

THE HIGH COURT

[2020] IEHC 606
[2019 No. 227 EXT]

BETWEEN

MINISTER FOR JUSTICE & EQUALITY

APPLICANT

AND

DORIAN SZAMOTA

RESPONDENT

JUDGMENT of Mr. Justice Binchy delivered on the 16th day of November, 2020

1. By this application, the applicant seeks an order for the surrender of the respondent to Poland pursuant to a European arrest warrant dated 26th February, 2019 (the "EAW"). The EAW was issued by a judge of the District Court in Wroclaw, as issuing judicial authority ("IJA").
2. The EAW was endorsed by the High Court on 1st July, 2019. The respondent was arrested and brought before the Court on 23rd October, 2019, and this application proceeded on 8th November, 2019.
3. At the opening of this application, I was satisfied that the person before the Court is the person in respect of whom the EAW was issued, and counsel for the respondent confirmed that the identity of the respondent was not in dispute.
4. Counsel for both parties also affirmed that the none of the matters referred to in ss. 21A, 22, 23 and 24 of the European Arrest Warrant Act 2003 (as amended) (the "Act of 2003") arose, and that the surrender of the respondent was not prohibited for any of the reasons set forth in any of those sections.
5. The basis for the issue of the EAW is stated at para. B of the same to be a "*valid verdict issued by the District Court for Wroclaw-Śródmieście dated 29 May 2015.*" At para. D of the EAW it is stated that the respondent appeared personally at the court that handed down the decision.
6. At para. E of the EAW it is stated that it relates to one crime. That is described in the following terms:

"[A]cting in short time intervals with a deliberate plan, in order to obtain a financial profit in a period from 16 January 2014 to 17 January 2014 in Starogard Gdański, he unlawfully made it impossible to process computer (IT) data by causing an Internet Ddos attack on the server of the company Headway sp. z o.o. owned by Jaroslaw Gasiorek with its seat in Wroclaw by means of a computer network botnet (malware) configured in a way so that it sent a large number of queries onto the said server by overloading it and thus causing its blockade on the Internet and afterwards using the Internet communicator he sent illegal threats to Jaroslaw Gasiorek saying that he will continue threatening him with the Dos attack resulting in stopping the possibility to process the computer (IT) data in order to force his victim to make a money transfer of 200 PLN to his bank account of the following

number..., which act was detrimental to the company Headway... owned by Jaroslaw Gasiorek”.

7. Particulars of the provisions of Polish law whereby these actions constitute an offence are set out comprehensively in the EAW. The offences of which the respondent was convicted under Polish law were:
 1. An offence contrary to Article 268a § 1 of the Penal Code which, *inter alia*, makes it an offence to hinder access to a computer or to process computer data, the penalty for which is a sentence of up to three years' imprisonment;
 2. An offence contrary to Article 287 § 1 of the Penal Code, which makes it an offence, *inter alia*, to affect an automatic process of processing, collecting or transferring of computer data, without being entitled to do so, in order to obtain a financial profit or to harm another person, the penalty for which is a sentence of imprisonment ranging from three months to five years;
 3. An offence contrary to Article 191 § 1 of the Penal Code which makes it an offence, *inter alia*, to use an illegal threat in order to force another person to engage in a certain action, the penalty for which is sentence of imprisonment of up to three years.
8. The EAW states at para. C that the respondent was sentenced to a penalty of one year of imprisonment, and that the full sentence remains to be served. It is apparent from all of the foregoing that minimum gravity is established.
9. No box has been ticked in relation to any of the matters set out at para. E of the EAW. Accordingly, it is necessary to establish that the acts as described in the EAW correspond to an offence or offences in this jurisdiction.
10. On 4th November, 2019, the Office of the Chief State Solicitor wrote to the solicitors for the respondent identifying those offences in this jurisdiction which, the applicant claims, correspond to the offences of which the respondent was convicted in Poland, as described in the EAW, as follows:
 - i. Blackmail, extortion or demanding money with menaces, contrary to s. 17 of the Criminal Justice (Public Order) Act, 1994;
 - ii. Interference with an information system without lawful authority, contrary to s. 3 of the Criminal Justice (Offences Relating to Information Systems) Act 2017;
 - iii. Interference with data without lawful authority, contrary to s. 4 of the Criminal Justice (Offences Relating to Information Systems) Act 2017;
 - iv. Unlawful use of computer, contrary to s. 9 of the Criminal Justice (Theft and Fraud Offences) Act, 2001.

