AN CHÚIRT UACHTARACH

THE SUPREME COURT

S:AP:IE:2022:000116
[2023] IESC 37

Dunne J.
Charleton J.
O'Malley J.
Woulfe J.
Collins J.

BETWEEN

MINISTER FOR JUSTICE AND EQUALITY

Appellant

AND

SH

Respondent

Judgment of Ms. Justice Elizabeth Dunne delivered on the 14th day of December 2023

Introduction

1. This appeal raises net, but important, questions as to the proper construction and application of Article 4a of Council Framework Decision 2002/584/JHA of 13th June,

2002 on the European Arrest Warrant and the Surrender Procedures between Member States[1] ("the Framework Decision") to which effect is given in the State by s. 45 of the European Arrest Warrant Act 2003 (as amended) ("the 2003 Act").

2. Article 4a provides as follows:

> "*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:*"

3. Article 4a(1) then sets out four alternative conditions. For present purposes, it appears necessary only to set out that at (a):

> *"(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;"*

4. There is a substantial body of jurisprudence of the Court of Justice of the European Union (CJEU) addressing the meaning and scope of the expression "*trial which resulted*

[1] Inserted by Council Framework Decision 2009/299/JHA of 26 February 2009.

in the decision" in Article 4a, including the recent decision of that Court in Joined Cases C-514/21 & C-515/21 *LU* & *PH* ("*LU*"). The decision in *LU*, which arose from references made by the Court of Appeal, was handed down after the decision of the High Court in these proceedings.[2]

Background

5. The material facts can be briefly stated. SH was convicted of two offences in 2014 resulting in each case in a sentence of imprisonment and a period of placement under police supervision. On 27th October, 2015, a court in Riga consolidated these sentences resulting in a cumulative custodial sentence of four years and nine months and placement under police supervision for three years. No issue arises as to the 2014 convictions or the order of 27th October, 2015.

6. Police supervision *"is an additional sentence, which a court may adjudge as a compulsory measure, in order to supervise the behaviour of the person released from a place of deprivation of liberty and so that this person may be subjected to the limitations prescribed by the police institution"* (s. 45 of the Latvian Criminal Law, cited at para 12(ii) of the High Court judgment, [2022] IEHC 614). The period of police supervision commences when the custodial sentence is complete.

7. Whilst in prison, SH was notified orally and in writing that as a condition of police supervision he was required to report to Jekabpils police station (SH's place of residence was in Jekabpils) within three working days of his release from custody (which was scheduled for 22nd August, 2019). He was also notified that failure to attend the requisite police station could lead to an administrative penalty

[2] *LU* arose from references made by the Court of Appeal in *Minister for Justice and Equality v Szamota* [2021] IECA 209 and *Minister for Justice and Equality v Siklosi* [2021] IECA 210. It is the practice of the CJEU to anonymise individual parties in such references.

being imposed on him pursuant to s. 177 of the Administrative Violations Code of Latvia. He signed a copy of the written notification to confirm his understanding of it.

8. SH was released from custody on 22nd August, 2019. He failed to report to Jekabpils police station. As a result, he was found guilty of committing an "*administrative violation*" of s. 177 by the Zemgale District Court on 11th May, 2020 and again on 27th May, 2020, resulting, respectively, in fines of €30 and €40 being imposed on him.

9. Latvian law provides that if a person subject to police supervision violates its provisions in bad faith, a court *"may replace the terms of an additional sentence that has not been served with the deprivation of liberty, counting two police supervision days as one liberty deprivation day".* A bad faith violation is established if the person has been administratively sentenced twice within a one-year period for such a violation (s. 45(5) and (6) of the Latvian Criminal Law). The making of such an order is not mandatory even where a violation in bad faith is established: "*in case of relevant circumstances (if there exist any circumstances justifying the avoidance of convict from the sentence served) the Court has a possibility to reject the application*" (letter from the Zemgale District Court dated 17th March, 2022).

10. In June 2020 an application was made by the Public Order Police Division of Jekabpils Station to the Zemgale District Court to convert SH's remaining period of police supervision into a "*deprivation of liberty*". On 25th June, 2020 a court summons was sent by registered post to SH's notified place of residence in Jekabpils. The summons was not collected and was returned on 31st July, 2020.

11. On 19th August, 2020, a hearing took place at Zemgale District Court. SH was not present and the hearing proceeded in his absence. On that date, the court issued a written decision ordering that the remaining period of police supervision – two years

and two days - should be converted into a custodial sentence of one year and one day in accordance with the 2:1 ratio prescribed by s. 45(5) of the Criminal Law.

12. A transcript of the Court's decision was sent to SH but it was returned unclaimed. It was open to SH to appeal the decision of the Zemgale District Court but no such appeal was brought by him.

13. On 26th February, 2021, a European arrest warrant issued for SH to enforce the custodial sentence was imposed by the Zemgale District Court. The warrant was endorsed by the High Court on 21st December, 2021 and SH was arrested on the same day.

High Court Judgment

14. The sole ground of objection to surrender advanced in the High Court related to Article 4a of the Framework Directive/s. 45 of the 2003 Act. SH contended that the order of the Zemgale District Court of 19th August, 2020 altered the nature and quantum of the sentence previously imposed on him. On that basis and having regard also to the fact that the District Court order was a discretionary order, SH contended that the hearing on 19th August, 2020 was the "*trial which resulted in the decision*" for the purposes of Article 4a (or, in terms of s. 45, *"the proceedings resulting in the sentence or detention order*"). That trial had been conducted in his absence and there was no evidence (so it was said) that he had received notice of the hearing or that he had waived his right to attend. The Minister disputed the contention that the hearing on 19th August, 2020 came within Article 4a or s. 45 and also maintained, in the alternative, that SH had waived his right to attend in any event.

15. In her judgment, Biggs J. referred to the relevant CJEU jurisprudence and in particular the decisions of the CJEU in Case C-270/17 PPU *Tupikas*, Case C-271/17 PPU *Zdziaszek* and Case C-571/17 PPU *Ardic*. She also referred to a number of decisions of

the Irish courts, including *Minister for Justice and Equality v. Lipinski* [2018] IESC 8, *Minister for Justice and Equality v. Fafrowicz* [2020] IEHC 680, *Minister for Justice and Equality v. Szamota* [2021] IECA 209 (which had resulted in one of the two references determined in *LU*), and *Minister for Justice and Equality v. Lukaszka* [2021] IEHC 631.

16. *Tupikas*, *Zdziaszek* and *Ardic* were considered at length by the Court of Appeal (Collins J.; Birmingham P. and Edwards J. concurring)) in *Szamota* and Biggs J. referred extensively to his analysis.

17. In *Tupikas*, the CJEU stated that "*trial which resulted in the decision"* was to be regarded as an autonomous concept of EU law and was to be understood as "*referring to the proceeding that led to the judicial decision which finally sentenced the person whose surrender is sought in connection with the execution of a European Arrest Warrant".* Where there were successive judicial decisions, what was decisive was "*the judicial decision finally disposing of the case on the merits, in the sense that there are no further avenues of ordinary appeal available*". The focus of Article 4a was on that final stage.

18. In *Zdziaszek*, Mr. Zdziaszek had been sentenced following a number of convictions. Following a change in the law, his sentences had been combined into one cumulative sentence in a manner which resulted in an overall reduction in his custodial sentence. An issue was referred to the CJEU as to whether the hearing which resulted in the reduction of his sentence – which proceeded in Mr. Zdziaszek's absence – was to be regarded as the "*trial which resulted in the decision".* The CJEU noted that, while the decision to amend the sentence previously imposed did not affect the finding of guilt made at his earlier trials, it did modify the *quantum* of the penalty imposed. Crucially, the level of the cumulative sentence was not prescribed and depended on the court's

assessment of the facts. Thus, it was possible that, if Mr. Zdziaszek had been present or represented, he would have obtained a greater reduction. That position was different, in the court's view, to measures that simply related to the methods of execution of a custodial sentence. The concept of a "*trial which resulted in the decision*" had to be interpreted as referring not only to proceedings which gave rise to the decision finally determining the guilt of the person concerned "*but also to subsequent proceedings, such as those which led to the judgment handing down the cumulative sentence at issue here, at the end of which the decision that finally amended the level of the initial sentence was handed down, inasmuch as the authority which adopted the latter decision enjoyed a certain discretion in that regard."*

19. In *Ardic*, the CJEU rejected the argument that a decision to activate a previously suspended term of imprisonment should be regarded as coming within the scope of the "*trial which resulted in the decision*" for the purposes of Article 4a. In its view "*questions relating to the detailed rules for the execution or application of such a custodial sentence*" were outside the scope of Article 4a. The concept of "*decision"* in Article 4a "*does not cover a decision relating to the execution or application of a custodial sentence previously imposed, except where the purpose or effect of that decision is to modify either the nature or quantum of that sentence and the authority which adopted it enjoyed some discretion in that regard".* Addressing specifically decisions to revoke the suspension of a previously imposed custodial sentence, the Court stated:

> *"78 . As regards, in particular, decisions to revoke the suspension of the execution of previously imposed custodial sentences, such as those at issue in the main proceedings, it is apparent from the case file before the Court that, in the present case, those decisions did not affect the nature or the quantum of*

custodial sentences imposed by final conviction judgments of the person concerned, which form the basis of the European arrest warrant which the German authorities are seeking to execute in the Netherlands.

