# THE HIGH COURT

[2022] IEHC 615

**[2021 No. 369 EXT.]**

**BETWEEN**

**MINISTER FOR JUSTICE AND EQUALITY**

**APPLICANT**

**AND**

**SERGEJS RADIONOVS**

**RESPONDENT**

**JUDGMENT of Ms. Justice Caroline Biggs delivered on the 27th day of July, 2022**

**1.** By this application, the applicant seeks an order for the surrender of the respondent to the Republic of Latvia pursuant to a European Arrest Warrant dated 26th of February 2021 ("the EAW"). The EAW was issued by Mrs S. Pētersone, Prosecutor of the Prosecutor General's Office, as the issuing judicial authority.

**2.** The EAW seeks the surrender of the respondent in order to enforce a sentence of imprisonment imposed upon the respondent of one year and one day.

**3.** The EAW was endorsed by the High Court on 21st of December 2021 and the respondent was arrested on the same date.

**4.** I am satisfied that the person before the Court, the respondent, is the person in respect of whom the EAW was issued. No issue was raised in that regard.

**5.** I am satisfied that 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"), arise for consideration in this application and surrender of the respondent is not precluded for any of the reasons set forth in any of those sections.

**6.** I am satisfied that the minimum gravity requirements of the Act of 2003 have been met. The sentence in respect of which surrender is sought is in excess of four months' imprisonment.

**7.** Section 38(1)(b) of the Act of 2003 provides that it is not necessary for the applicant to establish correspondence between the offences to which the EAW relates and offences under the law of the State, where the offences referred to in the EAW are offences to which Article 2.2 of the Framework Decision applies, and carry a maximum penalty in the issuing state of at least three years' imprisonment. In this instance, the issuing judicial authority has certified that the offences referred to in the EAW are offences to which Article 2.2 of the Framework Decision applies, that same are punishable by a maximum penalty of at least three years' imprisonment, and has indicated the appropriate box for "grievous bodily injury". There is no manifest error or ambiguity in respect of the aforesaid certification such as would justify this Court in looking beyond same.

**8.** The respondent objected to surrender on the following ground:

That surrender is prohibited by Section 45 of the Act of 2003. The respondent confirmed all other points referred to the in points of objections and submissions are no longer being relied upon.

**9.** Section 45 of the Act of 2003 states:

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

*Cooperation Agreement arrest warrant, the warrant indicates the matters required by paragraph 1(i) of Article LAW.SURR.81 of the Cooperation and Trade Agreement, as set out in the table to this section."*

**10. The EAW**

Part B.1. of the Warrant states:

*"Decision on which the warrant is based:*

*Enforceable judgment:*

*1. Judgment of the Valmiera District Court of 17 March 2014 by which S. Radionovs was found guilty of committing a criminal offence prescribed for by Paragraph 1 of Section 125 of the Criminal Law, and sentenced with a sentence of deprivation of liberty for 1 (one) year 9 (nine) months and with placement under police supervision for 1 (one) year.*

*2. Judgment of the Jēkabpils District Court of 15 December 2014 by which S. Radionovs was found guilty of committing a criminal offence prescribed for by Paragraph 2 of Section 231 of the Criminal Law, and sentenced with a sentence of deprivation of liberty for 1 (one) year without police supervision and of committing a criminal offence prescribing for by Paragraph 1 of Section 125 of the Criminal Law, and sentenced with a sentence of deprivation of liberty for 3 (three) years 6 (six) months with placement under police supervision for 2 (two) years.*

*The Riga City Latgale Suburb in a decision dated 27 October 2015 consolidated by "partially adding" the above sentences resulting in a custodial sentence of 4 years 9 months and placement under police supervision for 3 years.*

*The Zemgale District Court in a decision of 19 August 2020 decided to convert the police supervision into a custodial sentence of 1 years 1 day (which came into effect on 8 September 2020)."*

## 11. The respondent's affidavit

The respondent swore an affidavit dated the 3rd March 2022 wherein he averred to the following:

- The Latvian authorities seek his surrender for the purposes of executing a sentence of one year and one day. He states that he was aware of the three years police supervision, however he was not informed of the consequences of breaching the supervision. He did not know that it could be transferred into a custodial sentence.
- He was released from serving his custodial sentence and was informed that he needed to travel to Jēkabpils Police Station within three days to comply with police supervision. He says that he has no connection to that Jēkabpils, nor did he have money or transport to that place. He states that he stayed at his friend's place at Maskavas Street in Riga and then travelled to his brother's place in Dagda.
- On the third day he went to the police station in Dagba to register. They noted his attendance and took a note of his brother's address in Dagba.
- He has been in Ireland since March 2019.

## 12. Relevant Additional Information

In light of the respondent's averments, this Court sought additional information on a number of occasions and received comprehensive responses from the issuing judicial authority. This Court sets out the relevant extracts:

(i) The issuing judicial authority, in a letter dated 25th January 2022, stated:

*"[...]*

*Please be advised that Sergesi Radionovs has completely served the basic sentence imposed to him – liberty deprivation for 4(four) years 9 (nine) months. 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. The serving of the additional punishment shall start as of the moment when the serving of the basic sentence is completed. In the given case the serving of the additional punishment imposed to Sergejs Radionovs - police supervision for 3 years - was commenced after serving the basic sentence - liberty deprivation for 4 (four) years 9 (nine) months, namely, after the release from a prison."*

(ii) The letter of the 25th of January 2022 also provided relevant Latvian Criminal Law provisions, these provisions provided this Court with a better understanding of the domestic legal status of these proceedings, the important sections are set out hereunder:

*"Section 45. Police Supervision*

1) *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 ofliberty and so that this person may be subjected to the limitations prescribed by the police institution. If cases when a person is conditionally early released from the sentence serving, the enforcement of the additional punishment - police supervision - shall be started as of the moment when the supervision of a person after conditional early release has ended…*

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."*

(iii) The letter also provided this Court with the Decision of the Zemgale District Court on the 19th August 2020 which stated:

*"On 9 April 2019 S. Radionovs in Riga Central Prison was informed that after release from the prison he is obliged within three working days to report to Jēkabpils Station of Zemgale Regional Department of the State Police according to his notified place of residence - Draudzibas aleja 26-51, Jēkabpils. S. Radionovs on 22 August 2019 was released from Riga Central Prison after the serving of sentence. The term of additional punishment - police supervision - will come to end on 21 August 2022.*

*The applicant stated that S. Radionovs has not reported with Jēkabpils Station of Zemgale Regional Department of the State Police within three working days since the release from prison, as well as has not notified the reasons of his non-appearance until 19 June 2020. Therefore the restrictions of the additional punishment- police supervision- were not applied to S. Radionovs.*

*In the application is stated that within the time period between 22 August 2019 and 19 June 2020 S. Radionovs was twice imposed the administrative punishment for malicious failing to adhere with the conditions of the imposed additional punishment- police supervision: 1) by Zemgale District Court*