11. Section 38 of the Act of 2003 provides that a person shall not be surrendered to an issuing state under the Act of 2003 in respect of an offence unless it is established that the offence corresponds to an offence under the laws of the State. Although in the points of objection filed on behalf of the respondent it is pleaded that his surrender is prohibited by s. 38 of the Act of 2003, no arguments in support of this ground of objection were advanced on behalf of the respondent on the grounds that the acts described in the EAW did not correspond to offences in this jurisdiction. I am satisfied that the acts as described in the EAW correspond to the offences identified by counsel for the applicant.
12. At para. F of the EAW, it is stated that the penalty imposed upon the respondent was conditionally suspended for a probationary period of five years. It is stated that the sentenced person was present at the main court session during which the decision was announced, and that the verdict was not appealed. This decision was handed down on 29th May, 2015. The EAW then goes on to state that on 16th May, 2017, the same District Court ordered the execution of the sentence of imprisonment due to the fact that during the probationary period the sentenced person committed again a similar "*deliberate*" crime for which he received a sentence of imprisonment.
13. In an affidavit sworn on 6th November, 2019, in opposition to the application, the respondent avers that while he was present at the proceedings which resulted in his conviction and sentence to one year's imprisonment, suspended for five years, he has only become aware, in the course of these proceedings, that he was subsequently prosecuted for a similar offence alleged to have been committed while he was on probation for the offence in respect of which his surrender is now sought. He says he was not aware of this later prosecution, which resulted in his conviction, *in absentia*, which in turn gave rise to the decision to activate the suspended sentence. Since he was not aware of this prosecution, he was neither able to attend nor to instruct counsel to represent him in his defence.
14. Counsel for the respondent submitted that, this being the case, the surrender of the respondent is prohibited by s. 37 of the Act of 2003, on grounds of a violation of his rights under Article 6 of the European Convention on Human Rights ("the Convention"). At the initial hearing of the application, there was some uncertainty as to the exact circumstances by which the court came to order the execution of the sentence on 16th May, 2017. While this was subsequently clarified, counsel for the respondent submitted at the initial hearing of the application that the activation of the suspended sentence appeared to have occurred either owing to a subsequent conviction, *in absentia*, of the respondent of another offence, or owing to a presumption that he was guilty of another offence. In either case, it was submitted, this was in violation of his rights under Article 6 of the Convention. It was on this basis that this application was initially opposed. At this juncture, it is appropriate to state that I am satisfied in all other respects that the requirements of the Act of 2003 for surrender of the respondent pursuant to the EAW have been satisfied, and I will proceed to consider the s. 37 objection below.

15. Since there was some uncertainty as to the exact circumstances giving rise to the activation of the suspended sentence, I considered it appropriate to seek further information of the IJA, pursuant to s. 20 of the Act of 2003, and there followed several such requests and replies between 16th December, 2019 and 6th March, 2020, arising out of which the following was established:
1. The revocation of suspension of the sentence imposed upon the respondent on 29th May, 2015 arose out of his conviction for another offence before a different court (the Regional Court in Bydgoszcz) on 21st February, 2017. That offence involved the burglary of and theft of goods from a premises, and resulted in the imposition of a sentence of one year and two months. As this was the offence that later triggered the activation of the suspended sentence previously imposed upon the respondent, I will, for convenience, refer to his offence hereafter as the "Triggering Offence".
 2. The respondent did not attend the proceedings resulting in his conviction of the Triggering Offence, on 21st February, 2017. He claims that he was not notified of the relevant hearing dates. However, it appears that he was present at some stage in the process leading to this conviction, because the IJA states, in a letter of 20th January, 2020, that, during a hearing as part of "preliminary proceedings", he was instructed about his obligation to provide the court with his correspondence address; and he was warned that if he failed to do so, the proceedings could take place in his absence.
 3. It was as a result of the conviction of the respondent of the Triggering Offence, by the court in Bydgoszcz, that the Regional Court of Wroclaw-Śródmieście, being the court responsible for the enforcement of the judgment of 29th May, 2015, revoked the suspension of execution of the term of imprisonment imposed on the respondent on that date, and instead ordered the enforcement of that sentence. This followed a hearing that took place on 16th May, 2017 (the "Revocation Hearing"), at which the respondent was neither present nor represented.
 4. The IJA claims that a summons notifying the respondent of the date and place of the Revocation Hearing was sent to the address of the respondent, being the address provided by him, although he did not collect summons nor attend the proceedings on 16th May, 2017. The decision made by the court on that date (to revoke the suspension of the term of imprisonment imposed on him on 29th May, 2015) was also served on him at the same address, on 16th May, 2017.
 5. The order of the District Court in Wroclaw of 29th May, 2015 made it clear that if the respondent committed a similar offence within the probationary period, this could result in the execution of the term of imprisonment imposed on that date. In a second affidavit sworn by the respondent on 24th February, 2020, in opposition to this application, the respondent has acknowledged that he was aware "*generally*" that the commission of a subsequent, similar offence may give rise to revocation of

a suspended sentence, but he takes issue that there is any similarity between the offences of which he was convicted.

