

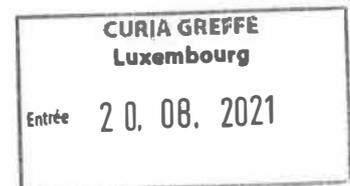
**IN THE MATTER OF THE EUROPEAN ARREST WARRANT ACT 2003  
(AS AMENDED) AND IN THE MATTER OF ARTICLE 267 OF THE  
TREATY ON THE FUNCTIONING OF THE EUROPEAN UNION AND IN  
THE MATTER OF A REFERENCE TO THE COURT OF JUSTICE OF  
THE EUROPEAN UNION**

**BEFORE**

**THE PRESIDENT**

**MR. JUSTICE EDWARDS**

**MR. JUSTICE COLLINS**



**APPEAL NO 2021 8**

**BETWEEN**

**THE MINISTER FOR JUSTICE AND EQUALITY**

**RESPONDENT**

**AND**

**LU**

**APPELLANT**

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**ORDER DATED THE 30<sup>th</sup> DAY OF JULY 2021**

**FOR REFERENCE TO THE**

**COURT OF JUSTICE OF THE EUROPEAN UNION PURSUANT TO**

**ARTICLE 267 OF THE TREATY**

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The appeal on behalf of the Appellant against the judgment and order of the High Court (Mr. Justice Binchy) given on the 15<sup>th</sup> of December 2020 and made on the 18<sup>th</sup> day of December 2020 (ordering the surrender of the Appellant pursuant to Section 16(1) of the European Arrest Warrant Act 2003(as amended) to such person duly authorised to receive him on behalf of the Republic of Hungary and making other ancillary orders and directions) on the grounds set forth in Notice of Appeal issued on behalf of the Appellant on the 18<sup>th</sup> day of January 2021 and the

matter coming for remote hearing before the Court on the 19<sup>th</sup> day of April 2021 in the presence of Counsel for the Appellant and Counsel for the Respondent

And on reading the said judgment and Order of the High Court and the said Notice of Appeal and the Respondent's Notice issued on the 19<sup>th</sup> day of February 2021 and the Submissions lodged on behalf of Counsel for the Appellant and Counsel for the Respondent and the additional documents contained in the Books of Appeal

And on hearing what was offered by said Counsel for the Appellant and Counsel for the Respondent

The Court was pleased to reserve judgment herein

And judgment having been delivered by remote means on the 21<sup>st</sup> day of July 2021 in the presence of Counsel for the respective parties and on further hearing what was offered by said Counsel for the respective parties and on reading further correspondence received from the parties

**THE COURT HAS DECIDED TO REFER** to the Court of Justice of the European Union pursuant to Article 267 of the Treaty on the Functioning of the European Union as set out in the said Reference dated the 30<sup>th</sup> day of July 2021 the questions set out in paragraph 37 [*sic*] page 16 of said Reference and request the said Court of Justice to give a preliminary ruling thereon

**AND IT IS ORDERED** that the further hearing of the said appeal do stand adjourned until after the said Court of Justice shall have given its preliminary ruling on the said questions



OWEN DUFFY

REGISTRAR OF THE COURT OF APPEAL

Tony Hughes & Co  
Solicitors for the Appellant  
Office of the Chief State Solicitor  
Solicitor for the Respondent



**THE COURT OF APPEAL**

**Record No 2021/8**

**Birmingham P**

**Edwards J**

**Collins J**

**IN THE MATTER OF THE EUROPEAN ARREST WARRANT ACT 2003  
(AS AMENDED)**

**BETWEEN**

**THE MINISTER FOR JUSTICE AND EQUALITY**

*Applicant/Respondent*

**AND**

**LU**

*Respondent/Appellant*

**REQUEST FOR PRELIMINARY RULING  
PURSUANT TO ARTICLE 267 OF THE  
TREATY ON THE FUNCTIONING OF THE EUROPEAN UNION**

**The Referring Court**

1. This reference is made by the Court of Appeal (The Hon Mr Justice George Birmingham (President), the Hon Mr Justice John Edwards and the Hon Mr Justice Maurice Collins).