*judgment of 11 May 2020 was found guilty for commission of the administrative violation pursuant to the Administrative Violations Code of Latvia (further referred as "AVCoL"), Section 177, and imposed the fine 30 EUR, the fine is not paid; 2) by Zemgale District Court judgment of 27 May 2020 was found guilty for commission of the administrative violation pursuant to the AVCoL, Section 177, and imposed the fine 40 EUR, the fine is not paid.*

*In the point of view of the applicant S. Radionovs is maliciously violating the conditions of the applied additional punishment - police supervision, and, referring in the application to the Section 13(4) of the Transitional Provisions of the Criminal Law and the Section 644(1) of the Criminal Procedure Law, is asking to render a decision on replacing the non-served additional punishment with the liberty deprivation.*

*Sergejs Radionovs has not appeared for the court hearing; the time and place of the case hearing to him are notified according to the procedures provided for by the Law; he has not informed the Court about any justified reasons of his non-appearance.*

*Therefore, Judge has found that the given case shall be examined without the presence of the convict Sergejs Radionovs according to the Section 651(1) of the Criminal Procedure Law.*

*[...]*

*S. Radionovs was sentenced pursuant to the provisions of the Criminal Law which were in force at the moment of the crime commission, therefore the Paragraph 4 of the Section 13 of the Transitional Provisions of the Criminal Law shall be applicable: if a person for whom police supervision has been determined by a court judgment violates its provisions in bad faith, a court may,*

*pursuant to a submission of the police institution, replace the time period of an additional unserved punishment by counting two police supervision days as one day of deprivation of liberty. The provisions of police supervision shall be violated in bad faith if within a year a person has twice been administratively punished for such violation.*

*In the notification of Riga Central Prison is shown that on 9 April 2019 Senior Inspector of the Resocialization Unit of Riga Central Prison has informed Sergejs Radionovs, whom by the courtjudgment is imposed the additional punishment - police supervision, and who as his next place of residence has stated the following address: Draudzibas aleja 26-51, Jēkabpils, that he within three days after release from the imprisonment shall report to Jēkabpils Station of Zemgale Regional Department of the State Police located at Brivibas iela 122, Jēkabpils, with an Inspector of the Public Order Police responsible for the matters of the police supervision and control. At the same time S. Radionovs was informed that in case of failure to appear he may be imposed the administrative liability pursuant to the Section 177 of the Administrative Violations Code of Latvia. The signature of S. Radionovs affixed to the mentioned notification shows that S. Radionovs has familiarized* [sic] *with it and has understood it (7th page of the case).*

*S. Radionovs was released from the prison on 22 August 2019 (6th page of the case).”*

(iv) The letter dated the 18th February 2022 the issuing judicial authority states:

*“In reply to your request herewith we provide the following further information in Sergejs Radionovs extradition case* [sic]*:*

- *Sergejs Radionovs was summoned to the court hearing of 19 August 2020 by sending on 25 June 2020 the court summons by the registered letter to the place of residence shown in the case - Draudzības aleja 26-51, Jēkabpils.*
- *The postal item was not served to S.Radionovs and on 31 July 2020 was returned back to the Court with notification "Storage term has expired".*
- *To the case is attached the notification of Riga Central Prison that after release from the imprisonment S. Radionovs, whom according to the court judgment was imposed the additional punishment - the police supervision - shall report within the three working days to Jēkabpils Station of Zemgale Regional Department of the State Police according to his notified place of residence - Draudzības aleja 26-51, Jēkabpils (the place of residence is not declared). S. Radionovs was familiarized with the given notification on 9 April 2019 and acknowledged it with his own signature. S. Radionovs was released from Riga Central Prison after the serving the sentence, but nonetheless failed to report to Jēkabpils Station of Zemgale Regional Department of the State Police within the three working days after the release, and he has not notified the reasons of his non-appearance.*
- *By the decision of Zemgale District Court of 19 August 2020 in the case No.4.1-1/0416-20 was ruled to replace in respect of Sergejs Radionovs, identity code 270192-11183, the non-served part of the additional punishment - police supervision for 2 (two) years and 2 (two) days imposed bythe judgment of Valmiera District Court of 17 March 2014, the judgment of Jēkabpils District Court of 15 December 2014 and the decision of Riga City Latgale Suburb Court of27 October 2015 -with the liberty deprivation for 1 (one) year and 1 (one) day according to the Sub-paragraph 13(4) of the*

*Transitional Provisions of the Criminal Law providing for that: "If a person for whom police supervision has been determined by a court judgment violates its provisions in bad faith, a court may, pursuant to a submission of the police institution, replace the time period of an additional unserved punishment by counting two police supervision days as one day of deprivation of liberty (..h.)".*

- *The transcript of decision of Zemgale District Court of 19 August 2020 was sent to Sergejs Radionovs on 19 August 2020 by the registered postal item with request to notify its receipt. The decision was appealable within ten days by filing the complaint with Zemgale District Court. The decision was not appealed and came into force on 8 September 2020."*

(v) The letter dated the 22nd March 2022 states:

*"[...]*

*Additionally answering your (1) question, let me inform you that Sergejs Radionovs did not appear in person at the trial held on 19 August, 2020 at Zemgale District Court. The Part D of the EAW is ticked ("yes, the person appeared in the trial resulting in the judgment) because only the issues related to the execution of judgment were settled by the decision of 19 August, 2020 by the Zemgale District Court, thereby this decision is not adjudications made in absentia in the meaning of Section 4a of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedure between Member States."*

In addition, this Court was advised:

*"In reply to your request herewith we provide the following further information in Sergejs Radionovs' extradition case:*

(1) *The court hearing took place in Jēkabpils on 19 August 2020.*

(2) *Please, find attached the copy of notification of Rīga Central Prison.*

(3) *a) Zemgale District Court had a discretion in replacing the police supervision for two years and two days to a liberty deprivation for one year and one day.*

*b) c) "may" means that it is not mandatory for the Court; in case of relevant circumstances (if there exist* [sic] *any circumstances justifying the avoidance of convict from the sentence serving), the Court has a possibility to reject the application.*

(4) *a) Zemgale District Court decision of 19 August 2020 is final (came into force on 8 September 2020).*

*b) c) S. Radionovs is not entitled to appeal Zemgale District Court decision of 19 August 2020.*

(5) *a) In the notification of Rīga Central Prison is shown that Sergejs Radionovs upon release from the liberty deprivation sentence serving place as his next place of residence has notified Draudzības aleja 26-51, Jēkabpils, because he has not any declared place of residence in Latvia since 5 November 2015. Therefore, the Court notification was sent to the place of residence notified by S. Radionovs himself. In the given case are not filed any evidence* [sic] *that S. Radionovs had ever appeared in Dagda police station.*

*b) It was not possible to inform S. Radionovs that he must notify any changes of his place of residence, because he, after release from the sentence serving institution, failed to appear within three working days in the specific police station, where such warning would have to be issued to him.*

*c) In the notification of Riga Central Prison, with which S. Radionovs was familiarized on 9 April 2019, is set out that to him was explained that in case of*