79. Since the proceedings leading to those revocation decisions were not intended to review the merits of the cases, but only concerned the consequences which, from the point of view of the application of the penalties initially imposed and whose execution had, subsequently, been partially suspended subject to compliance with certain conditions, it was necessary to consider the fact that the convicted person had not complied with those conditions during the probationary period.

80. In that context, under the relevant national rules, the competent court only had to determine if such a circumstance justified requiring the convicted person to serve, in part or in full, the custodial sentences that had been initially imposed and the execution of which, subsequently, had been partially suspended. As the Advocate General pointed out in point 71 of his Opinion, while that court enjoyed a margin of discretion in that regard, that margin did not concern the level or the nature of the sentences imposed on the person concerned, but only whether the suspensions should be revoked or could be maintained, with additional conditions if necessary.

81. Accordingly, the only effect of suspension revocation decisions, such as those in the main proceedings, is that the person concerned must at most serve the remainder of the sentence initially imposed. Where, as in the main proceedings, the suspension is revoked in its entirety, the sentence once again produces all its effects and the determination of the quantum of the sentence still remaining to be served is derived from a purely arithmetic operation, with the

number of days already served in custody being simply deducted from the total sentence imposed by the final criminal conviction.

82. In those circumstances, and in the light of what was stated in paragraph 77 of the present judgment, suspension revocation decisions, such as those at issue in the main proceedings, are not covered by Article 4a(1) of Framework Decision 2002/584, since those decisions leave unchanged the sentences imposed by the final conviction decisions with regard to both their nature and level."

20. Biggs J. then considered *Minister for Justice and Equality v. Lukaszka* [2021] IEHC 631 where (Paul) Burns J. had refused surrender in circumstances where the respondent had been sentenced to a restriction of liberty which had subsequently been replaced with a sentence of imprisonment (as here, on a 2:1 basis). Burns J. considered that the hearing that led to the sentence involved "*the variation of the nature of a sentence by the exercise of a discretionary power and so falls outside the ambit of the decision of the Court of Justice of the European Union decision in Ardic and the Supreme Court in Lipinski*" and was within the scope of Article 4a. In the absence of evidence that any of the conditions set out in Article 4a were satisfied, he refused surrender.

21. Referring to *Ardic*, Biggs J. considered that the "*conversion*" of police supervision to a custodial sentence was "*akin to*" the activation of a suspended sentence in this jurisdiction, in that both emanate from a failure to comply with a set of conditions. Both procedures provide for "*a margin of discretion*" (page 30). In her view, the conversion of the police supervision to a custodial sentence "*did not technically alter the nature and quantum of the original sentence*". The conversion was "*based on a mathematical application*". Accordingly, in her view, the hearing of 19th August, 2020 could not be deemed to be a "*trial resulting in the decision*" (para. 16).

22. Biggs J. went on to address what she characterised as the Minister's *"fall-back position*", namely that SH had waived his right to attend the hearing on 19th August, 2020. In her view, the evidence was insufficient to establish unequivocally that SH had waived his right to attend (para. 17). In her view the case was different to *Minister for Justice v. Sebastian Rafal Kasprzyk* [2022] IEHC 50 (*ibid*).

23. Biggs J. then identified and addressed a further issue, namely whether, even if the hearing of 19th August, 2020 was not a "*trial resulting in the decision*" (as was her view), there had been a breach of SH's rights under s. 45 of the 2003 Act. She read *Ardic* as indicating that part of the CJEU's rationale for holding that the activation of Mr. Ardic's suspended sentence did not constitute a "*trial resulting in the decision*" was that he must have been aware that breach of the conditions of suspension could result in the suspended sentence being activated. He therefore did not need to be told again or heard again for the purpose of compliance with Article 4a (para. 17). In contrast, the evidence before her established that, although SH had been told that failure to comply with the terms of police supervision could result in a fine, he had no knowledge that it could result in a further court hearing and that the hearing could result in the conversion of the police supervision into a sentence of imprisonment (para. 18).

24. Biggs J. interpreted this Court's decision in *Minister for Justice and Equality v. Zarnescu* [2020] IESC 59 as indicating that the High Court had a margin of discretion in how it approaches the facts and as to whether to refuse surrender, depending on its assessment of whether the rights of the defence had been adequately protected (para. 20). That approach was, in her view, consistent with the approach of the CJEU in Case C-108/16 *Dworzecki* and Case C-416/20 PPU *TR* (para 20).

25. Although she had found that the hearing of 19th August, 2020 was not a hearing within the meaning of the Framework Decision, Biggs J. considered that the issue of SH's knowledge was relevant to the court's consideration of the "*totality of the process"* leading to the events of that date. In her view, there had been a breach of SH's rights under s. 45, resulting from the failure to notify him at any point that there could be a further court hearing that could result in the police supervision being replaced by a sentence of imprisonment (para. 21).

26. Having referred to the decision of the European Court of Human Rights (ECtHR) in *Othman (Abu Qatada) v. United Kingdom* (Application 8139/09) (2011) 55 E.H.R.R. 1 and to certain observations of Collins J. in *Szamota*, Biggs J. expressed her conclusions as follows:

> *"28. Article 4a of the Framework Decision 2002/584 is designed to ensure a high level of protection. (Dworzecki C 108/16 PPU at para. 37 & Tupikas 270/17 PPU at para. 58). In this Court's view, although it is difficult to point exactly when, at some point during the course of the domestic proceedings the Article 4a rights* [of] *the respondent were breached, and he was not afforded these protections. I am not satisfied that the requirements of Section 45 of the Act of 2003 have been met in this instance. I am satisfied that the mischief which Article 4a of the Framework Decision and Section 45 of the Act of 2003 seek to avoid has arisen in this case."*

27. On that basis, and notwithstanding her finding that the hearing resulting in the conversion of the remaining period of police supervision into a custodial sentence was not a "*trial resulting in the decision*" sought to be enforced, Biggs J. concluded that the surrender of SH should be refused.

Application for Leave

28. The High Court refused the Minister's application for leave to appeal to the Court of Appeal pursuant to s. 16(11) of the 2003 Act. The Minister then applied for leave to appeal to this Court pursuant to Article 34.5.4° of the Constitution. That application was opposed by SH but by a Determination dated 19th January 2023 ([2023] IESCDET 5) the Court granted leave. The Determination explains that the Court considered that a point of general public importance arose concerning the interplay between the CJEU's decision in *Ardic* and the issue of whether the activation of suspended sentences could, in some circumstances, amount to a breach of s. 45 of the 2003 Act. The Court considered that the interests of justice also required that the issue be examined. The Court also noted that consideration might have to be given to the course of the reference in *Szamota*.

29. In his Respondent's Notice, SH simply sought to stand over the decision of the High Court. Subsequently, however, he sought and was given leave to file an Amended Notice, pleading additional grounds for upholding the order refusing surrender. In essence, the additional grounds asserted that the hearing which led to the conversion of the police supervision into a custodial sentence was a "*trial resulting in the decision*" within the meaning of *Ardic* and of Article 4a and that the Judge had erred in finding otherwise.

The Decision of the CJEU in *LU*

30. At the time of this Court's Determination granting leave, the references in *Szamota* (and the related reference in *Minister for Justice and Equality v. Siklósi* [2021] IECA 210) – the references determined by the CJEU as *LU* & *PH* and referred here as "*LU*" – had been heard by the CJEU (Fourth Chamber) and Advocate General Ćapeta had delivered her Opinion. While the case management process was ongoing, the CJEU indicated that

it intended to give judgment on 23rd March, 2023 and directions were given affording the parties an opportunity to deliver supplemental submissions addressing the judgment. The CJEU duly gave its judgment on 23rd March, 2023 and both parties addressed it in further submissions.

31. In each of the references in *LU,* a suspended sentence had initially been imposed on the requested person which sentence was later activated as a result of a subsequent criminal conviction *in absentia*. It was argued that those circumstances took the cases outside *Ardic* and that the proceedings leading to the subsequent conviction and/or the decision to activate the suspended decision was a "*trial leading to the decision*" within the scope of Article 4a. The Court of Appeal referred the following 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 [Framework Decision 2002/584]?*
>
> *(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*

[ECHR] 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 [ECHR] 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 ([i]) to refuse surrender of the requested person on the basis that such surrender would be contrary to Article 6 of the [ECHR] and/or [Article] 47 and [Article] 48(2) of the [Charter] and/or ([ii]) 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 [ECHR] and/or [Article] 47 and [Article] 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 [the] 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?'

