Neutral Citation Number: [2013] IEHC 618

THE HIGH COURT

Record No. 2012/154 Ext.

IN THE MATTER OF THE EUROPEAN ARREST

WARRANT ACT 2003, AS AMENDED

Between/

THE MINISTER FOR JUSTICE AND EQUALITY

Applicant

-AND-

PAWEL SURMA

Respondent

Judgment of Mr Justice Edwards delivered on the 3rd day of December, 2013

Introduction

The respondent is the subject of a European arrest warrant dated the 20th November 2007 on foot of which the Republic of Poland seeks his surrender for the purpose of executing a sentence of 8 months imprisonment imposed upon him by the Military Garrison Court in Warsaw on the 5th October 2004 in respect of three offences against military discipline, as particularised in Part E of the said warrant. The warrant was endorsed for execution in this jurisdiction on the 1st May 2012, and it was duly executed on the 10th December 2012. The respondent was arrested by Garda David Rothwell on that date, following which he was brought before the High Court later on the same day pursuant to s.13 of the European Arrest Warrant Act 2003 (hereinafter "the Act of 2003"). In the course of the s.13 hearing, a notional date was fixed for the purposes of s.16 of the Act of 2003, and the respondent was remanded on bail to the date fixed. Thereafter, the matter was adjourned from time to time, ultimately coming before the Court for the purposes of a surrender hearing.

The respondent does not consent to his surrender to Poland. Accordingly, this Court is now being asked by the applicant to make an Order pursuant to s.16 of the Act of 2003 directing that the respondent be surrendered to such person as is duly authorised by the issuing state to receive him. The respondent has raised objections to his surrender under two broad headings.

The first relates to the alleged non-correspondence of the three offences to which the warrant relates to offences in Irish law. The Court has already resolved the issues raised under this heading in favour of the applicant in an ex-tempore ruling, and it is unnecessary to elaborate on that in this judgment.

The second, relates to whether amendments to s. 16(1) and s.45, respectively, of the Act of 2003 effected by the European Arrest Warrant (Application to Third Countries and Amendment) and Extradition (Amendment) Act 2012 (hereinafter "the Act of 2012") have retrospective effect, and if so, to what extent. How the Court determines this issue will in turn affect how a number of subsidiary issues are to be resolved. These subsidiary issues concern whether the warrant in the present case is in the correct form having regard to those amendments and, if the warrant is not in the correct form, what the implications of that may be in terms of any possible surrender of the respondent to the issuing state on foot of the present warrant.

The respondent has clearly raised important issues of principle which the Court must seek to address in this judgment.

Sections 16(1) and 45 of Act of 2003 (pre-2012 amendments)

The Act of 2003 was intended to transpose for the purposes of Irish domestic law Council Framework Decision 2002/584/JHA on the European arrest warrant and the surrender procedures between Member States, O.J. L190/1 18.7.2002 (hereinafter referred to as "Framework Decision 2002/584"). Under article 1(2) of Framework Decision 2002/584, the member states participating in the European arrest warrant system are in principle obliged to act upon a European arrest warrant.

Section 16(1) pre-2012 amendments

The Act of 2003 provides for the non-voluntary surrender of a person who is the subject of a European arrest warrant once it has been demonstrated to the satisfaction of the High Court that certain preconditions laid down in s. 16(1) of that Act are met.

In the form in which it was enacted prior to recent amendments effected by the Act of 2012, s.16(1) of the Act of 2003 provided:

> "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—
>
> (a) the High Court is satisfied that the person before it is the person in respect of whom the European arrest warrant was issued,
>
> (b) the European arrest warrant, or a true copy thereof, has been endorsed in accordance with section 13 for execution of the warrant,
>
> (c) where appropriate, an undertaking under section 45 or a facsimile or true copy thereof is provided to the court,
>
> (d) the High Court is not required, under section 21A, 22, 23 or 24 (inserted by sections 79, 80, 81 and 82 of the Criminal Justice (Terrorist Offences) Act 2005), to refuse to surrender the person under this Act, and

(e) the surrender of the person is not prohibited by Part 3 or the Framework Decision (including the recitals thereto)."

For reasons that will become apparent later in this judgment, particular note should be taken both of the form and substance of precondition 16(1)(c) in that enactment.

Section 45 pre-2012 amendments
According to the provisions of Framework Decision 2002/584, the member states may refuse to execute such a warrant only in the cases of mandatory non-execution provided for in article 3 thereof and in the cases of optional non execution listed in article 4. Furthermore, the execution of a European arrest warrant may, by the laws of the executing state, be made subject to compliance with some or all of the conditions set out in article 5 of that Framework Decision.

Article 5(1) of Framework Decision 2002/584 had provided:

> "where the European arrest warrant has been issued for the purposes of executing a sentence or a detention order imposed by a decision rendered and if the person concerned has not been summoned in person or otherwise informed of the date and place of the hearing which led to the decision rendered *in absentia*, surrender may be subject to the condition that the issuing judicial authority gives an assurance deemed adequate to guarantee the person who is the subject of the European arrest warrant that he or she will have an opportunity to apply for a retrial of the case in the issuing Member State and to be present at the judgment"

Ireland elected to avail of the option contained in article 5(1) in enacting its domestic legislation. Accordingly, article 5(1) of Framework Decision 2002/584 was transposed for the purposes of Irish domestic law by the enactment of s. 45 of the Act of 2003. It should be noted that s.45 as originally enacted was repealed by s.20 of the Criminal Justice (Miscellaneous Provisions) Act 2009 (hereinafter "the Act of 2009"). That provision effected a substitution that re-enacted s.45 in identical terms to the terms in which it had originally been enacted, but added immediately thereafter a new s.45A, s.45B and s.45C. This Court is not concerned at this point with s.45A, s.45B or s.45C. Accordingly, for present purposes, the Court may regard s.45 as having been unaffected by the Act of 2009.

S.45 of the Act of 2003 as originally enacted provided:

> "A person shall not be surrendered under this Act if—
>
> (a) he or she was not present when he or she was tried for and convicted of the offence specified in the European arrest warrant, and
>
> (b) (i) he or she was not notified of the time when, and place at which, he or she would be tried for the offence, or
>
> (ii) he or she was not permitted to attend the trial in respect of the offence concerned,
>
> unless the issuing judicial authority gives an undertaking in writing that the person will, upon being surrendered—
>
> (i) be retried for that offence or be given the opportunity of a retrial in respect of that offence,
>
> (ii) be notified of the time when, and place at which any retrial in respect of the offence concerned will take place, and
>
> (iii) be permitted to be present when any such retrial takes place."

The rationale underpinning article 5(1) of Framework Decision 2002/584.
To understand the rationale underpinning article 5(1) of Framework Decision 2002/584, it is necessary to appreciate the wider European legislative context and, in particular, how the instrument itself interfaces with other key European legislative instruments and treaties such as the Treaty on European Union (hereinafter "the Treaty on European Union" or " the T.E.U."); the Charter of Fundamental Rights of the European Union (hereinafter "the Charter of Fundamental Rights of the European Union" or "the Charter"); and the European Convention on Human Rights and Fundamental Freedoms (hereinafter "the European Convention on Human Rights and Fundamental Freedoms", "the Convention" or "the E.C.H.R."). In addition, it is necessary to take account of the jurisprudence of the European Court of Human Rights (hereinafter "the E.Ct.H.R) in relation to the right to a fair trial, with particular reference to the right of an accused to be present for and to participate in his or her trial.

Recital No. 12 to Framework Decision 2002/584 asserts:

> "This Framework Decision respects fundamental rights and observes the principles recognised by Article 6 of the Treaty on European Union and reflected in the Charter of Fundamental Rights of the European Union, in particular Chapter VI thereof."

Furthermore, sub. articles (2) and (3) of article 1 of Framework Decision 2002/584 provide:

> "2. Member States shall execute any European arrest warrant on the basis of the principle of mutual recognition and in accordance with the provisions of this Framework Decision.
>
> 3. This Framework Decision shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union."

Article 6(1) of the T.E.U. in turn provides:-

> "The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adopted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.
>
> The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties.

> The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions."

It is then necessary to have regard to the Charter, and to articles 47(2), 48(2) and 52(3) thereof in particular.

> Article 47(2) of the Charter provides:
>
> 'Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.'
>
> Article 48(2) of the Charter states:
>
> 'Respect for the rights of the defence of anyone who has been charged shall be guaranteed.'
>
> Article 52(3) of the Charter then states:
>
> "In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection."

Turning then to a consideration of the E.C.H.R., the right to a fair trial is guaranteed in Article 6 thereof, which provides:

> "1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
>
> 2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
>
> 3. Everyone charged with a criminal offence has the following minimum rights:
>
> a. to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
>
> b. to have adequate time and facilities for the preparation of his defence;
>
> c. to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
>
> d. to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
>
> e. to have the free assistance of an interpreter if he cannot understand or speak the language used in court."

According to the case-law of the E.Ct.H.R. the right to a fair hearing by a tribunal (Art. 6(1) E.C.H.R.) comprises the right to take part in the hearing.

The right to take part in the hearing can be derived from the defence rights guaranteed in Article 6 (3) E.C.H.R., such as the right to defend one's self in person, and the right to examine witnesses, because an accused cannot exercise these rights without being present. This point was made in *Colozza v Italy* (1985) 7 E.H.R.R. 516, when the Court, at para. 27 stated:

> "27. Although this is not expressly mentioned in paragraph 1 of Article 6 (art. 6-1), the object and purpose of the Article taken as a whole show that a person 'charged with a criminal offence' is entitled to take part in the hearing. Moreover, sub-paragraphs (c), (d) and(e) of paragraph 3 (art. 6-3-c, art. 6-3-d, art. 6-3-e) guarantee to 'everyone charged with a criminal offence' the right 'to defend himself in person', 'to examine or have examined witnesses' and 'to have the free assistance of an interpreter if he cannot understand or speak the language used in court', and it is difficult to see how he could exercise these rights without being present."

However, although an accused has a right to be present for his trial it happens from time to time that an accused is not present for some or all of his trial. This can arise for a variety of reasons. It can arise due to a failure of notification, or due to force majeure, or due to disruptive behaviour by the accused, or because of waiver of the right to be present by the accused, or because of deliberate voluntary non- attendance for the purpose of seeking to escape trial. It can also occur in two different circumstances. The first, is where the accused does not turn up at all and never appears at any stage of the trial process. The second, is where he is present for part of the proceedings, but then absents himself (usually voluntarily) before it is concluded.

In the civil law tradition, trials *in absentia* are usually a normal part of the criminal justice system, although not all civil law traditions allow for trials *in absentia*. Whether a state allows for trials *in absentia* depends on the national law of the state and often on the severity of the crime concerned. For instance, as the Court understands it, Germany does not allow for trials *in absentia* at all. However, the French Code of Criminal Procedure permits trials *in absentia* in felony cases, under the condition that when the suspect is captured, he has the right to a retrial. Many other States of the European Union, including the Netherlands, Italy, Hungary and others also allow for trials *in absentia*.