*failure to appear he may be applied theadministrative liability according to the Section 177 of the Administrative Violations Code of Latvia.*

*d) The transcript of Zemgale District Court decision of 19 August 2020 was sent to S. Radionovs on 19 August 2020 with the registered postal item with request to notify its receipt. The postal item was not issued to S. Radionovs; it was sent back to the Court with ticked checkbox "Unclaimed", that means that the addressee has not appeared in the post office to receive the postal item (the copy of envelope with notification is enclosed thereto)."*

(vi) During the concluding hearings on this matter this Court asked the issuing judicial authority one final set of questions on 1st July 2022, in the following terms:

*"1. Was the respondent advised at any stage, i.e. prior to, during or after the hearing for the 27th of October 2015 that police supervision of three years could be changed to a sentence of imprisonment.*

*2. If so, what was said or written, by whom, and in what circumstances.*

*3. If there is any documentation relevant to these questions please provide same.*

*4. In summary, is there any way that the respondent could have known prior to the 18th of August 2020 that the 3 years police supervision could and would be changed to a sentence of one year and one days imprisonment in the circumstances, if so how did he know?"*

(vii) A response dated 6th July 2022 was received in the following terms:

*"Based on the files of the case No. 4.1-1/0416-20, <u>it can be concluded that there are no such documents, which would prove that Sergejs Radionovs was informed that police supervision could be replaced by real deprivation of liberty.</u>*

*We have previously informed that the only document in the case is a statement of Riga Central Prison (Rīgas Centrālcietums), which shows that Sergejs Radionovs, who had been sentenced by a court judgement to an additional punishment - placement under police supervision*

*- was notified of his obligation within three working days after his release from imprisonment to arrive for registration in Jēkabpils Station of Zemgale Regional Department of the State Police, at 122 Brīvības Street (Brīvības ielā 122), in Jēkabpils, L V-5201, to the Order Police Inspector, who is dealing with issues of police supervision and control.*

*S. Radionovs was acquainted with this statement on 09 April 2019, explaining that he understood its essence, which he confirmed by his signature."* (Emphasis added).

**13. The Issues**

The respondent submits that both the quantum and the nature of the penalty of two years and two days police supervision were altered by Zemgale District Court, on the 19th of August 2020 to a penalty of one year and one day imprisonment. He submits that the additional information clarifies that the decision depended on the exercise of a judicial discretion. The respondent submits that the relevant *in absentia* hearing must thus be regarded as a hearing for the purposes of Article 4a of the Framework Decision or Section 45 of the Act of 2003. He further submits that there is no evidence before the Court that would allow this Court to take the view that the respondent unequivocally waived his right to attend the hearing on the 19th of August 2020 and therefore his Section 45 rights have been breached. The applicant submits that relevant *in absentia* hearing should not be regarded as a hearing for the purposes of Article 4a of the Framework Decision or Section 45 of the Act of 2003 and even if the Court holds against the Minister on this issue that it can be shown that the respondent did in

fact unequivocally waive his right to attend on the 19th of August 2020 the date when the conversion took place in his absence.

**14. Relevant Facts/Chronology of Events**

In order to understand the nature of the issues raised in this case, a chronology of relevant events is necessary, and is set out hereunder:

| | |
|---|---|
| **17th March 2014:** | Respondent found guilty by Valmiera District Court |
| **15th December 2014:** | Respondent found guilty by Jēkabpils District Court |
| **27th October 2015:** | Decision of Riga City Latgale Suburb Court – "partially adding" the sentences imposed by the above two courts – deprivation of liberty of 4 years, 9 months plus police supervision for 3 years. |
| **9th April 2019:** | Respondent informed in prison orally and in writing of requirement to report to Jēkabpils police station "within three working days" of release. |

| | |
|---|---|
| **22 August 2019:** | Respondent released from Riga Central Prison, the respondent avers that he did not provide an address upon release and that the Latvian authorities used an address previously provided by the respondent, the closest police station to this address was Jēkabpils Police Station. The respondent avers that he had no connection in 2019 to this address, that as a consequence he attended at an alternative police station. |
| **11th May 2020:** | Fine imposed by Zemgale District Court (breach by the respondent of the Administrative Violations Code of Latvia, in that he failed to attend at Jēkabpils Police Station within 3 days of release). |
| **27th May 2020:** | Fine imposed by Zemgale District Court (breach by the respondent of Administrative Violations Code of Latvia, for failing to attend at Jēkabpils Police Station). |

| | |
|---|---|
| **25th June 2020:** | Summons sent to the respondents address previously provided in 2015, requiring him to attend Zemgale District Court. |
| **19th August 2020:** | Decision of Zemgale District Court – conversion of unserved police supervision period (2 years, 2 days) by statutory conversion into a 1 year, 1 day custodial sentence. |

**15. Relevant Caselaw**

In *Minister for Justice and Equality v. Lipinski* [2018] IESC 8, the Supreme Court had to consider whether the absence of the respondent at the hearing which led to the revocation of suspension of a sentence of imprisonment engaged the *in absentia* requirements of the Framework Decision. While the Supreme Court initially made a reference to the CJEU on the point, it transpired that such reference was unnecessary by virtue of the decision of the CJEU in *Ardic* (Case C-571/17 PPU), Clarke C.J., at para. 3.7 of the Supreme Court decision, held;

-

> *"[3.7] It is clear, therefore, that a hearing at which a suspension of sentence is revoked on grounds of infringement of conditions attaching to that suspension is not considered to be part of a 'trial resulting in the decision' for the purposes of the Framework Decision unless the revocation decision changes 'the nature of the level of the sentence initially imposed'. If the consequence of the revocation is to alter the sentence originally imposed then different considerations may apply."*

The CJEU cases of *Tupikas* (C - 270/17 PPU) *Zdziaszek* (Case C - 271/17 PPU), *Ardic* (CJEU Case - 571/17 PPU), are of importance to the issues raised in this case, these cases are considered and summarised in the judgment of Mr. Justice Collins in *Minister for Justice and Equality v. Dorian Szamota* [2021] IECA 209 wherein he stated at para 34; -