32. In her Opinion, Advocate General Ćapeta proposed that the Court should hold that the term "*trial resulting in the decision*" is to be interpreted as "*any step of the proceedings which has the decisive influence on the decision on the deprivation of a person's liberty*" (Opinion, para. 141(1)). That was because the person involved "*must be given the opportunity to influence the final decision concerning his or her liberty*" (*ibid*). Where surrender is sought for the purpose of serving a sentence which was suspended *ab initio* but which was subsequently ordered to be enforced as a result of a subsequent conviction, the proceedings leading to that conviction and enforcement order were, in her view, a part of the "*trial resulting in the decision*" for the purposes of Article 4a (Opinion, para. 141(1)(a)). Whether the court that made the enforcement order had any discretion about doing so was not relevant – what was relevant was that the proceedings had a *"determinative effect*" on the reopening of the suspension decision (Opinion, para. 141(1)(b)). As to the issue of Article 6 ECHR, the Advocate General was of the view that when a situation fell within the scope of Article 4a, the executing authority was required only to examine whether the conditions stated in that article were fulfilled and where a situation did not fall under Article 4a, in the absence of evidence of "*systemic deficiencies*" in the judicial system of the issuing Member State, surrender could not be refused (Opinion, para. 141(2)).

33. The CJEU in *LU* took a somewhat different approach. Citing the judgment of the Grand Chamber in Case C-158/21 *Puig Gordi*, the Court emphasised that the execution of the European arrest warrant was the rule, whereas refusal was intended to be an exception to be interpreted strictly (para. 47). Referring to its previous case law – particularly *Ardic* – the Court re-iterated that a decision relating to the execution or application of a custodial sentence previously imposed did not constitute a "*decision*" within the meaning of Article 4a "*except where it affects the finding of guilt or where its purpose*

or effect is to modify either the nature of the quantum of that sentence and the authority which adopted it enjoyed some discretion in that regard" (para. 53). A decision revoking the suspension of a custodial sentence on account of a breach of an *"objective condition*" attached to the suspension, such as the commission of a new offence during the probation period did not fall within the scope of Article 4a *"since it leaves that sentence unchanged with regard to both its nature and quantum"* (para 53). Even where the authority making the decision to revoke suspension had a discretion, the decision did not come within Article 4a(1) "*as long as that margin of discretion does not allow it to modify either the quantum or the nature of the custodial sentence, as determined by the decision finally convicting the requested person*" (para. 54). That strict construction of Article 4a was consistent with the scheme and objectives of the Framework Decision (paras. 55 – 57) and with Article 6 of the European Convention on Human Rights (ECHR) (para 58).

34. However, the Court went on to emphasise the right of an accused to be present at the trial of criminal proceedings against him (paras. 59-64) and therefore the executing judicial authority had to be able to take into account not only *in absentia* proceedings leading to the final conviction the subject of a surrender request, "*but also any other in absentia proceedings leading to a criminal conviction without which such a warrant could not have been issued*" (para. 65).

35. Addressing the other questions referred, the CJEU emphasised that Member States had no discretion to refuse surrender where one of the conditions set out in Article 4a was satisfied (paras. 71–75). Even if none of the Article 4a conditions were satisfied, it might still be possible for the executing judicial authority to satisfy itself that an order for surrender would not breach the rights of the defence (para. 78). Where a decision to activate a suspended sentence falls outside Article 4a (as it ordinarily will, absent an *in*

absentia conviction triggering the activation), the fact that decision was adopted *in absentia* cannot form the basis for refusing surrender (para. 84), at least in the absence of evidence of systemic deficiencies in the justice system of the requesting state (para. 86). Nor can the requested state impose a condition requiring the requesting state to permit a judicial review of such a decision (para. 90). That follows from the fact that the Framework Decision "*lists exhaustively the grounds for refusing to execute a European arrest warrant*" (para. 89, citing *Puig Gordi*).

36. The CJEU proceeded to answer the questions referred by the Court of Appeal in the following terms:

> *"1. Article 4a(1) of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, as amended by Council Framework Decision 2009/299/JHA of 26 February 2009, read in the light of Articles 47 and 48 of the Charter of Fundamental Rights of the European Union, must be interpreted as meaning that where the suspension of a custodial sentence is revoked, on account of a new criminal conviction, and a European arrest warrant, for the purpose of serving that sentence, is issued, that criminal conviction, handed down in absentia, constitutes a 'decision' within the meaning of that provision. That is not the case for the decision revoking the suspension of that sentence.*
>
> *2. Article 4a(1) of Framework Decision 2002/584, as amended by Framework Decision 2009/299, must be interpreted as authorising the executing judicial authority to refuse to surrender the requested person to the issuing Member State where it is apparent that the proceedings resulting in a second criminal conviction of that person, which was decisive for the issue of the European arrest warrant, took place in absentia, unless the European arrest warrant*

contains, in respect of those proceedings, one of the statements referred to in subparagraphs (a) to (d) of that provision.

3. Framework Decision 2002/584, as amended by Framework Decision 2009/299, read in the light of Article 47 and Article 48(2) of the Charter of Fundamental Rights of the European Union, must be interpreted as precluding the executing judicial authority from refusing to surrender the requested person to the issuing Member State, on the ground that the proceedings resulting in the revocation of the suspension of the custodial sentence for the execution of which the European arrest warrant was issued took place in absentia, or from making the surrender of that person subject to a guarantee that he or she will be entitled, in that Member State, to a retrial or to an appeal allowing for the re-examination of such a revocation decision or of the second criminal conviction which was handed down against that person in absentia and which proves decisive for the issue of that warrant."

Submissions

Submissions of the Minister in support of his appeal

37. The Minister makes two main submissions as to why the High Court erred in refusing surrender on the basis that it did. First, Article 4a/s. 45 was not engaged on the facts. Surrender can only be refused where "*a trial resulting in the decision*" took place in the absence of the requested person. Here, however, there was no question of a *"trial resulting in the decision"* taking place in the absence of SH, as indeed the judge herself had concluded. According to the Minister, Article 4a/s. 45 presents a "*binary question*". It only applies to a "*trial resulting in the decision*", as that expression has been interpreted by the CJEU. Where a procedure or hearing is not a *"trial resulting in the decision*", then Article 4a/s. 45 has no application and cannot provide a basis for

refusing surrender. Second, and in the alternative, the Minister says that, even if Article 4a/s. 45 *was* engaged, the basis under which the High Court refused surrender was erroneous, that basis being that the requested person did not know that police supervision could be converted into a custodial sentence. That, it is said, is a novel basis for refusal that is not supported either by the wording of Article 4a/s. 45 or the relevant jurisprudence.

38. The Minister explains that s. 45 of the 2003 Act transposes into Irish law the optional ground for refusal provided for in Article 4a. Section 45 must be interpreted in a manner consistent with Article 4a and the term "*proceedings resulting in the sentence or detention order*" in s. 45 must be equated with the term used in Article 4a, "*the trial resulting in the decision"*. Only where "*the trial resulting in the decision*" took place in the absence of the requested person did s. 45 operate to permit the refusal of surrender. The Minister emphasises the consistent approach of the CJEU to the effect that surrender is the general rule and refusal is the exception, permissible only in one of the *"exhaustively listed cases of non-execution provided for by Framework Decision*" which are to be interpreted strictly. That approach is confirmed by the CJEU judgment in *LU*.

39. As regards what constitutes a *"trial resulting in the decision*", the Minister's main submissions reviewed the jurisprudence up to that point, including the Advocate General's Opinion in *LU*. The Minister observed that, insofar as the Opinion might be read to suggest that Article 4a encompassed a hearing relating to the activation of a suspended sentence, it constituted a departure from *Ardic.* In his supplemental submissions, the Minister notes that the CJEU chose not to adopt the "*expansive definition*" advanced by the Advocate General and had instead maintained the distinction in *Ardic* between proceedings relating to the execution of a sentence and

proceedings resulting in the conviction of a person. A decision relating to the execution or application of a previously imposed custodial sentence does not constitute a "*decision*" within the meaning of Article 4a, other than in limited circumstances, and the fact that such a decision was adopted *in absentia* was not a ground for refusal and refusal was in fact precluded on that basis.

40. The second ground identified by the Minister is that, in any event, the trial judge erred in refusing surrender on the basis that SH did not know that police supervision could be converted into a custodial sentence. The Minister argues that this could not justify a refusal of surrender in circumstances where any rights conferred by s. 45 did not extend beyond the right to be present at "*the trial resulting in the decision*". On that basis, the Minister says, refusal of surrender was not justified. The Minister also argues that it would be inconsistent with the European arrest warrant system – based as it is on the application of uniform concepts – if surrender could be refused on the basis of the "*subjective knowledge or awareness of a requested person*." A "*more fundamental difficulty*" with the High Court's approach (according to the Minister) is that, in effect, the High Court created a new ground for refusing surrender where there has been an *in absentia* hearing outside the scope of Article 4a. That, it is said, is contrary to CJEU jurisprudence, reference being made to Case C-399/11 *Melloni* and Case C-416/20 *TR. Ardic* does not support the approach taken by the High Court. *LU* is said by the Minister to support his arguments on this point.