However, in countries that have a common law tradition, trials *in absentia* do not form an ordinary part of the criminal justice system. The requirements set down by national law differ in every country. In Ireland, and also in the United Kingdom, an accused is required to be present throughout the trial when it concerns a serious (ie. non-minor) offence. If an accused does not turn up in an indictable matter, the trial will not usually proceed in his absence. What happens instead is that a bench warrant is issued for the arrest of the accused. If an accused goes absent in mid-trial the case may or may not continue in his absence at the discretion of the trial judge. Whether or not the trial in fact continues will depend on the circumstances of the case e.g., whether the accused is believed to have

deliberately absconded as opposed to possibly having fallen ill; or having suffered an accident; or having experienced some other mishap. A further consideration will be the stage that the trial had reached when the accused went absent. A trial judge in this country also has discretion to allow a trial to proceed in the absence of an accused if the accused is disruptive.

The jurisprudence of the E.Ct.H.R indicates that although proceedings conducted in the absence of the defendant are not in themselves incompatible with Article 6 of the Convention, a denial of justice will nevertheless occur where a person convicted *in absentia* is unable 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, where it has not been unequivocally established that he has waived his right to appear and to defend himself (*Colozza v Italy* (1985) 7 E.H.R.R. 516; *Jones v. the United Kingdom* (2003) 37 E.H.R.R. CD269; Poitrimol v France (1994) 18 E.H.R.R. 130,; *Krombach v. France* Application No. 29731/96, 13th February, 2001; and *Somogyi v. Italy* (2008) 46 E.H.R.R. 5; *Sejdovic v Italy* (2006) 42 E.H.R.R. 17 ; and *Makarenko v Russia* Application No 5962/03, 22nd December, 2009, amongst others.)

Waiver of right to be present in person
It is well established in the jurisprudence of the E.Ct.H.R. going back to the 1970's and 1980's that the exercise of rights guaranteed by Article 6 of the E.C.H.R. can be waived, expressly or tacitly, though the waiver must be voluntary and unequivocal (*Neumeister v Austria* (1979-1980) 1 E.H.R.R. 136,; *Le Compte, Van Leuven and De Meyere v . Belgium* (1983) 5 E.H.R.R. 130, amongst others.)

Thus, trials *in absentia* are considered to comply with the right to a fair hearing if it can be unequivocally established that the accused has, expressly or tacitly, waived the right to be present in person. However, if an accused has not waived the right to be present in person, "*that person should, once he becomes aware of the proceedings, be able to obtain, from a court which has heard him, a fresh determination of the merits of the charge*" - *Colozza v Italy* (1985) 7 E.H.R.R. 516, at para. 29.

Some commentators (notably Martin Böse, "Harmonizing procedural rights indirectly: the Framework Decision on trials in absentia" (2011) 37 N.C. J. INT'L L. & COM. REG. 489-510 have interpreted certain cases (such as *Colozza v Italy* (1985) 7 E.H.R.R. 516; *Medenica v Switzerland* Application No 20491/92, 12th December 2001 and *Sejdovic v Italy* (2006) 42 E.H.R.R. 17 , amongst others) which appear to draw a distinction between a person waiving the right to be present on the one hand, and a person seeking to evade justice on the other hand, as also determining that a person who deliberately absconds forfeits the benefit of the right to be present in person. However, the better view appears to be that the Court, while alluding to that possibility, has not actually decided that a person who deliberately absconds forfeits the benefit of the right to be present in person, and that it remains an open question. Certainly, in *Colozza v Italy* (1985) 7 E.H.R.R. 516 the court was able decide the issue before it without expressing a firm view on this question, and stated at para. 28:

> " … the material before the Court does not disclose that Mr. Colozza waived exercise of his right to appear and to defend himself or that he was seeking to evade justice. It is therefore not necessary to decide whether a person accused of a criminal offence who does actually abscond thereby forfeits the benefit of the rights in question."

While in a number of subsequent cases (e.g., *Medenica v Switzerland* Application No 20491/92, 12th December 2001 and *Sejdovic v Italy* (2006) 42 E.H.R.R. 17) the E.Ct.H.R continued to draw an ostensible distinction between a person waiving the right to be present on the one hand, and a person seeking to evade justice on the other hand, none of these cases contains an express finding that a person, in the latter scenario, is to be regarded as having forfeited his right to be present in person.

For example, in *Sejdovic v Italy* the Court said at paras 30-31:

> "30. Although proceedings that take place in the accused's absence are not of themselves incompatible with Article 6 of the Convention, a denial of justice nevertheless undoubtedly occurs where a person convicted *in absentia* is unable 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, where it has not been established that he has waived his right to appear and to defend himself (see *Colozza*, cited above, at [29], and App. No. 71555/01*, Einhorn v France*, Dec. 16.10.2001, at [33]).
>
> 31. The Convention allows the Contracting States wide discretion as regards the choice of the means calculated to ensure that their legal systems are in compliance with the requirements of Article 6. The Court's task, however, is to determine whether the result called for by the Convention has been achieved. In particular, the resources available under domestic law must be shown to be effective where a person charged with a criminal offence has neither waived his right to appear and to defend himself nor sought to escape trial (see *Medenica*, cited above, at [55])."

Similar statements are to be found in the judgments in *Medenica v Switzerland*, Application No 20491/92, 12th December 2001 (at para. 55) and more recently in *Demebukov v Bulgaria*, (2010) 50 E.H.R.R. 41 (at paras. 45-46 and 57) amongst other cases.

Indeed, *Colozza v Italy* appears to be the only case in which the language of forfeiture (i.e., the word "forfeits" as used in the penultimate quotation above) was in fact employed.

Although not wholly unproblematic, the alternative view (to the forfeiture model) is that a person who, being aware of his trial, deliberately absents himself with a view to escaping trial or seeking to evade justice may, in certain circumstances, be regarded as having tacitly or implicitly waived his right to appear in person. As will become clear later in this judgment this alternative view, which might be described as the "tacit waiver model", appears to have been adopted for the purposes of Council Framework Decision 2009/299/JHA of the 26th February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial (hereinafter "Framework Decision 2009/299"), which proceeds on the principle that trials *in absentia* can solely be recognised on the ground that the accused has unequivocally waived his right to be present at the trial. (To put this amending instrument in context, the Act of 2012 was enacted, *inter alia*, to transpose Framework Decision 2009/299 for the purposes of Irish domestic law.)

In order for an accused to be able to exercise his right to take part in a hearing he must, of course, be notified of the hearing. In *Poitrimol v France*, (1994) 18 E.H.R.R. 130 the E.Ct.H.R held that if an accused has been notified it is up to him to appear at the hearing or to waive the exercise of this right. However, such a waiver must be established in an unequivocal manner and be attended by minimum safeguards. The Court stated at para. 31:

> "31. Proceedings held in an accused's absence are not in principle incompatible with the Convention if the person concerned can subsequently obtain from a court which has heard him a fresh determination of the merits of the charge, in respect of both law and fact (see, mutatis mutandis, Colozza v Italy, cited above, paras. 27 and 29).It is open to question whether this latter requirement applies when the accused has waived his right to appear and to defend himself,

> but at all events such a waiver must, if it is to be effective for Convention purposes, be established in an unequivocal manner and be attended by minimum safeguards commensurate to its importance (see the Pfeiffer and Plankl v. Austria (A/227): (1992) 14 E.H.R.R. 692, para. 37)."

Where there is a waiver it must be both voluntary and informed. In that regard the E.Ct.H.R. has stated in *Makarenko v Russia*, Application No 5962/03, 22nd December, 2009 at para. 135 that:

> "A waiver of the right, once invoked, must not only be voluntary, but must also constitute a knowing and informed relinquishment of the right."

Accordingly, if an accused cannot attend his trial due to *force majeure*, he will not be regarded as having waived his right to appear in person. Conversely, if an accused absents himself, but is represented by a lawyer to whom he has given a mandate to represent him, he is to be regarded as having waived his right to appear in person.

In an number of judgments, including *Jones v. the United Kingdom* (2003) 37 E.H.R.R. CD 269; *Sejdovic v Italy*, (2006) 42 E.H.R.R. 17 and *Makarenko v Russia*, Application No 5962/03, 22nd December, 2009, the E.Ct.H.R. has sought to emphasise that the consequences of a waiver must be foreseeable. In *Makarenko* the Court stated at para. 87:

> "Before an accused can be said to have implicitly, through his conduct, waived an important right under Article 6, it must be shown that he could reasonably have foreseen what the consequences of his conduct would be (see Talat Tunç v. Turkey, no. 32432/96, 27 March 2007, § 59, and Jones v. the United Kingdom (dec.), no. 30900/02, 9 September 2003)."

Further, in *T v Italy*, Application No 14104/88, 12th October, 1992, the Court made the point at para. 28 that:

> "To inform someone of a prosecution brought against him is … a legal act of such importance that it must be carried out in accordance with procedural and substantive requirements capable of guaranteeing the effective exercise of the accused's rights, as is moreover clear from Article 6 para. 3 (a) (art. 6-3-a) of the Convention. Vague and informal knowledge cannot suffice."

It is clear, therefore, that for there to have been a valid waiver it is necessary that an accused should have been officially and precisely notified of the charge(s) and concerning when and where his trial would take place.

Where an accused makes himself unavailable with a view to escaping trial, it creates particular difficulties as it is frequently impossible to notify such a person concerning the charges against him and/or concerning when and where his trial will take place. This, of course, is why the tacit waiver model is problematic and it is one of the reasons why the E.Ct.H.R in distinguishing between a person waiving the right to be present on the one hand, and a person seeking to evade justice on the other hand, is thought by some to favour the forfeiture model for persons in the latter category. Be that as it may, Framework Decision 2009/299 ostensibly eschews any question of forfeiture of the right to be present in person, and instead proceeds on the basis that trials *in absentia* can solely be recognised on the ground that the accused has unequivocally waived his right to be present at the trial. Indeed, in order to ensure that an accused's absence can be assumed to be based upon a voluntary and deliberate decision not to exercise his right to be present in person, Framework Decision 2009/299 requires the accused to be provided with detailed information. The earlier instrument with which this Court is concerned, namely Framework Decision 2002/584, also required the provision of information, but was less specific in terms of what is required.

