THE HIGH COURT

[2022] IEHC 634

[2021 No. 307 EXT.]

BETWEEN

MINISTER FOR JUSTICE AND EQUALITY

APPLICANT

AND

MARCIN KRZYSZTOF MINIERSKI

RESPONDENT

JUDGMENT of Ms. Justice Caroline Biggs delivered on the 24th day of October, 2022

1. By this application, the applicant seeks an order for the surrender of the respondent to the Republic of Poland pursuant to a European Arrest Warrant dated the 6th of June 2016 ("the EAW"). The EAW was issued by Jerzy Zielinski, Judge of the Circuit Court in Świdnica, as the issuing judicial authority.

2. The respondent was arrested on the 1st of November 2021, on foot of a Schengen Information System II Alert, and brought before the High Court on that date. The EAW was produced to the High Court on the 11th of November 2021.

3. The respondent is sought for surrender for the purposes of serving a sentence of imprisonment of 4 years, 3 years and 4 months remains to be served.

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, s. 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.

7. Part E. of the warrant states:

> *"On the 30th of October 2004 in Wałbrzych, in the province of Dolny Śląsk, acting jointly and in co-operation* [the respondent] *took part in the beating-up of Grzegorz Bajorski in the following way: they repeatedly punched and kicked him on the head and all over the body, which resulted in the said male's suffering such injuries as: numerous skin abrasions on the head, face, hips, left hand and the neck, intradermal blood extravasations on the head, on the face and on the neck, a contused wound in the chin penetrating the oral vestibule and with the front teeth knocked out, a damage to the tongue and mucosa, numerous post-trauma oedemas in the area of the face and the neck as well as injuries to the facial skeleton. The said injuries led to the loss of consciousness, to the bleeding into the respiratory track and to the swallowing of blood into the alimentary tract. They constitute a bodily harm specified in Art.156 §1 of C.Pen. being an actual risk to life as they were the injuries to the facial skeleton leading to the loss of consciousness, to impaired defence reflex, to major bleeding into the respiratory track and to a decrease in the blood oxygenation to a dangerously low oxygen level, all which* [sic] *was to the detriment of Grzegorz Bajorski; this is an offence under Art.158 §2 of C. Pen. and Art.156 §1 (2) of C.Pen. in conj. with Art.11 §2 of C. Pen."*

8. I am satisfied that correspondence can be established between the offences referred to in the EAW and offences under the law of this State, that is, assault causing harm contrary to Section 3 of the Non-Fatal Offences Against the Person Act, 1997 or, alternatively, an offence of causing serious harm contrary to Section 4 of the Non-Fatal Offences Against the Person Act, 1997.

9. The respondent objected to surrender on the following grounds:

- That surrender of the respondent is prohibited by Part 3 of the European Arrest Warrant Act and by the Framework Decision and it would otherwise by contrary to law.
- That the respondent's surrender is prohibited by Section 37 of the European Arrest Warrant Act on the grounds of the breach of his Constitutional, his Charter, and his Convention rights, and it otherwise represents a disproportionate interference with his personal and/or his family rights.
- That the surrender of the respondent would be contrary to Section 45 of the European Arrest Warrant Act, on the grounds of trial *in absentia.*
- That the European arrest warrant asserts that the underlying domestic Polish decision became final on 14th June, 2006, more than fifteen years ago. However, that appears to be inconsistent with the known facts of the case, and/or in any event, and in the light of the previous surrender proceedings it would be unfair to surrender the respondent who, in any event and without prejudice to the foregoing, denies that he committed the offence outlined in the European arrest warrant.
- Further or in the alternative, that the surrender of the respondent would represent an abuse of process and/or constitute a fundamental unfairness in light of the excessive passage of time, the respondent's circumstances, the previous proceedings, the nature of the case and all the attendant circumstances.
- That there has been an inordinate and unwarranted delay in transmitting the European arrest warrant in seeking surrender and/or in arresting the respondent and he is greatly prejudiced thereby.