41. The Minister also addresses the issue of whether the hearing on 19th August, 2020 was the "*trial resulting in the decision*". But it appears appropriate to deal with this aspect of the Minister's submissions after setting out SH's arguments on this issue.

42. The Minister submits that the matters before this Court are *acte clair* but also says that if this Court is of a different view, then a preliminary reference under Article 267 should

be made to the CJEU and the Minister has helpfully suggested the terms of the questions to be referred.

Submissions of SH

43. SH identifies six main issues in his submissions. First, the order for police supervision was converted to a custodial sentence altering the nature of the penalty imposed. Second, a "*knowledge requirement*" is hardwired into the imposition of sentences of imprisonment which are suspended and a fundamental attribute of suspended sentences which is recognised by the CJEU is that the prison sentence imposed is the appropriate penalty for the crime committed by the convicted person in all circumstances. Third, the decision in *Ardic* clearly distinguished between where a suspended sentence is reactivated and one where a new judicial decision modified either the nature or quantum of the sentence previously imposed (citing *Gurguchiani v. Spain* (App. No. 16012/16) (Unreported, European Court of Human Rights, 15th December 2009)). Fourth, stemming from the third point, a hearing that converts a supervision order to a custodial sentence of imprisonment cannot be analogous to a hearing on the revocation of a suspended sentence, as such a hearing modifies the nature of the sentence previously imposed. Fifth, SH disagrees that the hearing at Zemgale District Court was "*equivalent to an enforcement hearing for a suspended sentence*". Sixth, the fact that the hearing at Zemgale District Court resulted in an order which deprived the liberty of SH is the principal concern and not a question of whether a mathematical formula was involved in reaching that conclusion.

44. SH says that the High Court erred in finding that the hearing at Zemgale District Court did not amount to *"a trial resulting in the decision for the purposes of Article 4a of the Framework Decision*" which finding, it is suggested, was heavily influenced by the fact that the conversion was based on a mathematical formula. This,

SH maintains, was a misapplication of the relevant case law, namely, *Lukaszka,* and that three CJEU decisions (*Tupikas*, *Zdiazszek* and *Ardic*) show that the relevant conversion hearing falls "*under the umbrella of the EU law concept of a trial resulting in the decision*".

45. The balance of the High Court's reasoning *"resonates with the rationale of the trial in absentia rules"* deriving from Article 6 ECHR as they have been interpreted and applied by the CJEU. The decision here had the purpose or effect of modifying the sentence previously imposed on SH. The decision was discretionary. The decision was therefore one within the scope of Article 4a and s. 45 and the High Court was correct in its findings that *"the mischief which Article 4a… and Section 45 ... seek to avoid applies to the unusual facts of this case."*

46. SH reads the decision in *LU* as applying *Ardic* to extend the fair trial protections under Articles 47 and 48 of the Charter of Fundamental Rights of the European Union ("the Charter") and Article 6 ECHR to *in absentia* hearings of trigger offences resulting in the revocation of suspended sentences in a separate hearing. He contends that the refusal of his surrender does not require any extension or modification of the autonomous EU law concept of the "*trial resulting in the decision*". In his case, SH argues, he did not have a relevant sentence of imprisonment imposed and suspended over him. Rather he "*had an order for police supervision imposed where the default was a fine*". The *in absentia* hearing before the Zemgale District Court "*changed the nature of the penalty to a custodial sentence of imprisonment*." According to SH, the decision in *LU* "*provides a continued basis of support for the refusal of his surrender pursuant to section 45*."

The Minister's submissions in response to SH's contention that the hearing on 19th August 2020 was the "trial resulting in the decision"

47. The Minister's main submissions were delivered before SH was given leave to amend his Respondent's Notice to plead that the hearing which led to the conversion of the police supervision into a custodial sentence was a "*trial resulting in the decision*" for the purposes of Article 4a and that the judge had erred in finding otherwise. Accordingly, the Court gave the Minister leave to address that issue in his supplemental submissions, as well as addressing the CJEU's judgment in *LU*.

48. According to the Minister, the conclusion of the CJEU in *LU* has no relevance here. The administrative proceedings which resulted in the imposition of fines on SH could not be equated with proceedings leading to a criminal conviction such as was at issue in *LU*. The considerations that led the CJEU to take the approach it did in *LU* – for instance the application of the criminal limb of Article 6 ECHR to proceedings leading to a criminal conviction – did not arise in respect of *"administrative proceedings"*.

49. The Minister argues that the law is comprehensively set out in *Ardic* and *LU*: for the purposes of Article 4a, the "*trial resulting in the decision*" does not include a decision relating solely to the execution or application of a custodial sentence finally imposed at the conclusion of criminal proceedings, subject to one exception, namely where the decision "*affects the finding of guilt or where its purpose or effect is to modify either the nature or quantum of that sentence and the authority enjoys some discretion in that regard*" (Minister's emphasis). Discretion in deciding whether or not to revoke the suspension of a sentence was not to be equated with discretion over *"the nature or quantum of that sentence*". The discretion here was limited and the Latvian court did not have discretion over the nature or quantum of the sentence.

50. According to the Minister, the hearing on 19th August, 2020 was the equivalent of an *"enforcement hearing for a suspended sentence*". Noting that SH sought to

draw a distinction between a suspended sentence and police supervision, the Minister argues that "*there is little room for drawing a distinction*". Police supervision is, the Minister says, "*functionally equivalent to a suspended sentence.*" It is "*questionable*" whether, as SH contends, the decision of the Zemgale District Court on 19th August, 2020 changed the nature of the penalty that had been imposed on him, given that "*the possibility of a custodial sentence is hardwired into the sentence of police supervision*". In any event, even if SH is correct, it followed from *Ardic* and *LU* that the "*key issue*" was whether the court enjoyed a discretion in relation to the nature or quantum of the sentence imposed. SH's submissions conflated the discretion of the court as to whether to revoke the supervision *"with a discretion over the nature and quantum of the sentence that would follow if it exercised that discretion".* If it exercised its discretion to revoke supervision, its options as to the nature and extent of the penalty to be imposed were then "*firmly limited in law"* and there was *"no reality"* to the suggestion that the court had discretion over the nature and quantum of the sentence. In contrast to the position in *Lukaszka*, the court had no discretionary power of assessment as to the extent of alternative imprisonment.

51. On this basis, the Minister contends that the hearing of 19th August, 2020 was not a "*trial resulting in the decision*" for the purposes of Article 4a and s. 45. Therefore, s. 45 was not engaged and it was not permissible to refuse surrender under that section.

Discussion

52. In circumstances where the trial judge had found that the decision of the Zemgale District Court of 19th August, 2020 was not a trial resulting in the decision, it would be difficult to argue that surrender should be refused, having regard to the jurisprudence of the CJEU in cases such as *Ardic* and *LU* to which reference has already been made. Article 4a was inserted into the Framework Decision in 2009 to ameliorate the original

provisions of the Framework Decision and to provide for circumstances where surrender was sought in respect of someone who had been the subject of a trial *in absentia*. Section 45 of the 2003 Act (as amended) was enacted to give effect to the Framework Decision.

53. In *Ardic*, the CJEU made a number of observations which deal with the overall effect of the Framework Decision. At para. 70 it was stated as follows:

> *"70. To that end, Article 1(2) of the Framework Decision lays down the rule that Member States are required to execute any European arrest warrant on the basis of the principle of mutual recognition and in accordance with the provisions of that Framework Decision. Except in exceptional circumstances, the executing judicial authorities may therefore refuse to execute such a warrant only in the exhaustively listed cases of non-execution provided for by Framework Decision 2002/584 and the execution of the European arrest warrant may be made subject only to one of the conditions listed exhaustively therein. Accordingly, while the execution of the European arrest warrant constitutes the rule, the refusal to execute is intended to be an exception which must be interpreted strictly (see judgment of 10 August 2017, Tupikas, C-270/17 PPU, EU:C:2017:628, paragraph 50 and the case-law cited).*
>
> *71. As regards, more particularly, Article 4a of Framework Decision 2002/584, inserted by Article 2 of Framework Decision 2009/299, this seeks to restrict the possibility of refusing to execute the European arrest warrant by listing, in a precise and uniform manner, the conditions under which the recognition and enforcement of a decision given following a trial in which the person concerned did not appear in person may not be refused (judgment of 10 August 2017, Tupikas…paragraph 53 and the case-law cited).*

72. Under that provision, the executing judicial authority is obliged to execute a European arrest warrant, notwithstanding the absence of the person concerned at the trial resulting in the decision, where one of the situations referred to in Article 4a(1)(a), (b), (c) or (d) of that Framework Decision is established (judgment of 10 August 2017, Tupikas…paragraph 55)."