> *"[34] In Case C-270/17 PPU Tupikas, Lithuania sought the surrender of Mr Tupikas from the Netherlands for the purpose of carrying out a sentence of imprisonment. Mr Tupikas had appeared at the trial at first instance which had resulted in his conviction and sentence. He had appealed but was not present at the appeal hearing. The appeal procedure provided for the substance of the case to be re-examined. However, the appeal had been dismissed and the sentence imposed at first instance was not in fact altered. The Amsterdam District Court asked the CJEU whether appeal proceedings which involved an examination of the merits and which resulted in a new sentence or a confirmation of the first instance sentence constituted the "trial resulting in the decision" for the purposes of Article 4a (1).*
>
> *[35] The Court emphasised that the Framework Decision was based on principles of mutual trust and recognition. It also emphasised that those principles must not undermine the fundamental rights guaranteed to the persons concerned. The Framework Decision is to be interpreted in such a way as to ensure compliance with the requirements of respect for the fundamental rights of the persons concerned "without, however, calling into question the effectiveness of the system of judicial cooperation between the Member States" (para 61). The expression "trial resulting in the decision" must be regarded as an autonomous concept of EU law (para 67) and, in the absence of any definition, was to be interpreted in the context of the Framework Decision as a whole and, in that context, 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" (para 74). Where there were successive judicial decisions, at least one of which was given in absentia, it was important to identify "the instance which led to the last of those decisions provided that the court at issue made a final ruling on the guilt of the person concerned and imposed a penalty on him, such as a custodial sentence, following an assessment, in fact and in law, of the incriminating and exculpatory evidence ..." (para 81). What is decisive is the "judicial decision finally disposing of the case on the merits, in the sense that there are no further avenues of ordinary appeal available" (para 83). Where a person appeared at that stage, but not at first instance, any breach of the rights of defence would be remedied and Article 4a would not apply. Conversely, attendance at first instance did not exclude the application of Article 4a if the person concerned was not present at the hearing leading to the "final sentence" (para 86).*

*[36] In Case C-271/17 PPU Zdziaszek, Mr Zdziaszek had been convicted of a number of offences in Poland over a number of years. In 2012, a four-year cumulative custodial sentence had been imposed on him in respect of three of those offences. In 2014, that cumulative sentence was reduced to a cumulative sentence of three years and six months. That reduction arose from an amendment to the law favourable to Mr Zdziaszek. He was summoned to appear at the proceedings but did not respond. The relevant court had appointed a lawyer on his behalf and adjourned the hearing. Mr Zdziaszek was summoned to the second hearing but again did not attend though the lawyer appointed for him did participate.*

*[37] The District Court of Amsterdam referred a number of questions, including one directed to the issue of whether the proceedings in which the court of the issuing Member State changed an aggregate custodial sentence previously imposed by a final*

*judgment, without any examination of guilt, constituted a "trial resulting in the decision" for the purposes of Article 4a (1).*

*[38] The Fifth Chamber noted that, although the decision to amend the custodial sentence previously imposed did not affect the findings of guilt made at the earlier trials of Mr Zdziaszek, it did modify the quantum of the penalty or penalties imposed. It was, the Court considered, necessary to distinguish between measures of that type and "those relating to the methods of execution of a custodial sentence". Article 6(1) ECHR did not apply to questions concerning the methods for executing a sentence, in particular those relating to provisional release (at para 85, citing Boulois Luxembourg 37575/04)."*

*[39] Where proceedings were concerned with the determination of an overall sentence, then unless the proceedings were a purely formal and arithmetic exercise not involving any element of discretion, compliance with the requirements of a fair trial entails the right of the person to be present at the hearing. The fact that the sentence could only be reduced was not relevant in this context:*

*"91 Given that such proceedings determine the quantum of the sentence which the convicted person will ultimately serve, that person must be able to effectively exercise his rights of defence in order to influence favourably the decision to be taken in that regard.*

*92 The fact that the new sentence is hypothetically more favourable to the person concerned is irrelevant since the level of the sentence is not determined in advance but depends on the assessment of the facts of the case by the competent authority and it is precisely the duration of the sentence to be served which is finally handed down which is of decisive importance for the person concerned."*

*[40] In light of that analysis, the Court concluded that "the concept of a 'trial resulting in the decision' ... must be interpreted as referring not only to the proceedings which gave rise to the decision on appeal, where that decision, after a fresh examination of the case on the merits, finally determined 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."*

*[41] As will be apparent from Tupikas and Zdziaszek, the 'trial resulting in the decision' may, in fact, involve a number of hearings and decisions, such as a first-instance trial and a subsequent appeal. However, as Zdziaszek demonstrates, proceedings that occur even after a criminal conviction and sentence has become final may come within the concept of the 'trial resulting in the decision', thus requiring the issuing Member State to establish compliance with the conditions in Article 4a (1) (assuming that the person concerned was not present) or otherwise to demonstrate that surrender would not breach that person's rights of defence.*

*The Decision in Ardic*

*[42] The circumstances in Ardic more closely resemble the circumstances at issue here and thus it warrants particular attention. Mr Ardic had been sentenced to two custodial sentences, each for a period of 20 months, following separate trials at which he appeared in person. After he had served a part of both sentences, the competent German courts granted a suspension of the remainder of the sentences. Subsequently, however, the orders suspending the custodial sentences were revoked on the ground that Mr Ardic had not complied with the conditions attaching to the suspensions and had evaded the supervision of his probation office. Mr Ardic did not appear at the*

*proceedings which led to the revocation decisions and had not been heard on the issue of revocation.*

*Subsequently, his surrender from the Netherlands was sought for the purpose of his serving the balance of the custodial sentences that had been imposed on him. He resisted surrender, arguing that the revocation proceedings constituted a "trial resulting in the decision" for the purposes of Article 4a and that the conditions set out in Article 4a (1) were not satisfied. Although it thought that Article 6 ECHR did not apply to the revocation decisions, the Amsterdam District Court was uncertain as to the possible application of Article 4a and therefore decided to refer that issue to the CJEU pursuant to Article 267 TFEU.*

*[43] The Opinion of Advocate General Bobek records that the Irish Government submitted that, in circumstances where the revocation is not automatic and where the court enjoys a margin of discretion, a person must be regarded as still being subject to criminal proceedings at the revocation hearing. In the language of Zdziaszek (see para 91 set out above) in such circumstances the revocation decision determined the quantum of the sentence. According to the Irish Government, having regard to the potential consequences for the person concerned, such proceedings relate to the determination of a criminal charge within the meaning of Article 6(1) ECHR and, in any event, more extensive protection could be granted under Article 47 of the Charter, in accordance with Article 53(2) thereof. That submission reflected domestic law and practice relating to the activation of suspended sentences (see section 99 of the Criminal Justice Act 2006 (as amended)).*

*[44] The Court took a different view. It explained that Article 4a was intended to limit the possibility of refusing to execute an EAW by listing, in a precise and uniform manner, the conditions under which recognition and enforcement of a decision*

*following a trial in absentia may not be refused (para 71). Article 4a therefore seeks to improve judicial cooperation in criminal matters while also strengthening the procedural rights of persons subject to criminal proceedings by ensuring full observance of their rights of defence, flowing from the right to a fair trial enshrined in Article 6 ECHR and, to that end, the Court ensures that Article 4a(1) is interpreted and applied in accordance with Article 6 (paras 73 & 74). It was apparent from the ECtHR case-law that Article 6 had no application to "questions relating to the detailed rules for the execution or application of such a custodial sentence" (para 75)*