6. The respondent acknowledges that he was arrested and interviewed in relation to the Triggering Offence in or around October 2016. He says he was released after a few hours, without being arrested. He denies being asked to give his address to the police, and he did not therefore provide an address. He denies being informed that there could be consequences for not being contactable, as claimed by the IJA.
7. The period within which the respondent would be entitled to appeal his conviction of the Triggering Offence has expired, and in order to challenge that decision now he would have to pursue what is described as “*an extraordinary legal remedy*”, such as a motion to reopen the proceedings and reverse the decision of the court.

The Decision of the CJEU in Ardic

16. The question as to whether or not an executing judicial authority is concerned with the circumstances in which the suspension of a term of imprisonment is revoked, was considered by the Court of Justice of the European Union (“CJEU”) in its decision in the case of *Samet Ardic* (Case C-571/17 PPU). That case concerned a referral of a request for a ruling from the CJEU by the District Court of Amsterdam. In that case, the arrest and surrender of Mr. Ardic, a German national residing in the Netherlands, was sought by way of European arrest warrant for the purpose of executing in Germany two custodial sentences, each for a period of one year and eight months imposed by final judgments of 4th March, 2009, and 10th November, 2010, which were handed down by two separate District Courts in Germany following trials at which Mr. Ardic appeared in person.
17. Mr. Ardic subsequently served a portion of the sentences, and the competent German courts then granted a suspension of the execution of the remainder of those sentences. However, by subsequent decisions of 4th April and 18th April, 2013, the District Court revoked those suspensions and ordered the execution of the remainder of those sentences, comprising 338 days and 340 days, respectively, on the ground that Mr. Ardic had persisted in infringing the prescribed conditions of suspension and evading the supervision and guidance of his probation officer and the supervision of the courts.
18. Against that background, the District Court of Amsterdam referred the following question to the CJEU for a preliminary ruling:

“If the requested person has been found guilty in final proceedings conducted in his presence and has had imposed on him a custodial sentence, the execution of which has been suspended subject to certain conditions, do subsequent proceedings, in which the court, in the absence of the requested person, orders that suspension to be revoked on the ground of non-compliance with conditions and evasion of the supervision and guidance of a probation officer, constitute a ‘trial resulting in the decision’ as referred to in Article 4a of Framework Decision [2002/584]?”

19. The CJEU reframed this question slightly, as follows, at para. 62:

"In those circumstances, the question submitted by the referring court must be understood as seeking to determine, in essence, whether, in a situation where, as in the main proceedings, the person concerned appeared in person in the criminal proceedings resulting in the judicial decision which definitively found him guilty of an offence and, as a consequence, imposed a custodial sentence the execution of which was subsequently suspended in part subject to certain conditions, the concept of 'trial resulting in the decision', as referred to in Article 4a(1) of Framework Decision 2002/584, must be interpreted to include subsequent proceedings in which that suspension is revoked on the grounds of infringement of those conditions during the probationary period."

20. The CJEU then went on to recall the meaning of the concept of "trial resulting in the decision", and referred to its decisions in *Tupikas* (C-270/17 PPU) and *Zdziaszek* (C-271/17 PPU). Drawing from its decisions in those cases, the CJEU held, at para. 67, that it follows that Article 4a(1) of Framework Decision 2002/584 (the "Framework Decision") must be interpreted as meaning that the concept of "decision" referred to therein relates to the judicial decision or decisions concerning the criminal conviction of the interested person, namely the decision or decisions that definitively rule, after an assessment of the case in fact and in law, on the guilt of that person and, where relevant, on the custodial sentence imposed upon him. It then posed the question as to whether or not a decision to revoke the suspension of execution of a custodial sentence can be equated to such a decision.
21. Having noted the rule reflected in Article 1 (2) of the Framework Decision that Member States are required to execute any European arrest warrant on the basis of the principle of mutual recognition, save in exceptional circumstances, and having further noted the insertion of Article 4a of the Framework Decision by the later Framework Decision 2009/299 in order to protect those convicted *in absentia*, the court then went on to say, at para. 74 that it strives to ensure that Article 4a(1) of the Framework Decision is interpreted and applied in accordance with the requirements of Article 6 of the Convention. It then went on to consider certain decisions of the European Court of Human Rights (the "ECtHR") in which the question as to whether the execution of a custodial sentence engaged Article 6 of the Convention, was considered. It referred to the decisions of the ECtHR in the cases of *Boulois v. Luxembourg* (37575/04), *Vasilescu v. Belgium* (64682/12) and *Pacula v. Belgium* (68495/12) and stated that it is apparent from those authorities that Article 6 of the Convention does not apply to questions relating to the detailed rules for the execution or application of a custodial sentence.
22. At para. 76 it stated:

"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, as is the case when a prison sentence is replaced by an expulsion measure (ECtHR, 15 December 2009, Gurguchiani v. Spain, CE: ECHR: 2009: 1215JUDOO1601206, §§

40, 47 and 48) or where the duration of the detention previously imposed is increased...”