54. This approach was reiterated most recently in the case of *LU*, to which reference has previously been made. In that context, the CJEU made the following comments, commencing at para. 46 of its judgment:

"46. In the first place, it must be recalled that Framework Decision 2002/584 seeks, by the establishment of a simplified and effective system for the surrender of persons convicted or suspected of having infringed criminal law, to facilitate and accelerate judicial cooperation with a view to contributing to the attainment of the objective set for the European Union of becoming an area of freedom, security and justice, and has as its basis the high level of trust which must exist between the Member States …

47. With that in mind, it follows from that framework decision, in particular from Article 1(2) thereof, that execution of the European arrest warrant constitutes the rule, whereas refusal to execute is intended to be an exception which must be interpreted strictly (judgment of 31 January 2023, Puig Gordi and Others, C-158/21, EU:C:2023:57, paragraph 68 and the case-law cited)."

55. The Court went on in that case to observe, at para. 55, as follows:

"That strict interpretation of the concept of 'trial resulting in the decision' within the meaning of Article 4a(1) of Framework Decision 2002/584 is, moreover, consistent with the general scheme of the regime established by that framework decision. As has been pointed out in paragraph 47 above, that

provision is an exception to the rule requiring the executing judicial authority to surrender the requested person to the issuing Member State and must, therefore, be interpreted strictly."

56. I think it can safely be said that there is no doubt that the Framework Decision is intended to provide for a simple and straightforward process for the surrender of persons required by other states within the EU from the state in which they are to be found. As has been made clear by the CJEU on numerous occasions, surrender is the rule and a refusal to surrender is the exception to the rule. The question that arises in this case, therefore, is whether or not the respondent can bring himself within the exceptions to the rule.

57. In the first instance, I propose to look at the question as to whether or not the trial judge was correct in concluding that the decision of 19th August, 2020 was *a "trial resulting in the decision"*. Depending on the answer to that question, it may be necessary to consider whether there was any other residual basis left, having regard to the terms of the Framework Decision and s. 45 of the 2003 Act, which would result in the refusal of surrender in this case.

"A trial resulting in the decision"

58. In order to consider the issue of whether the events of 19th August, 2020 constituted a trial resulting in the decision, it is necessary to look at the events leading up to that decision once more. As will be recalled, SH was the subject of a sentence hearing on 27th October, 2015 which consolidated a number of sentences into a term of imprisonment for a period of four years and nine months, and placement under police supervision for three years. No issue arises as to the validity of that order. Leaving aside for now any issue as to SH's understanding of police supervision and what a failure to comply with it would entail, it is clear that on his release SH did

not comply with that order. It appears from the information provided to the High Court by the Latvian authorities that, under s. 45 of the Latvian Criminal Code, police supervision is an "*additional sentence*", and if there is a violation of police supervision, it may be replaced with the deprivation of liberty calculated in the manner previously described (see para. 12(ii) of the judgment of the High Court).

59. It should be noted that s. 45(6) of the Latvian Criminal Code provides:

> *"A violation of a police supervision provision is in bad faith if the person has been administratively sentenced twice within a one-year period for such violation."*

60. The information provided by the Latvian authorities indicated that within the time period between 22nd August, 2019 and 19th June, 2020 SH was twice administratively sentenced to "*the administrative punishment for malicious failing to adhere with the conditions of the imposed additional punishment – police supervision*", and thus Zemgale District Court, on 11th May, 2020, found that SH was guilty of the commission of an administrative violation of the *"administrative violation code of Latvia"* and a fine of €30 was imposed and not paid by SH, and subsequently, once more, there was a judgment of 27th May, 2020 by Zemgale District Court to the same effect when a fine of €40 was imposed which remained unpaid. Accordingly, it appears that a violation of the police supervision provision *"in bad faith"* was established. It appears that in respect of those hearings, SH was notified at the address he had provided to the prison authorities. It is not in dispute that SH was not present at those hearings.

61. It was argued in the course of the hearing before this Court on behalf of the Minister that the administrative sentences imposed on SH were not in respect of criminal offences. In other words, failing to co-operate with the obligation to comply

with police supervision did not constitute a criminal offence. It was conceded that, if the two administrative sentences which imposed fines were to be regarded as "trigger offences" as that phrase is used in *LU*, then, as those hearings were *in absentia*, assuming that the principles set out in *LU* were applicable, there would be a real difficulty in surrendering SH. However, the point emphasised on behalf of the Minister is that there is no criminal conviction when the administrative sentences are imposed and, therefore, *LU* does not apply.

62. It should be noted that, in making the argument that the "administrative sentence" was not a criminal penalty, counsel for the Minister relied on the provisions of s. 45 of the Latvian Criminal Code, and, in particular, contrasted the provisions of s. 45(4) and (5). Section 45(5) has been set out above previously and refers to whether or not there has been a violation of a police supervision provision in bad faith. As we have seen, a violation of police supervision is said to be in bad faith if the person has been administratively sentenced twice within a one-year period for that violation. By contrast, s. 45(4) states as follows:

> *"If a convicted person, while serving the term of an additional sentence, has committed a new crime, a court shall substitute deprivation of liberty for the unserved additional sentence term and shall determine the final sentence in accordance with the provisions provided for in Sections 51 and 52 of this Law."*

63. The point is made that there is a clear distinction between a new crime which results in an obligatory deprivation of liberty for the unserved additional sentence term, and s. 45(5) where a violation of the provisions may be replaced with deprivation of liberty. Such a violation will have occurred if there has been an administrative sentence imposed on two occasions within a one-year period. In other words, it appears that in Latvian law there is a distinction between a "new crime" and a violation resulting in an

"administrative sentence". One leads to an automatic deprivation of liberty, and the other may lead to a deprivation of liberty. So far as Latvian law is concerned, the two concepts, i.e. crime and administrative sentence, are treated differently.

64. Essentially, the position of the Minister is that the administrative sentences fall outside the concept of a "trigger" offence, and that what occurred in Zemgale District Court on 19th August, 2020 was the execution of a sentence previously imposed. As such, Article 6 rights under the ECHR are not engaged, and the fact that the hearing on that date was *in absentia* does not mean that SH should not be surrendered. The hearing at issue was not a trial resulting in the decision.

65. For his part, counsel on behalf of SH relied heavily on the judgment of the CJEU in *Ardic*, and in particular on paras. 75 and 76 of that judgment, which are set out above. He argued that in this case, the sentence imposed originally was a sentence of four years and nine months, and that a further sentence of imprisonment was imposed on 19th August, 2020. Accordingly, given that this was in his submission a further sentence, the hearing at which that sentence was imposed could not be an *in absentia* hearing. Critically, from the point of view of SH, the argument being made was that what occurred on 19th August, 2020 was a new judicial decision which modified the nature of the sentence. Clearly, if the position is that the decision on 19th August, 2020 was a new judicial decision, then the safeguards provided for in Article 4a would have to apply, as Article 6 rights would be engaged. In making this case, counsel sought to distinguish between police supervision in Latvia and the concept which is familiar to this jurisdiction of a suspended sentence. The argument that was made was that, in this instance, what is occurring is not the activation or reactivation of a suspended sentence or partially suspended sentence, but rather the imposition of a new term of imprisonment which had not otherwise been provided for by the original

sentence. In other words, this was a sentence of imprisonment imposed for the first time in 2020.

Did the decision of 19th August 2020 amount to the imposition of a new sentence?

66. At issue in this case is a sentence of imprisonment coupled with police supervision. This has been described as being akin to a suspended sentence. To some extent, this is an apposite analogy. There are, of course, differences between a suspended sentence, as that term is understood in our jurisprudence, and police supervision. At the time of sentencing in this jurisdiction, a term of imprisonment may be imposed which is either fully or partially suspended. The person being sentenced knows where they stand when sentencing is complete, and further knows that no period of imprisonment longer than the extended portion of the sentence can be imposed in the event of the activation of the suspended sentence. So far as the sentence of imprisonment, coupled with police supervision, is concerned, the calculation of the term of imprisonment is fact dependent and not as easily predicted as in a comparable Irish situation. Nevertheless, it is clear that it is possible to calculate the portion of the sentence of imprisonment to be served by means of an arithmetic exercise. The variables depend on the date of release from prison, and the date upon which police supervision is converted into imprisonment. The Latvian authorities provided further information to the High Court in this case, and the nature of the police supervision is set out in the Latvian Criminal Code as previously indicated but it is worth re-iterating here (s. 45(1)):

> *"The additional sentence (in the given case - police supervision) is the punishment, which the Court shall impose as a coercive measure with purpose to supervise the conduct of a person released from a prison and to subject such person to the restrictions laid down by the police authority."*