10. Is surrender prohibited by Section 11 of the 2003 Act?

Of relevance to the respondent's points of objection, is the fact that a previous European arrest warrant had issued for this respondent relating to the sentence which is the subject matter of the EAW presently before the Court. Though not specifically referred to in the notice of objection, the respondent has suggested that there were a number of errors in the current European arrest warrant sufficient to prohibit surrender.

11. The respondent submits that the information in part E of the warrant is the same information that was outlined in the previous EAW, as issued by the same Judge on 13th July, 2009 [2009 No. 304 EXT] and the respondent submits it is deficient in its detail.

12. Furthermore, the respondent submits that the previous EAW indicated that 3 (three) years, (two) months and 2 (two) days of deprivation of liberty (i.e. a period less than the current EAW) remained to be served.

13. In addition, the respondent submits that the previous EAW indicated (at section B) that the applicable case reference number was II K 396/05 and not case no. II K 369/05 as is stated in the present manifestation of the same surrender request.

14. In light of these issues, this Court sought further information from the issuing judicial authority. This was provided by the issuing judicial authority in a letter dated the 17th of January 2022 wherein it was stated:

> *"1. The correct file number of the case concerning Marcin Minierski is II K 396/05. The files of reference* [sic] *II K 369/05 do not have any relevance to this sentenced person.*
>
> *2. When calculating the remaining portion of the sentence to be served by the said sentenced person a calculation error occurred. The correct length of the sentence of imprisonment remained* [sic] *to be served by Marcin Minierski is 3 years and 4*

months. The Court has credited the provisional detention from the 29th of November 2004 to the 27th of July 2005 (7 months and 28 days) and the detention in Irish prison [sic] *from the 1st of July 2010 to the 2nd of July 2010 (2 days) against the sentence of 7-year* [sic] *imprisonment imposed on him.*

3. Pursuant to the content of Article 158 paragraphs 1 & 2 of the Criminal Code anybody that takes part in a fight or a battery/beating in which a person is exposed to the immediate risk of loss of life or of a consequence specified in Article 156 § 1 or Article 157 § 2 shall be liable to imprisonment for up to 3 years. If the consequence of a fight or of a beating is a serious damage to human health, the perpetrator is liable to imprisonment for a term from 6 months to 8 years. Beating means an active assault on one or more people by two or more attackers, being, at least, in the form of a violation of bodily integrity. In the judgment dated the 14th of November 2005 the District Law Court of Wałbrzych found that the said sentenced person together with and in co-operation with two other persons had taken part in the beating of Grzegorz Bajorski in this way that they had repeatedly punched him, kicked him on the head and the whole body, as a result of which the victim suffered numerous injuries which caused severe damage to his health (Article 156 paragraph 1 of the Criminal Code). Such circumstances of the perpetrators' behaviour emerged from the testimonies of witnesses and (in part) from the statements/explanations provided by the sentenced persons themselves."

15. In relation to the requirement for clarity, this Court has considered the case of the *Minister for Justice & Equality v. Herman* [2015] IESC 49, wherein the Supreme Court stated at para. 17; -

"[17] At the core of this appeal is the issue of clarity; or the lack of it. It is essential when a court has before it a request in a European arrest warrant that there be clarity as to the offences for which surrender is sought, and as to any proposed sentencing."

16. In *Minister for Justice and Equality v. AW* [2019] IEHC 251, Donnelly J. indicated at para. 48; -

"[48] The respondent has also claimed that his surrender is prohibited because the information does not set out the degree of participation of the respondent in the offences. The information in the EAW has already been set out. This does not list the names of the people he conspired with. The requirement for detail in the EAW is set out in the Framework Decision and in the Act of 2003. The Superior Courts in a number of cases have examined the reasons for the giving of details. These are to permit the High Court to carry out its functions under the Act of 2003 of endorsing the EAW and establishing correspondence and also to permit the respondent to challenge his surrender on grounds such as the rule of speciality (s.22), ne bis in idem and extraterritoriality (See Minister for Justice and Equality v Cahill [2012] IEHC 315 and Minister for Justice Equality and Law Reform v Desjatnikovs [2008] IESC 53). The respondent also has the right to know the reason for his arrest.

