THE HIGH COURT

Record No. 2015/62 EXT

BETWEEN

THE MINISTER FOR JUSTICE AND EQUALITY

APPLICANT

AND

TOMASZ KRZYSZTOF SKWIERCZYNSKI

RESPONDENT

JUDGMENT of Ms. Justice Donnelly delivered the 24th day of October, 2016.

1. On a European arrest warrant ("EAW") issued by the Regional Court in Gdansk, Poland on 3rd March, 2015, the surrender of the above named respondent is sought for the purpose of serving five months and twenty eight days of a sentence remaining from a six month custodial sentence imposed upon him by the District Court of Gdansk-South on 6th August, 2007. This sentence was imposed upon him for the offence of attempting to take, with the intention of misappropriation, a hammer drill from an open Mercedes car on 22nd February, 2007.

2. The respondent has raised four separate issues as points of objection to his surrender:

(i) An issue of lack of correspondence with an offence in this jurisdiction;

(ii) An issue regarding the signature by a representative of the issuing judicial authority;

(iii) A point under s. 45 of the European Arrest Warrant Act, 2003, as amended ("the Act of 2003"), dealing with trial in *absentia.*

(iv) An issue under Article 8 of the European Convention on Human Rights ("ECHR").

Section 16 of the Act of 2003
Uncontentious issues
3. The Court is satisfied, on the basis of the details in the EAW, the additional information and the affidavit of Sergeant Gerard Newton, that the person before the Court is the person in respect of whom the EAW has issued. The Court is satisfied that the EAW has been endorsed in accordance with s. 13 of the Act of 2003 for execution in this jurisdiction. The Court is satisfied that is it not required to refuse the surrender of this respondent under s. 21A, 22, 23 or 24 of the Act of 2003. The Court is also satisfied that, subject to further consideration of s. 37, s. 38 and s. 45 of the Act of 2003, the surrender of the respondent is not prohibited by Part 3 of the said Act.

Contentious issues

Section 38 of the Act of 2003
4. The description of the circumstances of the offence as alleged in the EAW is set out at point E.2. as follows: "On 22 February 2007, in Gdansk, he attempted to take, with the intention of misappropriation, a Wacker Warke EH 23 220 hammer drill worth PLN 10,000 from an open Mercedes 210 registration GAH 6881, though he did not to (sic) carry through his intent because he was stopped by employees of PBUH Want spolka cywilna in Tezew, and in his attempt he acted to the detriment of the said business."

5. Counsel for the minister submitted that the corresponding offence is attempted theft contrary to common law. Counsel also submitted that the requirements of minimum gravity have been met in that the maximum length of custodial sentence outlined in the EAW is stated to be six months, with five months and twenty eight days remaining to be served by the respondent.

6. The respondent submitted that no correspondence had been made out with the offence of attempted theft. It was submitted that the use of the word "attempt" was insufficient to show correspondence with the jurisprudence on what amounted to a "criminal attempt" in this jurisdiction. It was also submitted that there was an absence of correspondence as it had never been shown that this was an attempted taking of an item without the consent of the owner as no owner had been identified.

7. Section 5 of the Act of 2003 states:

> "For the purposes of this Act, an offence specified in a European arrest warrant corresponds to an offence under the law of the State, where the act or omission that constitutes the offence so specified would, if committed in the State on the state on which the European arrest warrant is issued, constitute an offence under the law of the State."

8. The court is bound to apply the provisions of s. 5 of the Act of 2003 in accordance with the well established case law in this area including *Attorney General v. Dyer* [2004] 1 I.R. 40, *Minister for Justice v. Sas* [2010] IESC 16 and *Minister for Justice v. Dolny* [2009] IESC 48. As the Supreme Court stated in *Dolny,* in assessing whether the facts set out in the EAW would amount to an offence in this jurisdiction, the court is to have regard to the totality of the information before it.

9. In *Minister v. Sas*, the Supreme Court reiterated the well established jurisprudence that words in an extradition warrant must be given their plain and ordinary meaning, save where otherwise indicated. Words such as "stole", "rob", "murder", "rape", *etc*. must be given their plain and ordinary meaning and are not required to be explained in accordance with the law of a particular Member State. In the view of the Court, the word "attempt" must also be given a plain and ordinary meaning.

10. As the above description of the offence sets out, there was an attempt to take a hammer drill from an open Mercedes car. The attempt was thwarted by other people stopping it. The essence of what this respondent was engaged in has been clearly demonstrated; he was dishonestly (with the intention of misappropriation) trying to take the hammer drill from the car and was stopped because other people intervened. To say in this jurisdiction that a person was attempting to dishonestly appropriate another

person's drill from an open car but was stopped due to the intervention of others, would clearly amount to an attempted theft.

11. Under the heading of lack of correspondence, the main submission of the respondent was that the owner has not been identified. Section 4 of the Criminal Justice (Theft and Fraud Offences) Act, 2001 ("the Act of 2001") requires that the property be dishonestly appropriated from an owner. Reference was made to the case of *Minister for Justice and Law Reform v. Nowakowski* (Unreported, *ex tempore*, Supreme Court, Murray J., 12th October, 2011) in which the relevant EAW had referred to the phrase to the detriment of "a named person", owner.

12. The decision in *Nowakowski* establishes that the phrase *"'taking with a view to appropriate' is sufficient to meet the requirement that "he usurped or adversely interfered with the proprietary rights of the owner [and] that this occurred without the consent of the owner". The use of the phrase 'to the detriment' in all offences is sufficient to indicate an intention at the time of the taking to deprive the owner of the goods in question. In this composite way, all the necessary ingredients are contained in the description of these offences so that correspondence with an [offence] under s. 4 is established."* The Supreme Court also stated that the phrase *"'took in order to appropriate'[…] "may be interpreted as appropriating for one's own use and denotes an element of dishonesty."* By contrast, the Supreme Court held that to allege merely that a person has taken someone else's property, is, in law, a neutral statement and is not sufficient to constitute the offence of theft. In that case, the addition of the phrase "to the detriment of the owner" did not cure the lacuna in proofs.

13. In the present case, the reference to "with the intention to misappropriate" is sufficient to show that there was a level of dishonesty involved in the conduct of this particular respondent, which said dishonesty is further clarified by the particular circumstances of the offence outlined in the European arrest warrant. The offence also states that in the respondent's attempt to take the drill, "he acted to the detriment of the said business." It is in those circumstances that the respondent raises the fact that the word "owner" is missing and that no owner has been identified.

14. The Act of 2001 provides that a person shall be regarded as owning property if he or she has possession or control of it or has in it any proprietary right or interest (not being an equitable interest arising only from an agreement to transfer or grant an interest).

15. The Court disagrees that the absence of the word "owner" is of crucial significance. What is of significance is that the Court is satisfied that this respondent dishonestly attempted to appropriate the drill without the consent of the owner. The identity of that owner must be assessed by looking at the EAW as a whole. The question of whether the business is identified as an owner is first and foremost a matter of construction of the linguistic meaning of the overall description of the said offence. Undoubtedly, it has been demonstrated that the respondent was attempting to take the drill with the intention of misappropriating it. It was in that attempt to take the drill that the respondent acted to the detriment of the business. The phrase "the business" is undoubtedly used at that point to convey the meaning that the attempted taking of the drill was to the business's detriment, as it was the owner of the drill in the sense used in the Act of 2001. It would be absurd to construe the reference to the business as meaning that the business was either only the owner of the car or indeed only employing its employees and somehow lost the time that it took the employees to stop the attempted theft. The only reasonable and proper construction of the sentence is that the loss through the attempted theft of the drill would have been a loss to the business because of the absence of the drill.

16. The Court is also conscious that it is only correspondence of the offence that is required to be demonstrated and not the proof of the offence. In this case, the phrase "attempted to take with the intention of misappropriation" of the hammer drill in the particular circumstances outlined establishes that the respondent was attempting dishonestly to appropriate the drill without the consent of the person who is entitled to the possession or control of it, i.e. without the consent of the owner. Indeed, for the purposes of correspondence, the exact identity of the owner may not be required to be established, provided the court is satisfied that the details of the offence (or alleged offence) demonstrate that the dishonest appropriation of the goods was without the consent of the owner. That is unnecessary to decide in the present case as the Court is satisfied that the owner has been identified in this case.

17. For the reasons set out above, the Court is satisfied that the offence set out in the EAW corresponds with the offence of attempted theft, contrary to common law.