67. Therefore, it will be seen that the coercive nature of the police supervision can be equated with the conditions that tend to be imposed as a matter of course in respect of a suspended sentence. The decision of the CJEU in the case of *Ardic* is of some assistance in this regard. Reference was previously made to paras. 75 and 76 of the judgment in that case, and it is worth referring once more to those paragraphs. As appears from para. 75, it was noted by the CJEU that the final judicial decision convicting the person concerned, including that part of the decision determining the custodial sentence, "*falls fully within Article 6 of the ECHR*", but as was pointed out in para. 75, the case law of the ECtHR makes clear that that provision does not apply to questions relating to the detailed rules for the execution or application of such a custodial sentence. The CJEU went on to point out in para. 76 that the position is different only where "*following a finding of guilt of the person concerned and having imposed a custodial sentence on him, a new judicial decision modifies either the nature or the quantum of sentence previously imposed*", and in para. 76 two examples were given, one being the situation where a prison sentence was replaced by an expulsion measure, and in that regard a Spanish case was cited, and secondly where the duration of the detention previously imposed is increased, and in that context a case from the United Kingdom was cited. Therefore, the Court concluded, at para. 77, that the concept of "*decision*" referred to in Article 4a(1) of the Framework Decision "*does not cover a decision relating to the execution or application of a custodial sentence previously imposed*", save where the subsequent decision is to modify the nature or quantum of the sentence and the authority which adopted it enjoyed some discretion in that regard. Thus, the question must be asked as to whether or not the decision at issue affected the nature or the quantum of the custodial sentence imposed by the final conviction decision in relation to the person concerned. The CJEU went on, at para. 79, to note that in that

case the proceedings involved in the revocation decisions were not intended to review the merits of the cases, but only concerned the consequences of a failure by the convicted person to comply with those conditions. The Court went on to conclude, at para. 81, as follows:

> *"…the only effect of suspension revocation decisions…is that the person concerned must at most serve the remainder of the sentence initially imposed. Where, as in the main proceedings, the suspension is revoked in its entirety, the sentence once again produces all its effects and the determination of the quantum of the sentence still remaining to be served is derived from a purely arithmetic operation, with the number of days already served in custody being simply deducted from the total sentence imposed by the final criminal conviction."*

68. What is clear from the information provided by the Latvian authorities in this case is that the period of three years' police supervision commenced from the moment the serving of the period of four years and nine months had been completed. Thereafter, in the event of a breach, an arithmetic calculation is used to determine the period of any deprivation of liberty that will follow from a breach of the police supervision. It appears, to use the language used by the CJEU, that no new judicial decision is made in relation to the quantum of sentence to be served, as the maximum period involved has already been decided by the District Court in Zemgale. Neither the nature nor the quantum of the sentence is varied, save and in accordance with the provisions of Latvian law, as previously described. No additional terms are imposed and no additional period of time is added to that which was already provided for in the original court decision of 2015. Latvian law provides for the maximum period that can be allocated to police

supervision, having regard to the offence and the period for which the initial term of imprisonment is imposed.

69. However, as was made clear in *Ardic*, "*decision*" does not cover a decision relating to the execution or application of the custodial sentence previously imposed, except where the decision modifies the nature and quantum of that sentence "*and the authority which adopted it enjoyed some discretion in that regard*" (see para. 77). In this case as has been seen, there has been no variation or modification of the terms of the sentence imposed but it does appear that the relevant court making the decision as to the execution of the sentence had some discretion as to whether or not to impose the additional sentence. In that regard it is worth considering the terms of the rationale provided by the court for its decision which were in the following terms:

> "*The judge has not found any impartial circumstances that would show that the convict had not a possibility to serve the additional punishment laid down by the court judgement-police supervision, nor any circumstances justifying the non-enforcement of the additional punishment. The convict after release from the prison has not appeared to report for the enforcement of the police supervision in Jekabils Station of Zemgale Regional Department of the State Police. That fact already solely shall serve as the sufficient ground for finding that the convict has careless and frivolous attitude towards the serving of the additional imposed to him*."

70. That passage from the decision of the Zemgale District Court certainly leaves open the possibility that had the hearing on that date taken place in the presence of SH, the exercise of the discretion by the Court could have been different. If that is the case, then an issue arises as to whether the decision of the Zemgale District Court

falls outside the "*decision*" as that termed is explained in *Ardic*. The position is not entirely clear.

71. It has also been said on behalf of SH that a sentence of four years and nine months was imposed on him and that a new sentence was imposed on 19th August, 2020. I do not agree with that proposition. When the original sentence was imposed, the terms of that sentence were made clear. There was a period of imprisonment to be followed by police supervision. A failure to comply with police supervision could, in accordance with Latvian law, lead to a further deprivation of liberty, and whilst there might be a need to calculate the precise period of time, by reference to the arithmetic exercise provided for in Latvian law, the outer limit of what could be imposed in that regard was fixed by the original decision of the sentencing court in 2015. It could not be increased or changed by Zemgale District Court at its hearing in August 2020. The only question was whether or not to impose the additional sentence. To my mind, the position in Latvian law, whilst not precisely the same as that which pertains in this jurisdiction to a suspended sentence, is undoubtedly similar to the approach in this jurisdiction. In the case of *Balmer v. The Minister for Justice & Equality* [2017] 3 I.R. 562, a decision of this Court of 12th May, 2016, in a concurring judgment I made the following observation at page 627:

> *"It is a trite observation that there are many differences in the way in which the trial process works in the member states of the European Union. Equally, there are many differences in the sentencing regimes operated in the member states. For example, in this country, a person is entitled to trial by jury save for certain exceptions provided for in the Constitution. Not every member state operates a system of trial by jury. While a trial in this jurisdiction without a jury would not be constitutionally permissible save as provided for in the Constitution, the fact*

that legal systems in other member states do not provide for trial by jury does not mean that an individual facing trial in such member states cannot be surrendered to that State by reason of that fact. (See Minister for Justice v. Brennan [2007] IESC 21, [2007] 3 I.R. 732 at p. 744.) It is only in the case where it is established that surrender would lead to a denial of fundamental or human rights such that it is necessary to consider a refusal of an application for surrender as pointed out by Murray C.J. in that case. He considered that in egregious circumstances such as a clearly established and fundamental defect in the system of justice, a refusal may be necessary."

72. Notwithstanding the obvious differences between the system in Latvia and in this country, it does not seem to me that those differences are such as to cause any issue in relation to surrender, by reason of the fact that the terms of the sentence imposed in Latvia provide for a fixed term in relation to imprisonment, together with a period of a fixed term for police supervision, and that in the event of a breach of the police supervision, a calculation is required in order to fix the period of time for the deprivation of liberty. I therefore would not refuse surrender on the basis that the sentence imposed on 19th August, 2020 was a new sentence. As far as I am concerned, the terms and parameters of the deprivation of liberty that followed a breach were clear and ascertainable and did not involve a new decision or a variation in terms of the nature or quantum of the original sentence. Nevertheless, in circumstances where the Court enjoyed a discretion as to whether or not to impose the additional sentence, and the hearing took place in the absence of SH, it is not clear to me that the decision of the Zemgale District Court of the 19th August, 2020 comes within the meaning of "a trial resulting in the decision" as explained in *Ardic.*

The decision in *LU* and administrative sentences

73. It is also necessary to consider the arguments of the parties as to the nature of the "administrative sentences" imposed on SH prior to the decision of the Zemgale District Court. As set out above, essentially, the position of the Minister in respect of the administrative sentences is that the hearings leading to the imposition of fines were not hearings in respect of criminal offences, and that the administrative fines do not attract the protections of Article 6 of the ECHR.

74. As has been mentioned previously, the decision in *LU* arose out of a reference from the Court of Appeal in this jurisdiction in respect of two cases referred to above, *Szamota* and *Siklosi*. Judgment in both of those matters was delivered on 21st July, 2021 by Collins J. A detailed consideration of the decision of the CJEU in the case of *Ardic* was conducted in the case of *Szamota* from para. 42 onwards. Collins J. in that case noted a number of differences between the facts in *Ardic* and the case of *Szamota*. It would be useful in that context to refer to those differences, as set out at para. 48 of the judgment of the Court of Appeal in that case:

> *"As already noted, the fundamental position of the Minister here - one which was accepted by the High Court - is that the decision in Ardic is a complete answer to the arguments of the Appellant regarding the effect of Article 4a of the Framework Decision. While that may well be so, it will be evident that the facts presented here differ from the facts in Ardic in a number of respects. Whether any of these differences is material is, of course, another matter. These differences are:*
>
> - *First and foremost, the enforcement of the sentence here was triggered by a further criminal charge and conviction. Article 6 ECHR clearly applies to the criminal proceedings that resulted in that conviction.*
> - *Unlike the position in Ardic, the enforcement decision made by the District Court for Wroclow-Śródmieście on 16 May 2017 appears to have been*

mandatory rather than discretionary. Upon proof of the Appellant's conviction for the Second Offence, it appears that the Enforcement Decision followed as a matter of law.