**Contact:** Owen Duffy, Registrar of the Court of the Appeal, Office of the Court of Appeal, Aras Ui Dhalaigh, The Four Courts, Inns Quay Dublin 7, +353 (0)1 888 6131.  
Email:Owenduffy@courts.ie

### **The Parties and their Representatives**

2. The parties to these proceedings are as follows:

**The Minister for Justice and Equality** (*“the Minister”*), represented by Ciara McMahon, the Chief State Solicitor’s Office, Osmond House, Little Ship Street, D08 V8C5; Tel: +35314176100; Email: ciara\_mcmahon@csso.gov.ie, contact@csso.gov.ie

**LU** (*“the Appellant”*) represented by Tony Hughes, Tony Hughes & Co. Solicitors, 283a Ballyfermot Road, Dublin 10, D10 DE93. Tel: +33516266549; Email: tonyhughessolicitor@gmail.com

### **Subject Matter of the Dispute in the Main Proceedings**

3. Hungary seeks the surrender of the Appellant pursuant to a European arrest warrant (EAW) issued on 27 July 2017. The EAW seeks the Appellant’s surrender for the purpose of his serving the remaining 11 months of a one year term of imprisonment imposed on him following his conviction for four offences arising from incidents of domestic violence directed at his former spouse, his child and mother-in-law, including assaulting his former spouse and false imprisonment of her and their child. These offences were committed in August 2005 and are referred to in this Order as the *“2005 Offences”*.
4. Section (b) of the EAW identifies the relevant enforceable judgments as a judgment of Encsi Municipal Court (as the court of first instance) of 10 October 2006 and a judgment of the Borsod-Abaúj Zemplén Court (as the court of second instance) of 19 April 2007.

5. The EAW was unclear in a number of respects and the High Court considered it necessary to make a several successive requests for further information. The information provided in response to these requests, in conjunction with the EAW, discloses the following sequence of events:

- On 10 October 2006, the Appellant was convicted of the 2005 Offences by the Encsi Municipal Court, following a trial held on 23 May 2006 and 10 October 2006. The Appellant was present at this trial.
- On 19 April 2007, the Appellant was convicted at second instance of the 2005 Offences by the County Court of Borsod-Abaúj Zemplén. The Appellant was duly summoned to appear at this hearing. While he did not appear personally, he was represented by his chosen defence counsel.
- As a result of these convictions, the Appellant was sentenced to one year's imprisonment. However, execution of that sentence was suspended for a two year probation period.
- The Appellant had spent a month in custody in April/May 2006, leaving a maximum of 11 months to be served (that balance being suspended as per above).
- In December 2010, the Appellant was convicted at first instance by the Encsi Municipal Court of an offence of failing to pay child support (the "*Child Support Offence*"). The Appellant was present at the hearings held on 15 November and 13 December 2010 but was not present when the Court gave its decision on 16 December 2010. The Encsi Municipal Court imposed a fine on the Appellant. It did not make any order in relation to the sentence imposed on the Appellant for the 2005 Offences. The Child Support Offence had been committed in 2008 (during the probation period applicable to the suspended sentence for the 2005 Offences).

- The decision of the Encsi Municipal Court was appealed, though it is unclear by whom. In June 2012, the Miskolc Court of Appeal varied the sentence and in lieu of a fine sentenced the Appellant to 5 months imprisonment, banned him from public affairs for 1 year *and* ordered the enforcement of the sentence imposed on him for the 2005 Offences . The Appellant was summoned to attend the hearing before the Miskolc Court of Appeal but the summons was not collected. That was considered due service under Hungarian law. The Appellant was not present at the hearing but the Court appointed a defence attorney who attended at the trial and subsequently filed a motion for a re-trial and submitted an appeal for clemency on the Appellant's behalf.
- The information made available to the High Court does not disclose the exact legal basis for the enforcement order made by the Miskolc Court of Appeal and, in particular, whether that order was mandatory or discretionary.
- In September 2012 a European Arrest Warrant was issued by Hungary seeking the Appellant's surrender for the purpose of serving the sentences imposed on him in respect of both the 2005 Offences and the Child Support Offence.
- The Appellant opposed his surrender and, for the reasons set out in the judgment of the High Court (Donnelly J) of 19 May 2015 (*sub nom Minister for Justice and Equality v AB* [2015] IEHC 338), the High Court refused to order his surrender.
- On 28 October 2015, the Miskolc Court of Appeal directed that the Encsi Municipal Court consider whether a retrial should be ordered in relation to the 2005 offences. The procedure seeking a retrial had been initiated by the Appellant but he was not present at the hearing before the Miskolc Court of Appeal.