[49] In the present case, any claimed lack of detail by the respondent, does not affect any of those items. The respondent has not indicated any real difficulty and therefore his complaints about lack of detail are only theoretical in nature. The issuing judicial authority is not required to give every single detail as to the degree of participation. (Minister for Justice, Equality and Law Reform v Stafford [2009]

IESC 83). The details required are those which relate back to the reasons why such detail is required."

17. Clarity is essential to the EAW process for the following two reasons:

(i) To permit the High Court to carry out its functions under the Act of 2003 of endorsing the EAW and establishing correspondence, and also, to permit the respondent to challenge his surrender on grounds such as the rule of speciality (s.22), *ne bis in idem* and extraterritoriality.

(ii) The respondent also has the right to know the reason for his arrest.

18. Having considered the EAW and the additional information received, this Court has all of the information necessary to carry out its function under the Act, and it has not been suggested otherwise by the respondent. Furthermore, there is now no ambiguity in the EAW in respect of the reasons why surrender is sought in relation to the sentence to be served or indeed the level of participation of the respondent in the offences. The respondent is well aware of the reasons for his arrest, i.e. that he is being sought to serve a sentence of 3 years and 4 months for a conviction from the District Law court of Wałbrzych, dated the 14th of November 2005, that conviction related to a very serious assault that occurred on the 30th of October 2004 in Wałbrzych. There was undoubtedly a typographical error on the part of the translator of the warrant in relation to the Polish file reference number. This Court is satisfied with the explanation from the issuing judicial authority in this regard. This Court is satisfied that no ambiguity arises in relation to this EAW. In the circumstances, the Court will dismiss the Section 11 objection in relation to this matter.

19. **Is surrender prohibited on the basis of delay and abuse of process?**

The central issues raised by the respondent relate to issues of delay and abuse of process. The respondent submits that this is the second request for the respondent's surrender to Poland pursuant to the European Arrest Warrant Act, 2003. The sentence was imposed by the District Law Court of Wałbrzych more than 16 years ago, on 14th November 2005, for an offence that occurred more than seventeen years ago, on 30th October, 2004. The sentence became legally valid over 15½ (fifteen and a half) years ago on 14th June 2006.

20. When the respondent attended at Fermoy Garda Station to renew a passport on 31st October 2021, the respondent was arrested as a consequence of a SIS Alert. He was brought into custody before the High Court on 1st November, 2021 and the EAW was produced to this Court on the 11th November, 2021.

21. He submits that this EAW is recorded as having been issued on 6th June 2016. The first EAW was executed in this State on 1st July, 2010 and the High Court proceedings in respect of that EAW concluded on the 2nd of November, 2010 after the issuing judicial authority requested of the Minister:

> *"[That] the seeking of the said person on the basis of the European arrest warrant should be discontinued*."

He submits that almost another 5½ years passed before the second EAW issued on 6th June, 2016 and a cumulative 11 years passed before the respondent was arrested again and brought before this Court.

22. In this regard, the respondent swore an Affidavit in December 2021 in which he averred to the following:

- In 2005 he was charged with an offence of assault. He was not present at the time or at the location of the incident and he believes the victim pointed out two other persons who were involved, but did not nominate him and he believes there was no evidence

against him. However, he was convicted and sentenced to imprisonment and he spent about eight months in custody. When he was released he availed of the opportunity to make a new life in Ireland. He came here in February 2006.