The signature of the representative of the issuing judicial authority

18. This point of objection was raised at the hearing of the action. It is a point which goes to the validity of the EAW before the Court. It is claimed that there is a discrepancy over the identity of the representative of the issuing judicial authority who issued the European arrest warrant. This arises in the following circumstances;

At point (I) of the EAW, it is stated as follows:

> "The judicial authority which issued the Warrant:
>
> 1. Name: Regional Court in Gdansk
>
> 2. Representative: Przemyslaw Banasik
>
> 3. Function (title or grade): Judge at the Regional Court in Gdansk – President of the Regional Court in Gdansk"

At point (K) in the EAW, it is stated:

> "1. Signature of the representative of the judicial authority which issued the warrant:
>
> 2. Forename, surname: Robert Studzienny
>
> 3. Function (title or grade): Judge at the Regional Court in Gdansk"

19. Counsel for the respondent pointed out that at point (I), it is stated that the representative of the issuing judicial authority is Banasik J. but the EAW has been issued by another person, namely Studzienny J. In counsel's submission, there is a failure to comply with both the Act of 2003 and the Council (EC) Framework Decision of 13th June, 2002 (2002/584/JHA) on the European arrest warrant and the surrender procedure between Member States ("the 2002 Framework Decision") and, in particular, a failure to comply with the form of the EAW set out in the Annex to the 2002 Framework Decision. Counsel submitted that this cannot be considered an insubstantial detail.

20. Section 11(1A)(b) of the Act of 2003 requires an EAW to specify the name of the judicial authority that issued the EAW, and the

address of its principal office. Section 11(1) requires that "A European arrest warrant shall, in so far as is practicable, be in the form set out in the Annex to the Framework Decision". Article 8 of the 2002 Framework Decision deals with the content and form of the EAW and it requires that the EAW shall contain the name, address, telephone and fax numbers and e-mail address of the issuing judicial authority. The standard format of the EAW set out in the Annex in the 2002 Framework Decision at point (I) indicates that what is required to be inserted is "[t]he judicial authority which issued the warrant:".

21. Undoubtedly, the judicial authority which has issued this particular EAW has been identified as the Regional Court in Gdansk. The issuing judicial authority is identified at both point (I) (clearly stated therein to be the Regional Court in Gdansk) and by implication in point (K) (as per the reference to Robert Studzienny being a Judge of the Regional court in Gdansk and to him having signed as the representative of the judicial authority which issued the warrant). Therefore, the position is that the identity of the issuing judicial authority has been clearly established in the manner required by both the Act of 2003 and the 2002 Framework Decision.

22. The respondent's complaint centres on the representative indicated at point (I) being different from the representative set out at point (K) of the European arrest warrant. Counsel for the respondent has relied upon the case of *Minister for Justice, Equality and Law Reform v. Kavanagh*, a decision of the Supreme Court. It is unfortunate that no written decision is apparently available. From the information provided by counsel, which is accepted, the facts of that case were somewhat different. As appears from the High Court decision in the same case (*Minister for Justice, Equality and Law Reform v. Kavanagh* [2008] IEHC 81), the EAW had contained very little information about certain matters that it should have contained, such as the date of the domestic warrant. More importantly, for the purpose of this case, it also did not contain a signature of the issuing judicial authority. That is unlike the situation here, as a representative who is identified as a judge of the issuing judicial authority has in fact signed the European arrest warrant.

23. Furthermore, this is not a situation, as was identified in Minister for *Justice and Equality v. Jalloh* [2016] IEHC 485, where the identity of the issuing judicial authority (as distinct from the identity of its representative) was directly contradicted in official documentation received from the issuing state. In the present case, the EAW has stated all that is required to be stated by the Act of 2003 and by the 2002 Framework Decision*, i.e.* the identity of the issuing judicial authority. There is a unambiguous identification of the issuing judicial authority.

24. While there may be a difference between the representative nominated at point (I) and the representative nominated at point (K) who actually issued the EAW, there is no suggestion that the Judge who actually signed the EAW was not entitled to do so. The EAW on its face has been issued by a representative of the issuing judicial authority. Under the principles set out in the 2002 Framework Decision and affirmed by the Supreme Court, this court must operate upon a high level of confidence between member states. Therefore, the court must have regard to the principle of mutual trust which is the cornerstone of judicial cooperation. In the circumstances of this present case, the Court must accept what is stated on the face of this EAW and accept that it has been issued by a representative of an issuing judicial authority.

25. The only difference is that, at one point, the representative is stated to be a particular person and that at the point at which the EAW is issued, a different representative signs the European arrest warrant. There is not necessarily a conflict here as there is nothing to say that the representative in point (I) must necessarily be the same representative as in point (K). Indeed, point (I) may be indicating the identity of the general representative of the particular court rather than the specific representative who issued the EAW as indicated in point (K). Therefore, as regards the essential aspects the EAW has identified those aspects and there is no ambiguity as regards the European arrest warrant.

26. Moreover, even if it considered that there is a difference between the identity between one representative in one place and another, the Court is entitled to have regard to the provisions of s. 45C of the Act of 2003 as regards the treatment of defects or omissions of insubstantial details in the European arrest warrant. The Court is satisfied that, even if it is considered to be a defect in that a different representative has been identified at point (I) than at point (K), this is a defect of a non-substantial detail in the European arrest warrant. There is no injustice caused to the person by this defect if it be a defect because the issuing judicial authority is clearly identified at both places, and there is no doubt as to which of the representatives has actually issued the European arrest warrant. The listing of another representative of the issuing judicial authority in another part of the EAW, does not impinge on the validity of a clearly identified signature of a clearly identified representative, namely a judge, of the clearly identified issuing judicial authority. Those substantial details have been identified and even if it is an error to list another representative elsewhere, it is an insubstantial detail in the context of the particular EAW and no injustice is caused by his surrender on foot of this European arrest warrant.

27. There is a difference in the wording of this EAW and the wording set out in the form of the EAW contained in the Annex to the 2002 Framework Decision. At point (K), the EAW refers to "signature of the representative of the judicial authority which issued the warrant". The form of EAW in the Annex to the 2002 Framework Decision refers to "signature of the issuing judicial authority and/or its representative". This slight difference in the wording of the EAW between the form set out in the Annex to the 2002 Framework Decision and the actual wording of the EAW submitted in this case is a defect of a non-substantial detail which does not cause any injustice. That difference may also be termed a technical failure to comply with a provision of the Act of 2003 namely to have the EAW in the form set out in the Annex to the 2002 Framework Decision, but it does not cause any injustice. I am quite satisfied that there is unambiguous clarity with respect to the nature and purpose of this EAW, despite two different judicial representatives of the issuing judicial authority being identified in different places on the European arrest warrant.

28. For the avoidance of all doubt, the Court is quite satisfied that this is an EAW which has been issued by a judge of the Regional Court in Gdansk and the Regional Court in Gdansk is an issuing judicial authority for the purposes of the 2002 Framework Decision and the Act of 2003.

Section 45 of the Act of 2003

29. This was the most seriously contested aspect of the case. In order to understand the legal issues, it is necessary to set out in detail the contents of the EAW and also of the affidavits filed by the respondent and the additional information sent by the issuing judicial authority.

30. Section D as set out in the EAW states that the respondent did not appear in person at the trial on 6th August, 2007 during which the judgment was pronounced. Under the 2002 Framework Decision, each member state may chose to prohibit surrender where there has been a trial *in absentia* unless certain conditions have been met. Ireland chose that option and did so by means of s. 45 of the Act of 2003. The circumstances in which that opt-out is to be exercised formed the basis for a further Framework Decision, namely the Council (EC) Framework Decision of 26th February, 2009 (2009/299/JHA) on the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial ("the 2009 Framework Decision"). By an amendment to s. 45 of the Act of 2003, Ireland implemented the newly inserted Article 4a provisions regarding this optional ground for refusal to surrender.

31. Points D.1b and D.1d in section D of the EAW have been relied upon by the issuing judicial authority, these being equivalent to paragraphs 3.1(b) and 3.3 of point (d) of the Table set out in s. 45 of the Act of 2003 and of the amended standard form EAW provided for in the 2009 Framework Decision. For ease of understanding, the Court will use the numeric system as found in the 2009 Framework Decision. There are some slight linguistic differences in the translation which will be dealt with by the Court in due course below.