- On 24 October 2016, the Encsi Municipal Court rejected the application for a retrial. The Appellant did not appear before the Encsi Municipal Court but he was represented by a defence counsel appointed by him.
  - The Appellant appealed the decision of the Encsi Municipal Court. That appeal was heard by the Miskolc Court of Appeal on 20 March 2017. The Appellant did not appear but he was represented by a defence counsel appointed by him. The proceedings were adjourned to 29 March 2017 when the Court of Appeal announced its decision to dismiss the motion for a retrial.
  - As a result of that decision, the sentence of imprisonment imposed on the Appellant following his conviction for the 2005 Offences – which had been ordered to be enforced by the Miskolc Court of Appeal in June 2012 – was again enforceable as a matter of Hungarian law.
  - The EAW at issue in these proceedings then issued on 27 July 2017.
6. The Court’s provisional view is that the proceedings before the Miskolc Court of Appeal that resulted in the Appellant’s conviction for the Child Welfare Offence, his sentencing for that offence and the making of the enforcement order, which took in the absence of the Appellant, did not comply with Article 6 ECHR. On the information currently available, it is not possible to conclude that the Appellant waived his right to be present at those proceedings. Similarly, the Court is of the provisional view that, if the proceedings before the Miskolc Court of Appeal are properly to be regarded as “*the trial resulting in the decision*” for the purposes of surrender here, the requirements of Article 4a/section 45 are not to be satisfied. The real issue on the appeal is whether, as a matter of principle, such matters are relevant to the surrender decision. If determined to be relevant, further inquiry may then be necessary before making a definitive assessment as to whether surrender should actually be refused on the facts.
7. A number of different grounds of objection to surrender were advanced, all of which were rejected by the High Court. This Court, on appeal, has already rejected certain

grounds of objection. For the purposes of this reference, two related grounds of objection only are relevant:

(1) The Appellant argues that in circumstances where the sentence of imprisonment imposed upon him for the 2005 Offences (being the sentence for which his surrender is sought) is enforceable solely by reason of his subsequent conviction for the Child Support Offence which in turn led to the enforcement order made by the Miskolc Court of Appeal in June 2012, the proceedings leading to that conviction and enforcement order constitute the '*trial resulting in the decision*' for the purposes of Article 4a(1) of Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA) ("*the Framework Decision*"), which is given effect to in Irish law by section 45 of the European Arrest Warrant Act 2003. On that basis, the Appellant argues, his surrender ought to be refused because those proceedings, and in particular the proceedings before the Miskolc Court of Appeal resulting in the enforcement order, were conducted *in absentia* and none of the conditions set out in Article 4a(1)/section 45 has any application.

(2) The Appellant argues that the proceedings leading to his conviction on the Child Support Offence and the making of the enforcement order were conducted in violation of his fair trial rights guaranteed by Article 6 of the European Convention on Human Rights and Fundamental Freedoms (ECHR). As the proceedings were conducted *in absentia*, and as it is evident that the Appellant will not have any entitlement to a retrial or any appeal which may lead to the conviction or enforcement order being reversed in the event of his surrender, the Appellant argues that it would be a "*flagrant breach*" of Article 6 ECHR, as well as of Articles 47 and 48 of the Charter of Fundamental Rights of the European Union (the Charter), to order his surrender in execution of the EAW and that, in such circumstances, section 37 of the European Arrest Warrant Act 2003 requires the Court to refuse his surrender.