*[45] The Court then stated its principal conclusions at paragraphs 76 – 82. For the purposes of Article 4a (1), "the concept of 'decision' ... 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". (para 77). Decisions to revoke the suspension of the execution of previously imposed custodial sentences "did not affect the nature or the quantum of custodial sentences imposed by final conviction judgments of the person concerned" (para 78). All that the competent court had to determine was whether there had been non-compliance with the conditions of suspension such as 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. While that court enjoyed a margin of discretion in that regard, it" 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." (para 80). Accordingly, the CJEU concluded*

*"81.. 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."*

This case is pending before the Supreme Court in circumstances where Mr. Justice Collins asked the following:

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

*2. In the circumstances set out in question 1 above, is the court of the executing State entitled to inquire into whether the proceedings leading to the subsequent conviction and/or the proceedings leading to the enforcement order, all of which were conducted*

*in the absence of the requested person, were conducted in compliance with Article 6 of the European Convention on Human Rights and Fundamental Freedoms and, in particular, whether the absence of the requested person from those proceedings involved a violation of the rights of the defence and/or of the requested person's right to a fair trial?*

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

The Court has considered the judgment of Burns J. in *Minister for Justice and Equality v Grzegorz Lukaszka* [2021] IEHC 631, wherein he stated at para. 19; -

*"[19] By additional information dated 7th September, 2020, it is indicated that the original order of 22nd December, 2009, had sentenced the respondent to restriction of liberty consisting of the performance of unpaid controlled work for social purposes of 20 hours per month for ten months. At a hearing on 2nd December, 2011, this had*

*subsequently been replaced with a sentence of 150 days' imprisonment, assuming that one day replacement imprisonment is the equivalent of two days' restriction of liberty.*

*[20] The respondent swore an affidavit dated 16th December, 2020, in which he avers that he had been present for the original hearings in each matter but he had not been notified of the hearing on 2nd December, 2011, and thus had not appeared and had not arranged legal representation at same. He also avers that he had been unaware that he was not permitted to leave Poland at the time. I am somewhat sceptical of this latter averment given that the respondent was present when the sentences were imposed and must therefore have known of the requirement to carry out the unpaid work.*

*[21] As a result of the aforesaid affidavit and further submissions on behalf of the respondent, the Court sought additional information from the issuing judicial authority. By reply dated 11th January, 2021, it is indicated that, under Article 34.3 of the Polish Penal Code, if a convicted person evades serving a sentence of deprivation of liberty, the court may order the execution of a substitute sentence of imprisonment. If the convicted person has served part of the sentence of restriction of liberty then the court shall order enforcement of the substitute sentence of imprisonment proportionate to the restriction of liberty remaining to be served, on the understanding that one day substitute imprisonment shall be equivalent of two days' restriction of liberty. The reply further states that the respondent was informed of this by letter dated 16th March, 2010, summoning him to commence the restriction of liberty, in which he was informed that in the case of evasion of the sentence of restriction of liberty:-*

*"[T]he court will impose a substitute fine, on the understanding that one day of the penalty of restriction of liberty will be equivalent to one daily fine or one day of alternative imprisonment shall be equivalent to two days of restriction of liberty."*

*The issuing judicial authority indicates that the original order dated 22nd December, 2009 did not specify the default provisions as that is not required by Polish Law. Of importance, it is stated that the court, in its ruling of 2nd December, 2010, had a discretionary power of assessment as to the extent of alternative imprisonment and based its decision on particular provisions of Polish law, the content of the motion of the probation officer for the pronouncement of substitute imprisonment and the analysis of enforcement records. It is stated that the respondent did not appear at the hearing on 2nd December, 2011, when appropriately summoned. Reference is made to Article 139.1 of the Polish Code of Criminal Procedure whereby service at an address is deemed sufficient if the party has failed to notify a change of address.*

*[22] By additional information dated 6th May 2021, it is indicated that as regards the decision of 2nd December, 2011 "It is not possible to establish whether the presence of the convicted person would have influenced the court." In such circumstances, counsel for the applicant conceded that the decision of 2nd December 2011 was a hearing for the purposes of Article 4a of the Framework Decision and s. 45 of the Act of 2003 and she further conceded that the requirements of those provisions could not be established. In such circumstances, surrender is precluded by reason of s. 45 of the Act of 2003.*

*[23] A hearing which merely revokes the suspension of a penalty previously imposed but suspended, is not to be regarded as a hearing for the purposes of Article 4a of the Framework Decision or s.45 of the Act of 2003, provided the nature and length of the initial penalty is not varied (see Ardic (Case C-571/17 PPU) (2017) and Minister for Justice and Equality v. Lipinski [2017] IESC 26). I am satisfied on the basis of the specific documentation before the Court in in this particular matter, that the hearing on 2nd December, 2011 involved the variation of the nature of a sentence by the exercise of a discretionary power and so falls outside the ambit of the Court of Justice of the*

*European Union decision in Ardic and the Supreme Court decision in Lipinski. In such circumstances, the hearing 2nd December, 2011, imposing the sentence of imprisonment, was a hearing in absentia and must meet the requirements of Article 4a of the Framework Decision and s. 45 of the Act of 2003. Such compliance has not been established and so I must refuse surrender."*

This Court has also considered the judgment of *Minister for Justice and Equality v Fafrowicz* [2020] IEHC 680, wherein Mr. Justice Burns considered whether a hearing that resulted in a cumulative sentence should be considered a hearing for the purposes of article 4a of the Framework Decision. He stated at para. 26 therein; -

*"[26] Such hearing was not simply a formality; nor was it the application of a fixed mathematical calculation or the mere lifting of a suspension. The hearing on 4th June, 2014 required the court to exercise a discretion as to the new penalty to be imposed. In such circumstances, the respondent had a right to be present at same. Given that such a hearing was not, and could not reasonably be expected to have been, within the contemplation of the respondent, or the prosecutor, when the respondent left Poland, it is difficult to see how he could be said to have taken an informed decision to waive his right to attend same. Similarly, it is difficult to regard any lack of diligence on his part in respect of his address or post as amounting to a deliberate avoidance of service or wilful ignorance of that hearing, as it cannot reasonably be said to have been within his contemplation. The fact that the hearing in question imposed a penalty which was more favourable to the respondent than the previous penalties is not a relevant factor. The respondent either had the right to attend this sentence hearing or he did not. I am satisfied he had such a right. Ultimately, the issue is whether that right was adequately protected in all of the circumstances. In the rather unusual facts of this matter and, in*

*particular, the circumstances in which the third hearing came about, including the remove in time of same from the original proceedings, I am not satisfied that it would be safe to treat the respondent as having made an informed decision to waive his right to be present or that it would be safe to conclude that his defence rights were adequately protected as regards the hearing of 4th June, 2014.*

*[27] Further additional information was received from the issuing judicial authority dated 27th November, 2020, again making the argument that the respondent had waived his right to notice of the hearing on 4th June, 2020, but more importantly, confirming that the respondent would have a right to submit a request to have the proceedings re-opened and that such right was unlimited in time (emphasis added). If the Court decides to reopen the proceedings, the merits of the case concerning the cumulative sentence, including fresh evidence, will be re-examined and the respondent will have a right to participate in the new proceedings and a new judgment might be issued. In addition, it was stated that the respondent could request the Attorney General or the Commissioner for Citizens' Rights to bring the extraordinary cassation appeal from the decision of 4th June, 2014, which is unlimited in time, and also the extraordinary complaint to the Supreme Court which may be submitted until 3rd April, 2021.*