At para. 77 it then reached its conclusion in the case as follows:

"In light of the foregoing, it must therefore be considered that, for the purposes of Article 4a(1) of the Framework Decision 2002/584, the concept of 'decision' referred to therein 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."

23. Later in its decision, the court noted that an interpretation of the concept of "decision" within the meaning of Article 4a(1) of the Framework Decision which is broader than that set out in para. 77 of its judgment, would risk undermining the effectiveness of the European arrest warrant mechanism. At para. 88 it added:

"It should also be added that the Court's interpretation in paragraph 77 of this judgment merely implies that a decision, which relates solely to the execution or application of a custodial sentence finally imposed at the conclusion of criminal proceedings and which does not affect either the finding of guilt or the nature or level of that sentence, does not fall within the scope of Article 4a(1) of Framework Decision 2002/584, so that the absence of the person concerned during the proceedings leading to that decision cannot constitute a valid ground for refusing execution of the European arrest warrant."

Is Ardic distinguishable?

24. In these proceedings, counsel for the respondent submitted that the nature of the decision giving rise to the revocation of suspension of sentence in *Ardic* and the corresponding decision in these proceedings is different. This is because the decision of the District Court of Wrocław-Śródmieście of 16th May, 2017, revoking the suspension of the sentence of imprisonment, resulted from the *conviction* of the respondent of another offence (the Triggering Offence), by the Regional Court in Bydgoszcz in February 2017, whereas the revocation of suspension of sentence in *Ardic* had come about as a result of his failure to comply with prescribed conditions of probation, and evading the supervision and guidance of his probation officer. Accordingly, it is submitted, *Ardic* may be distinguished, and this Court should enter into an inquiry regarding the circumstances of the revocation of the suspended sentence. In particular, the Court should be satisfied that the respondent's fair trial rights, as guaranteed by Article 6 of the Convention, have not been violated in the course of those proceedings.
25. In support of this argument, counsel for the respondent argued that it is clear from the decision of the CJEU in *Ardic* that Article 4a(1) of the Framework Decision must be interpreted and applied in accordance with the requirements of Article 6 of the Convention. In this regard, counsel for the respondent relied upon two decisions of the ECtHR that were not referred to in the decision of the CJEU in *Ardic*. The first of these (in

time) is that of *Böhmer v. Germany* (37568/97), a decision of the ECtHR of 3rd October, 2002, and the second is the case of *El Kaada v. Germany* (2130/10), a decision of the ECtHR of 12th November, 2015. In both cases the ECtHR concluded that there had been a violation of Article 6 (2) of the Convention in circumstances where there had been a revocation of suspension of a custodial sentence on the grounds that the applicant in each case had committed an offence, subsequent to receiving a suspended sentence. So therefore, the respondent submits, these cases are authority for the proposition that hearings resulting in the revocation of a suspended sentence do engage Article 6 of the Convention, at least where they are a consequence of the conviction of a subsequent offence, as distinct from being a consequence of a failure to comply with conditions of parole. However, as will be seen, in *El Kaada*, the revocation of suspension of sentence did not follow upon a conviction for a later offence, while in *Böhmer*, the conviction for later offences was under appeal at the time of the hearing to revoke the suspension of sentence.

26. In *El Kaada* the applicant had been convicted of an offence, resulting in the imposition of a custodial sentence, which was suspended. One of the conditions applicable to that suspension of sentence was that the applicant should not re-offend. Subsequently, he confessed to another offence, but withdrew that confession before he was charged with the offence. In the meantime however, the court that suspended his sentence revoked that suspension, on the grounds of his confession, but did this after he had revoked his confession, and before he was charged with the second offence. The ECtHR said, at para. 63 of its judgment:

"The Court considers that the impugned statements [referring to statements made by the applicant in criminal proceedings, which he later withdrew] contained in the Regional Court's judgment confirmed without any reservations or reference to a state of suspicion of the District Court's finding, required by the applicable provision of domestic law, that the applicant had committed a new offence. The Court therefore finds that they amounted to a clear declaration that the applicant was guilty of another burglary before he was proved guilty thereof by the competent trial courts in a final judgment in accordance with the law."

For this and other reasons, the ECtHR concluded that the decision of the domestic courts revoking the suspension of the applicant's sentence breached the principle of the presumption of innocence, and that there had been a violation of Article 6 (2) of the Convention.