8. These grounds are contested by the Minister. As regards (1) above, the Minister contends that it is apparent from the judgment of 22 December 2017 in *Samet Ardic* Case C-571 PPU, EU:C:2017:1026 ("*Ardic*") that the proceedings leading to the

Appellant's conviction for the Child Support Offence did not constitute "*the trial resulting in the decision*" for the purpose of Article 4a/section 45; the trial for that purpose was the trial before the County Court of Borsod-Abaúj Zemplén resulting in the decision of 19 April 2007. The requirements of Article 4a/section 45 had been fully met as regards that decision, as the High Court Judge found. The enforcement order made by the Miskolc Court of Appeal in June 2012 was a measure relating to the methods of execution of a custodial sentence and did not affect "*the nature or the quantum*" of the custodial sentence that had previously been imposed on the Appellant following his conviction for the 2005 Offences. As regards (2) above, the Minister contends that the proceedings leading to the conviction of the Appellant for the Child Support Offence and the making of the subsequent enforcement order are not relevant to the decision whether to execute the EAW or not. Even if there was a breach of Article 6 (and the Minister does not concede any such breach), any remedy is a matter for the courts of the issuing State (and, it was said, this Court should assume that an effective remedy would be available to the Appellant if surrendered) and any such breach did not approach the threshold of seriousness that could warrant a departure from the general position under the Framework Decision that warrants should be executed.

### **Relevant Legal Provisions**

#### ***The European Arrest Warrant Act 2003 (as amended)***

9. The European Arrest Warrant Act 2003 (as amended) ("*the 2003 Act*") gives effect in Irish law to the Framework Decision
10. Section 45 of the 2003 Act exercises the option provided to Member States by Article 4a. It provides that "*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..*” Point 3.1a, 3.1b, 3.2 and 3.3 correspond to Article 4a(1)(a)-(d) respectively (section 45 is set out in full in the Schedule to this Order of Reference).

11. Section 37(1) of the 2003 Act provides (*inter alia*) that:

*“A person shall not be surrendered under the Act if-*

*(a) his or her surrender would be incompatible with the State’s obligations under (i) the Convention or (ii) the Protocols to the Convention”*

### ***The Charter***

12. Article 47(2) of the Charter provides that:

*“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.”*

13. Article 48(2) provides:

*“Respect for the rights of the defence of anyone who has been charged shall be guaranteed.”*

### ***The Framework Decision***

14. Recital (12) of the Framework Decision provides (*inter alia*) that the 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.”*

15. Article 4a of the Framework Decision (inserted by Article 2 of Framework Decision 2009/299/JHA) provides that:

*“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*

*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.*

*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.”*

### ***Relevant Case-law***

16. Article 4a was considered by the Court of Justice in *Ardic*. There the Court held that where a party has been found guilty of a criminal offence and had a custodial sentence imposed on them the execution of which is subsequently suspended in part, subject to certain conditions, the concept of ‘*trial resulting in the decision*’, must, for the purposes of Article 4a, “*be interpreted as not including subsequent proceedings in which that suspension is revoked on grounds of infringement of those conditions during the probationary period, provided that the revocation decision adopted at the end of those proceedings does not change the nature or the level of the sentence initially imposed.*”
  
17. The test for determining whether surrender should be refused on the basis that it would be incompatible with Article 6 ECHR of the Charter has been considered by Irish courts on a number of occasions. The case-law emphasises the high threshold for refusal. In *Minister for Justice v Stapleton* [2007] IESC 30, [2008] 1 IR 669, the Supreme Court stated “*that the courts of the executing member state, when deciding whether to make an order for surrender must proceed on the assumption that the courts of the issuing member state will, as is required by Article 6.1 of the Treaty on European Union, “respect ... human rights and fundamental freedoms”* (at para 70). In *Minister for Justice and Equality v Celmer* [2019] IESC 80, [2020] 1 ILRM 121 – where the argument against surrender primarily relied on Articles 47 and 48(2) of the Charter – the Supreme Court expressed the test in terms of whether, if surrendered, the requested

person would suffer a breach “*of the essence of his fundamental right to a fair trial.*” The Court derived that test from the judgment of the Grand Chamber of 25 July 2018 in *LM*, Case C-216/18 PPU, EU:C:2018:586.