- He is in a relationship and has two children, the youngest is 2 years old and their eldest child is 7 years old. They were both born in Ireland and they have Irish passports. The respondent and his partner are well known in their community and the respondent believes that they are held in high regard. Nine months ago they were allocated a social house in a newly-built housing estate, and that is where they now reside.
- Shortly after he arrived in Ireland in 2006, the respondent secured work on a building site. He later obtained employment in a wood factory, where he worked for ten years. For the past three years he has been employed at a large agricultural company. He works 12-hour shifts between 5am and 5pm, Monday to Friday. He looks after his children when he comes home in the evenings and his partner then goes to her work as a shop assistant in a local shop.
- In July 2010, the respondent was arrested under a previous European arrest warrant for the same offence. He believes that warrant issued on the 13th of July 2009. He and his partner had not expected that arrest and they were both in a state of shock. The respondent had been at work and when he returned home a Garda advised him about the warrant and that they were obliged to arrest him. Many Gardaí were customers at the local restaurant where the respondent's partner worked and they know both of them well. Although they were very polite and helpful to us, he submits that the respondent and his partner were still very embarrassed by the affair. They live is a small town and they have a good reputation that they did not want tarnished.

- The respondent was brought to the High Court in Dublin and remanded from time to time. The proceedings went on for about four months before the EAW was withdrawn and the respondent was discharged. Before it concluded, the respondent and his partner had many sleepless nights and the respondent developed low mood, and he attended a doctor. The respondent further states that it was very difficult time for both of them.
- The respondent states that when the EAW proceedings concluded in November 2010, it was the best day ever for him. He and his partner could begin planning for a family. Their first child was born in 2014 and their second was born in 2019. He submits that they had put the nightmare of the 2010 arrest behind them and they were planning a trip to Poland.
- However, when the couple went to the Garda station in relation to their son's passport in November 2021, the respondent was arrested again and he was detained. He was advised that a fresh EAW was issued in Poland on the 6th of June 2016, and that when the Gardaí checked his details in connection with the passport application, it was noted that the respondent's name still remained on the list of existing EAWs. The respondent states that he does not know why that warrant has remained dormant in Poland for so long.

23. In light of the above averments and the respondent's points of objection, this Court sought further information from the issuing judicial authority. Same was provided by way of a letter from Circuit Court Judge Bialek, enclosing a letter from District Judge Slywia Poradzisz, dated the 6th of December 2021 which stated:

> *"Under the judicial decision dated the 3rd of July 2009 (file reference III Kop 121/09) the Circuit Law Court of Świdnica issued European Arrest Warrant in respect of Marcin Krzysztof Minierski, son of Wieslaw, date of birth: 18 January*

1980, place of birth: Wałbrzych – for the purpose of executing a custodial sentence of 4 (four) years imposed on the said requested person under the judgment rendered by the District Law Court of Wałbrzych on the 14th of November 2005 (file reference II K 396/05) for the perpetration of offence under Art. 158 § 2 of the Criminal Code and Art.156 §1 (2) of the Criminal Code in conjunction with Art. 11 § 2 of the Criminal Code. Then, on the 16th of September 2010 Marcin Krzysztof Minierski, through his defence counsel, submitted a request for the postponement of the execution of the custodial sentence. As the request for the postponement of the execution of the custodial sentence was properly filed and met formal requirements – in this request, Marcin Minierski gave both his full address abroad and the Polish address for service and he also undertook to appear when summoned, the District Law Court of Wałbrzych reinstated the stayed enforcement proceedings and withdrew the wanted notice under the judicial decision dated the 27th of September 2010. The Circuit Law Court of Swidnica was notified about the decision of 27 September 2010 in the letter dated the 22nd of October 2010 and was asked to withdraw the European Arrest Warrant in respect of Marcin Krzysztof Minierski. In the letter dated the 28th of October 2010 (file reference III Kop 121/09) the Circuit Law Court of Swdnica notified the appropriate Police unit that the search for Marcin Krzysztof Minierski under the European arrest warrant had been called off.

Following the appeal filed by the Wałbrzych District Prosecutor against the decision of the court of 1st instance, the Circuit Law Court of Świdnica, in the Ruling dated the 20thof January 2011, did not postpone the execution of the custodial sentence of 4 years in respect of Marcin Krzysztof Minierski on the 1st of April 2011

the said sentenced person through his defence counsel submitted a petition for pardon, with regard to which the court issued a negative opinion.

