

**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 2020 263

BETWEEN

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

AND

PH

APPELLANT

ORDER DATED THE 30th DAY OF JULY 2021

FOR REFERENCE TO THE

COURT OF JUSTICE OF THE EUROPEAN UNION PURSUANT TO

ARTICLE 267 OF THE TREATY

The appeal on behalf of the Appellant against the judgment and order of the High Court (Mr. Justice Binchy) given on the 16th of November 2020 and made on the 30th day of November 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 Poland and making other ancillary orders and directions) on the grounds set forth in Notice of Appeal issued on behalf of the Appellant on the 11th day of December 2020 and the

matter coming for remote hearing before the Court on the 3rd day of June 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 4th day of January 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 21st 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 30th day of July 2021 the questions set out in paragraph 37 page 14 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

Damien Rudden

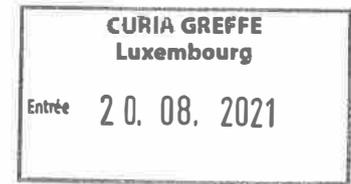
Solicitors for the Appellant

Office of the Chief State Solicitor

Solicitor for the Respondent



THE COURT OF APPEAL



Record No 2020/263

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

PH

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; (Tel) +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

PH (“*the Appellant*”) represented by Damien Rudden/Eamonn Rudden, Damien Rudden Solicitors, Stradone Village, Co. Cavan H12 Y6Y5. Tel: +353494323027. Email: eamonn@damienrudden.ie; law@damienrudden.ie

Subject Matter of the Dispute in the Main Proceedings

3. Poland seeks the surrender of the Appellant pursuant to a European Arrest Warrant (EAW) issued on 26 February 2019. The EAW seeks the Appellant’s surrender for the purpose of his serving a one year term of imprisonment imposed on him following his conviction by the District Court for Wroclaw-Śródmieście on 29 May 2015 in respect of an offence of carrying out a denial of service attack on a commercial business in Wroclaw accompanied by threats to continue the attack unless a monetary payment was made to him. Execution of the sentence was conditionally suspended for a probation period of 5 years. This offence was committed in January 2015 and is referred to in this Order as the “*First Offence*” .
4. The Appellant was notified of the proceedings against him and he was present in the District Court. He did not appeal against his conviction or sentence.
5. On 21 February 2017, the Appellant was found guilty by the District Court in Bydgoszczy of an offence of breaking into a caravan and the theft of items from it. The Appellant was sentenced to a term of imprisonment of 14 months for this offence, which is referred in this Order as the “*Second Offence*”.

6. The Second Offence was committed within the probation period applicable to the sentence imposed for the First Offence and, as a result, on 16 May 2017, the District Court for Wrocław-Śródmieście made an order pursuant to Article 75.1 of the Penal Code for the enforcement of the one year sentence (the “*Enforcement Decision*”). Article 75.1 provides that “*The Court will order the sentence to be carried out if, during the probation period, the convicted offender commits an intentional offence similar to the one he or she was validly and finally sentenced to imprisonment for.*” Article 75.1 is, on its face, mandatory and the Issuing Judicial Authority refers to the order on serving the penalty imposed as “*obligatory*”.
7. The Appellant was not aware of the hearing before the District Court in Bydgoszczy in February 2017 and did not appear at that hearing either in person or by a legal representative. He also did not know of the further proceedings before the District Court for Wrocław-Śródmieście which resulted in the Enforcement Decision and he did not appear either personally or by his legal representative at the hearing on 16 May 2017.
8. On 26 February 2019, the District Court for Wrocław-Śródmieście issued the EAW. It seeks the surrender of the Appellant in respect of the First Offence only. Surrender has not been sought in respect of the Second Offence.
9. In response to a request from the High Court, the Bydgoszcz District Court explained that the period within which the Appellant could appeal his conviction for the Second Offence has expired. However, according to that Court, it is open to any party to “*lodge an extraordinary legal remedy (reversal, motion to re-open the proceedings).*” No further information about that procedure has been provided. From the information provided by the IJA, it is apparent that, unless and until an order is made suspending the execution of the order of 21 February 2017, the Enforcement Decision will continue in force.
10. The Court’s provisional view is that the Appellant’s trial and conviction *in absentia* for the Second Offence did not comply with Article 6 ECHR or (to the extent applicable) Articles 47 and 48 of the Charter. On the information currently available, it is not possible to conclude that the Appellant waived his right to be present at that trial. It is

also the Court's provisional view that, if the trial of the Appellant for the Second Offence and/or the subsequent hearing leading to the making of the Enforcement Decision is properly to be regarded as "*the trial resulting in the decision*" for the purposes of surrender here, the requirements of Article 4a 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*")/section 45 of the European Arrest Warrant Act 2003 (as amended) ("*the 2003 Act*") would not be satisfied. The real issue on the appeal is whether, as a matter of principle, such matters are relevant to the surrender decision at all. 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.