27. In *Böhmer* the applicant had been convicted of two separate offences, one on 14th June, 1991, and another on 18th March, 1993, each of which gave rise to custodial sentences, and each of which was suspended. The suspension of these penalties was later revoked as a result of the applicant having been convicted of a number of other offences. However, he appealed those convictions and, separately, he also appealed the revocation of the suspension of the sentences. The Court of Appeal in Hamburg heard the latter appeal, and determined it before the appeal of the applicant against conviction in respect

of the later offences. It did so having conducted a full investigation of the underlying facts. In fact, according to the submissions of the German government, the Court of Appeal proceeded at the hearing in the same manner as the trial court in the main proceedings would have done, and accordingly the applicant had been afforded proceedings in accordance with the rule of law. The applicant on the other hand submitted that the Court of Appeal's decision contained a finding of guilt in respect of a criminal charge which was the subject of criminal proceedings before another court, and which remained to be determined on appeal.

28. The ECtHR held, at para. 54 of its judgment that:

"The presumption of innocence will be violated if a judicial decision or a statement by a public official concerning a person charged with a criminal offence reflects an opinion that he is guilty before he has been proved guilty according to law. It suffices, even in the absence of any formal finding, that there is some reasoning suggesting that the court or the official regards the accused as guilty..."

At paras. 57 and 58 the ECtHR stated:

"In the present case, the Court observes at the outset that the sentence of imprisonment was lawfully imposed upon the applicant after his conviction in 1991. Following the revocation of its suspension, detention to serve this prison sentence would have to be regarded as lawful detention in accordance with Article 5 § 1(a) of the Convention. The impugned decision therefore does not as such violate Article 6 § 2 of the Convention.

58. *It remains to be examined whether the supporting reasoning in the Court of Appeal's decision amounts in substance to a determination of the applicant's guilt contrary to Article 6 § 2."*

29. The ECtHR concluded that the Court of Appeal, sitting as a court supervising the execution of sentences, had assumed the role of the Hamburg District Court, the competent trial court and had unequivocally declared that the applicant was guilty of a criminal offence. At para. 66 it stated: *"With its decision to revoke the suspension of the applicant's prison sentence under the initial conviction, the Court of Appeal drew penal consequences from the new criminal offence and imposed a disadvantage upon the applicant that, in the Court's view, equates with a penalty."* At para. 67 the court stated:

"The presumption of innocence, considered in the light of the general obligation of a fair criminal trial under Article 6 § 1, excludes a finding of guilt outside the criminal proceedings before the competent trial court, irrespective of the procedural safeguards in such parallel proceedings and notwithstanding general considerations of expediency."

30. It can be seen therefore that in *El Kaada* and *Böhmer*, the ECtHR arrived at the decisions that it did on the grounds that there had been a violation of Article 6 (2) of the

Convention through the denial of the presumption of innocence at the hearings that resulted in the revocation of the suspended sentence in each case. While in this case the revocation of the suspension of the sentence of imprisonment imposed upon the respondent was as a result of his *conviction* of another offence, and not as a result of a court being satisfied of his guilt on any other basis, nonetheless it is submitted that, in circumstances where the respondent was convicted of that other offence in his absence, this engages Article 6 of the Convention in the context of the Revocation Hearing. Accordingly, since the respondent did not receive notification of and was not in attendance at the Revocation Hearing, his surrender is prohibited by s. 37 of the Act of 2003

31. Moreover, in these circumstances, the concept of “decision” as referred to in Article 4a(1) of the Framework Decision, must also encompass the Revocation Hearing. This is because unlike in *Ardic*, where the revocation of suspension arose because of a failure to comply with probation conditions, in this case the revocation arose because of a conviction of an offence *in absentia*, hence Article 4a(1) of the Framework Decision and s. 45 of the Act of 2003 are engaged.

Discussion and Decision

32. The applicant places heavy reliance on the decision of the CJEU in *Ardic*, whereas the respondent argues that that decision should not apply to the circumstances of this case, for the reasons summarised above.

33. At para. 75 of its decision in *Ardic*, the CJEU stated:

“While the final judicial decision convicting the person concerned, including the decision determining the custodial sentence to be served, falls fully within Article 6 of the ECHR, it is apparent from the case-law of the European Court of Human Rights that that provision does not apply, however, to questions relating to the detailed rules for the execution or application of such a custodial sentence (see, to that effect, ECtHR, 3 April 2012, Boulois v Luxembourg, ...)”

At para. 76, the CJEU identified the exception to this rule:

“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, as is the case when a prison sentence is replaced by an expulsion measure...”