On the 30th of December 2011, a petition for pardon was submitted by Ms. Lueyna Komewq (the person living together with Marcin Krzysztof Minierski), which was left by the Court unexamined due to the fact that it was submitted within a year from a negative decision with respect to the previous petition for pardon (Article 568 of the Code of Criminal Procedure).

After that, following Marcin Krzystof Minierski's new request – submitted through his defence counsel – the District Law Court of Wałbrzych, in the judicial decision dated the 20th of January 2012 (at that time the sentenced person's partner was heavily pregnant so the Court found that the impact of the immediate execution of the prison sentence on his family would be too severe. During the postponement period the said sentenced person was expected to make some organisation and financial preparations to secure adequate means of livelihood for his non-working partner and their new-born baby).

After the postponement period passed, Marcin Krysztof Minierski submitted – through his defence counsel – another request for the postponement of the execution of the custodial sentence. In the judicial decision dated the 8th of January 2013, the District Law Court of Wałbrzych decided not to postpone the execution of the custodial sentence. In respect of the said person. In the statement of reasons for the decision the Court noted that after the previous postponement period had expired the said sentenced person had left the country without giving any information on his address, his workplace, his personal and family circumstances. The Court also found that the sentenced person's going abroad before the commencement of a

long-term prison sentence, after the postponement ended, should be treated as a flight.

In these circumstances the District Law Court of Świdnica in a judicial decision dated the 22nd of May 2013, stayed the enforcement proceedings and ordered search for Marcin Krzysztof Minierski under a 'Wanted' notice, and then – after receiving it from the Police, information that the said sentenced person might be living/staying on the territory of a Member State of the European Union – applied to the Circuit law Court of Świdnica for a European arrest warrant being issued [sic].

Under the Judicial decision dated the 3rd of June 2018 the District Law Court of Świdnica issued the European arrest warrant in respect of Marcin Krzysztof Minierski, file reference III Kop 55/18.

The District Law Court of Wałbrzych also wishes to explain that under the Judgment dated the 14th of November 2005, file reference II K 398/05, Marcin Krzysztof Minierski was sentenced to imprisonment of 4 (four) years. Against this sentenced the Court has credited the time of the said person's arrest and provisional detention from the 29th of November 2004 to the 27th of July 2005 and also the time spent by him in Irish prison from the 1st of July 2010 to the 2nd of July 2010. The remaining part of the sentence to be served by him is 3 (three) years 2 (two) months and 29 (twenty-nine) days.

Marcin Krzyzstof Minierski knew about the criminal proceedings conducted against him because he appeared in person at the trial resulting in the judgment. He also knew about the criminal enforcement proceedings conducted in respect of him

because he submitted – through his defence counsel – requests/petitions regarding the execution of the custodial sentence."

24. From this additional information, the circumstances became clear that the respondent had sought a postponement of the enforcement order in 2010. This was granted, and the EAW was withdrawn.

25. The respondent filed a second Affidavit, dated the 17th December 2021, wherein he averred to the following:

- Since he swore his last Affidavit, he has had sight of the information provided by the issuing judicial authority in Poland in response to the questions asked by the High Court. He denies living in Poland between 2010 and 2013, and says that he has not been in Poland at any stage since 2006.
- He says that shortly after he arrived in Ireland in 2006, he secured work on a building site. He worked with his friend Adam, who was engaged to build a house for a Garda in County Cork. After approximately one year, he moved to Cork and they resided there between 2007 and 2018. He lived and worked openly during all that time and never concealed his whereabouts.
- He says that other than what he has read in the additional information he does not know the nature or the outcome of the applications that were made to the Polish courts and he cannot dispute what is said, but there is absolutely no basis for the suggestion that he left Poland in or about 2013 without giving his details. He has not been in Poland since 2006 and he has always lived and worked in the Cork or surrounding regions as outlined above.