11. A number of different grounds of objection to surrender were advanced, all of which were rejected by the High Court. 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 First Offence (being the sentence for which his surrender is sought) is enforceable solely by reason of his subsequent conviction for the Second Offence, which in turn led to the Enforcement Decision made on 16 May 2017, the proceedings leading to that conviction and the Enforcement Decision constitute the '*trial resulting in the decision*' for the purposes of Article 4a(1) of the Framework Decision, to which section 45 of the 2003 Act gives effect in Irish law. On that basis, the Appellant argues, his surrender ought to be refused because those proceedings 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 Second Offence and the proceedings leading to the making of the Enforcement Decision 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.

12. 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 neither the proceedings leading to the Appellant’s conviction for the Second Offence nor the subsequent proceedings leading to the making of the Enforcement Decision 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 District Court for Wrocław-Śródmieście that led to his conviction and sentence in respect of the First Offence on 29 May 2015. The requirements of Article 4a/section 45 had been fully met as regards that trial and decision, as the Appellant was present in the District Court. The Minister further submitted that the Enforcement Decision subsequently made by that Court consequent on the Appellant’s conviction for the Second Offence was a merely 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 First Offence. As regards (2) above, the Minister contends that the proceedings leading to the conviction of the Appellant for the Second Offence and then to the making of the Enforcement Decision are not relevant to the decision of 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)

13. The 2003 Act gives effect in Irish law to the Framework Decision
14. 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).
15. 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

16. 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.”

17. Article 48(2) provides:

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

The Framework Decision

18. 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.*”

19. 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

20. 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.”

21. The test for determining whether surrender should be refused on the basis of section 37 of the 2003 Act 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.

22. 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).

23. 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.
24. 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

25. The Court has given a detailed judgment in these proceedings (under the citation [2021] IECA 209) and that judgment sets out in detail the reasons why the Court considers a preliminary reference to be necessary for its determination of the appeals. A copy of that judgment is appended to this Order as **Appendix 1**.
26. 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 Second Offence. That conviction 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 (other than the right to seek an "*extraordinary legal remedy*"). If surrendered, he has no right to a retrial in respect of the Second Offence and the time for bringing an appeal against his conviction for that Offence has expired. While the conviction remains in place, the Enforcement Decision remains in force and he will have to serve the sentence of imprisonment in respect of which his surrender is sought.

27. Even so, it may be said that the Enforcement 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 Second Offence had the purpose or effect of modifying the nature or *quantum* of the custodial sentence imposed on him in respect of the First Offence. 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 may 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.
28. 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, which are engaged here given that the EAW regime is a creature of Union law) than was the case in *Ardic*. The custodial sentence for the First Offence is enforceable only because of the Appellant's *in absentia* conviction for the Second Offence and the consequent making of the Enforcement Decision. Although the Enforcement Decision was a distinct judicial decision, it appears to have been a formality: in light of Mr Szamota's conviction for the Second Offence, it appears that the District Court had no discretion and was obliged to order enforcement of the suspended sentence. In substance, therefore, it was the conviction for the Second Offence that had decisive effect in triggering the activation of the Appellant's previously suspended custodial

sentence for the First 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 Second Offence (because of the provisions of Article 4a/section 45) – and there the Appellant draws attention to the fact that Poland has not sought his surrender for that Offence, for reasons which have not been explained – they ought not to recognise or give effect to that conviction for the purpose of his surrender for the First Offence.

29. On the premise that Article 4a/section 45 would have barred the surrender of the Appellant to serve the sentence imposed on him following his *in absentia* trial and conviction for the Second Offence, it would seem anomalous if he is liable to be surrendered to serve the sentence imposed on him for the First Offence, where that sentence is enforceable only by reason of the self-same *in absentia* conviction.
30. 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 Second 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 First Offence. As a matter of substance, that conviction triggered the enforcement of the sentence.
31. In these circumstances, it appears to this Court to be arguable that the Enforcement Decision is so closely connected to the conviction for the Second Offence that a breach of Article 6(1) affecting that conviction must also affect the Enforcement Decision. 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 Decision made here is bad in law on the basis that it relied on a determination of guilt – the conviction for the Second 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).

32. *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.
33. 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 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, in principle, may 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.
34. 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) 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.

35. 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.
36. 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 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. 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 subsequent conviction of the requested person for a further criminal offence, in circumstances where the order for enforcement was mandatory by reason of that conviction, are the proceedings leading to that subsequent

conviction and/or the proceedings leading to the making of the enforcement order part of the 'trial resulting in the decision' for the purposes of Article 4a(1) of Council Framework Decision 2002/584/JHA?

2. In the circumstances set out in question 1 above, is the executing judicial authority entitled and/or obliged to inquire into whether the proceedings leading to the subsequent conviction and/or the proceedings leading to the enforcement order, all of which were conducted 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 from those proceedings involved a violation of the rights of the defence and/or of 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

37. 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.”