- *Unlike the position in Ardic, the custodial sentence imposed here was suspended ab initio. The effect of the Enforcement Decision was to make that sentence enforceable for the first time, rather than restoring the position that obtained when that sentence was first imposed (in Ardic the revocation decision restored the status quo prior to the suspension decisions which had been made some time after the initial custodial sentences had been imposed and only after Mr Ardic had served a part of those sentences).*
- *Finally, there appears to be no provision of Polish law equivalent to the provisions of the German Code of Criminal Procedure that allowed Mr Ardic to be heard ex post in relation to the revocation decisions and allowing for those decisions to be amended if appropriate. Of course, if the Enforcement Decision here was one which the District Court for Wroclow-Śródmieście was obliged as a matter of law to make upon proof of the Appellant's conviction for the Second Offence (subject to that offence appearing to be "similar" to the First Offence) - as appears to be the case from the information before the Court – it would seem to follow that no useful purpose would have been served by allowing the Appellant a right to be heard in relation to that decision. That serves to highlight that, as Mr Munro SC emphasised, the decisive event in terms of the enforcement of the custodial sentence imposed on* [the] *Appellant was his conviction by the District Court in Bydgoszcz on 21 February 2017 rather than the*

subsequent proceedings before the District Court for Wroclow-Śródmieście resulting in the Enforcement Decision of 16 May 2017."

75. In the second of those two cases, *Siklosi*, the argument that had been made on behalf of the appellant was that there was a "*qualitative difference*" between the position considered by the CJEU in *Ardic* and the position in that case, where a suspended sentence was activated as a result of a further criminal conviction. It had been argued that where that further conviction followed from a trial conducted *in absentia*, Article 6 of the ECHR was clearly engaged and that, at least in the absence of any evidence of waiver, it would be a breach of Article 6 to surrender the person concerned in such circumstances. Counsel on behalf of the Minister in that case argued that *Ardic* covered the situation, although it was accepted that, if the decision that resulted in the enforcement order was to be regarded as the "*trial resulting in the decision*", the evidence available did not demonstrate that the conditions of Article 4a were satisfied. The court in that case took the view, as set out at para. 23, as follows:

"For the purposes of this appeal, it appears to me that the Court is entitled to reach a provisional view that the proceedings before the Miskolc Court of Appeal that resulted in his 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. Similarly, the Court is in my view entitled to proceed on the basis of a 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 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."

76. In the circumstances, the Court of Appeal in both cases referred a number of questions to the CJEU, which gave its decision in *LU*.

77. I have already referred in some detail to the decision in *LU*, and the fact that it relied heavily on the Court's earlier decision in the case of *Ardic*. It is helpful I think to reiterate what was said in para. 53 of that decision:

> *"By contrast, a decision relating to the execution or application of a custodial sentence previously imposed does not constitute a 'decision', within the meaning of Article 4a(1), except where it affects the finding of guilt or where its purpose or effect is to modify either the nature or quantum of that sentence and the authority which adopted it enjoyed some discretion in that regard. It follows that a decision revoking the suspension of a custodial sentence on account of the breach by the person concerned of an objective condition attached to that suspension, such as the commission of a new offence during the probation period, does not fall within the scope of Article 4a(1), since it leaves that sentence unchanged with regard to both its nature and its quantum …"*

Reliance was placed on *Ardic* for that statement.

78. At para. 63, the following was stated:

> *"Therefore, a criminal conviction handed down in absentia in respect of the person who is the subject of a European arrest warrant and without which, as is the case here, that warrant could not have been issued constitutes a necessary element for the issue of that warrant, which is liable to be affected by a fundamental defect seriously undermining the right of the accused to appear in person at his or her trial, as guaranteed in the second and third paragraphs of Article 47 and in Article 48 of the Charter."*

79. The Court added at para. 65 as follows:

"Therefore, if Article 4a(1) of Framework Decision 2002/584 is not to be rendered largely ineffective, the executing judicial authority must be able to take into account, in order to assess whether the surrender of the requested person should be refused under that provision, not only the possible in absentia proceedings leading to the final conviction for the execution of which the European arrest warrant was issued, but also any other in absentia proceedings leading to a criminal conviction without which such a warrant could not have been issued."

80. Therefore, the Court concluded that a judicial decision which convicted the requested person, *in absentia*, had to be regarded as being a "*decision*" within the meaning of Article 4a(1) where that decision was decisive for the issue of the European arrest warrant (see para. 67).

81. The Court then concluded at para.68 that Article 4a(1) "*must be interpreted as meaning that where the suspension of a custodial sentence is revoked, on account of a new criminal conviction, and a European arrest warrant, for the purpose of serving that sentence, is issued, that criminal conviction, handed down in absentia, constitutes a 'decision' within the meaning of that provision. That is not the case for the decision revoking the suspension of that sentence*". Thus, it appears to be the case that, in the event that the revocation of the suspension of a sentence is triggered by a new criminal conviction which took place after a trial *in absentia*, and assuming that the matters set out in Article 4a were not complied with, then, in those circumstances, it would be appropriate to refuse to surrender the individual concerned. As was pointed out in para. 67 of the judgment in that case, the key question is whether the judicial decision resulting in the conviction of the trigger offence was decisive in relation to the revocation and the subsequent issue of the European arrest warrant.

82. It was emphasised by the court in that case as follows:

> *"71. With the benefit of that clarification, it must be recalled, first, that Article 4a(1)(a) to (d) lists, in a precise and uniform manner, the conditions under which the recognition and enforcement of a decision rendered following a trial in which the person concerned did not appear in person may not be refused…*
>
> *72. It follows that Article 4a(1) of Framework Decision 2002/584 does not allow the executing judicial authority to refuse to surrender the person concerned if the European arrest warrant contains, as regards the judicial decision which imposed the custodial sentence for the execution of which that warrant was issued, one of the statements referred to in points (a) to (d) of that provision."*

83. I have already expressed the view that the hearing of the Zemgale District Court on 19th August, 2020 did not involve the imposition of a new sentence. A separate question arises, and that is whether the administrative sentences imposed in this case can be regarded as trigger offences, as that phrase is explained in *LU*. There is no doubt that hearings took place *in absentia* at which the administrative sentences were imposed. It is apparent, as previously explained, that a distinction is drawn in Latvian law between a conviction in respect of a new crime and a violation of police supervision in s. 45 of the relevant Latvian law. As has previously been set out, s. 45(5) and (6) provides as follows:

> *"(5) If a person, for whom police supervision has been determined by a judgment of the court, violates its provisions in bad faith, a court, pursuant to a submission from the police institution, may replace the term of an additional sentence that has not been served, with the deprivation of liberty, counting two police supervision days as one liberty deprivation day."*

(6) A violation of a police supervision provision is in bad faith if the person has been administratively sentenced twice within a one-year period for such violation."

84. There are a couple of observations to be made in that regard. First of all, s. 45 of the Latvian law makes it clear that police supervision is an additional sentence. It is imposed at the time of the imposition of the original sentence. Secondly, it is clear that matters are brought back before the court "*pursuant to a submission from the police institution"*. That is similar to the situation that would occur in this jurisdiction where it is alleged that there has been a breach of the terms of the conditions imposed on a person in respect of a suspended or partially suspended sentence. Thirdly, the Latvian law indicates that, in order to replace the period of the additional sentence that has not been served, there has to be a violation of its provisions in bad faith, and the terms of s. 45(6) go on to provide for the circumstances in which there is a violation of the provision in bad faith, namely, that the person concerned has been administratively sentenced twice within a one-year period for the violation. As such, it appears that Latvian law treats the imposition of the administrative sentences as part and parcel of the execution of the original sentence and does not equate it to a sentence imposed as a result of the commission of a new crime, because it clearly distinguishes between what is to happen when a new crime is committed, and where there has been a violation of police supervision. However, the question of what is or is not "a criminal charge" for the purposes of Article 6 ECHR cannot be considered solely by reference to Latvian law. That is clear from the ECtHR jurisprudence, dating back to *Engel and Others v. The Netherlands* (App. Nos. 5100/71, 5101/71, 5102/71, 5354/72; 5370/72) (1979-1980) 1 E.H.R.R 706. The domestic classification *"serves only as a starting point"* and the nature of the offence and the severity of the penalty that the person concerned risks

incurring are more significant factors. In the context of these proceedings, these are issues of fact (foreign law being an issue of fact in this jurisdiction) which can only be assessed on the basis of appropriate evidence. There is no such evidence here. In fact, it was not argued in the High Court that the administrative violations amounted to the determination of a criminal charge for the purposes of Article 6 ECHR and thus came within Article 4a of the Framework Decision. That is so even though that issue was the subject of a pending reference to the CJEU in *Szamota* and *Siklosi*. The argument was first made by SH shortly before the hearing of the appeal. That explains why no evidence was adduced by SH on this issue. It should be borne in mind that while SH had the opportunity to make this argument, no application was made to adduce new evidence to support such an argument. Whilst it was open to SH to make the argument that the imposition of the administrative fines did engage Article 6 ECHR rights, in the absence of any evidence dealing with this issue, he has not persuaded the Court that this is so and the information and material before the Court simply does not substantiate such an argument. In the circumstances, it seems to me that the facts of this case can be distinguished from those that pertained in *LU*. The position would be different if SH had clearly been convicted of a new crime in respect of which Article 6 ECHR rights were engaged, as provided for in s. 45 of the Latvian law. Therefore, in my view, notwithstanding the imposition of administrative sentences, this is a case in which surrender cannot be refused on the basis that the administrative sentences imposed on SH should have engaged his Article 6 rights, and did not do so.