The E.Ct.H.R has emphasised that the national legislator must be able to discourage "unjustified absence", but that sanctions for unjustified absence must be proportionate. In *Poitrimol v France* (1994) 18 E.H.R.R. 130 the applicant had clearly expressed his wish not to attend appeal hearings and, thus, not to defend himself in person. On the other hand, it was apparent from the evidence that he intended to be defended by a lawyer instructed for the purpose, who would attend the hearings. However, under French law he was not entitled to be represented by his lawyer in circumstances where he was not willing to be present in person. In *Poitrimol*, the E.Ct. H.R., at para. 33, viewed the law in question as "a coercive one, because it was designed to compel the accused to appear and thus lay himself open to execution of the warrant for his arrest." The question for the E.Ct.H.R was whether an accused who deliberately avoids appearing in person remains entitled to "legal assistance of his own choosing" within the meaning of Article 6.3(c) of the E.C.H.R.. The Court held at paras. 34 & 35:

> "34. … Although not absolute, the right of everyone charged with a criminal offence to be effectively defended by a lawyer, assigned officially if need be, is one of the fundamental features of a fair trial. A person charged with a criminal offence does not lose the benefit of this right merely on account of not being present at the trial (See *Campbell and Fell v.United Kingdom (A/80)*: *(1984) 7 E.H.R.R. 165*, para. *99* and *mutatis mutandis*, *Goddi v. Italy*, cited above, para. 30 and *F.C.B. v. Italy*, cited above, para. 33). In the instant case it must be determined whether the Aix-en-Provence Court of Appeal was entitled under Article 411 of the Code of Criminal Procedure to deprive Mr Poitrimol of this right, given that he had been summoned personally and had provided no excuse acknowledged as valid for not attending the hearing.
>
> 35. It is of capital importance that a defendant should appear, both because of his right to a hearing and because of the need to verify the accuracy of his statements and compare them with those of the victim - whose interests need to be protected - and of the witnesses.
>
> The legislature must accordingly be able to discourage unjustified absences. In the instant case, however, it is unnecessary to decide whether it is permissible in principle to punish such absences by ignoring the right to legal assistance, since at all events the suppression of that right was disproportionate in the circumstances. It deprived Mr Poitrimol, who was not entitled to apply to the Court of Appeal to set aside its judgment and rehear the case, of his only chance of having arguments of law and fact presented at second instance in respect of the charge against him."

In all the circumstances of the case the Court found that there had been a breach of Article 6 of the E.C.H.R.

In *van Geyseghem v Belgium*, (2001) 32 E.H.R.R. 24, it was again held that to deprive an absent accused of the right to be represented at the hearing by a lawyer was a disproportionate measure. The Court stated at paras. 33-34:

> "33. …The fact that a defendant, in spite of having been properly summoned, does not appear, cannot – even in the absence of an excuse – justify depriving him of his right under Article 6 § 3 of the Convention to be defended by counsel (ibid.). It was for the courts to ensure that a trial was fair and, accordingly, that counsel who attended trial for the apparent purpose of defending the accused in his absence was given the opportunity to do so."

> "34. …The right of everyone charged with a criminal offence to be effectively defended by a lawyer is one of the basic features of a fair trial. An accused does not lose this right merely on account of not attending a court hearing. Even if the legislature must be able to discourage unjustified absences, it cannot penalise them by creating exceptions to the right to legal assistance. The legitimate requirement that defendants must attend court hearings can be satisfied by means other than deprivation of the right to be defended."

It is clear, however, that where a person who is aware of his trial absents himself, but is represented by a lawyer to whom he has given a mandate, he will be regarded as having voluntarily waived his right to be present in person such that his trial *in absentia* will not be regarded as having been unfair or in breach of Article 6(3) of the E.C.H.R.

Point (d) and the European arrest warrant
Before proceeding to consider Framework Decision 2009/299 in more detail it is important to also record that the standard form of the European arrest warrant is specified in the annex to Framework Decision 2002/584. Point (d), thereof, addresses possible issues relating to convictions *in absentia* and, prior to its replacement by article 2(3) of Framework Decision 2009/299, where relevant it required the issuing judicial authority to certify which of two alternative situations obtained (by ticking or "X-ing" the applicable alternative or by striking out the inapplicable alternative); and in the case of one of those alternatives to also provide specific further information. Point (d), as described, was in the following precise terms:

> "(d) Decision rendered in absentia and:
>
> — the person concerned has been summoned in person or otherwise informed of the date and place of the hearing which led to the decision rendered in absentia,
>
> or
>
> — the person concerned has not been summoned in person or otherwise informed of the date and place of the hearing which led to the decision rendered in absentia but has the following legal guarantees after surrender (such guarantees can be given in advance)
>
> Specify the legal guarantees:
>
> ……
>
> ……
>
> ……"

Framework Decision 2009/299
Framework Decision 2009/299 was adopted under Title VI of the Treaty on European Union on the 26th February 2009. It had been proposed on the initiative of the Republic of Slovenia, the French Republic, the Czech Republic, the Kingdom of Sweden, the Slovak Republic, the United Kingdom of Great Britain and Northern Ireland and the Federal Republic of Germany. The background to its proposal was concern about inconsistencies of approach to mutual recognition of decisions rendered *in absentia* depending on the context in which the issue was being considered.

In Ireland, we are well familiar with *in absentia* issues arising in the context of Framework Decision 2002/584. However, there are a number of other contexts in which there are Framework Decisions in which *in absentia* issues may arise, but with which we are less familiar because Ireland has either not yet transposed them or has chosen to opt out of them. These include Framework Decision 2005/214/JHA on the application of the principle of mutual recognition to financial penalties (hereinafter "Framework Decision 2005/214"); Framework Decision 2006/783/JHA on the application of the principle of mutual recognition to confiscation orders (hereinafter "Framework Decision 2006/783"); Framework Decision 2008/909/JHA on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union (hereinafter "Framework Decision 2008/909"); and Framework Decision 2008/947/JHA on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions (hereinafter "Framework Decision 2008/947").

As recital 3 to Framework Decision 2009/299 makes clear, Framework Decisions 2005/214, 2006/783, 2008/909 and 2008/947, respectively, each allow the executing authority to refuse execution of judgments rendered *in absentia*. However, Framework Decision 2002/584 allows the executing authority to require the issuing authority to give an assurance deemed adequate to guarantee the person who is the subject of the European arrest warrant that he or she will have an opportunity to apply for a retrial of the case in the issuing Member State and to be present when the judgment is given. Moreover, the adequacy of such an assurance is a matter to be decided by the executing authority, and it was therefore difficult to know exactly when execution may be refused.

Recital No. 2 to Framework Decision 2009/299 acknowledges that "[t]his diversity could complicate the work of the practitioner and hamper judicial cooperation", and it is against this background that Framework Decision 2009/299 seeks in recital no. 14 to refine the definition "of grounds for non recognition in instruments implementing the principle of mutual recognition". However, any intention to harmonise national legislation is expressly disavowed in Recital No. 14, and in Recital No. 15 it is expressly stated that the grounds for non-recognition are optional and that it is left to the discretion of Member States as to how they transpose these grounds.

The detail of the proposed refinements is set out in Recitals Nos. 4 to 13 respectively, which state:

> "(4) It is therefore necessary to provide clear and common grounds for non-recognition of decisions rendered following a trial at which the person concerned did not appear in person. This Framework Decision is 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. This Framework Decision is not designed to regulate the forms and methods, including procedural requirements, that are used to achieve the results specified in this Framework Decision, which are a matter for the national laws of the Member States.
>
> (5) Such changes require amendment of the existing Framework Decisions implementing the principle of mutual recognition of final judicial decisions. The new provisions should also serve as a basis for future instruments in this field.

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

(7) The recognition and execution of a decision rendered following a trial at which the person concerned did not appear in person should not be refused if either he or she was summoned in person and thereby informed of the scheduled date and place of the trial which resulted in the decision, or if he or she actually received, by other means, official information of the scheduled date and place of that trial in such a manner that it was unequivocally established that he or she was aware of the scheduled trial. In this context, it is understood that the person should have received such information "in due time", meaning sufficiently in time to allow him or her to participate in the trial and to effectively exercise his or her right of defence.

(8) The right to a fair trial of an accused person is guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, as interpreted by the European Court of Human Rights. This right includes the right of the person concerned to appear in person at the trial. In order to exercise this right, the person concerned needs to be aware of the scheduled trial. Under this Framework Decision, the person's awareness of the trial should be ensured by each Member State in accordance with its national law, it being understood that this must comply with the requirements of that Convention. In accordance with the case law of the European Court of Human Rights, when considering whether the way in which the information is provided is sufficient to ensure the person's awareness of the trial, particular attention could, where appropriate, also be paid to the diligence exercised by the person concerned in order to receive information addressed to him or her.

(9) The scheduled date of a trial may for practical reasons initially be expressed as several possible dates within a short period of time.

(10) The recognition and execution of a decision rendered following a trial at which the person concerned did not appear in person should not be refused where the person concerned, being aware of the scheduled trial, was defended at the trial by a legal counsellor to whom he or she had given a mandate to do so, ensuring that legal assistance is practical and effective. In this context, it should not matter whether the legal counsellor was chosen, appointed and paid by the person concerned, or whether this legal counsellor was appointed and paid by the State, it being understood that the person concerned should deliberately have chosen to be represented by a legal counsellor instead of appearing in person at the trial. The appointment of the legal counsellor and related issues are a matter of national law.

(11) Common solutions concerning grounds for non-recognition in the relevant existing Framework Decisions should take into account the diversity of situations with regard to the right of the person concerned to a retrial or an appeal. Such a retrial, or appeal, is aimed at guaranteeing the rights of the defence and is characterised by the following elements: the person concerned has the right to be present, the merits of the case, including fresh evidence are re-examined, and the proceedings can lead to the original decision being reversed.

(12) The right to a retrial or appeal should be guaranteed when the decision has already been served as well as, in the case of the European arrest warrant, when it had not yet been served, but will be served without delay after the surrender. The latter case refers to a situation where the authorities failed in their attempt to contact the person, in particular because he or she sought to evade justice.

(13) In case a European arrest warrant is issued for the purpose of executing a custodial sentence or detention order and the person concerned has not previously received any official information about the existence of the criminal proceedings against him or her, nor has been served with the judgment, this person should, following a request in the executing Member State, receive a copy of the judgment for information purposes only. The issuing and executing judicial authorities should, where appropriate, consult each other on the need and existing possibilities to provide the person concerned with a translation of the judgment, or of essential parts thereof, in a language that the person understands. Such provision of the judgment should neither delay the surrender procedure nor delay the decision to execute the European arrest warrant."

The mechanism by which the objectives set forth in the recitals just quoted are implemented is by means of the amendment of relevant provisions of each of the Framework Decisions in question. Accordingly, after article 1 of Framework Decision 2009/299 which sets out the objectives and scope of the instrument, it goes on to effect necessary amendments to Framework Decision 2002/584 in article 2, to Framework Decision 2005/214 in article 3, to Framework Decision 2006/783 in Article 4, to Framework Decision 2008/909 in Article 5 and to Framework Decision 2008/947 in Article 6. This Court need only concern itself with the amendments to Framework Decision 2002/584 that were effected by article 2.

Before doing so, it should be stated for completeness that article 8 of Framework Decision 2009/299, which is headed "Implementation and transitional provisions", sets two alternative dates by which it was required to be transposed. The first date set by article 8(1) was the 28th March 2011 and was intended to be generally applicable. However, article 8(3) allowed for transposition by the later date of 1 January 2014 if a Member State had declared, on the adoption of the instrument, that it had serious reasons to assume it would not be able to do so by the first date.

Importantly, article 8(2) provides:

> "This Framework Decision shall apply as from the date mentioned in paragraph 1 to the recognition and enforcement of decisions rendered in the absence of the person concerned at the trial."