*[28] In light of the additional information dated 27th November, 2020, the Court requested clarification of the right to appeal. There is clearly a significant distinction between a right to request an appeal or re-hearing and a right to an appeal or re-hearing (emphasis added). Article 4a of the Framework Decision and table (d) as set out in s. 45 of the Act of 2003 both refer to a "right to a retrial or appeal". By letter dated 2nd December, 2020, the Court sought clarification in the following terms:-*

*"The letter dated 27th November 2020, at point IV states that the respondent will have a right to submit a request to re-open the court proceedings. As you are*

*aware article 4a of the Framework decision requires that the person surrendered 'will be expressly informed of his or her right to a retrial, or an appeal' (emphasis added). Please clarify whether the respondent, if surrendered, will have a right to an appeal or re-hearing or merely a right to request an appeal or re-hearing."*

*By reply dated 8th December, 2020, the issuing judicial authority stated:-*

*"I clarify that Dariusz Fąfrowicz, if surrendered, will have a right to request an appeal or re-hearing."*

*It is clear from the reply that the respondent does not have a right to an appeal or rehearing as envisaged by article 4a of the Framework Decision or s. 45 of the Act of 2003.*

*[29] Having decided that the hearing on 4th June, 2014, conducted in the absence of the respondent, was a hearing in respect of which the respondent had a right to be present and participate in, it falls upon the issuing state to demonstrate compliance with the requirements of article 4a of the Framework Decision as enacted in s. 45 of the Act of 2003, or alternatively to unequivocally establish a waiver of the right to be present. The issuing state has failed to unequivocally establish a waiver of the right to be present. It has also failed to demonstrate compliance with the requirements of s. 45 of the Act of 2003 and in such circumstances, surrender is precluded.*

*[30] I emphasise that this case turns upon the rather unusual circumstances in which the hearing of 4th June, 2014, came about. It appears that as a result of a change in Polish law, it was necessary to revisit two previous sentences imposed a number of years earlier upon the respondent. Such re-visitation was outside the reasonable contemplation of the respondent, and most likely the prosecution also, at the time of the original sentences. At such hearing, the court had a discretion as to what substituted penalty to impose. While it imposed a lesser penalty than the two earlier sentences, it*

*is possible that if the respondent had been in attendance and participated, either personally or through a legal representative, a greater reduction may have been imposed. The respondent was not notified of the hearing, was not legally represented at same and was not informed of the outcome of same so that he could appeal within time. Upon his surrender, he will have no automatic right to a retrial or to appeal the decision but merely a right to submit a request for a retrial or appeal. In such circumstances, I am not satisfied that the rights of defence were or are adequately protected."*

**Decision**

**(i) Was the hearing of the 19th of August 2020 part of the trial process?**

The conversion of the period of police supervision to a custodial sentence imposed in this case is akin in many material respects to the activation of a suspended sentence in this jurisdiction. The police supervision can be converted to a term of imprisonment in the event of a failure to comply with set conditions. A suspended sentence can be activated for failure to comply with set conditions. On the facts of this case, the police supervision was converted simply due to a failure to comply with set conditions. An activation of a suspended sentence is not covered by Article 4a once there is no change to the nature or level of the initial sentence initially imposed. In an activation of a suspended sentence application the Court has some a margin of discretion in deciding whether to activate the sentence in whole, or in part, or at all. In deciding whether the period of police supervision is converted to a sentence under Latvian Law, the Latvian court also has a margin of discretion as to whether to activate the sentence. In this regard, this Court is reminded of dicta in *Ardic*, wherein the court stated at para. 19; -

*"Paragraph 56a of the Strafgesetzbuch (German Criminal Code, 'StGB') provides as follows:*

*'1. The court shall determine the length of the term of probation. It may not exceed five years nor be less than two years.*

*2. The term of probation shall begin when the decision to suspend execution of the sentence becomes final. It may subsequently be reduced to the minimum or prolonged to the maximum before its expiration.'"*

The Court also stated at para. 23 therein; -

*"Under the heading 'Revocation of suspended execution of sentence', Paragraph 56f of the StGB provides:*

*'1. The court shall revoke the suspended execution of a sentence if the convicted person (i) commits a crime during the term of probation and thereby shows that the expectation on which the suspended execution of the sentence was based was not fulfilled (ii) grossly and persistently infringes directions or persistently evades the supervision and guidance of the probation officer, thereby causing reason for fear that he will re-offend, or (iii) grossly and persistently infringes conditions. ...*

*2. The court shall, however, refrain from revocation when it suffices (i) to impose further conditions or directions, in particular to place the convicted person under the supervision of a probation officer, or (ii) to prolong the term of probation or supervision. In the second case, the term of probation may not be prolonged for more than one-half of the term of probation initially imposed...'"*

The Court continued at para. 37; -

*"According to the referring court, the German courts are obliged to revoke the suspension, inter alia, if the convicted person persists in evading the supervision and guidance of the probation officer or persists in failing to comply with the stipulated conditions. Those courts must, on the other hand, refrain from revoking the suspension*

*if, in essence, the setting of further conditions or the extension of the probationary period would suffice."*

The Court further indicated at para. 79; -

*"[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.*

*[83] While it cannot be denied that a suspension revocation measure is likely to affect the situation of the person concerned, the fact remains that that person cannot be unaware of the consequences that may result from an infringement of the conditions to which the benefit of such a suspension is subject.*

*[84] Moreover, in the present case, it is precisely the fact that the person concerned left the German territory, in breach of an express condition of the grant of suspension, which made it impossible for the competent German authorities to notify him personally of the information relating to the introduction of proceedings seeking revocation of the suspension previously granted and, consequently, the adoption in his absence of the revocation decisions at issue in the main proceedings."*

The Court concluded at paras. 88 and 92 as follows; -

*"[88] 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.*

*[…]*

*[92] In the light of all the foregoing, the answer to the question referred is that, where a party appears in person in criminal proceedings that result in the judicial decision which definitively finds him guilty of an offence and, as a consequence, imposes a custodial sentence the execution of which is 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 as not including subsequent proceedings in which that suspension is revoked on the grounds of infringement of those conditions during the probationary period, provided that the revocation decision adopted at the end of those proceedings does not change the nature or the level of the sentence initially imposed."*

**16.** In this Court's 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. The hearing of 19th of August 2020 could not, therefore, be deemed to be a 'trial resulting in the decision' for the purposes of article 4a of the Framework Decision, or s. 45 of the Act of 2003.