32. Point (d) 3.1b of the EAW states that "the person was not summoned in person, however was actually served the official notification of the place and date set for the trial which resulted in pronouncement of the judgement, and this was done in a way which allows concluding beyond any doubt that the person was aware of the schedule trial and was cautioned that the court might issue the judgement even if he/she did not appear at trial".

33. Information as to how this condition is met is set out at point (d) 4 of the EAW as follows: "the summons to the trial of 6 August 2007 was sent correctly to the requested person to the address he had indicated; the summons was received by the brother of the concerned on 14 June 2007. Earlier on, on 23 February 2007, the requested person had been instructed in person of his rights and obligations in the capacity of the suspect, including the obligation to appear in response to any summons served on him in the course of the criminal procedure, and to notify the authority in charge of the proceedings of any change of his residence address or place of stay for any time in excess of 7 days. In addition, the requested person was cautioned that if a suspect changed his place of abode or did not stay at the address he had indicated without notifying of his new address, any writ sent to such previous address would be deemed served".

34. Point (d) 3.3 of the EAW states that "the person was served the judgement on 24 August 2007 and expressly instructed of his/her right to have the case re-considered or to file an appeal, and to participate in either of the procedures both enabling factual reconsideration of the matter and admission of new evidence and both leading potentially to the quashing or changing of the original judgement". The EAW also indicates that "the person did not apply for re-consideration of the case or file an appeal within the statutory term".

35. Point (d) 4 of the EAW, under which the issuing judicial authority is bound to set out how the particular condition at point (d) 3.3 was met, states "the requested person received the judgement in person at the address he had indicated; the judgement was appended with the instruction explaining the right to lodge an objection within 7 days following the service, where the objection letter should excuse his absence at the trial of 6 August 2007; the letter could further be combined with a request for written reasons of the judgement if the objection were to be rejected or dismissed.".

36. The respondent swore an affidavit saying that he recalled being arrested for the offence and having a conversation with the police but that when he walked out of the police station, it was the last he heard of the matter from an official point of view. He also stated that he had not been served with the judgment of the said trial. The central authority requested additional information about the serving of the judgment on the respondent. In its reply dated 13th April, 2016, the issuing judicial authority stated that the respondent did not appear at the trial even though he had been "notified in person of the date of the trial closed with the judgment pronounced *in absentia*". The issuing judicial authority also stated that: "the judgment was served on him in person (delivered to his own hands). Following the appeal lodged by the requested person and dismissed, the judgment became valid and final on 2 October 2007."

37. Further clarification was sought in respect of the service of the judgment. The reply came and stated that the service on him was evidenced by a mail receipt signed in person by the respondent. The issuing judicial authority again confirms that the respondent actually exercised his right to appeal.

38. The respondent swore a further affidavit having been served with the contents of the additional information. In that affidavit, he stated "I have seen the document with what is my signature but I don't have recollection of receiving same." That is the extent of his averment and it is noted that he does not dispute the fact of an appeal or indeed even stated that he does not recall appealing.

The Points of Objection under Section 45 of the Act of 2003

Form of the EAW

39. The first point made by the respondent is that the form set out in the EAW at issue in these proceedings does not conform with the form set out in the Annex to the 2009 Framework Decision. Counsel submitted that the form of words set out in s. 45 of the Act of 2003 corresponds directly with the form of the wording set out in the Annex of the 2009 Framework Decision. This EAW, it was submitted, conforms to neither.

40. Counsel for the minister has placed before the Court the original Polish version of the 2009 Framework Decision. Counsel refers to point (d) therein which now is included in the standard form Annex under the 2002 Framework Decision. Apart from some very minor reordering of words, the Polish version of this EAW and the official form set out in the Annex are identical.

41. While the High Court is obliged to have regard to the English translation, nonetheless it is appropriate for the Court to take this into account in identifying that clearly what is in question is the translation of the original Polish EAW into the English version, upon which this Court proceeds. The original Polish language form (d) clearly corresponds with the form of Polish language version of the EAW set out in the Annex to the 2009 Framework Decision. Undoubtedly, great care was taken at European Union level to ensure that the Polish version of the form is a proper translation of the English version (or vice versa as the case may be).

42. It is a matter of constant amazement to this Court that, despite the standard parts of original language EAWs being identical to the official version of the form recognised under EU law in that language, those standard parts nonetheless are constantly translated into various different English language versions. It should not be beyond the bounds of possibility that translators of EAWs would familiarise themselves with the original English language version of the EAW and use that as the basis for their translation of the standard form sections of the European arrest warrant. Of course, if there are words or phrases which, in their professional view, do not in fact accord with the official translation, they are free to change that translation. That is not what appears to be happening, however. The translators simply seek to reinvent the wheel on every occasion and naturally come up with versions that do not match in every respect the official version.

43. For the purpose of this case, I have had regard to the English language translation. However, having carefully considered it, I am quite satisfied that any difference in the language being used in the form is merely a matter of form rather than of substance. For example, it is stated that the person was served the judgment on 24th August, 2007, whereas the English language version refers to service of the decision. There is clearly no difference between these two matters and I am of the view that throughout the particular sections at issue, there is no difference in substance between what is stated in the Annex and what is said in this European arrest warrant. For example, to have a case reconsidered is effectively a retrial in the English language. Therefore, insofar as there may be a

technical failure to comply with the Act of 2003 in so far as the wording of these sections reads slightly different in English, there is no injustice in surrendering the person. Under the provisions of s. 45C of the Act of 2003, there is no reason to prohibit the respondent's surrender, merely on the ground of a difference in the wording as a result of the translation difference, where those differences do not affect the substance of what is being stated.

44. Having disposed of that preliminary submission, the main issues of contention can now be addressed:

> a) Have the options at point (d) been met by the issuing judicial authority?
>
> b) If not, if the Court reaches the conclusion that the failure to meet the condition does not impinge on a right of defence, is the Court nonetheless bound to refuse his surrender because there has been a failure to comply with the provisions of s. 45 of the Act of 2003?

Relying upon point (d) (1b) – receipt of official notification

45. Counsel for the minister submitted that point (d) 3.1b was validly relied upon by the issuing judicial authority in this case. Counsel pointed to the fact that the EAW on its face states that the summons had been given to the respondent's brother at the address provided by the respondent himself, and that the additional information received from the issuing judicial authority confirms unequivocally that the respondent had been notified in person of the date of the trial. Counsel confirmed that the minister was not relying upon point d (1a) of the Table to s. 45 of the Act of 2003 – *i.e*. personal service, as this had not been indicated by the issuing judicial authority.

46. Counsel for the minister referred the Court to the recent decision of the Court of Justice of the European Union ("CJEU") in *Openbaar Ministerie v. Pawel Dworzecki* (Case C-108/16 PPU, 24th May 2016) where that court examined the circumstances in which point 3.1b of part (d) will be applicable. The facts of that case were noted at para. 18 of the Opinion of Advocate General Bobek as follows:

> *"– according to the European arrest warrant, the summons was served, at the address of the requested person, on an adult resident of the household, who undertook to hand the summons over to the requested person;*
>
> *– it is not clear from the European arrest warrant whether and when that resident actually handed the summons over to the requested person;*
>
> *– it cannot be inferred from the statement which the requested person made at the hearing before the referring court that he was — in due time — aware of the date and place of the scheduled trial,".*

47. In *Dworzecki*, the notification was found not to come within the terms of point (d) 3.1b. Counsel pointed out that, while the facts in *Dworzecki* might bear some similarity to facts in the present case, there are differences. Counsel pointed to the fact that in the present case, the additional information states that the respondent was notified in person. Counsel also pointed out that a major point of difference is that, in *Dworzecki*, no credibility issues are raised or recorded in the CJEU's judgment in relation to that requested person's statements regarding whether he was aware of the trial date. Counsel pointed to this as an important factor in light of the finding of the CJEU at para. 49 that it is not only the information provided by the issuing judicial authority that can be taken into account, but also evidence from the requested person:

> *"In that regard, it is for the issuing judicial authority to indicate in the European arrest warrant the evidence on the basis of which it found that the person concerned actually received official information relating to the date and place of his trial. When the executing judicial authority ensures that the conditions set out in Article 4a(1)(a) of Framework Decision 2002/584 are satisfied, it may also rely on other evidence, including circumstances of which it became aware when hearing the person concerned."*

48. As regards whether the respondent should be believed when he states that he did not receive notification of the trial date, counsel pointed to the lack of credibility of the respondent who had categorically asserted that when he walked out of the police station in Poland, it was the last he had heard of the matter, although he had in fact appealed the judgment. Counsel referred in this context to the comments of this Court in *Minister for Justice and Equality v. Tulis* [2015] IEHC 806 at para. 19 of that judgment and submitted that they could also apply to the respondent's assertion in the present case that he does not remember receiving the notification of his conviction:

> *"In the present case, I accept the history of events leading to the conviction and appeal presented by the issuing judicial authority. The respondent has been, at the very least, inaccurate as to the chain of events which occurred in Slovakia. I find it more likely than not that he has been deliberately evasive about the extent of his dealings with the Slovakian authorities. He did not aver to the fact that he had appeared in court in relation to the appeal which he himself had originated. That is not a factor a person is likely to forget, particularly where this was the first time he had appeared in any court in relation to the offence."*

49. It was submitted that the respondent's credibility has been fundamentally undermined as regards the service of court documents on him, and that the Court should disregard both his contention that he was not made aware of the trial date and his contention that he did not receive notification of the judgment. When his lack of credibility is taken into account, together with the fact that his brother was served with the summons at the address provided by the respondent, it is submitted by the minister that the respondent was in fact aware of the trial date – and this is even without needing to rely on the statement in the additional information that he was notified in person of the trial date.

