ostrowski*.

127. Counsel for the minister relied upon the well-established case law in this jurisdiction as regards how issues such as delay in Article 8 are to be approached. He relied on the case of *Minister for Justice v. T.E.* [2013] IEHC 323 in which Edwards J. set out that delay was a factor to be considered in the balance and was not an automatic bar to surrender. That has been the position in this jurisdiction for some considerable time now. The cases of *Minister for Justice and Equality v. Brennan* [2007] IESC 21, *Stapleton* and *Hall* establish that issues such as delay and fair trial are to be raised in the issuing state. It would only be where such issues cannot be raised in the issuing state to such a degree that there may be an egregious breach therein, that they fall to be decided in this jurisdiction.

128. That is not to say that delay is not to be considered in this jurisdiction, on the contrary it is to be considered in the context of Article 8. It is also to be considered where a claim of abuse of process is made.

129. The Court is satisfied that the case of *Minister for Justice and Equality v J.A.T (No 2)* [2016] IESC 17 has given a clear indication as to how exceptional it will be that surrender would be prohibited on the grounds of Article 8. That is not to say that exceptional circumstances must be shown; it is only exceptionally that a situation will be reached where the high threshold for prohibiting surrender will be met.

130. The minister also relied upon the case of *Minister for Justice and Equality v Corry* [2016] IEHC 670. In particular, counsel relied upon para. 42 onwards, para. 44, para. 50, and paras. 58 and 59. In that case, the court had held that even where there was culpable delay, in circumstances where there had been an initial refusal to extradite, extradition was not prohibited. It is accepted by the respondent that there is a not insignificant difference between the two cases, in that Mr. Corry was requested for prosecution for extremely serious offences. However, it was submitted that in the present case, these were extremely serious offences, that there was a high public interest in the prosecution of financial crime and in the recovery of assets.

131. On the other hand, the respondent emphasised the difference in the cases and also that unlike in the *Corry* case, it could not be said that his averments were untrue.

132. In respect of Article 8, this Court must engage in a fact specific exercise. The Court has to examine the issue of the public interest in his surrender. The Court has to look at the issue of delay in the context of that public interest. The evidence establishes that the respondent had this confiscation order made against him in 2003, and that he appealed against that order and that appeal was dealt with in 2005. In that respect the respondent has known about this case for a considerable period and it can be no surprise to him that he was being sought for this.

133. In respect of his averment about having entered into a second relationship in 2007, that he did so on the basis that he would not be required to return to the UK to serve any further period in prison. I am required to assess the evidence before me. I do not accept that the position he states is correct. In the first place, the respondent has provided no basis for his statement. He has not provided any evidence that he was told that by a solicitor or that he could have thought that the sentence would never be enforced. It is not stated in the time line he exhibited as having been presented to the UK court when his claim in respect of Article 6 delay was being considered.

134. The evidence is that he was present when the confiscation order was imposed upon him and it was ordered that the default penalty was to be consecutive to the sentence he was serving. As it was a default sentence, he was given time up to the 31st May, 2004 to pay the confiscation order. It is clear that from his own evidence that in July 2004, his solicitor in England was writing in respect of that matter. He said that they wrote without instructions at that stage. On the other hand, he must have been aware that from May 2004, he was required to pay that money. He does not explain how he thought, without having paid the confiscation order, that he would no longer be required to serve that default period in prison. Nowhere in his affidavit does he explain anything about his appeal against the confiscation order, an application for leave to appeal against the sentence being dismissed, as is stated in the additional chronology that he himself put before the court. That was on the 9th June, 2005. Therefore, at this stage it appears that he must have known that the default sentence was liable to be triggered.

135. Overall however, there is simply no ground whatsoever on which he could have believed that he would no longer have to serve that sentence. Similarly, it is rejected that he had his child only in the belief that he would be with her at all times. The implication of what he said is that he would not have had the child if they had known that she would be left without a father in the state in her formative years. The facts are somewhat similar to *Corry* except the respondent in this case is still in a relationship with the mother of his child. In the present case it is even more remarkable that the respondent did not file an affidavit from his partner to corroborate this statement.

136. Even if he did enter that relationship or have the child on that basis, it is not however determinative of the issue that this Court has to decide, namely is it disproportionate to order his surrender? The Court must look at all the circumstances of the case. It must also be said that even accepting that he had that belief, it can only have been a mistaken one. It was not as a result of any misrepresentation to him by the authorities in the UK or even mistakenly by his own solicitors. He has not made the case of misrepresentation or inducement.

137. The Court assesses this as a crime of particular seriousness. It was a complex series of VAT frauds involving as it did five companies. It involved cross border trade. The respondent's role was one as a controlling mind of these companies and therefore his culpability was significant. The length of the sentence both in terms of the original sentence of eight years, and the amount of the confiscation order, and the default period in respect of same, signify just how seriously the court in the UK viewed this. No evidence has been put before me that this jurisdiction would view such VAT fraud of this type of number and complexity as being particularly less serious. In particular, and more pertinently, there is no suggestion that this jurisdiction would treat such offending behaviour as anything other than serious.

138. In terms of the delay, it is important to recall that the United Kingdom authorities have not been asked to give an explanation as to delay. The central authority did not believe it was necessary to exercise their function under s.20. If this Court was of the view that it was necessary, this Court would have no hesitation in asking for that explanation. Indeed, some of the explanation may be found in the judgment dealing with delay that the issuing judicial authority has forwarded for the consideration of this Court. I am going to deal with the matter without recourse to the information contained in the judgment. This is perhaps somewhat artificial but in my view, it establishes that even when this Court acts on the information provided by the respondent, the delay, even assuming a deal of culpability on the part of the UK and Irish authorities, does not alter the outcome.