Turning then to article 2 of Framework Decision 2009/299 which amends Framework Decision 2002/584: first, by repealing article 5(1) of that instrument; secondly, by inserting a new article 4a therein; thirdly, by replacing point (d) in the form of the European arrest warrant annexed to Framework Decision 2002/584 with a questionnaire in which the issuing judicial authority may certify the existence of certain matters by the ticking of a box or boxes, and provide other relevant information.

The new article 4a is headed "Decisions rendered following a trial at which the person did not appear in person" and it provides:

"1. The executing judicial authority may also refuse to execute the European arrest warrant issued for the purpose of executing a custodial sentence or a detention order if the person did not appear in person at the trial resulting in the decision, unless the European arrest warrant states that the person, in accordance with further procedural requirements defined in the national law of the issuing Member State:

(a) in due time:

(i) either was summoned in person and thereby informed of the scheduled date and place of the trial which resulted in the decision, or by other means actually received official information of the scheduled date and place of that trial in such a manner that it was unequivocally established that he or she was aware of the scheduled trial;

and

(ii) was informed that a decision may be handed down if he or she does not appear for the trial;

or

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

or

(c) after being served with the decision and being expressly informed about the right to a retrial, or an appeal, in which the person has the right to participate and which allows the merits of the case, including fresh evidence, to be re-examined, and which may lead to the original decision being reversed:

(i) expressly stated that he or she does not contest the decision;

or

(ii) did not request a retrial or appeal within the applicable time frame;

or

(d) was not personally served with the decision but:

(i) will be personally served with it without delay after the surrender and will be expressly informed of his or her right to a retrial, or an appeal, in which the person has the right to participate and which allows the merits of the case, including fresh evidence, to be re-examined, and which may lead to the original decision being reversed;

and

(ii) will be informed of the time frame within which he or she has to request such a retrial or appeal, as mentioned in the relevant European arrest warrant.

2. In case the European arrest warrant is issued for the purpose of executing a custodial sentence or detention order under the conditions of paragraph 1(d) and the person concerned has not previously received any official information about the existence of the criminal proceedings against him or her, he or she may, when being informed about the content of the European arrest warrant, request to receive a copy of the judgment before being surrendered. Immediately after having been informed about the request, the issuing authority shall provide the copy of the judgment via the executing authority to the person sought. The request of the person sought shall neither delay the surrender procedure nor delay the decision to execute the European arrest warrant. The provision of the judgment to the person concerned is for information purposes only; it shall neither be regarded as a formal service of the judgment nor actuate any time limits applicable for requesting a retrial or appeal.

3. In case a person is surrendered under the conditions of paragraph (1)(d) and he or she has requested a retrial or appeal, the detention of that person awaiting such retrial or appeal shall, until these proceedings are finalised, be reviewed in accordance with the law of the issuing Member State, either on a regular basis or upon request of the person concerned. Such a review shall in particular include the possibility of suspension or interruption of the detention. The retrial or appeal shall begin within due time after the surrender."

Point (d) in the form of the European arrest warrant annexed to Framework Decision 2002/584 was replaced by the following:

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

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

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

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

❒ 3.1a. the person was summoned in person on . . .

(day/month/year) and thereby informed of the scheduled

date and place of the trial which resulted in the decision and was informed that a decision may be handed down if he or she does not appear for the trial;

OR

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

OR

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

OR

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

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

OR

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

OR

❒ 3.4. the person was not personally served with the decision, but

— the person will be personally served with this decision without delay after the surrender, and

— when served with the decision, the person will be expressly informed of his or her right to a retrial or appeal, in which he or she has the right to participate and which allows the merits of the case, including fresh

evidence, to be re-examined, and which may lead to

the original decision being reversed, and

— the person will be informed of the time frame within

which he or she has to request a retrial or appeal,

which will be . . . days.

4. If you have ticked the box under points 3.1b, 3.2 or 3.3

above, please provide information about how the relevant

condition has been met:

.....

.....".

Recent amendments to the Act of 2003 effected by the Act of 2012
Part 3 of the Act of 2012 was clearly enacted predominantly for the purpose of transposing Framework Decision 2009/299 into Irish domestic law. It also effects certain structural changes to the way in which Framework Decision 2002/584 had been transposed by earlier legislation, perhaps partly in response to certain legitimate criticisms made by both the High Court and the Supreme Court concerning the manner in which that instrument had initially been transposed. However, in so far as this case is concerned, this Court need only have regard to those amendments to the Act of 2003 specifically intended to transpose Framework Decision 2009/299.

Accordingly, by virtue of s.6 of the Act of 2012 the following is substituted for section 11(1) (inserted by section 72 of the Criminal Justice (Terrorist Offences) Act 2005) of the Act of 2003:

> "(1) A European arrest warrant shall, in so far as is practicable, be in the form set out in the Annex to the Framework Decision as amended by Council Framework Decision 2009/299/JHA."

It further requires to be noted that a number of major amendments to s. 16 of the Act of 2003 were then effected by s.10 of the Act of 2012. For the purposes of the issue in this case, it is sufficient to consider those relating to s.16 (1). S.16(1) of the Act of 2003, as amended by subs.10(a) to 10(d) inclusive of the Act of 2012, now 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—
>
> (a) the High Court is satisfied that the person before it is the person in respect of whom the European arrest warrant was issued,
>
> (b) the European arrest warrant, or a true copy thereof, has been endorsed in accordance with section 13 for execution of the warrant,
>
> (c) the European arrest warrant states, where appropriate, the matters required by section 45 (inserted by section 23 of the *European Arrest Warrant (Application to Third Countries and Amendment) and Extradition (Amendment) Act 2012*),
>
> (d) the High Court is not required, under section 21A, 22, 23 or 24 (inserted by sections 79, 80, 81 and 82 of the *Criminal Justice (Terrorist Offences)* Act 2005), to refuse to surrender the person under this Act, and
>
> (e) the surrender of the person is not prohibited by Part 3."

It will be immediately apparent from a comparison of these provisions with the old form of s. 16(1) that the most significant and far reaching change is to subs. 16(1)(c). The effect of the change to this particular provision is to render it a condition precedent to the making of a surrender order that the court be satisfied that the European arrest warrant states certain matters required by s.45 of the Act of 2003 as amended by s. 23 of the Act of 2012. It will become apparent, when the Court comes to consider the new form of s.45, that the required matters are, in effect, certification by the issuing judicial authority in accordance with point (d) in the form of the warrant now provided for in the annex to Framework Decision 2002/584 as amended by Framework Decision 2009/299.

S.45 of the Act of 2003 as amended by s.23 of the Act now provides:

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

TABLE

(d) Indicate if the person appeared in person at the trial

resulting in the decision:

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

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

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

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

OR

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

OR

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

OR

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

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

OR

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

OR

❒ 3.4. the person was not personally served with the
decision, but

— the person will be personally served with this decision
without delay after the surrender, and

— when served with the decision, the person will be

expressly informed of his or her right to a retrial or

appeal, in which he or she has the right to participate

and which allows the merits of the case, including fresh

evidence, to be re-examined, and which may lead to

the original decision being reversed, and

— the person will be informed of the time frame within

which he or she has to request a retrial or appeal,

which will be . . . days.

4. If you have ticked the box under points 3.1b, 3.2 or 3.3

above, please provide information about how the relevant

condition has been met:

.....

.....".

It is clear that the parliamentary draftsman has adopted the expedient approach of cutting and pasting within the new s.45, the new form of point (d) as it now appears in the annex to Framework Decision 2002/584 as amended by Framework Decision 2009/299. According to the new s.45, the executing Member State is obliged not to surrender a person who has been tried *in absentia* unless the European arrest warrant "indicates" the matters required in points 2, 3, and 4 of point (d). Point 2 is directed at obtaining confirmation that the person was in fact tried *in absentia*. Points 3 and 4 are directed at establishing the existence of at least one of a number of alternative situations, which could according to the jurisprudence of the E.Ct.H.R cited earlier in this judgment justify a finding of unequivocal waiver of the right to be present, or alternatively, if an unequivocal waiver cannot be established, that the executing court can be satisfied that the person concerned, if surrendered, will be able 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.

In reality the new s. 45 makes provision for a system of judicial certification (not unlike that which can be invoked under article 2(2) of Framework Decision 2002/584 to obviate the need for demonstration of double criminality in respect of certain categories of offence) and in that regard it appears to be firmly anchored to the principle of mutual recognition. Pursuant to the principle of mutual recognition, the executing judicial authority is obliged to surrender once the issuing judicial authority has indicated the matters required in points 2, 3 and 4 of point (d), and save in exceptional circumstances, the executing judicial authority would not be entitled to look behind that which has been certified. However, in this Court's view it could not be the case that all competence on the part of an executing judicial authority is ousted by a purported certification in the manner provided for, because point 4 of point (d) requires the provision of amplifying information to support a bald certification in any of the alternative scenarios contemplated under points 3.1b, 3.2 or 3.3 of point (d). The scheme clearly contemplates that the executing judicial authority must have some entitlement to review the assessment of the issuing judicial authority in those scenarios, otherwise there is no logical reason why amplifying information would be required to be provided at point 4. It is, in this Court's judgment, clearly envisaged that a person facing surrender should be able to challenge the information provided by the issuing judicial authority in support of its certification. That said, respect for the principle of mutual recognition would also demand that where a certification has been provided, it will require the adduction of cogent evidence suggesting that that which has been certified could not in fact be the case before an executing judicial authority would be justified in seeking to look behind what has been certified. However, at the end of the day the executing judicial authority retains competence to assess whether the proceedings conducted *in absentia* in the issuing member state complied with the standards mandated under the E.C.H.R., and in doing so, it must have due regard to the jurisprudence of the E.Ct.H.R.

Retrospectivity

The Court now comes to the issue which is at the heart of this case. The respondent contends that the amendments to s. 11, s. 16 and s.45 respectively. effected by the Act of 2012. have retrospective effect and apply even in the case of warrants that had been issued and endorsed prior to the commencement of the Act of 2012 which, in the absence of a specific commencement provision and, in accordance with Article 25.4.1 of the Constitution and s.16 of the Interpretation Act, 2005, occurred on the date that it was signed into law by the President of Ireland, namely the 24th July 2012.

The warrant in this case was both issued and endorsed prior to the commencement of the Act of 2012. In particular, it is relevant that the warrant is in the old form i.e., the matters set forth at point (d) thereof are in the form required by Framework Decision 2002/584 before that instrument was amended by Framework Decision 2009/299. If the respondent is right in his contention that the amendments in question have retrospective effect and apply to warrants already in the system when the Act of 2012 was commenced, then the Court cannot, as things stand, be satisfied as to one of the preconditions required to be satisfied under s.16(1) of the Act of 2003 as amended by the Act of 2012. In particular, the respondent says, the Court cannot be satisfied that "the European arrest warrant states, where appropriate, the matters required by section 45 (inserted by section 23 of the European Arrest Warrant (Application to Third Countries and Amendment) and Extradition (Amendment) Act 2012)", a matter in respect of which it is required to be satisfied by s.16(1)(c) of the Act of 2003 as amended by the Act of 2012.