**17.** As a fall-back position, in the event that this Court determined that the hearing of the 19th of August 2020 was a trial resulting in a decision, the applicant submits that the respondent unequivocally waived his right to attend that date. While it may not be strictly necessary to deal with this issue, in the event that this Court is incorrect in it's views on the status of the hearing of the 19th of August 2020, for completeness I will indicate my views in relation to the issue of unequivocal waiver. The height of the applicant's case is that the respondent had provided an address, that he did not appear to live at that address, that two notices of administrative fines were sent to that address, that the respondent did not receive them, that a summons to attend court was sent in relation to the hearing of the 19th of August 2020, that this was not received, and the respondent did not attend. In this Court's view, it

has not been shown that the respondent unequivocally waived his right to attend the hearing. Firstly, it is unclear as to whether he gave the address to the authorities immediately prior to release or whether it was an address simply on file. However, that is not a matter of great concern to the Court. On either version, the respondent did not know and could not have known that further Court proceedings were pending or envisaged. He had not been advised at the time he left the jurisdiction of his duties to provide a change of address. In the circumstance, this case can clearly be distinguished from the cases opened on this issue, including, *Minister for Justice and Equality v. Sebastian Rafal Kasprzyk* [2022] IEHC 50. In all of the circumstances, this Court is satisfied that it must be established, unequivocally, that the respondent was aware of the date and place of the trial in August 2020. It must also be established that he was aware of the consequences of not attending, and that he waived his rights to attend. The evidence falls short of unequivocal waiver.

**(ii) Even if the hearing of the 19th of August 2020 is not a trial resulting in a decision on the facts of this case, has there been a breach of the respondent's rights under Section 45 of the Act of 2003?**

In order to answer this question, this Court is reminded of the dicta in Ardic wherein the CJEU stated; -

> *"[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.*
>
> *[83] While it cannot be denied that a suspension revocation measure is likely to affect the situation of the person concerned, the fact remains that that person cannot be*

*unaware of the consequences that may result from an infringement of the conditions to which the benefit of such a suspension is subject."*

In this Court's view, part of the Court's rationale in Ardic in determining that the activation of a partially suspended sentence is not deemed to be a trial resulting in a decision, is based, to a degree, on the premise that the rights of the respondent would have been adhered at the original sentence stage of proceedings. Further, that a respondent would have known that if he breached any particular condition of his suspended sentence then it would naturally follow that he would be sought to serve the balance of the sentence. Therefore, his rights are not breached by the activation of the sentence as he is deemed to have been fully on notice of the consequences of these actions in the event that he breached the conditions. His fair trial rights would therefore be fully vindicated. The applicant submits that para 74 is *obiter* in nature. In this Court's view, para 74 is part of the *ratio* of Ardic. However, even if the Minister is correct, and this Court is incorrect in taking such an approach, an *obiter* comment in this regard should not be lightly ignored, particularly in circumstances where paragraph 74 of Ardic is based on sound reasoning and logic. 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.

**18.** In this case, the issuing judicial authority has confirmed that the respondent was aware

that if he failed to turn up at the relevant police station that he would be fined. However, the important letter from the issuing judicial authority dated the 6th of July 2022 has supported the respondent's averment that the respondent did not know, was never told and therefore could not have known that his police supervision could be replaced by a sentence of imprisonment. Therefore, in this Court's view, on the particular facts of this case, the respondent was advised, and knew that if he failed to turn up at a designated Police Station that he would receive an administrative fine. He received two of these fines. He had no knowledge and was never told that a further court hearing could take place, and that that hearing could result in the conversion of the police supervision to a sentence of imprisonment. Further, he was never advised that he was duty bound to provide an alternative address should he move at any stage, he would have been advised of same had he attended at the Jēkabpils Police Station after his release.

**19.** This Court has considered the Supreme Court judgment in *Minister for Justice and Equality v. Zarnescu* [2020] IESC 59, wherein Baker J. states at para 49; -

> *"[49] The parties however are agreed that the proper interpretation of s. 45 of the Act must have regard to the judgments of the Court of Justice, described by them as a "purposive" approach. The list of circumstances express in the Table are therefore not exhaustive. This emerges from an analysis of the jurisprudence of the Court of Justice."*

Ms Justice Baker continues at para. 90; -

> "[90] *From this analysis the following emerges:*
>
> *(a) The return of a person tried* in absentia *is permitted;*
>
> *(b) Article 4(6) of the 2002 Framework Decision permits the refusal to return where the requested state has a legitimate reason to refuse the EAW;*
>
> *(c) A person tried* in absentia *will not be returned if that person's rights of defence were breached:*

*(d) Section 45 of the Act expressly identifies circumstances in which a person tried* in absentia *may be returned, primarily where there is evidence of service or where the person was legally represented or where it is shown that a right of retrial in the requesting state is available as of right:*

*(e) The examples outlined in section 45 as forming the basis of the analysis are not exhaustive, and the requested authority may look to the circumstances giving rise to the non-attendance of the accused person at the hearing;*

*(f) The requested state has a margin of discretion in how it approaches the facts, and whether to refuse return;*

*(g) In so doing the requested authority must be satisfied that it has been established unequivocally that the accused person was aware of the date and place of trial and of the consequences of not attending;*

*(h) Actual proof of service is not always required, and an assessment may be made from extrinsic evidence that the requested person was aware but nonetheless chose not to attend;*

*(i) Proof of service on a family member is not sufficient extrinsic evidence of that knowledge;*

*(j) The assessment is made on the individual facts but there must be actual knowledge by the requested person;*

*(k) Whether actual knowledge existed is a matter of fact and can be shown from extrinsic evidence;*

*(l) The purpose of the exercise is to ascertain whether the requested person who did not attend at trial has waived his or her right of defence;*

*(m) A waiver may be express or implicit from the circumstances, but an implication that a requested person has waived his or her rights to be present at trial is not to be*

*lightly made and will not be made if it has not been unequivocally established that the person was aware of the date and place of trial;*

*(n) The degree of diligence exercised by a requested person in receiving notification of the date and place of trial may be a factor in the assessment of his or her knowledge of the date of trial:*

*(o) In a suitable case a manifest absence of diligence may lead a requested authority to the view that the accused person made an informed decision not to be present at trial, or where it can be shown that there was an informed choice made by the person to avoid service;*

*(p) The mere absence of enquiry as to the date or place of hearing in itself may not be sufficient, as it must be unequivocally shown that the requested person made an informed decision and, so informed, either expressly or by conduct waived a right to be present:*

*(q) It may in a suitable case be appropriate to weigh the degree of responsibility of the requesting state to notify an accused person of the date of trial against the accused's responsibility for the receipt of his or her mail:*

*(r) The enquiry has as its aim the assessment of whether rights of defence have been breached. It is not therefore a wide ranging or free-standing enquiry into the behaviour or lack of diligence of the requested person, and the purpose is to ascertain if rights of defence were adequately protected.*"

**20.** Thus, this Court has a margin of discretion in how it approaches the facts, and whether to refuse surrender, however the executing judicial authority's inquiry must at all time be on whether the rights of the defence have been adequately protected. Ms. Justice Baker's approach is consistent with the views expressed by the CJEU in *Zdiaszek* (referred to above, Case C 271/17 PPU) wherein the Court stated; -