139. Undoubtedly a great deal of time elapsed since the original offences, and the subsequent hearing. Given the nature of the offences it was inevitable there would be some delay before trial. The process of seeking the making of the confiscation order by its nature requires a separate consideration. It also required that he be given time to comply. The period in which to comply with the confiscation order extended beyond the custodial part of the original sentence. He was fully aware of the fact of this default sentence. It is also clear that he had appealed the matter and that it was only in 2005 that the appeal was rejected. Although one may be critical to a certain extent of the inability to find him in Ireland when he was still living at the same address, it appears that even when the matter was referred to Ireland the Irish authorities were not then in a position to indicate where he was. That may also be criticised in light of the information in possession of the Irish authorities.

140. Relying on the time line he has produced, the UK authorities appeared to have been seeking him. It appears that the authorities were not perhaps as diligent in joining all the dots as they should have been. There is no indication whatsoever however in anything that has been placed before me, that there was any *mala fides* in respect of this matter. At worst there was some lack of joined up thinking which appears to have resulted in some delay. From the chronology exhibited by the respondent, it appears there was at least regular consideration of the file and enquiries about this respondent's whereabouts and the whereabouts of any assets in other jurisdictions. The absence of *mala fides* is not determinative and the Court must still take into account the delay.

141. In my view, a sizeable portion of the delay since the finalisation of the appeal regarding the confiscation order, with all of the resources that were available to the authorities both here and in the UK, is apparently culpable. Even that type of culpable delay as was stated in *Corry*, does not extinguish the public interest but it may lessen it. I am not satisfied that the delay prior to 2005 can be said to be culpable per se given the nature of the proceedings.

142. The time line provided by the respondent and relied on by him demonstrates that the authorities in the UK still sought him and have actively communicated with authorities in this jurisdiction and in other jurisdictions to find both him and the assets. They never abandoned their search for him. It must also be noted that the delay was in seeking the enforcement order in the Magistrates' court. The respondent was arrested when he came to the UK but that arrest gave him the opportunity to contest the enforcement. I am satisfied that no matter what culpable delay there was in failing to join all of the dots in the time between the end of his appeal and the arrest of the respondent, it does not reduce the high public interest in his surrender for such serious offences to any significant degree.

143. The respondent has raised the fact that he will have to serve this sentence after having served the previous sentence. The sentences were however to be consecutive. Consecutive sentences are a matter for an issuing state. By the time the appeal process was over the respondent was already out on licence from the original custodial sentence. There is nothing particularly egregious about the fact that he was released prior to the other sentence coming into being. This is especially so where a long period had to be given for the payment of the confiscation order.

144. The Court must assess his personal circumstances. The Court has set them out above, they are not in any way unusual. Indeed, the fact that he has a minor child and had that child in the interim period since the sentence was imposed is the type of situation that comes before this Court on a regular basis. It is of note that there is no peculiar or particular aspect to his link with his child that can be said to be out of the ordinary. While the Court has to have regard to the best interests of the child, and does so, it is established law that the best interest of a child does not of itself mean that no extradition can be ordered. In this case, there is no suggestion that the child will suffer in any particular way over and above that which can be expected of any child who would lose access to a parent due to imprisonment. Even taking into account that he decided to have the child because he believed he would

not have to serve the sentence, there is nothing particularly oppressive, injurious or harmful that would result from his surrender.

145. The Court has to balance the public interest in his surrender for these serious offences taking into account the culpable delay of the UK and Irish authorities in not taking all possible steps to find him in this jurisdiction which was added to by the failure of the authorities in this jurisdiction to locate him although he was living at an address known to the authorities, as against his personal and family circumstances. On his personal and family rights there is nothing beyond the ordinary consequences of having to serve such a sentence more than ten years after his final appeal and sometime after his original conviction on these matters. The Court has no hesitation in holding that the public interest outweighs the private interests of the respondent.

146. The Court has taken into account all of the factors relied upon by the respondent, including delay, the fact that he is a person of limited means, (although the extent of his inadequate means and its effect on the sentence is a matter for the UK courts), the fact that this is an unusual sentence, the fact that it is a sentence by means of a default sentence in respect of a confiscation order and the fact that he has already served another custodial period in respect of this matter. The Court is satisfied that in the context of the serious offending and the length of the sentence imposed by the UK court, it is not disproportionate to surrender him.

147. Therefore, this Court rejects the points raised by the respondent in relation to their contention that their surrender would violate their family and personal life fundamental rights as protected in Article 8 of the European Convention on Human Rights.

Cumulative Fundamental Rights Consideration
148. The respondent argued that his surrender would constitute a breach of his fundamental rights both individually but also on a cumulative basis. The Court assessed all of the human rights concerns raised by the respondent on an individual basis and rejected them. However, even taking all the issues raised by the respondent in his written and oral submissions on a cumulative basis, this Court is satisfied that the respondent's surrender is not prohibited on fundamental rights grounds. Furthermore, taking all the factors raised by the respondent into account, it is not oppressive or unjust to surrender him to serve this significant sentence, albeit a default sentence, imposed upon him in respect of these serious offences.

Conclusion
149. For the reasons set out above, this Court rejects all the points of objection raised by the respondent to his surrender. The Court will therefore make an Order for his surrender to the person duly authorised by the issuing state to receive him.