Submissions on behalf of the Respondent

In support of his client's case that the amendments in question have retrospective effect, counsel for the respondent has made a number of points. First, he points to the absence of any transitional provisions in the Act of 2012. He invites the Court to contrast this with the position in respect of earlier amendments to the Act of 2003 effected by the Criminal Justice (Terrorist Offences) Act, 2005 (hereinafter "the Act of 2005"). S.68 of the Act of 2005 had provided:

> "The amendments effected by this Part (other than section 83) shall apply to European arrest warrants, and facsimile and true copies thereof, that are endorsed under section 13, or produced under section 14(7), of the Act of 2003 after the passing of this Act."

Counsel for the respondent stresses that the Act of 2012 contains nothing comparable.

Secondly, the respondent relies upon the decision of Peart J. *in Minister for Justice, Equality and Law Reform v Jastrzebski*, [2010] IEHC 201 (unreported, Peart J., 12th January 2010) for its persuasive influence. In that case, Peart J. was required to consider whether the amendment to s.10 of the Act of 2003 effected by s. 6 of the Criminal Justice (Miscellaneous Provisions) Act 2009 had retrospective effect. Just as in the present case, the amending Act contained no transitional provision(s). Peart J held in favour of the applicant's contention that the amendment applied retrospectively, stating:

> "It is possible for the respondent to argue that he cannot be the subject to an order for surrender on the basis that he did not 'flee' Poland, only if the amendment to s. 10 of the Act achieved by s. 6 of the 2009 Act is not applicable in this case since the amendment postdates the date of the warrant, the date of its indorsement and/or the date of arrest in this case.
>
> Section 1 of the 1999 Act provides in the usual way that the Act shall come into operation on such day or days as the Minister may by order or orders appoint. By Statutory Instrument 330 of 2009 signed by the Minister for Justice, Equality and Law Reform on the 20th August 2009, he ordered that the 25th August 2009 is appointed as the day on which a number of provisions of the Act, including s. 6 thereof "*shall come into operation*". Neither Section 6 of the 2009 Act nor any other provision thereof provides that the amendment to s. 10 of the Principal Act shall operate only in respect of applications for surrender made, or warrants dated or endorsed, after the commencement date.
>
> In my view it is clear that the amendment to s. 10 of the Principal Act achieved by s. 6 of the 2009 Act operates in respect of any application for an order for surrender which comes before the court for hearing on any date subsequent to the 25th August 2009, regardless of the date of the warrant, the date of endorsement thereof or the date on which the respondent was arrested on foot of such warrant."

The High Court subsequently certified that its decision involved a point of law of exceptional public importance and that it was desirable in the public interest that an appeal should be taken to the Supreme Court. The circumstances in which the court agreed to certify a point of law and the form in which the question was certified is apparent from a further judgment of Peart J. on this specific issue in *Minister for Justice, Equality and Law Reform v Jastrzebski* [No 2], [2010] IEHC 202 (unreported, Peart J, 3rd February 2010). The learned High Court judge stated:

> "I feel it is appropriate to state that on the application for surrender before me, the applicant argued that the amendment operated in respect of the hearing of the application for surrender in respect of the present warrant. In my judgment I agreed for the reasons appearing. But the applicant has now reconsidered the question, and no longer stands over the arguments put forward on that occasion, and is consenting to this Court certifying a point of exceptional importance for determination by the Supreme Court.
>
> It seems to me that a point of exceptional public importance arises from my decision in this case, given the inevitability of some number of warrants, be that number large or small, have yet to come on for hearing, and whose date of issue predates the commencement of Part II of the 2009 Act.
>
> I propose certifying the following as a point of law of exceptional public importance arising from my decision:
>
> > *"On the hearing of an application under s. 16 of the European Arrest Warrant Act, 2003, as amended ('the Act'), for an order of surrender on foot of a European arrest warrant which was issued in the requesting state on a date prior to the commencement of Part II of the Criminal Justice (Miscellaneous Provisions) Act, 2009 by S.I. 330 of 2009 (i.e. prior to 25th August 2009) is the High Court required, when that hearing occurs after the 25th August 2009, to apply the provisions of s. 10 of the Act, as if the provisions of the said Part II of the 2009 Act, in so far as they amend s. 10 of the Act, had not been so commenced, thereby permitting a respondent arrested on foot of such a warrant to argue that he/she was not a person 'who fled from the issuing state before he or she - (i) commenced serving that sentence, or (ii) completed serving that sentence', and that he/she is not therefore a person whose arrest and surrender may, subject to the provisions of the Act and the Framework Decision, be ordered?"*

The respondent duly appealed to the Supreme Court armed with this certificate. However, in circumstances where the Supreme Court had been informed that there was no longer any controversy *inter partes*, it simply answered the question in the negative and did not issue a judgment providing its reasons.

Thirdly, counsel for the respondent contends that approaching the issue from first principles, and applying the Constitution and the jurisprudence of the superior courts on the retrospectivity of legislation, the amendments brought about by the Act of 2012 must be given retrospective effect.

It was acknowledged by counsel for the respondent that Article 15.5 of the Constitution contains an express prohibition on retrospective penalisation, in these terms:

> "The Oireachtas shall not declare acts to be infringements of the law which were not so at the date of their commissions."

However, counsel for the respondent submitted, the issue under consideration in the present case does not concern any issue of retrospective penalisation – rather it concerns the question of whether or not the provisions of ss. 16(1) and 45 of the Act of 2003 as amended by the Act of 2012 apply to warrants issued prior to the commencement of the latter Act. More generally, the question is posed as to when such amendments take effect vis-à-vis warrants already in existence prior to the commencement of the legislation in its amended form.

It was urged upon the Court that, proceeding from first principles, the starting point must necessarily be to consider whether the well established presumption against retrospective effect applies. The rationale underlying this presumption was described in Hamilton v. Hamilton [1982] IR 466. In the course of his judgment in that case O'Higgins CJ stated at pp. 473-474:

> "Many statutes are passed to deal with events which are over and which necessarily have a retrospective effect. Examples of such statutes often described as ex post facto statutes are to be found in acts of immunity or pardon. Other

> statutes having a retroactive effect are statutes dealing with the practice and procedure of the courts and applying to causes of action arising before the operation of the statute. Such statutes do not, and are not intended to impair or effect vested rights and are not within the type of statute with which it seems to me this case is concerned. For the purpose of stating what I mean by retrospectivity in a statute I adopt a definition taken from Craies on Statute Law which is, I am satisfied based on sound authority. It is to the effect that a statute is deemed to be retrospective in effect when it '…takes away or impairs any vested right acquired under existing laws or creates a new obligation or imposes a new duty or attaches a new disability in respect to transactions or considerations already past.' "

The judgment of Henchy J in the same case effectively restates this proposition somewhat more succinctly. The learned judge stated at pp. 480-481:

> "When an act changes the substantive as opposed to procedural law then, regardless of whether the act is otherwise prospective or retrospective in its operation, it is not to be deemed to effect proceedings brought under the pre-act law and pending at the date of the coming into operation of the act unless the act expressly or by necessary intendment provides to the contrary."

Counsel for the respondent submitted that the distinction between substantive and procedural provisions is significant. It was submitted that there can be little doubt but that procedural amendments do have retrospective effect. In the conjoined cases of *Cork County Council–v- Slattery Pre-Cast Concrete & Ors*; and *Froggat & Ors –v- Slattery Pre-Cast Concrete & Ors* [2008] IEHC 291 (unreported, High Court, Clarke J, 19th September, 2008) an issue arose as to what was the appropriate limitation period *vis-à-vis* enforcement proceedings under s. 160 of the Planning & Development Act 2000. In light of the fact that the limitation period had been extended from a period of 5 years to 7 years under subsequent legislation. Clarke J held as follows:

> "It does not seem to me that any such amendment can properly be characterised as being retrospective in nature. Unauthorised development is unlawful. It is open to enforcement. When a limitation period expires, there may be an argument as to whether the re-opening of such a limitation period might amount to a retrospective measure. It is, of course, the case that Article 15 of the Constitution prohibits retrospective criminal legislation. Furthermore, it has consistently been held, as a matter of construction that the courts will lean against a construction creating retrospective effect in respect of civil matters. However, there is no prohibition as such on retrospective civil legislation although obviously, on the facts of an individual case, there might be a constitutional infirmity resulting from an express and disproportionate retrospective element to the legislation. That the ordinary presumption against retrospective effect in civil matters is applicable in the planning field can be seen from *Kenny –v- An Bord Pleanala (No.1)* [2001]1 I.R. 565.
>
> It seems to me that there can be no question of it being said that there has been retrospective interference with the rights of entitlement of an individual whose wrongful actions remained capable of being subject to enforcement proceedings as of the date of a statutory amendment, where the effect of the amendment concerned is simply to prolong the period during which enforcement proceedings could be taken. Such a change brings about no alteration in any rights or entitlements. The relevant amendment simply extends the period during which enforcement proceedings, which were capable of being brought as of the date of the amendment concerned, can be maintained. There is no right or entitlement to have those proceedings brought within any particular period of time, subject only to the exceeding statute law. A change in statute law which has the effect of extending the time within which such "live" proceedings can be brought is in my view, not properly characterised as retrospective at all".

In counsel for the respondent's submission the same logic applies to the institution of criminal proceedings, as illustrated by the following passage from *Toss Limited –v- District Court Justice Ireland* [1987] IEHC196 (unreported, High Court, Blaney J, 24th of May 1987):

> "Are statutes which deal with procedure only retrospective in effect? It appears to be well settled that they are. In *Rex .v. Chandra Dharma* 1905 2 KB 335 the defendant was convicted of an offence under Section 5 (1) of the Criminal Law (Amendment) Act 1885. At the date of the commission of the offence, the prosecution had to be commenced within three months. Section 7 of the Prevention of Cruelty to Children Act 1904, passed after the commission of the offence, extended the time limit from three months to six months. It was held that the defendant had been properly convicted even though the prosecution had not been commenced within three months of the commission of the offence as Section 27 related to procedure only and was therefore retrospective. Lord Alverstone C.J. said in his judgment at page 338:-
>
> 'The rule is clearly established that, apart from any special circumstances appearing on the face of the statute in question, statutes which make alterations in procedure are retrospective. It has been held that a statute shortening the time within which proceedings can be taken is retrospective, and it seems to me that it is impossible to give any good reason why a statute extending the time within which proceedings may be taken should not also be held to be retrospective.'
>
> In my opinion there are no special circumstances appearing on the face of the 1986 Act so as to remove that Act from the general rule applicable to statutes relating to procedure, and accordingly that rule applies with the result that the 1986 Act is retrospective in its effect and accordingly the Summons issued on the 25th March 1987 pursuant to Section 1 of the Act is a perfectly valid Summons. The Applicant is therefore not entitled to an Order of Prohibition restraining the hearing of the Summons and I refuse the application for such an Order."