18. European Court of Human Rights jurisprudence emphasises the entrenched and fundamental character of the rule against *in absentia* trial and conviction, unless accompanied by a right to obtain a retrial: *Stoichkov v. Bulgaria*, (9808/02) 44 EHRR 14, *Sejdovic v Italy* (56581/00, 2006) and *Othman v United Kingdom* (8139/09) (2012) 55 EHRR 1. The duty of contracting parties to guarantee the right of a criminal defendant to be present in the courtroom – either during the original proceedings or in a retrial – “*ranks as one of the essential requirements of Article 6*” (*Sejdovic*, para 84). In *Othman*, the ECtHR noted that it was “*established in the Court’s case law that an issue might exceptionally be raised under art 6 by an expulsion or extradition decision in circumstances where the fugitive had suffered or risked suffering a flagrant denial of justice in the requesting country*” (para 258). It went on to observe that the Court had indicated that “*certain forms of unfairness could amount to a flagrant denial of justice*” including “*conviction in absentia with no possibility subsequently to obtain a fresh determination of the merits of the charge*” (at para 259).
19. As a matter of Irish law, “[n]othing could be clearer than the principle that in order to exercise any of the rights guaranteed by Article 38.1 of the Constitution, which prohibits any criminal trial taking place ‘save in due course of law’, a person accused of a crime must know when and where they are to be tried.” (*O’ Brien v Coughlan* [2016] IESC 4, [2018] 2 IR 270, at para 8). The right of an accused to be present and to follow the proceedings against them has been characterised as “*a fundamental constitutional right of the accused which every court would be bound to protect and vindicate*” (per Murphy J in *Lawlor v Hogan* [1993] ILRM 606, at 610). That right extends to sentencing hearings and also extends to hearings which may result in the activation or enforcement of a suspended sentence. However, the right to be present is not absolute and is capable of being waived in certain limited circumstances.

20. Finally, two further decisions of the European Court of Human Rights, *Bohmer v Germany* (37568/97) (3 October 2002) and *El Kaada v Germany* (2130/10) (12 November 2015) were relied on by the Appellant as establishing the application of Article 6 ECHR to decisions for the enforcement of suspended sentences in certain circumstances. In each of those decisions, the Court found that there had been a breach of the presumption of innocence in Article 6(2) ECHR where suspended sentences had been activated on the basis that the person concerned had committed a further criminal offence, in circumstances where that determination was made in advance of the final determination of guilt by an Article 6 trial.

### **Grounds for the Reference**

21. The Court has given a detailed judgment in these proceedings (citation: [2021] IECA 110) and in another appeal which raises similar issues and in which it has also decided to make a preliminary reference (*Minister for Justice & Equality v Szamota* [2021] IECA 109). These judgments – and in particular the Court’s judgment in *Szamota* – set out in detail the reasons why the Court considers a preliminary reference to be necessary for its determination of the appeals. Copies of these judgments are appended to this Order as **Appendices 1 and 2**.
22. The facts here differ from *Ardic* in a number of respects. Unlike *Ardic*, the trigger for the enforcement of the custodial sentence imposed on the Appellant for the 2005 Offences (which, unlike the position in *Ardic*, was suspended in full *ab initio*) was his subsequent conviction for the Child Support Offence. That conviction appears to have had a decisive effect in triggering the activation of the Appellant’s previously suspended custodial sentence. A further difference is that the Appellant, unlike Mr *Ardic*, has no right to be heard *ex post* in the event that he is surrendered. He has already sought a retrial in respect of the Child Support Offence but his application was unsuccessful.
23. Even so, it may be said that the enforcement order made by the Miskolc Court of Appeal of the Decision was no more than “*a decision relating to the execution or application*

*of a custodial sentence previously imposed*’ and that neither that decision nor the Appellant’s conviction for the Child Custody Offence had the purpose or effect of modifying the nature or *quantum* of the custodial sentence imposed on him in respect of the 2005 Offences. While a decision to activate a previously suspended sentence obviously has significant consequences for the person concerned, it was held in *Ardic* that such a decision does not have the effect of modifying the nature or *quantum* of the sentence. On that basis, it could be said to follow that the precise nature of the triggering decision – whether a decision to revoke a conditional release for breach of the conditions of release as in *Ardic* or a decision to activate a previously suspended sentence consequent upon a further criminal conviction as here – is not material.