50. In referring to the details outlined in point (d).4, counsel for the respondent submitted that such details clearly provide cogent evidence on the face of the EAW that there is no factual basis for stating that the conditions have been met for the issuing judicial authority to rely on point. 3.1b. Counsel also submitted that, if the additional information from the issuing judicial authority stating that the respondent was notified in person of the date of the trial was correct, then the issuing state would have been entitled to rely on point 3.1a, i.e. notification in person. The issuing judicial authority did not do so.

Analysis and Decision

51. The issuing judicial authority has not indicated that it is relying on personal service on the respondent under point (d) 1a of the Table in s. 45 of the Act of 2003. The reference in the additional information must be understood in that context. The Court has no hesitation in finding that the reference in the additional information to notification in person of the trial date is a reference to the wider concept of personal service within the meaning of Polish law, namely through official notification by other means. It is a

question of fact to be assessed in each individual case as to whether the method of service adopted by the Polish authorities satisfies the condition laid down in point (d) 3.1b.

52. Since this EAW issued, and indeed since the reply of the issuing judicial authority on 13th April, 2016, the CJEU, in the case of *Dworzecki*, which was relied upon by the minister, has rejected service on an adult member of the household at the address given for service of documents, as being consistent *per se* with what is required under point (d) 3.1b as set out in the Annex to the 2002 Framework Decision as amended by the 2009 Framework Decision. The CJEU stressed the requirement that there be actual receipt of notification.

53. At para. 54 of *Dworzecki*, the CJEU said that the relevant part of Article 4a of the 2002 Framework Decision must be interpreted "*as meaning that a summons, such as that at issue in the main proceedings, which was not served directly on the person concerned but was handed over, at the latter's address, to an adult belonging to that household who undertook to pass it on to him, when it cannot be ascertained from the European arrest warrant whether and, if so, when that adult actually passed that summons on to the person concerned, does not in itself satisfy the conditions set out in the provision.".* What has to be established unequivocally is that the third party actually passed the summons on to the person concerned (as per para. 48 of the judgment).

54. In this EAW and additional information, there is no indication given as to whether the summons was passed on by the respondent's brother or when it was passed on. In so far as the respondent's credibility is at issue, it will be recalled that in questions regarding the compliance of an issuing judicial authority with s. 45 of Act of 2003 of the Act, there is no onus on a respondent to provide evidence that he was not so served (in accordance with the decision of the Court of Appeal in *Minister for Justice v. Palonka* [2015] IECA 69). It is for the issuing judicial authority to satisfy the executing judicial authority by providing the information as to how the particular condition has been met in the issuing state. If a respondent in fact provides the evidence of compliance, the Court may be entitled to have regard to that evidence. However, because a respondent is lacking in general credibility, this does not provide proof of compliance where that proof is absent.

55. Therefore, the Court is not satisfied that the issuing judicial authority is entitled to rely upon point (d) 3.1b because they have not indicated with sufficient clarity that the condition contained therein has been met. There is simply no evidence as to whether or how this respondent was served with actual notification of the scheduled date and place of the trial.

Point 3.3 (D.1d in this EAW)

56. Under the original EAW, the issuing judicial authority relied upon this heading to suggest that the respondent was served with the judgment but did not appeal. As became clear from the additional information furnished by the issuing judicial authority on request for further information, this respondent had in fact exercised his right to appeal the *in absentia* judgment.

57. During the course of the proceedings, there was a suggestion put forward that reliance could be placed upon the averment of the respondent that he did not have such an appeal. On reflection, counsel for the minister withdrew any suggestion that the Court should accept the initial word of this particular respondent that no appeal had been taken, despite the very clear indication by the issuing judicial authority that such an appeal had in fact been taken. The Court considers such an approach to be entirely appropriate. The evidence clearly establishes that this respondent had an appeal and there is no reliable suggestion to the contrary. The respondent himself accepted that he had signed for receipt of the judgment, despite having sworn earlier that no other official communication had been received by him regarding this matter.

58. The fact that the respondent had his appeal means that an unusual situation arises. The wording of point (d) 3.3 appears, on its face, only to cater for the situation where a person who was tried *in absentia* has been served with a judgment and a) either expressly stated they did not contest it, or b) did not request a retrial or appeal within the specified time. In this case, the respondent was served with the judgment, he appealed in time and the appeal was rejected. There is no compliance in a strict sense with any of the conditions set out in the Table to s. 45 of the Act of 2003.

59. This gives rise to what is the central issue in the case: does that mean that the respondent's surrender is prohibited by s. 45 of the Act of 2003 because none of the express conditions set out therein have been met?

Interpretation of Section 45 of the Act of 2003

Minister's Submissions

60. Counsel for the minister referred to s. 16(1)(c) of the Act of 2003 which provides that the matters required by s. 45 of the Act of 2003 need to be stated only "*where appropriate*". He also referred to the decision in *Minister for Justice and Equality v. Surma* [2013] IEHC 618, where Edwards J. confirmed that the amendment to s. 45 of the Act of 2003 prompted by the 2009 Framework Decision was purely procedural in nature, and created no substantive right not to be surrendered where there has been a conviction *in absentia*. It was submitted that the following comments at p. 65 of his decision are particularly relevant to the present case, where a higher court heard (and refused) an appeal which was lodged by that respondent against his *in absentia* conviction:

> *"Neither article 5(1) of Framework Decision 2002/584, nor article 4a(1) of Framework Decision 2009/299, created/creates a substantive personal right, assertable by a person who has been convicted in his/her absence, not to be surrendered on that account. It does not do so because not all trials conducted in absentia will have breached, or even may have breached, the overarching right to a fair trial guaranteed in Article 6 of the E.C.H.R., e.g., where the right to be present in person has been unequivocally waived, either expressly or tacitly. Moreover, even where there may be cause for concern in regard to a possible breach of the right to a fair trial, <u>the deficit is usually capable of being remedied where the person concerned is able subsequently to obtain from a court which has heard him a fresh determination of the merits of the charge, in respect of both law and fact.</u>"*

61. Counsel submitted that the respondent in the present case has not shown how his right to a fair trial under Article 6 ECHR has been breached by a procedure, where he was notified of the conviction and given the opportunity to appeal it, and where he did in fact appeal it. It was submitted that neither Article 4a of the amended 2002 Framework Decision nor s. 45 of the Act of 2003 set out to prohibit surrender in such circumstances. In the present case, any cause for concern which might have arisen from the initial conviction *in absentia* has already been remedied, by the determination of an appeal which the respondent himself lodged.

62. Counsel referred again to *Dworzecki*, stating that the CJEU, at para. 50 of that judgment, clearly envisaged situations where the facts are not covered by Article 4a of the amended 2002 Framework Decision, but where nonetheless there is no unfairness to the requested person as regards his/her fair trial rights:

> *"Furthermore, as the scenarios described in Article 4a(1)(a)(i) of Framework Decision 2002/584 were conceived as exceptions to an optional ground for non-recognition, the executing judicial authority may in any event, <u>even after</u>*

having found that they did not cover the situation at issue, take into account other circumstances that enable it to be assured that the surrender of the person concerned does not mean a breach of his rights of defence."