In reliance on these authorities, counsel for the respondent has submitted that the first question that falls to be considered by the court is whether the amendments to ss. 16 and 45, respectively, of the Act of 2003 effected by the Act of 2012 are to be considered procedural or substantive. It was further submitted that they are properly to be considered procedural having regard to their nature and effect, and also because they were intended to give effect to amendments to Framework Decision 2002/584, brought about by Framework Decision 2009/299, which the European Court of Justice has ruled to be procedural in nature in the case of *Stefano Melloni v Ministerio Fiscal* [2013] 2 C.M.L.R. 43.

The *Melloni* case concerned an Italian citizen, Mr Melloni, who was arrested in Spain in 1996 and for whom Italy had issued an extradition request in 1993 so that he might be tried for bankruptcy fraud. He was released on bail in April 1996 pending his extradition hearing before a Spanish court. In October 1996 the court in question duly authorised the extradition of Mr Melloni on foot of the said request but he could not be extradited because he had absconded while on bail. Despite this the proceedings then pending against Mr Melloni in Italy continued, and since he failed to appear in person before the court of trial that court decided that notice should in future be given to his appointed lawyers. The trial subsequently proceeded in his absence, he was duly convicted, and he was sentenced *in absentia*, to ten years imprisonment. Mr Melloni's lawyers appealed the sentence without any success and in 2004 the

Italian authorities issued a European arrest warrant seeking his surrender for execution of the said sentence.

In 2008, Mr Melloni was again arrested in Spain. On this occasion Mr Melloni submitted, inter alia, before a Spanish court, i.e., the first section of the Sala de lo Penal of the Audiencia Nacional, that his surrender to Italy should be refused because, under Italian law, it would be impossible for him to appeal against the sentence imposed *in absentia*. The Audiencia Nacional dismissed the objection and ordered his surrender. In the circumstances Mr Melloni filed a "*recurso de ampero*" or petition for constitutional protection to the Spanish Constitutional Court, i.e., the Tribunal Constitucional, claiming that extradition to Italy, without the condition that he could appeal against the sentence imposed *in absentia*, would violate his constitutional rights to a fair trial. The Constitutional Court found that the extradition of a person from Spain to another county, which does not guarantee that the convicted person will be able to appeal, would be a violation of the Spanish constitutional right to a fair trial. It was therefore decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling at para. 26:

> "1. Must Article 4a(1) of Framework Decision 2002/584/JHA, as inserted by Council Framework Decision 2009/299/JHA, be interpreted as precluding national judicial authorities, in the circumstances specified in that provision, from making the execution of a European arrest warrant conditional upon the conviction in question being open to review, in order to guarantee the rights of defence of the person requested under the warrant?
>
> 2. In the event of the first question being answered in the affirmative, is Article 4a(1) of Framework Decision 2002/584/JHA compatible with the requirements deriving from the right to an effective judicial remedy and to a fair trial, provided for in Article 47 of the Charter [of Fundamental Rights of the European Union]…, and from the rights of defence guaranteed under Article 48(2) of the Charter?
>
> 3. In the event of the second question being answered in the affirmative, does Article 53 of the Charter, interpreted schematically in conjunction with the rights recognised under Articles 47 and 48 of the Charter, allow a Member State to make the surrender of a person convicted *in absentia* conditional upon the conviction being open to review in the requesting State, thus affording those rights a greater level of protection than that deriving from European Union law, in order to avoid an interpretation which restricts or adversely affects a fundamental right recognised by the Constitution of the first-mentioned Member State?"

It has been urged upon this Court by counsel for the respondent that a highly significant feature of the *Melloni* case is the fact that the surrender proceedings in Spain would appear to have taken place prior to the coming into force of Framework Decision 2009/299. Nevertheless, the Tribunal Constitucional considered that its provisions should be taken into account on the date that constitutionality was assessed. The E.C.J at para. 25 stated:

> "25. The Tribunal Constitucional rejects the contention of the Ministerio Fiscal to the effect that a request for a preliminary ruling is not necessary because Framework Decision 2009/299 is not applicable, *ratione temporis*, to the main proceedings. The object of the main proceedings is to determine not whether the order of 12 September 2008 infringed that framework decision, but whether it indirectly infringed the right to a fair trial protected by Article 24(2) of the Spanish Constitution. Framework Decision 2009/299 should be taken into account for determining what part of that right has 'external' effects, because it constitutes the European Union ('EU') law applicable at the time constitutionality is assessed. It must also be taken into account by virtue of the principle that national law is to be interpreted in accordance with framework decisions (*Criminal proceedings against Pupino* (C-105/03) [2005] E.C.R. I-5285; [2005] 2 C.M.L.R. 63 at [43])."

Moreover, it was submitted by counsel for the respondent, it is clear from the judgment that the foregoing arose, not merely as an artefact of Spanish constitutional law but, in the view of the E.C.J., by reason of the fact that the amendments effected by Framework Decision 2009/299 were inherently procedural in nature. An objection to the admissibility of the questions posed had been argued before the E.C.J. on the grounds of non-retrospectivity. The E.C.J. disposed of this objection (at paras. 31 to 34 inclusive) as follows:

> "31. It should be observed, in the first place, with respect to the applicability *ratione temporis* of Article 4a of Framework Decision 2002/584, that the very wording of Article 8(2) of Framework Decision 2009/299 makes it clear that, as from 28 March 2011, that decision 'shall apply to the recognition and enforcement of decisions rendered in the absence of the person concerned at the trial', without any distinction whatsoever being drawn between decisions rendered prior or subsequently to that date.
>
> 32. A literal interpretation is confirmed by the fact that since the provisions of Article 4a of Framework Decision 2002/584 are to be considered procedural rules (see, by analogy, *Greece v Tsapalos (C-361/02 & C-362/02 [2004] E.C.R. I-6405* at [20], and *Extradition proceedings against Santesteban Goicoechea (C-296/08 PPU) [2008] E.C.R. I-6307* at [80]), they are applicable to the surrender procedure in the main proceedings, which is still pending. According to settled case-law, procedural rules are generally held to apply to all proceedings pending at the time when they enter into force, whereas substantive rules are usually interpreted as not applying to situations existing before their entry into force (see *inter alia, Amministrazione delle finanze dello Stato v Srl Meridionale Industria Salumi (212/80-217/80) [1981] E.C.R. 2735 at [9]; Criminal proceedings against dell'Orto (C-467/05) [2007] E.C.R. I-5557: [2007] 3 C.M.L.R. 29* at [80]).
>
> 33. In the second place, the fact that the Italian Republic availed itself of the opportunity offered by Article 8(3) of Framework Decision 2009/299 to defer until 1 January 2014 at the latest the application of the Framework Decision to the recognition and enforcement of decisions rendered in the absence of the person concerned at the trial by the competent Italian authorities does not make the present request for a preliminary ruling inadmissible. It is apparent from the order for reference that, in order to interpret the fundamental rights recognised under the Spanish Constitution in accordance with the international treaties ratified by the Kingdom of Spain, the national court wishes to take into consideration the relevant provisions of EU law to determine the substantive content of the right to a fair trial guaranteed by Article 24(2) of that constitution.
>
> 34. It follows from all of the foregoing considerations that the request for a preliminary ruling from the Tribunal Constitucional is admissible."

It was submitted by counsel for the respondent that the foregoing represents cogent authority for the proposition that the amendments brought about by Framework Decision 2009/299 are procedural in nature and are intended to have retrospective effect. It was further contended that, as such, the decision in *Melloni* is entirely dispositive of the argument advanced by the applicant who contends that the amendments effected by the Act of 2012 only apply to warrants endorsed subsequent to the 24th July 2012.

Moreover, counsel further submitted, it is clear that Framework Decision 2009/299 contains within it (at article 8) an express provision as to its temporal applicability:

> "1. Member States shall take the necessary measures to comply with the provisions of this Framework Decision by 28 March 2011.
>
> 2. This Framework Decision shall apply as from the date mentioned in paragraph 1 to the recognition and enforcement of decisions rendered in the absence of the person concerned at the trial."

Counsel for the respondent submitted that it is of some significance that this commencement provision relates, not to the date of the warrant or trial, but rather to the date of the recognition and enforcement decisions i.e. the section 16 hearing.

It was further urged upon the Court, that whilst the conclusion that the provisions of Framework Decision 2009/299 are inherently procedural may seem counterintuitive at first, it flows from the rationale underlying the substance of the decision in *Melloni*. The E.C.J. considered that Framework Decision 2009/299 represented the common understanding and position of the Member States as regards the minimum safeguards applicable in relation to trial *in absentia*. In that regard counsel believed it was significant to point out that the Framework Decision 2009/299 applies to areas other than surrender under a European arrest warrant.

It was submitted that the E.C.J. considered that Framework Decision 2009/299 was simply declaratory of the right to a fair trial found in Articles 47 and 48 of the Charter. The E.C.J. stated at paras. 49 to 51:

> "49. Regarding the scope of the right to an effective judicial remedy and to a fair trial provided for in Article 47 of the Charter, and the rights of the defence guaranteed by Article 48(2) thereof, it should be observed that, although the right of the accused to appear in person at his trial is an essential component of the right to a fair trial, that right is not absolute (see, *inter alia, Trade Agency Ltd v Seramico Investments Ltd (C-619/10) (2012) 162 N.L.J. 1218* at [52] and [55]). The accused may waive that right of his own free will, either expressly or tacitly, provided that the waiver is established in an unequivocal manner, is attended by minimum safeguards commensurate to its importance and does not run counter to any important public interest. In particular, violation of the right to a fair trial has not been established, even where the accused did not appear in person, if he was informed of the date and place of the trial or was defended by a legal counsellor to whom he had given a mandate to do so.
>
> 50. This interpretation of Articles 47 and 48(2) of the Charter is in keeping with the scope that has been recognised for the rights guaranteed by Article 6(1) and (3) of the ECHR by the case-law of the European Court of Human Rights (see*, inter alia, Medenica v Switzerland* (20491/92) (ECtHR), judgment of 14 June 2001, not yet reported, at [56]-[59]; *Sejdovic v Italy (56581/00) (2006) 42 E.H.R.R. 17* at [84], [86] and [98]; and Haralampiev v Bulgaria (29648/03) (ECtHR), judgment of 24 April 2012, not yet reported, at [32] and [33]).
>
> 51. Furthermore, as indicated by Article 1 of Framework Decision 2009/299, the objective of the harmonisation of the conditions of execution of European arrest warrants issued for the purposes of executing decisions rendered at the end of trials at which the person concerned has not appeared in person, effected by that framework decision, is to enhance the procedural rights of persons subject to criminal proceedings whilst improving mutual recognition of judicial decisions between Member States."

It was contended by counsel for the respondent that this conclusion is of particular significance in the context of the issue currently under consideration as it underlines the purpose of Framework Decision 2009/299, to enhance what are clearly *procedural* rights, by refining the definition of grounds for non-recognition of convictions and sentences rendered *in absentia* in European Union instruments implementing the principle of mutual recognition. Therefore, suggested counsel, whilst extradition practitioners might frequently consider trial *in absentia* to be a *substantive* issue in the context of extradition law this is perhaps to lose sight of the fact that what is under consideration is an entirely *procedural* issue, albeit one of great importance.