34. At the end of para. 88 of its judgment in *Ardic*, the CJEU held, *inter alia*:

“...the absence of the person concerned during the proceedings leading to that decision [the decision to revoke the suspension] cannot constitute a valid ground for refusing execution of the European arrest warrant.”

35. It was not argued in this case that the decision made at the Revocation Hearing in any way altered the nature or quantum of the sentence previously imposed on the respondent, and it is apparent that it did not do so.
36. The case of *Boulois*, referred to at para. 75 of *Ardic*, involved a complaint made by the applicant in that case to the ECtHR arising out of numerous refusals by the authorities in Luxembourg to grant the applicant prison leave. The applicant had brought proceedings by way of judicial review arising out of the various refusals of his request for prison leave, by the prison authorities. Those proceedings were dismissed by the administrative court, on the grounds of want of jurisdiction, and the applicant's claim before the ECtHR arose out of that decision. In his proceedings claiming a violation of Article 6 of the Convention, the applicant claimed that he had been deprived of his right to a fair hearing and his right of access to a court in connection with the refusal of his requests for prison leave. At para. 82 of its decision in that case the ECtHR stated:

"The Court reaffirms its settled case-law to the effect that prisoners in general continue to enjoy all the fundamental rights and freedoms guaranteed under the Convention save for the right to liberty, where lawfully imposed detention expressly falls within the scope of Article 5 of the Convention. ..."

37. The court then continued, at paras. 84 and 85:

"84. In the instant case the Court observes that the applicant relied on Article 6 of the Convention in complaining of the refusal of his requests for prison leave. The Court's first task is therefore to examine whether the applicant's complaint is compatible ratione materiae with Article 6.

85. Like the Chamber, the Grand Chamber considers that Article 6 § 1 of the Convention is not applicable under its criminal head, as the proceedings concerning the prison system did not relate in principle to determination of a "criminal charge" (see Enea,...)"

38. The court then went on to consider whether or not the applicant in that case had a "civil right", in order to assess whether the procedural safeguards afforded by Article 6 (1) of the Convention were applicable to the proceedings concerning his requests for prison leave. It concluded that the applicant did not have such a right, and as a consequence, Article 6 of the Convention was not applicable.

39. This Court was also referred by both parties to the opinion of Advocate General Bobek in *Ardic*. At para. 35 of his opinion, referring to *Boulois* he noted that:

"[A]ccording to the case-law of the ECtHR, questions concerning the methods for executing a custodial sentence do not fall within the scope of Article 6 (1) of the ECHR. In particular, the ECtHR has ruled that the criminal head of Article 6 (1) of the ECHR does not apply to proceedings concerning the prison system which do not relate, in principle, to the determination of a 'criminal charge'."

At para. 39 he stated:

"Moreover, there are doubts as to whether measures relating to the methods for executing a sentence fall within the scope, in certain cases, of Article 6 (1) of the ECHR under its civil head. Although the Grand Chamber of the ECtHR held, in Boulois, that the civil head of Article 6 (1) of the ECHR was not applicable, that answer was based on the fact that 'prison leave' did not constitute a right, with the determination of what constitutes a 'right' being closely linked to how it is recognised in the domestic legal system."

40. At para. 45 of his opinion, the Advocate General stated:

"The above arguments indicate that the scope of the guarantees under Article 6 of the ECHR and the determination of what constitutes a method of execution of a sentence raise complex issues. It is true that, in light of the case law of the ECtHR, the concept of 'methods of execution' and its implication on the applicability of the criminal and civil limbs of Article 6 of the ECHR are not entirely clear, in particular so far as concerns the revocation decisions at issue in the main proceedings, as provided for under German law."

Two Questions

41. The resolution of the objections raised by the respondent requires the determination of two questions:

- (i) Is the surrender of the respondent prohibited by s. 37 of the Act of 2003 on the grounds that his surrender would be incompatible with the obligations of the State under the Convention? If so, that is obviously determinative of this application, but if not I must then turn to the second issue below.
- (ii) Are the circumstances in which the suspended sentence imposed upon the respondent on 29th May, 2015, by the District Court of Wroclaw-Śródmieście, was activated by reason of his subsequent conviction, *in absentia*, by the Regional Court of Bydgoszcz on 21st February, 2017, distinguishable from the circumstances applicable in the case of *Ardic*, such that in this case the trial resulting in the decision for the purposes of Article 4a(1) of the Framework Decision/s. 45 of the Act of 2003 is the Revocation Hearing, and not the trial resulting in his conviction of 29th May, 2015.