63. Counsel submitted that point (d) 3.3 of the Table in s. 45 of the Act of 2003 and the amended 2002 Framework Decision is to be interpreted as not prohibiting surrender where there is a future opportunity of appealing. It would lead to an absurdity if s. 45 of the Act were read as prohibiting surrender when there has been a past opportunity of an appeal and which opportunity had in fact been exercised. Counsel submitted that the clear implication of point (d) 3.3 is that the opportunity to appeal an *in absentia* conviction cures any potential cause for concern arising out of the fact that the requested person was not present at first instance.

64. Counsel also made reference to the Court of Appeal decision in *Minister for Justice and Equality v. Lip*inski [2016] IECA 145 where at para. 27 that court stressed that the 2009 Framework Decision had not introduced any additional scenarios where a guarantee of a retrial must be given:

> *"The appellant is incorrect in my view that the changes wrought by the 2009 Framework Decision and specifically the insertion of new Article 4a into the 2002 Framework Decision were substantive in nature and not merely procedural. There is nothing in the wording to indicate an enlargement of the type of decisions for which the assurance of a retrial upon surrender is required. The objective was to bring greater clarity to the existing arrangements, and not to alter them in a substantive way."*

65. Counsel submitted that under the previous version of s. 45 of the Act of 2003, no undertaking to provide a retrial was required before a requested person could be surrendered, based on the fact that the requested person had already lodged and been granted an appeal. This is similar to the facts in this case.

66. As regards interpretation, counsel referred the Court to s. 5(1)(b) of the Interpretation Act, 2005, which provides, that, when construing a statutory provision which "on a literal interpretation would be absurd or would fail to reflect the plain intention" of the Oireachtas, "the provision shall be given a construction that reflects the plain intention of the Oireachtas or parliament concerned, as the case may be, where that intention can be ascertained from the Act as a whole". Counsel also made reference to the CJEU decision in *Criminal Proceedings in Pupino* (Case C-105/03, Grand Chamber, 16th June 2005) at para. 43 where it was stated: "When *applying national law, the national court that is called upon to interpret it must do so as far as possible in the light of the wording and purpose of the framework decision in order to attain the result which it pursues [...]*". This was also the method of interpretation of s. 45 of the Act of 2003 viewed by the Court of Appeal in *Lipinski*. Therefore, it was submitted by counsel that, if the Court were to take the view that a literal interpretation of s. 45 of the Act would have the result that surrender would have to be refused where a requested person had appealed against an *in absentia* conviction (which in the minister's submission would be an absurd result and one which was clearly not intended), then it would be both appropriate and necessary for the Court to look to the intention of the *Oireachtas* and the purpose and logic behind the insertion of Article 4a by the 2009 Framework Decision.

67. Counsel pointed to Recital 11 of the 2009 Framework Decision in which it is outlined that common solutions regarding grounds for non-recognition of decisions should take into account situations such as the right of the person concerned to a retrial or an appeal and that such a retrial or appeal is aimed at guaranteeing the rights of the defence. In this regard, he submitted that the 2009 Framework Decision envisages a retrial or appeal as a solution to potential problems caused by *in absentia* convictions. A purposive interpretation of s. 45 of the Act of 2003 and one which would conform with the obvious objectives of the 2009 Framework Decision is that, where the person convicted *in absentia* has already availed of a right to appeal, surrender is not prohibited.

68. Referring to Recital 15 of the 2009 Framework Decision, it was submitted that prohibiting surrender where a person convicted *in absentia* has already availed of an appeal would do nothing to enhance fair trial rights or to further the objectives of the 2009 Framework Decision. Referring to Recital 4 of the 2009 Framework Decision, counsel submitted that the latest court decision in the respondent's case at which his guilt or innocence was decided upon was the decision on appeal, which resulted in the affirmation of the 6 month sentence. There was no unfairness to the respondent in the making of this decision, given that he had lodged the appeal himself, and it is submitted that the mischief which the 2009 Framework Decision set out to address (that being unfairness resulting from an *in absentia* conviction) is simply not present in this case, where the earlier *in absentia* decision has been overtaken by and remedied by the appeal.

69. Counsel then went on to mention the case of *Minister for Justice and Equality v. Trepiak* [2011] IEHC 287, in which the High Court (Edwards J.) was called on to interpret certain provisions of Act of 2003 relating to consent to further prosecution. At p. 32 of his decision, Edwards J. stated: "*The Court does not accept that s. 22(7) and (8) are to be regarded as penal provisions such that they are to be afforded a strict interpretation".* Before reaching this conclusion, Edwards J. had set out at p. 27 the following quotation from the decision of Peart J. in *Minister for Justice, Equality and Law Reform v. Biggins* [2006] IEHC 351 which had been relied upon by the minister:

> *"[…] the obligation to strictly construe penal statutes or statutory provisions which have the capacity to deprive a person of his or her liberty must be kept in context. While I appreciate that some of the decisions refer specifically to an extradition context, it must be recalled that such context was at a time prior to 1st January 2004, when the European Arrest Warrant Act, 2003 came into law giving effect to the new surrender arrangements set forth in the Framework Decision. That Framework Decision has introduced a fundamental change in the nature of the process undertaken when one Member State seeks the surrender of a person resident in another Member State. Those arrangements have replaced former extradition procedures with a process of surrender for the purpose of the mutual recognition of arrest warrants issued in the requesting Member State. In so doing, fundamental rights are respected, and certain safeguards have been included in order to protect the constitutional and Convention rights of persons whose surrender is sought. But it is expressly stated in the Preamble to the Framework Decision at Recital (10) that 'the mechanism of the European arrest warrant is based on a high level of confidence between Member States', and 'that its implementation may be suspended only in the event of a serious and persistent breach by one of the Member States of the principles of Article 6(1) of the Treaty on European Union [...]' . This cannot be simply regarded as an empty formula. The Framework Decision is to be referred to when interpreting and construing the legislation.".*

70. Counsel submitted in this regard that the *dicta* of Kearns J. (as he then was) in *DPP v. Moorehouse* [2006] 1 I.R. 421 regarding the nature of the strict interpretation of penal statutes does not apply to a provision such as s. 45 of the Act of 2003, which neither creates criminal liability nor imposes or extends any penalty. In that case, Kearns J. found at para. 67 as follows:

> *"It is a well established presumption in law that penal statutes be construed strictly. This requirement manifests itself in various ways, including the requirement to use express language for the creation of an offence and the further requirement to interpret strictly words setting out the elements of an offence [Maxwell on The Interpretation of*

Statutes, (12th ed.) pp. 239 and 240]."

71. Counsel indicated that s. 45 of the Act of 2003 clearly does not create or extend penal liability. Even if s. 45 of the Act were seen as penal in nature, it would be important to note that, in *Moorehouse*, having stated that a penal statute should be interpreted strictly, Kearns J. clarified that a purposive approach could nonetheless be applied in certain circumstances:

> *"70 That is not to say that a penal statute cannot be construed in a purposive manner, or that the court should readily adopt a construction which leads to an artificial or absurd result."*

72. Counsel noted that this principle was also noted by the Supreme Court in *DPP v. McDonagh* [2008] 1 I.R. 767 at para. 65:

> *"I also consider it important to bear in mind the dicta of Goff L.J. in Howard v. Hallett [1984] R.T.R. 353 quoted above - "the machine must follow the Act and not the Act follow the machine". In construing a penal statute, as any other statute, the literal rule should be applied <u>but it should not be applied if this would lead to an absurd result which is pointless and which negates the intention of the legislature</u> derived from the construction of the section within its context: where appropriate a purposive interpretation may be applied."*

73. In conclusion, it was submitted that an interpretation of s. 45 of the Act of 2003 leading to surrender being prohibited in the particular circumstance of the present case, where any cause for concern arising from the (possibly) *in absentia* nature of the conviction has been removed by the lodging of an appeal by the respondent, would be absurd and pointless, and accordingly that s. 45 of the Act of 2003 should be given a purposive interpretation which looks to the clear intention of the Oireachtas and the stated objectives of the 2009 Framework Decision.

Respondent's Submissions:

74. Counsel for the respondent submitted that the simple and correct interpretation is that s. 45 of the Act of 2003 does not permit the court to surrender if the conditions set out therein have not been met. She submitted that they had clearly not been met and referred in detail to each of the particular options set out in the Table to s. 45 of the Act of 2003. In response to the submission that a literal interpretation would amount to an absurdity, counsel observed that just because a scenario does not fit within the wording of the Act of 2003 does not make it an absurdity.