*"[T]he Framework Decision does not prevent that authority from taking into account of all the circumstances characterising the case before it in order to ensure that the rights of the defence of the person concerned are respected during the relevant proceedings or proceedings."*

The approach of Mr. Justice Baker is also consistent with the approach of the CJEU in *Dworzecki* (Case C - 108/16), wherein the Court stated at paragraph 50 that an executing judicial authority could; -

*"[T]ake into account other circumstances that enable it to be assured that the surrender of the person concerned does not mean a breach of his rights of defence."*

This approach is also consistent with the views expressed by the CJEU in the case of *TR* (Case C - 416/20 PPU) wherein the Court stated at para. 51; -

*"[A]s article 4a provides for a case of optional non execution of that warrant the court in the executing state may, in any event take into account other circumstances that enable it to satisfy itself that the surrender of the person concerned does not entail a breach of his rights of defence, and surrender that person to the issuing member state".*

**21.** This Court has found that the hearing of the 19th of August 2020 was not a hearing within the meaning of the Framework Decision, the conversion was based on a mathematical equation and did not alter the nature or quantum of the original sentence of the 27th of October 2015. Nonetheless, the issue of the respondent's knowledge is relevant when this Court considers the totality of the process leading up to the 19th of August 2020. This Court takes the view that there has been a breach of the respondent's rights under Section 45 of the Act of 2003 in relation to the events of the 19th of August 2020. Had the respondent been advised that there could be a further court hearing that could result in the police supervision being replaced by a sentence of imprisonment, at any of the hearings on the 17th of March 2014, on the 15th of December 2014, or on the 27th of October 2015, or, indeed, by way of

correspondence post hearings, or any means prior to release on the 22nd of August 2019, or at any stage prior to the 19th of August 2020, then the respondent's Section 45 rights would have been vindicated.

**22.** At the time of the imposing sentence of one year and one day, the respondent was not aware of the hearing date of the 19th of August 2020. He was not aware of the powers of the Court, or of the consequences of non-attendance, and he was never made aware that the police supervision could be converted to a sentence of imprisonment. He was positively advised that his failure to attend at a police station would result in an administrative fine. He was never made aware of the fact that a further court hearing could take place, and that such a court hearing could affect his right to liberty. There is no evidence to suggest that he could, or should have, foreseen a further court date after the 27th of October 2015. Latvian law (Sub paragraph 4 of the Cabinet of Ministers Regulation no 479 of 30th of June 2008) provides for a full explanation of the respondent's rights or duties under police supervision however and unfortunately in the unusual circumstances of this case, this information was not given to the respondent.

**23.** In this Court's view, the facts of the case are unusual. On the facts of this case, as noted above, it has been confirmed by the issuing judicial authority that the respondent never knew, and could not have known, that his actions, though non-criminal in nature, could lead to his further incarceration. In the circumstances of this case, he had no notice of same, no notice of the hearing that resulted in same and thus, had no opportunity to argue his case.

**24.** In this Court's view, this case might be distinguished from Lukaszka on the basis that the activating court therein had the discretion to impose a fine or a sentence and therefore, in the view of the Trial Judge, did involve a variation of the nature of a sentence by the exercise of a discretionary power and thus fell outside the ambit of the decision of the CJEU

in Ardic, and the Supreme Court decision in Lipinski. Nonetheless, it is notable that the Minister conceded in Lukaszka; -

*"[That] it was not possible to establish whether the presence of the convicted person would have influenced the Court"*

In such circumstances, the Court conceded that the decision which converted the community service to a sentence of imprisonment, was a hearing for the purposes of Article 4a. In light of the history of the present case, in this Court's view, it can equally be said that had the respondent attended the court hearing, he may have influenced the court in its decision.

**25.** This case can also be clearly distinguished from Fafrowicz in circumstances where the EAW in that case referred to a court order that imposed a cumulative sentence after two prior hearings when the original sentences had been imposed. The respondent had notice of the original sentence dates but not the date when the cumulative sentence was imposed. Such a hearing was not a formality, nor was it the application of a fixed mathematical calculation, or the mere lifting of a suspension, and thus the Court has a discretion as to the new penalty to be imposed. What is of interest to this Court, however, is that the Court noted at para 25;-

> *"Unlike the earlier two sets of proceedings, the respondent was not only unaware of the hearing date but was unaware of the existence of any such proceedings at all."*

This is also a feature in the present case.

**26.** This Court notes that respondent has no appeal against this conversion of sentence. In Ardic, the Court observed at para. 85; -

> *"... [E]ven where, as in the case in the main proceedings, a convicted person has been the subject of a suspension revocation decision adopted following proceedings in which he has not appeared, that person is not deprived of all rights, in so far as, as is clear from the relevant national rules, he has the right to be heard a posteriori by the judge*

*and inasmuch as that judge is required to determine whether, in light of the hearing, the suspension revocation decision must be amended."*

**27.** This Court refers to the case of *Othman v. United Kingdom* (8139/09) wherein the European Court of Human Rights stated at para. 258; -

*"It is established in the Court's case-law that an issue might exceptionally be raised under Article 6 by an expulsion or extradition decision in circumstances where the fugitive had suffered or risked suffering a flagrant denial of justice in the requesting country."*

This Court also refers to the judgment of Mr. Justice Collins in Szamota referred to above wherein he states at para. 21; -

*"[21] As to Irish law, the Supreme Court has said that "[n]othing could be clearer than the principle that in order to exercise any of the rights guaranteed by Article 38.1 of the Constitution, which prohibits any criminal trial taking place 'save in due course of law', a person accused of a crime must know when and where they are to be tried." (per Charleton J in O' Brien v Coughlan [2016] IESC 4, [2018] 2 IR 270, at para 8). The right of an accused to be present and to follow the proceedings against them has been characterised as "a fundamental constitutional right of the accused which every court would be bound to protect and vindicate" (per Murphy J in Lawlor v Hogan [1993] ILRM 606, at 610). However, that right to be present is not absolute and is capable of being waived in certain circumstances. Where an accused is notified of their trial and elects not to attend, it appears that, in principle, a trial judge may decide to proceed with the trial, though there may be circumstances that require the presence of the accused. In practice, prosecutions rarely proceed in the absence of the accused, even where the court is satisfied that the accused was fully aware of when and where the hearing was take place. If the accused absconds in the*

*course of a trial, the trial may proceed. Similarly, where an accused has to be removed from the courtroom as a result of disruptive behaviour, the trial may continue in their absence: People (AG) v Messitt [1972] IR 204. The right to be present extends to the sentencing process and it is clear from O' Brien v Coughlan (following Brennan v Windle [2003] 3 IR 494) that no significant sentence of imprisonment ought to be imposed without first taking steps to ensure the attendance of the accused, such as by adjourning the hearing and issuing a bench warrant."*

**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 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.

**29.** It, therefore, follows that this Court will make an order refusing the application for surrender.