85. For completeness, I should refer briefly to the judgment in the case of *Minister for Justice and Equality v. Lukaszka* [2021] IEHC 631. That was a case involving Poland. The circumstances of that case appeared to have some similarity with those of this case.

The original order in that case had sentenced the respondent therein to *"restriction of liberty consisting of the performance of unpaid controlled work for social purposes of 20 hours per month for 10 months."* At a hearing on 2nd December, 2011, this sentence had subsequently been replaced with the sentence of 150 days' imprisonment, assuming that one-day replacement imprisonment is the equivalent of two days' restriction of liberty. There are, therefore, some similarities between that case and the present case in the manner in which a sentence not involving imprisonment can be converted into a term of imprisonment. However, there are also significant differences. In particular, it appears from information provided by the issuing authority that *"the court in its ruling of 2nd December 2010, had a discretionary power of assessment as to the extent of alternative imprisonment…"* (see para. 21 of the judgment). It was further noted that it was unclear whether the presence of the person concerned would have made a difference which could have influenced the court in the exercise of its discretion. The trial judge in that case concluded that the decision of 2nd December, 2011 *"involved the variation of the nature of a sentence by the exercise of a discretionary power"* and thus concluded that it fell outside the scope of *Ardic* and *Lipinski* and consequently surrender was refused. For my part, given the difference in the facts and circumstances between that case and the present case, I do not think reliance can be placed on that judgment to refuse surrender. The extent of the discretion to vary the original sentence seems to me to be markedly different from the extent of any discretion available in Latvia. Therefore, I would not conclude that a surrender should be refused in this case by reason of the judgment *in Lukaszka,* given the extent of the discretion to vary the extent of alternative imprisonment.

Article 4a(1)(a) to (d) / section 45 of the European Arrest Warrant Act 2003, as amended

86. In this case, the learned trial judge considered the question as to whether or not SH had waived his right to attend court on the 19th August, 2020. Having referred to the decision of the CJEU in *Ardic*, the trial judge in this case commented that:

> *"A person who is afforded a suspended sentence, is made aware at the time of the original sentence, of the conditions of his suspension, he is told and is aware of the consequences of any breach of conditions and is made aware that he will likely serve a sentence if he breaches those conditions. This process and, specifically, the awareness on the part of the respondent was part of the Court's ruling when the Court deemed that the activation of the sentence, when it does not alter the level of quantum of the original sentence, is not a hearing for the purposes of Article 4a of the Framework Decision. In such circumstances, the respondent can be deemed to have been fully aware of his suspended sentence and the consequences of his non-compliance. Therefore, he does not need to be told again or heard again, for the purposes of compliance with article 4a."*

87. Thus, it can be seen that as a general proposition, the trial judge accepted that, in circumstances where someone is told of the consequences of any breach of conditions and is made aware that there will likely be a further period of imprisonment in the event of a breach of those conditions, he does not need to be told again about that, or heard again for the purpose of compliance with Article 4a. However, the trial judge went on to conclude that, on the facts of this case, SH was not aware of the fact that a further court hearing could take place or that the hearing could result in the conversion of the police supervision to a sentence of imprisonment (see para. 18 of the judgment). In those circumstances, the court took the view that, notwithstanding her conclusion that the decision on 19th August, 2020 was not a trial resulting in the decision, she had

a margin of discretion in relation to the question of surrender. I have to say that I am of the view that the trial judge fell into error in concluding that, on the one hand, the hearing on the 19th August, 2020 was not a trial resulting in the decision for the purposes of Article 4a so that the requirements of Article 4a did not apply, and on the other hand, that the provisions of s. 45 permitted or required the refusal of surrender.

88. Critically, this Court is inclined to the view that the procedure in Latvia is akin to the procedure elsewhere when a suspended sentence is reactivated. The coercive nature of the police supervision can be equated with the conditions that tend to be imposed as a matter of course in respect of a suspended sentence. The decision of the CJEU in the case of *Ardic* is of some assistance in this regard. It is worth referring once more to paras. 75 and 76 of the judgment in which it was noted by the CJEU that the final judicial decision convicting the person concerned, including that part of the decision determining the custodial sentence, "*falls fully within Article 6 of the ECHR*", but, as was pointed out in para. 75, the case law of the ECtHR makes clear that that provision does not apply to questions relating to the detailed rules for the execution or application of such a custodial sentence. The CJEU went on to point out in para. 76 that the position is different only where "*following a finding of guilt of the person concerned and having imposed a custodial sentence on him, a new judicial decision modifies either the nature or the quantum of sentence previously imposed*", and in para. 76 two examples were given, one being the situation where a prison sentence was replaced by an expulsion measure, and in that regard a Spanish case was cited, and secondly where the duration of the detention previously imposed is increased, and in that context a case from the United Kingdom was cited. Therefore, the Court concluded at para. 77 that the concept of "*decision*" referred to in Article 4a(1) of the Framework Decision "*does not cover a decision relating to the execution or application of a custodial sentence previously*

imposed", save where the subsequent decision is to modify the nature or quantum of the sentence and the authority which adopted it enjoyed some discretion in that regard. Thus, the question must be asked as to whether the decision at issue affected the nature or the quantum of the custodial sentence imposed by the final conviction decision in relation to the person concerned. The Court went on, at para. 79, to note that in that case the proceedings involved in the revocation decisions were not intended to review the merits of the cases, but only concerned the consequences of a failure by the convicted person to comply with those conditions. The Court went on to conclude, at para. 81, as follows:

> *"…the only effect of suspension revocation decisions…is that the person concerned must at most serve the remainder of the sentence initially imposed. Where, as in the main proceedings, the suspension is revoked in its entirety, the sentence once again produces all its effects and the determination of the quantum of the sentence still remaining to be served is derived from a purely arithmetic operation, with the number of days already served in custody being simply deducted from the total sentence imposed by the final criminal conviction."*

89. What is clear from the information provided by the Latvian authorities in this case is that the period of three years' police supervision commenced at the moment when the serving of the period of four years and nine months had been completed. Thereafter, in the event of a breach, an arithmetic calculation is used to determine the period of any deprivation of liberty that will follow from a breach of the police supervision. It appears, to use the language used by the CJEU, that no new judicial decision is made in relation to the quantum of sentence to be served, as the maximum period involved has already been decided by the District Court in Zemgale. Neither the nature nor the

quantum of the sentence is varied, save and in accordance with the provisions of Latvian law, as previously described. No additional terms are imposed and no additional period of time is added to that which was already provided for in the original court decision of 2015. Latvian law provides for the maximum period that can be allocated to police supervision, having regard to the offence and the period for which the initial term of imprisonment is imposed. Nevertheless, there is a discretion left to the Latvian court as to whether or not to impose the additional sentence. SH was not present at that hearing and it could be that his presence might have made a difference to the outcome of that hearing.

90. In conclusion, I would hold that the question as to whether the decision of Zemgale District Court on 19th August, 2020 was a trial resulting in the decision is not *acte claire*, by reason of the discretion as to whether or not to impose the additional sentence in circumstances where that hearing occurred *in absentia*, given that the presence of SH at such hearing could have made a difference to the decision. Further, I would hold that the imposition of administrative fines did not amount to trigger offences as described in *LU*. In the circumstances, I propose that the following questions should be referred to the Court of Justice of the European Union:

> (1) *Where the surrender of the requested person is sought for the purpose of serving a custodial sentence imposed on that person as a result of violating the terms of a sentence of police supervision previously imposed on him, in circumstances where the court that imposed that custodial sentence had a discretion whether to impose a custodial sentence (though no discretion as to the duration of the sentence if imposed), are the proceedings leading to the imposition of that custodial sentence part of the 'trial resulting in the decision'*

for the purposes of Article 4a(1) of Council Framework Decision 2002/584/JHA?

(2) *Was the decision to convert the sentence of police supervision into a custodial sentence in the circumstances set out in (1) above, one that had the purpose or effect of modifying the nature and/or quantum of the sentence previously imposed on the requested person and, in particular, the sentence of police supervision that formed part of his previous sentence, such as to come within the exception referred to in para. 77 of Ardic?*