24. At the same time, the Court considers that that the circumstances presented here have a much closer nexus to Article 6 ECHR (and to Articles 47 and 48(2) of the Charter) than was the case in *Ardic*. The custodial sentence for the 2005 Offences is enforceable only because of the Appellant’s *in absentia* conviction and sentencing for the Child Custody Offence. Otherwise there would be no enforceable custodial sentence for which surrender could be ordered on foot of the EAW. In this context, the Appellant submitted that, just as the courts here would not recognise or give effect to the *in absentia* conviction in respect of the Child Custody Offence (because of the provisions of Article 4a/section 45) they ought not to recognise or give effect to that conviction for the purpose of his surrender for the 2005 Offences.
25. On the premise that Article 4a/section 45 would have barred the surrender of the Appellant to serve the sentence imposed on him for the Child Custody Offence, it would seem anomalous if he is liable to be surrendered to serve the sentence imposed on him for the 2005 Offences, where that sentence is enforceable only by reason of the self-same *in absentia* conviction.
26. In this Court’s view, the ECtHR jurisprudence considered in *Ardic*, such as the decision in *Boulois v Luxembourg*, does not really address this issue. *Boulois* was not concerned with the activation of a suspended sentence resulting from a subsequent conviction. Rather, it was concerned with decisions relating to prison leave, conditional release and

prison transfer taken by the Prison Board in Luxembourg. Here in contrast, there is no doubt that Article 6 did apply to the Appellant's trial, conviction and sentencing for the Child Custody Offence. As already noted, that conviction appears to have been decisive for the purpose of the enforcement of the suspended custodial sentence imposed on the Appellant for the 2005 Offences. As a matter of substance, that conviction triggered the enforcement of the sentence.

27. In these circumstances, it appears to this Court to be arguable that the enforcement order made by the Miskolc Court of Appeal is so closely connected to the conviction for the Child Support Offence that a breach of Article 6(1) ECHR affecting that conviction must also affect that enforcement order. The decisions of the ECtHR in *Bohmer v Germany* and *El Kaada v Germany* arguably provide support for such an argument. In contrast to *Boulois* and the other authorities referred to in *Ardic*, those decisions were concerned with the enforcement of a suspended sentence on the basis of the commission of a subsequent criminal offence. While the facts were different in that the courts made the enforcement orders on the basis of a determination of guilt that was not based on a final conviction reached after a criminal trial – thus giving rise to a breach of Article 6(2) ECHR – on the Appellant's case, just as the enforcement decisions in *Bohmer* and *El Kaada* were bad in law on the basis that they each relied on a determination of guilt that violated Article 6(2) ECHR, the enforcement order made here is bad in law on the basis that it relied on a determination of guilt – the conviction for the Child Support Offence – that violated Article 6(1) ECHR. In the latter case as much as in the former, arguably, “*a disadvantage that .. equates with a penalty*” – the revocation of the suspension of the prison sentence under the initial conviction – has been imposed as a result of the “*new criminal offence*” (*Bohmer*, para 66).
28. *Bohmer* and *El Kaada* are thus capable of being read as supporting a broader principle to the effect that, where a suspended sentence is sought to be enforced as a result of the subsequent commission of a criminal offence, the decision to enforce must be based on a determination of guilt that complies with Article 6 ECHR.

29. As regards the seriousness of any non-compliance here, the ECtHR jurisprudence suggests that the conviction of a person *in absentia* with no possibility to obtain a fresh determination of the merits of the charge is, in principle, capable of amounting to a “*flagrant denial of justice*” and is thus “*exceptionally*” may be raised under Article 6 by an extradition (or surrender) decision. Article 4a itself reflects that position – it expressly empowers the courts of executing States to refuse to surrender where “*the trial resulting in the decision*” (as that expression has been interpreted) took place *in absentia* in circumstances that amount to a breach of Article 6(1). *In absentia* convictions are, properly, seen as a serious matter which engage vital norms of criminal justice and fundamental rights and which warrant the extreme step of refusing surrender. Notably, in cases within the scope of Article 4a, the executing State is not required to leave the remedying of any Article 6 breach to the courts of the issuing State.
30. As regards the scope of Article 4a(1) of the Framework Decision, it appears to the Court that it is arguable that, in circumstances such as those presented here, the substantive vindication of the Article 6 rights of the requested person (and their rights under Articles 47 and 48 of the Charter which are engaged here given that the EAW regime is a creature of Union law) require that the “*the trial resulting in the decision*” should be read as including subsequent criminal proceedings resulting in a conviction where that conviction played a decisive role in the enforcement of a previously suspended sentence in respect of which surrender has been sought.
31. While that would expand the category of relevant “*decision*” for the purposes of Article 4a(1), arguably that would not adversely affect or undermine the effectiveness of the European Arrest Warrant mechanism in circumstances where Member States are already obliged to comply with Article 6(1) ECHR in their criminal procedures in any event. Therefore, where a suspended sentence is triggered by a subsequent conviction, it would not seem to place an undue burden on the issuing State to establish that the requested person was present at the trial resulting in that conviction (and, where relevant, the sentencing hearing) or, if not, that his Article 6 rights were otherwise respected.