It was submitted that this point was further underlined by the E.C.J. later in the *Melloni* judgement where the Court stated at para. 62 :

> "62. It should also be borne in mind that the adoption of Framework Decision 2009/299, which inserted that provision into Framework Decision 2002/584, is intended to remedy the difficulties associated with the mutual recognition of decisions rendered in the absence of the person concerned at his trial arising from the differences as among the Member States in the protection of fundamental rights. That framework decision effects a harmonisation of the conditions of execution of a European arrest warrant in the event of a conviction rendered *in absentia*, which reflects the consensus reached by all the Member States regarding the scope to be given under EU law to the procedural rights enjoyed by persons convicted *in absentia* who are the subject of a European arrest warrant."

In conclusion, counsel for the respondent submitted that the following conclusions can be drawn from a consideration of *Melloni* and Framework Decision 2009/299:

> (i) The amendments brought about by Framework Decision 2009/299 and consequently to Section 45 by way of the 2012 Act are properly considered to be purely procedural – as such they ought to be regarded as giving rise to retrospective effect as a matter of domestic Irish law;
>
> (ii) quite independently of this, Framework Decision 2009/299 expresses itself to have effect in relation to recognition and enforcement of decisions as of 28th March, 2011 irrespective of the date of trial. As such it is intended to have retrospective effect and ought to be regarded as such having regard to the interpretative obligation described in *Criminal Proceedings against Pupino* (Case C-105/03) [2005] ECR I-5285 ;
>
> (iii) even ignoring the foregoing and supposing the amendments to be substantive rather than procedural, the purpose of Framework Decision 2009/299 is to "*enhance the procedural rights of persons subject to criminal proceedings whilst improving mutual recognition of judicial decisions between Member States*." As such the amendments brought about by the 2012 Act in relation to trial *in absentia* are designed to enhance the position of both the respondent and the applicant – the latter by means of providing for greater and clearer mutual recognition of judgments. All of the domestic authorities that lean against retrospective effect, do so on the basis that the position of a party should not be *adversely* affected. No such consideration arises in the present case, nor could it – as such the rationale for supposing that there was no retrospective intent is entirely absent.

Submissions on behalf of the applicant
In reply to the submissions on behalf of the respondent, counsel for the applicant contends that the amendments effected by the Act of 2012 only apply in the case of warrants endorsed after the 24th July 2012 and that they do not apply to warrants endorsed prior to that date.

In support of this position counsel for the applicant contends that the respondent's position fails to take into consideration that persons who are dealt with under the new amended provisions have had a significant alteration in their capacity to argue matters in relation to section 45 issues, and that this materially and substantively effects the case the respondent comes before the Court to meet.

It was submitted that while it had to be accepted that Article 15.5.1 of the Constitution of Ireland cannot be said to act as a general bar to the retrospectivity of legislation – *Sloan, McKee & Magee v Culligan and ors* [1992] 1 I.R. 223 – the jurisprudence of the superior courts makes it clear that the default position is that legislation is presumed to be prospective in effect, or as counsel for the respondent had conceded, that there is a presumption against retrospectivity. That this is so is evident from a number of cases where the unfairness of potential retrospectivity was at issue, including Hamilton v Hamilton cited by counsel for the respondent, *Kenny v An Bord Pleanala (No. 1)* [2001] 1 I.R. 565 and Child v Wicklow County Council [1995] 2. I.R. 447. It was submitted that a consistent theme running through these cases was the following principle succinctly stated by McKechnie J in *Kenny v An Bord Pleanala* at pp.579-580 :

> "When under a statutory regime a process has been commenced, those involved in or affected thereby, have a right to see that process through, to a conclusion, under the law as it was at the date of its commencement."

Counsel for the applicant pointed to the ultimate outcome of the proceedings in *Minister for Justice, Equality and Law Reform v Jastrzebski* [2010] IEHC 201 (Unreported, High Court, Peart J., 12th January 2010) as being consistent with this position, notwithstanding that it appears to have been an order effectively made on consent and without any contest before the Supreme Court, and urged this Court that it should not regard the reasoning of Peart J at first instance as persuasive and applicable to the present case.

Counsel for the applicant also pointed to dicta of the Supreme Court in two other cases as being indicative that, consistent with the applicant's position, that Court considers both the recent amendments to s.45 of the Act of 2003 effected by the Act of 2012, and the earlier amendment to s.10 of the Act of 2003 effected by the Act of 2009, as being prospective in effect.

In the context of s.45 of the Act of 2003 as amended, counsel cited the following passage from the judgment of Murray J. in *Minister for Justice and Equality v Tokarski* [2012] IESC 61 (Unreported, Supreme Court, Murray J., 6th December 2012):

> "In this instance the learned High Court judge has, it would seem, and in my view correctly, taken a broad approach to the interpretation of that section and granted leave to appeal even though, since s.45 has been amended by the European Arrest Warrant (Application to Third Countries and Amendment) and Extradition Act, 2012, the issue is unlikely to arise again."

In the context of s.10 of the Act of 2003 as amended, counsel cited the following passage from the judgment of Fennelly J. in *Minister for Justice and Equality v Gheorghe* [2009] IESC 76 (unreported, Supreme Court, Fennelly J., 18 November 2009) at para. 24:

> "It may be noted that section 6 of the Criminal Justice (Miscellaneous Provisions) Act, 2009 has deleted (with future effect) the words in subparagraph (d) commencing with "*and who fled…"*

Counsel for the applicant contends that further support for her client's position is to be found in the Interpretation Acts 1937 – 2005. It was submitted that in examining the method in which legislation is to be implemented, the interpretation of statutes should be in accordance with the requirements of law, and that this is an approach which has consistently been applied since the introduction of s. 21(1)(c) Interpretation Act, 1937 which states:

> "Where an Act of the Oireachtas repeals the whole or a portion of a previous statute, then, unless the contrary intention appears, such repeal shall not affect any right, privilege, obligation or liability acquired, accrued or incurred under the statute or portion of a statute so repealed"

An important requirement of law, of which account must be taken, argued counsel for the applicant, is the statutory requirement for the endorsement of incoming European arrest warrants pursuant to s. 13(1) of the Act of 2003 as amended by s.9 of the Act of 2009, which provides:

> "The Central Authority in the State shall, as soon as may be after it receives a European arrest warrant transmitted to it in accordance with section 12, apply, or cause an application to be made, to the High Court for the endorsement by it of the European arrest warrant, or a true copy thereof, for execution of the European arrest warrant concerned."

Moreover, s. 13(2) of the Act of 2003 as amended by s.9 of the Act of 2009 provides:

> "If, upon an application under subsection (1), the High Court is satisfied that, in relation to a European arrest warrant, there has been compliance with the provisions of this Act, it may endorse the European arrest warrant for execution"

(Note, in order to correct a formatting error this provision was repealed but re-acted with no substantive change in s. 8 of the Act of 2012)

Counsel for the applicant correctly contends that it is at the point of endorsement that proceedings are commenced against a respondent under the Act of 2003. It was further submitted it is at the time of the making of an endorsement application that the Court must be satisfied there has been compliance with the provisions of the Act of 2003 as amended. It is the warrant of the issuing judicial authority endorsed by the High Court that provides for the lawful arrest of the person. The person must be shown a copy of the endorsed warrant at the time of arrest or, if it is not in the possession of the arresting member of an Garda Síochána at the time of the arrest, not later then 24 hours after the person's arrest.

Counsel for the applicant further submitted that the decision to endorse the warrant must be interpreted as approving the warrant for

execution which necessarily involves recognising the warrant. Once the warrant is endorsed for execution legal proceedings have commenced and both the applicant and the respondent have acquired substantive rights in relation to the applicable law. In this particular case the warrant was endorsed on the 5 May 2012 upon the *ex-parte* application of the applicant in intended proceedings entitled "*The Minister for Justice and Equality –v- Pawel Surma*". Proceedings were formally commenced upon the High Court ordering endorsement of the warrant for execution, at which point the matter was formally assigned its record number, i.e., "2012/154 Ext" and was added to the extradition list as an active case.

It was submitted that to date the applicant has maintained that European arrest warrants endorsed for execution by the High Court prior to amendments coming into force fall to be dealt with by the Court in accordance with the legislation as it stood at the time of the endorsement for execution. (The Court would comment that while that is largely true it is not entirely true. In the case of the amendment to s.10 of the Act of 2003 effected by s.6 of the Act of 2009 the applicant appears to accept that warrants issued, and not just warrants endorsed, before the coming into force of that amendment fall to be dealt with under the pre-amendment form of the enactment. It is indeed obvious when one looks at the particular wording of s.10 why that has to be the case. The Court does, however, take the point that the applicant has consistently maintained that, absent transitional provisions expressly providing for retrospective application, amendments to the Act of 2003 are to be regarded as prospective.)

The Court was further informed that in so far as the 2012 amendments are concerned the applicant has in any case been adopting the practice, in regard to any European arrest warrant received after the coming into force of the amendments and involving an *in absentia* conviction, of not presenting it for endorsement until the issuing judicial authority has been afforded the opportunity to provide "point (d) information" in the form required by the Annex to Framework Decision 2002/584 as amended by Framework Decision 2009/299.

Counsel for the applicant further relies upon s.26 and s.27 respectively of the Interpretation Act, 2005 [hereinafter "the Act of 2005"]. These provisions comprise Part 6 of that Act which is entitled "Amendment of Enactments, Etc".

S. 26 of the Interpretation Act 2005 states:

> "26.—(1) Where an enactment repeals another enactment and substitutes other provisions for the enactment so repealed, the enactment so repealed continues in force until the substituted provisions come into operation.
>
> (2) Where an enactment ("former enactment") is repealed and re-enacted, with or without modification, by another enactment ("new enactment"), the following provisions apply:
>
> (a) a person appointed under the former enactment shall continue to act for the remainder of the period for which the person was appointed as if appointed under the new enactment;
>
> (b) a bond, guarantee or other security of a continuing nature given by a person under the former enactment remains in force, and data, books, papers, forms and things prepared or used under the former enactment may continue to be used as before the repeal;
>
> (c) proceedings taken under the former enactment may, subject to section 27 (1), be continued under and in conformity with the new enactment in so far as that may be done consistently with the new enactment;
>
> (d) if after the commencement of this Act—
>
> (i) any provision of a former enactment, that provided for the making of a statutory instrument, is repealed and re-enacted, with or without modification, as a new provision, and
>
> (ii) such statutory instrument is in force immediately before such repeal and re-enactment,
>
> then the statutory instrument shall be deemed to have been made under the new provision to the extent that it is not inconsistent with the new enactment, and remains in force until it is repealed or otherwise ceases to have effect;
>
> (e) to the extent that the provisions of the new enactment express the same idea in a different form of words but are in substance the same as those of the former enactment, the idea in the new enactment shall not be taken to be different merely because a different form of words is used;
>
> (f) a reference in any other enactment to the former enactment shall, with respect to a subsequent transaction, matter or thing, be read as a reference to the provisions of the new enactment relating to the same subject-matter as that of the former enactment, but where there are no provisions in the new enactment relating to the same subject-matter, the former enactment shall be disregarded in so far as is necessary to maintain or give effect to that other enactment."