75. Counsel relied upon the decision of Peart J. in the Court of Appeal in Palonka at para. 28, that "*insofar as there may be some conflict between the provisions of the Act on a literal interpretation, and an interpretation which conforms to the objectives of the Framework Decision, the latter interpretation would be* contra legem.". Counsel also relied upon para. 29, wherein Peart J. stated that "*the provisions of s. 45 are very clear. Under section 16(1)(c) of the Act surrender is prohibited unless the European arrest warrant states, where appropriate, the matters required to be stated by section 45.".*

76. Counsel stated that the reference to "where appropriate" means in the case of a person convicted *in absentia*, as the Court of Appeal in *Lipinski* had observed. Counsel also referred to *Lipinski* in reliance upon the statement that the object of the new Article 4a of the Framework Decision was to bring greater clarity to the existing arrangements and not to alter them in a substantial way.

77. Counsel for the respondent did not disagree with the argument that this was not a penal statute but submitted that this did not affect the provisions of s. 5 of the Interpretation Act, 2005. There was no ambiguity on the face of it of the section.

78. Counsel also submitted that the totality of the information in the EAW failed to pass the test in *Minister for Justice, Equality and Law Reform v. Connolly* [2014] 3 I.R. 720 that there be unambiguous clarity in the European arrest warrant. She submitted that the various assertions of the issuing judicial authority as to the situation with regard to the trial and the appeal amount to a lack of unambiguous clarity.

Analysis and Decision:

79. The Court considers that it is of vital importance to the correct interpretation of s. 45 of the Act of 2003 that full regard is taken of the decision of the CJEU in *Dworzecki*. That judgment dealt with the provisions of Article 4a of the 2009 Framework Decision. The provisions in Article 4a are reflected in the new point (d) of the standard form EAW and that new point (d) is repeated word for word in the Table set out in s. 45 of the Act of 2003 upon which it is based.

80. The decision in *Dworzecki* concerned the provisions of Article 4a(1)(a)(i) of the 2009 Framework Decision regarding a person actually receiving official information of the scheduled date and place of the trial by service in person or any other official means. The particular relevance is that, at paras. 50 and 51 of *Dworzecki*, the CJEU indicated that even if the scenarios under that particular subsection of Article 4a did not cover the particular circumstances, the executing judicial authority may take into account other circumstances that enable it to be assured that the surrender of the person concerned does not mean a breach of his rights of defence. At para. 51 of *Dworzecki*, the CJEU stated:

> *"In the context of such an assessment of the optional ground for non-recongition, the executing judicial authority may thus have regard to the conduct of the person concerned. It is at this stage of the surrender procedure that particular attention might be paid to any manifest lack of diligence on the part of the person concerned, notably where it transpires that he sought to avoid service of the information addressed to him."*

81. The CJEU goes on to refer to the situation where a summons served on a third party is deemed effective when the summons is handed over to an adult member of the household. The CJEU emphasised that what had to be established was whether actual notification of the date and place of trial had been received. Apparently, that information was only put before the CJEU at the hearing before it. The CJEU goes on to say that, in any event, the executing judicial authority has the option to seek further information.

82. Although *Dworzecki* concerned the provisions of Article 4a(1)(a)(i), in the view of this Court, the interpretation by the CJEU has a wider application than merely to that subsection. In the course of its judgment, the CJEU focussed on Article 4a(1)(a)(i) as that was what was at issue in that case. The CJEU reached the conclusion that, although the 2009 Framework Decision and Article 41(1) in particular made several express references to national law, none of those references concerned the concepts set out in Article 4a(1)(a)(i) of the 2009 Framework Decision. These expressions were held to constitute autonomous concepts of E.U. law and had to be interpreted uniformly throughout the European Union. Similarly, the concepts in Article 4a(1)(c) (and indeed all the options) must be interpreted as autonomous concepts of European law. Following on from this and from the statements of the CJEU at para. 50 onwards, it is abundantly clear the *Dworzecki* principles apply to the consideration of any of the optional grounds.

83. Arising from the principles set out in *Dworzecki*, the interpretation of the provisions of the 2009 Framework Decision requires an executing judicial authority to take into account other circumstances that enable it to be assured that the surrender of the person concerned does not mean a breach of his rights of defence. If the 2009 Framework Decision was the only point of consideration for the High Court, it is undoubtedly the situation that this particular respondent has not suffered any breach of his rights of defence. On the contrary, he had a full appeal of his conviction *in absentia*. Such an appeal unquestionably ensures that his Article 6 rights under the ECHR have been met and that there has been no unfairness in the provision of a trial *in absentia*.

84. However, this Court has to consider whether his surrender is prohibited by s. 16 of the Act of 2003 in conjunction with s. 45 of the Act of 2003. In the Court's view, the approach to interpretation of s. 45 must take as its starting point the fact that the European Arrest Warrant Act, 2003 is an Act which implements a Framework Decision. The Supreme Court has indicated the approach to be taken to such interpretation. In *Minister for Justice, Equality and Law Reform v. Altaravicius* [2006] 3 IR 148, the Supreme Court stated at para. 29:

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

85. In the case of *Minister for Justice v. Tobin* (No. 1) [2008] 4 I.R. 42, the Supreme Court further expanded on how a question of interpretation is to be approached. In that case, the respondent had left the issuing state with permission whereas s. 10(d) of the Act of 2003 restricted the powers of arrest and surrender in relation to a sentenced person to circumstances where the person had fled the issuing state. The Supreme Court was satisfied that, in its ordinary meaning, the word "fled" carried with it a notion of escape or evasion. In those circumstances, the Supreme Court stated that if the Court were to hold otherwise, the court would be acting contrary to the clear meaning of s. 10 of the Act of 2003, i.e. *contra legem*.

86. In *Tobin (No. 1),* the Supreme Court made specific reference to the options under s. 10 of the Act of 2003 under which arrest and surrender pursuant to an EAW was permitted:

> *"If it is to order the surrender of the respondent to Hungary to serve the sentence of imprisonment which has been imposed on him by the Hungarian court, this court must be satisfied that he falls within one of the headings of s. 10 of the Act of 2003, as amended. Only para. (d) is capable of applying." (p. 74 of Tobin)*

87. It is therefore necessary for the Court to look at the provisions of s. 45 of the Act of 2003 itself – if the provisions are clear then, in accordance with the jurisprudence, the Court is obliged to give effect to the Act even if in doing so Ireland may not be meeting its obligations under the Framework Decision.

88. Section 45 of the Act of 2003 provides: "A person shall not be surrendered under this Act is 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 [2009 Framework Decision as amended], as set out in the table to this section."

89. Section 16(1) of the Act of 2003, in so far as relevant provides: "Where a person does not consent to his or her surrender to the issuing state, the High Court may, upon such date as is fixed under section 13 or such later date as it considers appropriate, make an order directing that the person be surrendered to such other person as is duly authorised by the issuing state to receive him or her, provided that:

> "[….] (c) the European arrest warrant sates, where appropriate, the matters required by section 45[…]
>
> (e) the surrender of the person is not prohibited by Part 3."

90. In the case of *Palonka*, the Court of Appeal made reference to a conflict between the provisions of the Act on a literal interpretation and an interpretation which confirms to the objectives of the Framework Decision. The reference to the phrase "literal interpretation" was relied upon in this case. It is appropriate to refer to the context in which the Court in *Palonka* made reference to the use of "literal interpretation". At the point at which it was raised, the Court of Appeal was discussing the very deliberate removal by the Oireachtas from the provisions of the Act of references to "the Framework Decision" as a matter the Court was to have regard to when considering to permit or refuse surrender. The reference to the Framework Decision having been deleted, all that remained for the court was to interpret and apply the relevant sections of the Act of 2003. It was in that sense that the phrase literal interpretation appears to have been used. Thus, the Court of Appeal did not intend to remove all other methods of statutory interpretation from consideration. Indeed, the judgment of Finlay Geoghegan J. which refers at para. 9 to *"add[ing] the principle of conforming interpretation with the limitations determined by the Supreme Court for this jurisdiction consistent with the judgment of the Court of Justice of the European Communities in* Pupino…", may be read as meaning that it is another principle to be brought to bear on statutory interpretation, i.e. by implication other canons of interpretation may apply where relevant.