Section 37 Objection

42. It is apparent from what has been set out above that this argument revolves around whether or not the Revocation Hearing engages Article 6 of the Convention. It is also apparent from the above that the CJEU addressed this question in *Ardic*. It did this because, in interpreting Article 4a(1) of the Framework Decision, it does so in a manner that is compliant with Article 6 of the Convention and the case law of the ECtHR (para. 74 of *Ardic*). If such hearings engage Article 6 of the Convention, then it could be the case that they would have to be regarded, for the purposes of Article 4a(1) of the Framework Decision as a *"trial resulting in the decision"*, with all the attendant fair trial rights, as

provided for in that article, as implemented in this jurisdiction by s. 45 of the Act of 2003. In arriving at its decision in *Ardic*, the CJEU had regard to the decision of the ECtHR in the case of *Boulois v. Luxembourg*.

43. It is apparent that a significant consideration of the ECtHR in *Boulois* was that the proceedings under consideration in that case (which, as pointed out above, were not “*revocation*” proceedings, but proceedings involving requests for prison leave) did not relate to the determination of a criminal charge. More broadly, as mentioned by Advocate General Bobek in *Ardic*, the ECtHR has held that questions concerning the methods for executing a custodial sentence do not fall within the scope of Article 6 (1) of the Convention. However, Advocate General Bobek also noted that the concept of “*methods of execution*” and its applicability to the criminal and civil limbs of Article 6 of the Convention are not entirely clear, in particular so far as concerns revocation hearings (see para. 40 above).
44. As previously mentioned, counsel for the respondent placed reliance on two decisions of the ECtHR, not referred to in *Ardic*, as authority for the proposition that revocation hearings do indeed engage Article 6 of the Convention. These are the cases of *Böhmer v. Germany* and *El Kaada v. Germany*. In each of these cases, against very different background circumstances, the ECtHR held that there had been a violation of Article 6 of the Convention, at hearings where there had been a revocation of a sentence of imprisonment previously imposed, because in each case the revocation of the suspension occurred in circumstances where the ECtHR considered there had been a violation of the presumption of innocence (in relation to offences allegedly committed by each of the claimants in those proceedings, after the suspension of the sentence imposed in connection with an earlier offence).
45. On the face of it, this appears to pose a conundrum. On the one hand, *Ardic* has been decided on the basis that “*revocation hearings*” do not engage Article 6 of the Convention. The principal authority relied upon by the CJEU in arriving at that conclusion was *Boulois*, which did not involve a “*revocation hearing*” at all, but instead was concerned with the circumstances by which prison leave had been denied to the claimant. That said, the ECtHR does seem to have endorsed a more general proposition in *Boulois*, to the effect that Article 6 is not engaged unless the proceedings concerned relate to the determination of a criminal charge. On the other hand however, the ECtHR found in both *Böhmer* and *El Kaada* that the revocation hearings held in those cases violated Article 6 of the Convention. While this appears to run contrary to *Boulois*, on closer analysis, I do not think that this is so.
46. In *Böhmer* and *El Kaada* the ECtHR found that the revocation of suspension of sentences previously imposed occurred in a manner that violated Article 6 of the Convention, because, put simply, in each case the suspension of sentence was revoked because the court, at the revocation hearing, effectively determined that the person concerned was guilty of another offence, for the purpose of deciding whether or not to revoke the suspension of sentence. So while the proceedings, properly construed, did not involve the

determination of a criminal charge (because that was not what was before the court) the courts in each case nonetheless did arrive at such a determination in order to deal with the application before the court.

47. However, the circumstances giving rise to the complaint in these proceedings are very different. While we know little about the Revocation Hearing, one thing that is clear is that there was no determination at that hearing, express or implied (such as occurred in *Böhmer* and *El Kaada*), of a criminal charge. The respondent had already been convicted of the Triggering Offence, and the court relied upon that conviction in deciding to revoke the suspension of the term of imprisonment. Accordingly, I am satisfied that the distinction which the respondent seeks to draw between the *ratio* of the CJEU in *Ardic* and the decisions of the ECtHR is illusory, and cannot avail the respondent. The jurisprudence of the ECtHR, as applied by the CJEU in *Ardic* establishes that hearings, the purpose of which is to consider the revocation of a suspension of a sentence of imprisonment, and not the determination of a criminal charge, do not engage Article 6 of the Convention.
48. Moreover, if there has been a violation of the respondent's Article 6 rights by reason of his absence either from the trial resulting in his conviction of the Triggering Offence, or by reason of his absence from the Revocation Hearing, any such a violation is not relevant in the consideration of this application, for the reasons given by Peart J. in *Minister for Justice, Equality and Law Reform v. McCague* [2010] 1 IR 456, a decision upon which the applicant relies. In that case, the respondent was tried, convicted and sentenced in his absence. He claimed that he was medically unfit to attend the trial and also that there was a paramilitary threat against his life if he did attend. In addressing arguments advanced on behalf of the respondent in that case under s. 37 of the Act of 2003, Peart J. stated, at para. 53:

"Under s. 37 of the Act of 2003, this court is required to refuse to order surrender if it would be 'incompatible with the State's obligations' under the Convention. That is not to be confused with a situation contended by the respondent to be a past breach of his Convention rights in the issuing state. It clearly cannot mean that this court must examine what occurred in that issuing state regarding trial, conviction and sentence, and decide that the court there is guilty of breaching one or more of the respondent's rights under the Convention. It must be borne in mind that the section provides that it is the surrender which must be 'incompatible with the State's obligations', and not anything which has already occurred in the issuing state. In other words, this court must act in accordance with this State's obligations under the Convention when carrying out its functions under the Framework Decision and the Act, and cannot order surrender if to do so would breach this State's obligations thereunder. It is difficult to envisage, absent some truly extraordinary, exceptional and egregious circumstance, in what way it would be incompatible with this State's obligations under the Convention to surrender a requested person to a member state of the European Union which has been designated pursuant to s. 3 of the Act of 2003, and which, on a reciprocal basis,

enjoys recognition of its judicial decisions, and the trust and confidence of this State in its legal system and procedures thereunder."

49. It is clear that the respondent's arguments under Article 6 of the Convention are concerned with alleged past violations thereof, and do not concern what may happen upon the surrender of the respondent. Moreover, unlike in *McCague*, the objections are not even concerned with the offences for which the surrender of the respondent is sought, but with another, later, offence.
50. For all of these reasons, I am satisfied that the surrender of the respondent is not incompatible with the State's obligations under the Convention, and is not therefore prohibited by s. 37 of the Act of 2003.
51. I turn next to consider the second question at para. 41 above. It is obvious from my conclusion to the first question that, in considering what was the trial resulting in the decision, I do not consider there to be any distinguishing factors in this case so as to depart from the test identified by the CJEU in *Ardic*. It will be recalled that at para. 88 of its judgment in that case, the CJEU held:

"It should also be added that the Court's interpretation in paragraph 77 of this judgment merely implies that a decision, which relates solely to the execution or application of a custodial sentence finally imposed at the conclusion of criminal proceedings and which does not affect either the finding of guilt or the nature or level of that sentence, does not fall within the scope of Article 4a(1) of Framework Decision 2002/584 so that the absence of the person concerned during the proceedings leading to that decision cannot constitute a valid ground for refusing execution of the European arrest warrant."

52. It is clear that the Revocation Hearing was concerned only with the execution of a custodial sentence previously imposed on the respondent at the conclusion of criminal proceedings. There was no determination of guilt at this hearing and nor did it result in any change to the nature or level of the sentence imposed upon the respondent, for which his surrender is sought. While there was of course a determination of guilt at the trial of the Triggering Offence, that is of no relevance in circumstances where the surrender of the respondent for that offence is not sought on this application. All of that being the case the Revocation Hearing cannot be regarded as a trial resulting in the decision for the purposes of Article 4a(1) of the Framework Decision. I am satisfied that the trial resulting in the decision for the purpose of this application was the trial that took place before the District Court of Wrocław-Śródmieście on 29th May, 2015, at which the respondent's fair trial rights were fully respected, and about which there is no dispute as to compliance with s. 45 of the Act of 2003.
53. I am therefore satisfied that the requirements of the Act of 2003 in relation to this application have been satisfied, and I will make an order for the surrender of the respondent for the purpose described in the EAW.

Other matters

54. Most of the background facts relating to this application are not in dispute, and are set forth at para. 15 above. However, on the crucial matters as to whether the respondent provided an address to the authorities in Poland, and whether or not he was notified of the trial of the Triggering Offence or the Revocation Hearing, there is disagreement. These matters must be resolved in favour of the applicant, as part of the trust and confidence which this Court is required to accord to the IJA.
55. However, this does not mean that the respondent actually received the summonses which the IJA says were sent to the address provided, or that he was aware of the respective hearing dates of the trial of the Triggering Offence or the Revocation Hearing. The evidence falls short of establishing this, but that does not affect the outcome of this application in view of my determination that, for the purpose of this application, it is the hearing that took place before the District Court of Wrocław-Śródmieście on 29th May, 2015 that is the trial resulting in the decision.
56. At one point, I considered referring the questions raised by these proceedings to the CJEU for determination, and I received very comprehensive submissions from counsel in the consideration of that possibility, for which I am very grateful. Ultimately, however, as is apparent from the above, I was satisfied that the CJEU in *Ardic* has made very clear the status of what I have referred to above as “*revocation hearings*” for the purpose of the Framework Decision, and that there is no ambiguity or uncertainty arising from that decision such as to give rise to any need to make such a reference.