Section 27 of the Interpretation Act, 2005 states:

> "27.—(1) Where an enactment is repealed, the repeal does not—
>
> (a) revive anything not in force or not existing immediately before the repeal,
>
> (b) affect the previous operation of the enactment or anything duly done or suffered under the enactment,
>
> (c) affect any right, privilege, obligation or liability acquired, accrued or incurred under the enactment,
>
> (d) affect any penalty, forfeiture or punishment incurred in respect of any offence against or contravention of the enactment which was committed before the repeal, or
>
> (e) prejudice or affect any legal proceedings (civil or criminal) pending at the time of the repeal in respect of any such right, privilege, obligation, liability, offence or contravention."

Counsel for the applicant places particular reliance on s. 26(2)(c) of the Act of 2005 and, applying it to European Arrest Warrant proceedings in being under the Act of 2003 on the 24th of July 2012, when the amending provisions were signed into law, has submitted that it is not possible to continue the proceedings in conformity with the new enactment when the endorsement of the warrant for execution was necessarily on the basis that the warrant complied with the pre-amended Act, including the form of warrant therein prescribed.

Further, particular reliance is also placed on s. 27(1)(b), (c), and (e) of the Act of 2005, respectively. Counsel for the applicant has urged upon the Court that subs. (b) is directly applicable, as the endorsement of the warrant for execution in this case was a "thing duly done under the enactment," as it was before it was amended by what was effectively a repeal of a then existing provision and the substitution, therefore, of a new provision the previous operation of the Act. It was further submitted that subs. (c) also applies, as once the warrant was endorsed the respondent was "liable" to be surrendered on foot of the warrant in accordance with the provisions of the Act at the time of the endorsement. Finally, Counsel for the applicant submitted that, proceedings pending as a result of the endorsement of a European arrest warrant should not, by virtue of subs. (e), be prejudiced or affected by subsequent amendments to the Act.

The Court's attention was drawn to the judgment of Dunne J. in *Start Mortgages Ltd & Ors v Gunn & Ors* [2011] IEHC 275 in illustration of the provisions in question have been applied (in that case to the repeal of s. 62(7) of the Registration of Title Act 1964 by certain provisions of the Land and Conveyancing Law Reform Act 2009). In her judgment Dunne J. stated:

> "So far as the Gunn case is concerned, it is clear that the facts of that case fall within the provisions of s. 27 (1) (e) and (2) of the 2005 Act. The legal proceedings in respect of the right vested in the plaintiff had already been instituted prior to the repeal of s. 62(7) and it is clear from the provisions of s. 27 (1) (e) and (2) that proceedings in respect of a right acquired or accrued may be continued as if the enactment had not been repealed.
>
> In other cases where the facts are that: a mortgage was registered as a charge before the 1st December, 2009; the default occurred before that date; demand was made before that date and proceedings were issued before that date, there can be no doubt but that the rights of the lender to apply for an order of possession are saved by the provisions of s. 27 of the 2005 Act, notwithstanding the repeal of section 62(7).The position in relation to those cases where some of those events have occurred before the 1st December, 2009 and some of those events have occurred after that date is relatively straightforward. Provided that default occurred and demand was made for the repayment of the principal monies due before that date, proceedings can be continued or instituted."

Finally, responding to the respondent's reliance upon the *Melloni* case, counsel for the applicant has submitted that while the E.C.J. did not accede to the preliminary issue that it had no jurisdiction to deal with the case before it, which was the context within which its comments were made, the judgment does not seek to remove from member states the capacity to the deal with the issues raised by member states themselves.

The Court's Decision

The Court finds itself in agreement with counsel for the respondent that the amendments brought about to ss. 11, 16(1) and 45 respectively of the Act of 2003 by the Act of 2012 were procedural in nature rather than substantive. The clear purpose of those amendments was to transpose the relevant provisions of Framework Decision 2009/299 for the purposes of Irish domestic law. That instrument refined for the purposes of greater clarity, and with a view to ensuring consistency of application in the various contexts in which *in absentia* decisions might not be recognized, the grounds for non-recognition of such decisions. The objectives of the instrument are clearly identified in article 1(1) thereof as being "*to enhance the procedural rights of persons subject to criminal proceedings, to facilitate judicial cooperation in criminal matters and, in particular, to improve mutual recognition of judicial decisions between Member States*" In doing so, that Framework Decision expressly disavowed any intention of seeking to harmonize national laws, and expressly confirmed in article 1(2) thereof that "*[t]his Framework Decision shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty, including the right of defence of persons subject to criminal proceedings, and any obligations incumbent upon judicial authorities in this respect shall remain unaffected*". Indeed, it is clearly based firmly upon the jurisprudence of the E.Ct.H.R and it does not seek to modify or change the approach that that jurisprudence mandates.

Moreover, although article 5(1) of Framework Decision 2002/584 was much less detailed in its terms, and provided less direct guidance as to how the right to be present in person as an aspect of the overarching right to a fair trial, was to be respected in the European arrest warrant context, the previous provision was in any event required to be interpreted and applied in accordance with the said jurisprudence of the E.Ct.H.R.

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, 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.

On the contrary, the effect of these provisions is to reflect an inter-state agreement on the part of those member states who have opted in to the arrangement, that where a judicial authority in the executing state is asked to surrender a person on foot of a European arrest warrant, who has been tried *in absentia* in the issuing state, the executing judicial authority will not as a matter of procedure surrender that person unless it has certain information, and/or certain undertakings have been given. The procedural requirements have been changed as between the two instruments. In particular, article 4a(1) of Framework Decision 2009/299 precludes, in the four situations set out therein, the executing judicial authority from making the surrender of a person convicted *in absentia* conditional upon the conviction being open to review in his presence. However, the underlying position has not changed. Persons facing surrender have no substantive right not to be surrendered merely because they were tried *in absentia*. However, they may not in fact be surrendered if certain procedural requirements are not met. If, however, the procedural requirements are met the executing state is obliged to surrender the person.

I have considered ss. 11, 16(1) and 45 respectively of the Act of 2003, both as originally enacted, and as amended by the Act of 2012. I have looked at these provisions individually, and cumulatively, within the context of the Act of 2003 (as enacted at the particular point of reference) viewed as a whole. I am satisfied that in enacting these provisions, both as originally enacted, and subsequently in their amended form, the intention of the Oireachtas was to transpose the provisions of the relevant Framework Decisions in so far as they relate to trials *in absentia*. I am further satisfied that the Oireachtas has not gone beyond what those

provisions require (save, in the case of the transposition of article 5(1) of Framework Decision 2002/584, to the extent indicated by this Court in its decision in *Minister for Justice and Equality v Horváth* [2013] IEHC 534 (unreported, High Court, Edwards J., 5th November 2013)) and has not at any stage purported to create a substantive personal right to non- surrender where a person has been tried in their absence in the issuing state.

I am reinforced in my view by the decision of the European Court of Justice in *Stefano Melloni v Ministerio Fiscal* [2013] 2 C.M.L.R. 43. In *Melloni* the E.C.J. clearly characterises the amending Framework Decision as effecting "*a harmonisation of the conditions of execution of a European arrest warrant in the event of a conviction rendered in absentia, which reflects the consensus reached by all the Member States regarding the scope to be given under EU law to the procedural rights enjoyed by persons convicted in absentia who are the subject of a European arrest warrant*" (para. 62, emphasis added).

Moreover, the *Melloni* judgment further makes it clear that it would not have been open to the Oireachtas to go further than the Framework Decisions in this particular matter and to create substantive rights where none otherwise exist. The Court held, inter alia, in *Melloni* at para. 63:

> "…allowing a Member State to avail itself of Article 53 of the Charter to make the surrender of a person convicted *in absentia* conditional upon the conviction being open to review in the issuing Member State, a possibility not provided for under Framework Decision 2009/299, in order to avoid an adverse effect on the right to a fair trial and the rights of the defence guaranteed by the constitution of the executing Member State, by casting doubt on the uniformity of the standard of protection of fundamental rights as defined in that framework decision, would undermine the principles of mutual trust and recognition which that decision purports to uphold and would, therefore, compromise the efficacy of that framework decision."

In the circumstances, the applicant's reliance upon ss. 26 and 27 of the Interpretation Act 2005 is inappropriate, and it does not assist him. Neither do the authorities that he relies upon in that context, such as *Kenny v An Bord Pleanala* [2001] 1 I.R. 565; *Child v Wicklow Co Council* [1995] 2. I.R. 447; and *Start Mortgages Ltd & Ors v Gunn & Ors* [2011] IEHC 275.

In so far as the dicta referred to in *Minister for Justice and Equality v Tokarski* [2012] IESC 61 (unreported, Supreme Court, Murray J, 6th December 2012), and *Minister for Justice and Equality v Gheorghe* [2009] IESC 76 (unreported, Supreme Court, Fennelly J, 18th November 2011) are concerned, in neither case was the Supreme Court being asked to consider whether or not the provisions in question had retrospective effect. It seems reasonable to interpret the dicta in question as reflecting the general position, acknowledged by both sides in the present case, that there is a general presumption against retrospective effect. However, in this Court's view, when the provisions currently under consideration are considered in their proper legislative context, and are given a conforming interpretation in accordance with Criminal Proceedings against *Pupino* (Case C-105/03) [2005] E.C.R. I-5285, they must be considered to be retrospective in effect, not least because, as counsel for the respondent has pointed out, article 8(2) of Framework Decision 2009/299 contains an express provision as to its temporal applicability.

The retrospective nature of the recent amendments to ss. 11, 16(1) and 45 respectively of the Act of 2003, will not create an insurmountable problem for the applicant in most cases. In practice, warrants not already endorsed are not being presented for endorsement until additional information in the form now required by the Table in s. 45 as amended has been obtained, and both the warrant and the additional information are presented to the Court at the time of endorsement and are read as one document. As regards the small number of cases where warrants not in the correct form had already been endorsed and in which proceedings were already underway on the 24 July 2012, the position can be remedied ex post facto the endorsement by the seeking of additional information in the required form, which again can be read by the Court with the warrant as though the material was all in one document. If necessary, the Court can seek this information of its own motion invoking its powers under s. 20(1) of the Act of 2003.

In the present case, the Court has been furnished with additional information dated the 2nd August 2013 consisting of a letter from the issuing judicial authority enclosing completed section (d) of the form of the warrant in the new (i.e., amended) form. That document certifies, per paragraph 3.1a, that Pawel Surma "*was summoned in person on 13/09/2004 and thereby informed of the scheduled date and place of the trial which resulted in the decision and was informed that a decision may be handed down if he or she does not appear for the trial*." Reading that document with the original warrant the Court can in fact be satisfied in the circumstances of this case that the precondition set out in s.16(1)(c) of the Act of 2003 as amended by the Act of 2012 has been met. In the circumstances this Court considers that it is at liberty to surrender the respondent, and will do so in circumstances where it is satisfied that all of the other requirements of the Act of 2003 as amended, and of s. 16(1) of the Act of 2003 in particular, have been met.