91. The question for this Court remains one of statutory interpretation. It is not irrelevant that the Court of Appeal in *Palonka* went on to say at para. 29 *"[t]hat the provisions of section 45 are very clear. Under section 16(1)(c) of the Acts surrender is prohibited unless the European arrest warrant states, where appropriate, the matters required to be stated by section 45."* That *dicta* is an unambiguous statement that, under the Act of 2003, surrender is prohibited unless the matters required to be set out in the Table to s. 45 of the Act of 2003 are listed in the European arrest warrant. There is no lack of clarity at all. Where the Act is clear, this Court is bound to apply it over the provisions of the Framework Decision as to do otherwise would not be to apply the rule of law.

92. Despite that statement regarding the provisions of s. 45 of the Act of 2003, it cannot be read as determinative of the point at issue here. In the first place, this precise issue was not before the Court of Appeal and secondly, the Court of Appeal did not have the benefit of the decision of the CJEU in *Dworzecki* as to the European Union wide interpretation of the concepts set out in article 4a of the 2009 Framework Decision. In those circumstances, the finding of the Court of Appeal in *Lipinski* that the provisions are clear or that a literal interpretation must be relied upon, does not relieve this Court of the duty to examine whether the application of specific canons of construction, in particular s. 5 of the Interpretation Act, 2005, require an interpretation of s. 45 of the Act of 2003 that

permits the High Court to go beyond the specific scenarios set out in the Table in s. 45 of the Act, in order to permit surrender if this respondent has had his rights of defence respected in the issuing state.

93. In seeking the correct interpretation of the section, the Court has been asked to consider a number of matters. The general tenor of the minister's submissions was that s. 45 and s. 16 of the Act of 2003 now have to be read in the light of the decision of the CJEU in *Dworzecki*. While the Court accepts that *Dworzecki* is relevant to how the Framework Decision has to be interpreted, the Court is satisfied, however, that the pronouncements of the Supreme Court and the Court of Appeal on the principle of conforming interpretation establish that where Irish law is clear, the duty of the Court is to apply Irish law even where it conflicts with the Framework Decision.

94. The argument that the phrase "where appropriate" can be relied upon was also made by the minister in *Palonka* but was roundly rejected by the Court of Appeal. The words "where appropriate" mean that on a s. 16 application for a surrender order, the EAW needs to state the matters required by s. 45 in a case where it is appropriate to do so, "namely in a case where a trial *in absentia* has occurred in the issuing state." There is no ambiguity in the phrase. There is nothing to suggest that the intention of the Oireachtas was that the phrase "where appropriate" had any other meaning than that identified by the Court of Appeal in *Palonka*.

95. It is appropriate to rely upon s. 5 of the Interpretation Act, 2005, in circumstances where the Court is not interpreting a provision that relates to the imposition of a penal or other sanction. The Court is not satisfied that the provisions of s. 45 of the Act of 2003 come within the first sub-section of s. 5(1), i.e. the Court is not satisfied that these are obscure or ambiguous provisions. The Court of Appeal in *Palonka* was quite satisfied that this was a clear provision in the sense that the section clearly stated that surrender is to be refused if the matters required in the Table in s. 45 were not stated in the EAW.

Absurdity and the plain intention of the Oireachtas

96. The final argument is that s. 5(1)(b) of the Act of 2005 requires that a purposive interpretation should be given because a literal interpretation would be absurd or would fail to reflect the plain intention of the Oireachtas. The starting point of the analysis is that the Act of 2003 was enacted "to give effect to [the 2002 Framework Decision]". The 2002 Framework Decision gave an opt out from surrender in the case of trial *in absentia*. Although Ireland decided to avail of those optional grounds for refusal of surrender, nonetheless, the principle of conforming legislation applies to these optional grounds (e.g. *Minister for Justice v. Bailey* [2012] 4 I.R. 1 and *Dworzecki*). Both the Framework Decision and more particularly the Act of 2003 also provide significant protection for ECHR rights as well as constitutional rights. A person is not to be surrendered from this jurisdiction if his rights to a fair trial have not been protected.

97. The Court has no doubt that the trial rights of this respondent were fully respected in the issuing state. He received notification of the judgment and exercised his right of appeal. To that extent there is no breach of Article 6 of the ECHR in the issuing state. There is no flagrant denial of rights and therefore there would be no breach of constitutional rights to surrender him. Moreover, the mischief that these trial *in absentia* provisions were designed to avoid, namely the potential for unfairness in such trials, has been abated in this case by the provision to this respondent of a right of an appeal which was in fact exercised.

98. The respondent's only potentially valid objection to surrender is that there has been a failure to comply with the literal wording of s. 45 of the Act of 2003, i.e. his particular case does not come within the Table *merely because he appealed*. If he had not appealed in time, or had indicated he was not appealing, there would be no reason at all to refuse his surrender. The particular section of the Act of 2003 was inserted to implement the 2009 Framework Decision which "[…] aimed at refining the definition of such common grounds allowing the executing authority to execute the decision despite the absence of the person at the trial, while fully respecting the person's right of defence" (Recital 4 of the 2009 Framework Decision as quoted at para. 5 of *Dworzecki*). This respondent has had those rights respected.

99. The Table at s. 45 of the Act of 2003 is in identical terms to that set out in the 2009 Framework Decision. The Act of 2003 has as its long title that it is to give effect to the 2002 Framework Decision. The purpose of the amendment to s. 45 of the Act of 2003 was to implement Article 4a of the 2009 Framework Decision. That article must be interpreted in accordance with the decision of the CJEU in *Dworzecki* to permit an executing judicial authority to take into account other circumstances than those set out in the article to ensure that the person's defence rights have been met. In those circumstances, the Court has no hesitation is saying that a literal interpretation of s. 45 of the Act of 2003, *i.e.* only permitting surrender if the precise opt outs are not met, would be absurd. It would fail to accord with the meaning of precisely the same wording in the Framework Decision which it implements; the concepts themselves being autonomous European Union concepts.

100. Furthermore, the Court is also satisfied the literal interpretation would fail to reflect the plain intention of the Oireachtas in its provisions. This plain intention was to give effect to the 2002 Framework Decision (as amended). The Oireachtas did so with respect to trial *in absentia* in a manner identical to the wording of the 2009 Framework Decision. This implementation leaves no doubt that surrender could be ordered even where there was a trial *in absentia*. In mirroring precisely, in the Table at s. 45 of the Act of 2003, the new form (d) set out in the 2009 Framework Decision, the Oireachtas showed an intention to have the grounds be subject to a common E.U. interpretation. This is entirely different to the use of the word "fled", which was the subject matter of the *Tobin (No. 1)* proceedings, but which word or concept was not to be found in the Framework Decision. On the contrary in this case, the Oireachtas have opted to repeat the words of the 2009 Framework Decision almost in its entirety.

101. In so far as there are differences in words between s. 45 of the Act of 2003 and the provisions of Article 4a of the 2009 Framework Decision, the Court is satisfied they do not affect the application of a purposive meaning to s. 45 of the Act of 2003 which accords with the decision in *Dworzecki*. In Article 4a, there is a reference to "[t]he issuing judicial authority may refuse to execute the European arrest warrant." Section 45 and s. 16 of the Act of 2003 use the words "shall not be surrendered". The use of the word "may" is to be read in the context that the overall heading is "[g]rounds for optional non-execution of the European arrest warrant". Ireland, having opted to avail of this particular option ground, is through the Act of 2003 directing the High Court to refuse surrender unless satisfied that the relevant conditions have been met. Similarly, in the *Dworzecki* case, Dutch law also used the mandatory phrase "[s]urrender shall not be authorised….". The use of the word "proceedings" rather than "trial" has no relevance to the particular issue at hand and indeed may have no relevance in any sense (see *Lipinski*).

102. Therefore, the plain intention of the Oireachtas in enacting s. 16 and s. 45, and taking into account the entirety of the Act, was to give effect to the Framework Decision. This optional ground for refusal to surrender a requested person was transposed almost entirely in accordance with the wording of the relevant article in the Framework Decision. The Act of 2003 also requires this Court to refuse to surrender if his ECHR rights or constitutional rights will be violated on surrender. The plain intention of the Oireachtas is that surrender must take place if the Court can be assured that the surrender of the person concerned does not mean a breach of his rights of defence.

103. Therefore, the Court is satisfied that it must give a construction which reflects the plain intention of the Oireachtas. That intention is plain from the sections and the Act as a whole. This is a section which is reflects the concepts set out in the Framework Decision. Those concepts are autonomous concepts of E.U. law to be interpreted uniformly throughout the European Union. The plain intention of the Oireachtas is that surrender is not to be refused simply on the basis that the requested person's situation does not come within one of the exceptions set out in the Table to s. 45 provided that the High Court can be assured that his surrender does not mean a breach of rights of defence.