32. In the circumstances, the Court cannot properly conclude that *Ardic* unambiguously forecloses acceptance of the objections to surrender advanced by the Appellant and, in light of its doubts, and having regard to the fundamental importance of the issues, and the need for clarity and certainty as to the extent of the respective obligations of issuing and executing States in this context, the Court considers that it is appropriate to make a reference to the Court of Justice pursuant to Article 267 TFEU.

### **Questions Referred for a Preliminary Ruling**

37. The Court refers the following questions. Depending on the answer to question 1, it may be unnecessary to address the subsequent questions.

*1. (a) Where the surrender of the requested person is sought for the purpose of serving a custodial sentence which was suspended ab initio but which was subsequently ordered to be enforced as a result of the conviction of the requested person for a further criminal offence, and where that enforcement order was made by the court that convicted and sentenced the requested person for that further criminal offence, are the proceedings leading to that subsequent conviction and enforcement order part of the 'trial resulting in the decision' for the purposes of Article 4a(1) of Council Framework Decision 2002/584/JHA?*

*(b) Is it relevant to the answer 1(a) above whether the court that made the enforcement order was obliged to make that order as a matter of law or whether it had a discretion to make such an order?*

*2. In the circumstances set out in question 1 above, is the executing judicial authority entitled to inquire into whether the proceedings leading to the subsequent conviction and enforcement order, which took place in the absence of the requested person, were conducted in compliance with Article 6 of the European Convention on Human Rights and Fundamental Freedoms and, in particular, whether the absence of the requested*

*person involved a violation of the rights of the defence and/or the requested person's right to a fair trial?*

*3. (a) In the circumstances set out in question 1 above, if the executing judicial authority is satisfied that the proceedings leading to the subsequent conviction and enforcement order were not conducted in compliance with Article 6 of the European Convention on Human Rights and Fundamental Freedoms and, in particular, that the absence of the requested person involved a violation of the rights of the defence and/or of the requested person's right to a fair trial, is the executing judicial authority entitled and/or obliged (a) to refuse surrender of the requested person on the basis that such surrender would be contrary to Article 6 of the Convention and/or Articles 47 and 48(2) of the Charter of Fundamental Rights of the European Union and/or (b) to require the issuing judicial authority as a condition of surrender to provide a guarantee that the requested person will, upon surrender, be entitled to a retrial or appeal, in which they will have a right to participate and which allows for the merits of the case, including fresh evidence, to be re-examined which may lead to the original decision being reversed, in respect of the conviction leading to the enforcement order?*

*(b) For the purposes of question 3(a) above, is the applicable test whether the surrender of the requested person would breach the essence of their fundamental rights under Article 6 of the Convention and/or Articles 47 and 48(2) of the Charter and, if so, is the fact that the proceedings leading to the subsequent conviction and enforcement order were conducted in absentia, and that, in event of his surrender, the requested person will not have a right to a retrial or appeal, sufficient to permit the executing judicial authority to conclude that surrender would breach the essence of those rights?*

### **Final**

33. The appeal is stayed pending the ruling of the CJEU on those questions. In view of the fact that the Appellant is currently on bail, the Court does not consider it appropriate to request that this reference be dealt with under the urgent or accelerated procedure.

**Dated** 30 July 2021

**Signed:**

  
The Hon Mr Justice George Birmingham (President)

  
The Hon Mr Justice John Edwards

  
The Hon Mr Justice Maurice Collins

## SCHEDULE – SECTION 45 OF THE 2003 ACT

45. — 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 or the Trade and Cooperation Agreement arrest warrant, as the case may be, was issued, unless in the case of a European arrest warrant, the 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.”