104. In the present case, there has been no breach of the respondent's right of defence. He has fully had his rights accorded to him. The Court has no hesitation in saying that his surrender is not prohibited by s. 16 or s. 45 of the Act of 2003.

A Lack of Clarity in the European Arrest Warrant

105. The Court has considered the submissions both written and oral that the Court should refuse surrender due to the overall lack of clarity in the warrant and the resultant ambiguity. The Court has dealt with all of these issues and it does not consider that the *Connolly* decision is to be interpreted as meaning that cumulative difficulties, whether through lack of or contradictory initial information, require the Court to refuse surrender. Rather, it is where there is lack of clarity or a resulting ambiguity on fundamental or essential matters required by the Act of 2003 that surrender is to be refused (See Denham C.J. in *Minister for Justice and Equality v. Herman* [2015] IESC 49). As all relevant matters have been clarified, either factually by the issuing judicial authority or as a matter of Irish law, there are no defects in the European arrest warrant. The Court rejects this point of objection.

Section 37 of the Act of 2003

Article 8 of the European Convention on Human Rights

106. The respondent submitted that it would be a disproportionate interference with his right to respect for his personal life to surrender him to the issuing state to serve this relatively short sentence for a minor offence. Counsel for the respondent relied upon the delay in seeking the respondent's surrender. Counsel submitted that there has been a long unexplained delay, that this is a relatively minor offence with a relatively short sentence.

107. The Court must have regard to the well established case-law on this point, including the twenty two principles set out by the High Court (Edwards J.) in *Minister for Justice and Equality v. T.E.* [2013] IEHC 323, *Minister for Justice and Equality v. P.G.* [2013] IEHC 54 and the more recent dicta of the Supreme Court (O'Donnell J.) in *Minister for Justice and Equality v. J.A.T.* (No. 2) [2016] IESC 17. The Court must engage in a fact-specific enquiry in determining whether this respondent's right to respect for his private life will be breached if his surrender is ordered. Therefore, the case-law in this jurisdiction on the Article 8 ECHR point in the EAW procedure must be applied by the court on a case by case basis according to the particular facts arising in a given case.

108. While there is a strong public interest in general in the surrender of a person who is wanted for criminal prosecution or to serve a sentence, the actual level of public interest may vary depending on such factors as the nature of the alleged or committed crime and the delay in seeking surrender. The court must calculate that public interest to assess the pressing social need for surrender in light of the particular circumstances of the respondent.

109. The court is entitled to take into account the gravity of the offence – the more grave the offence, the higher the public interest. However, as Edwards J. pointed out in T.E., this does not work in corresponding proportion for less grave offences. A minimum sentence of 4 months has been set by the 2002 Framework Decision as the starting point for requesting surrender. In this case, the sentence of 6 months (almost all of which remains to be served) exceeds the minimum sentence under the 2002 Framework Decision. It is, however, a relatively minor offence, being an attempt to steal a hammer drill. Nonetheless, it is an offence of dishonesty requiring intent as distinct from a regulatory or strict liability offence. Furthermore, he has been convicted and sentenced in respect of the offence rather than sought for prosecution. The public interest in his surrender based upon the nature of the offence and sentence is moderate. The Court will now take into account the lapse of time between the offence and the request for surrender in calculating the overall public interest in surrender.

110. In this case, it has been submitted that there has been a long and unexplained delay in the context that the respondent has been living in Ireland for approximately 7 years and for the majority of all that time, he has worked for the same employer and was in fact promoted in that job. He stated that it was only in January 2016 that he found out that the Polish authorities were looking for him, which was some 9 years (closer to about 8 and a half years) after the proceedings in Poland, such matters he thought were resolved. Given the fact that he has moved on with his life since then, he submitted that this delay is a factor to be taken into account by the Court when balancing his personal rights against the public interest in his surrender.

111. The Court must, however, take into account the circumstances of the delay which includes the conduct of the respondent. It is clear from the additional information in this case that the respondent was served with the judgment in Poland, appealed it and then subsequently left the issuing state, knowing that he had been sentenced to 6 months imprisonment. The only reasonable inference that the Court can make in this instance is that this was an attempt by the respondent at fleeing in order to avoid serving the sentence imposed. This was not a case of the requested person already being outside the issuing state when proceedings started or when a sentence was imposed. The conduct of this respondent must be recognised as having been a major contributor factor to the delay in this case. Furthermore, the respondent's averment that he thought the proceedings were over is rejected by this Court as untrue in circumstances where the additional information clearly establishes that this respondent received notification of the judgment and in fact appealed it. Indeed, upon arrest and when questioned as to whether he knew about the offences contained in the EAW, he replied "yes", and rather than being an indication that he was only referencing his knowledge of the arrest and questioning, the Court finds that this was a further indication that the respondent knew very well of what had occurred in the course of the trial proceedings in Poland. The lapse of time from the final proceedings in Poland (of which the respondent was aware) until the issuing of the EAW in March 2015 was 7 and a half years. The EAW was endorsed in Ireland on 21st April, 2015.

112. In all those circumstances, there has been little or no dilution of the moderate public interest in requiring this respondent to serve his sentence in Poland, by the further lapse of time since the date of offence and date of proceedings in Poland. The Court must now assess the interference with his private rights by surrender and calculate if the balance between those two will result in a disproportionate interference with his right to respect for his personal rights.

113. The respondent appears to be a single man with no children. He has been working in Ireland apparently for the past seven and a half years. He is unclear about when he came to Ireland but it appears to be some time after the events of 2007. He has a good job and is a valued worker in a factory where he has recently received a promotion. His mother has died in Poland, his elderly father remains there and the respondent supports him through sending money. The respondent wants to remain in Ireland. He wants to continue with his job and he believes that the length of time between the offence and the issue of the EAW and indeed the present proceedings means it would be a disproportionate interference with his personal rights under Article 8 ECHR to surrender him.

114. The Court accepts that a single person with no children is entitled to respect for his personal rights in considering whether it would be disproportionate to surrender him. Nonetheless, the Court must assess the particular circumstances of the respondent.

115. The evidence before the Court is that he is a man who has worked in Ireland for approximately 7 years. His ties to this jurisdiction appear to be based upon his steady job here which he enjoys and does not want to leave. From his evidence, most of his family ties lie in Poland where his elderly father resides and whom he helps support.

116. This Court has already held in the case of *Minister for Justice and Equality v. E.P.* [2015] IEHC 662, on the basis of the case law, that while a respondent does not have to show exceptional facts, there must be particular injurious or harmful consequences that would make surrender disproportionate. Surrender, by its very nature, causes interference with both pre-existing relationships and pre-existing personal circumstances such as employment. Interference, even with the strongest of familial bonds or employment ties, is often necessitated by the strong public policy considerations which call for the surrender of those who commit crimes. In reality, the personal rights which this respondent asserts are quite unremarkable and certainly there is no particularly injurious or harmful consequence of surrender.

117. In this case, the evidence before the Court does not show that it would be disproportionate to surrender this respondent. It will be exceptional for the court to refuse surrender for a breach of Article 8 ECHR rights or constitutional rights to family and private life. In particular, in light of the fact that he is sought to serve a sentence, and the fact that he fled the issuing state knowing that there was a case against him, and balanced against his personal circumstances, the public interest in the respondent's surrender is moderate. While there is no necessity to show exceptional facts, there are no particularly injurious or harmful consequences to this respondent's private and family life that will occur in the event of his surrender. The outcome of any surrender of which he complains amounts to little more than those consequences that will usually flow from the surrender of a person being sought by another member state.

118. Therefore, on balancing the public interest in his surrender as against his personal rights, I am satisfied that the consequences of his surrender to Poland would not be a disproportionate interference with his right to respect for his private life under Article 8 of the European Convention on Human Rights. I reject this point of objection. His surrender is not prohibited by s. 37 of the Act of 2003.

Conclusion

119. The Court has considered the requirements of s. 16 of the Act of 2003 and each of the points of objection filed or argued by this respondent against his surrender. The Court is satisfied that his surrender is not prohibited under s. 16 of the Act of 2003 or at all and the Court may therefore make an order for the surrender of this respondent on this EAW to such other person as is duly authorised by Poland to receive him.