26. In light of the foregoing, this Court sought further information. On the 17th of January 2022, Circuit Court Judge Bialek again furnished additional information in the form of a letter

from Sylwia Poradzisz, Judge of the District Law Court Wałbrzych, dated the 12th of January 2022, she stated as follows:

> *"4. The answer to question '4' is in this Court's letter dated the 6th of December 2021. It needs to be emphasised here that in the request dated the 20th of November 2012 for the postponement of the execution of the custodial sentence the defence counsel of the said requested person confined himself to laconically stating that "the said sentenced person has taken up permanent, legal, ongoing employment outside Poland, where he permanently resides at the known address.*
>
> *5. Herewith we have enclosed a copy of the final and legally valid decision issued by this Court on the 8th of January 2013 in the case of file reference II K 396/05 – II Ko 2587/12.*
>
> *6. In the letter dated the 16th of March 2016 sent to District Law Court of Wałbrzych the Criminal Department, the Municipal Police Headquarters in Wałbrzych – in response to the Court's enquiry about the status of the search for Marcin Minierski – stated* [sic] *that the said person had not been apprehended yet and that from the conversations with his neighours* [sic] *it appeared that he had broken off contact with his family and probably left for Germany. Having this information, on the 12th of May 2016, this Court applied to the Circuit Law Court of Świdnica for European arrest warrant* [sic] *being issued in respect of Marcin Minierski indicating that most probably he was in Germany. Further letters received by this Court and pertaining to the national search for the said sentenced person said that Marcin Minierski was abroad, most likely, in Germany."*

27. A further response dated the 9th February 2022 was received from Circuit Judge

Bialek enclosling a letter from the Deputy Head of the 3rd Criminal Division of the District Court of Law in Wałbrzych, Daniel Procyk, in the following terms:

"In response to the letter of 7th February 2022 the District Court of Law in Wałbrzych, the 3rd Criminal Division, is sending the following documents to you:

1. *Request for the postponement of the execution of the custodial sentence dated* [1st November 2011, 20th November 2012].
2. *Ministers of the Court hearing regarding the postponement of the execution of the custodial sentence dated* [20th January 2012, 8th January 2013].
3. *Petition for clemency dated* [19th December 2011] *along with the accompanying documents."*

28. The request for postponement dated the 1st November 2011, and signed by Adwokat Rafał Baranowski, states:

"*In the name and on behalf of the sentenced person Marcin Minierski, referring to the attached power of attorney I do request that*

- *The execution of the sentence of 4-year imprisonment, imposed on the said sentenced person under the final and legally valid judgment of the District Court of Law in Wałbrzych, file. Ref. II K 395/05, be postponed for a period of six months.*

Reasons

Marcin Minierski was sentenced to imprisonment for a term of four years under the judgment rendered by the District Court of Law in Wałbrzych in case II K 395/05.

It should be emphasized that since the commission of the offences that he was convicted of and sentenced for there have passed a number of years in which he has completely reorganised his life and his view of the world.

Having cut ties with the previous environment he entered into a live-in relationship with a woman, has taken up permanent, legal, ongoing employment outside Poland where he permanently resides at the known address.

It ought to be realised here that despite the distance he supports the family left behind in Poland actively and in every way, he has not come into any new conflict with the law.

Now, his live-in partner Lucyna Kostrzewa, whom he is maintaining [sic], *is heavily pregnant – it's a high risk pregnancy – with his baby, which, considering the above circumstances and the care he is providing for her, meets the factual criterioin defined in Art. 151 of the Penal Environment Code (k.k.w.) which, in turn, implies the submission of the petition herein."*

29. The minutes of the the hearing dated the 20th of January 2012, presided over by Judge of the District Court, SSR Alina Starzyńska, record as follows:

"For the hearing there appeared – sentenced Mariusz Minierski – did not appear, his defence counsel states that the said sentenced person has been notified of the scheduled date and the subject-matter of today's hearing.

Adw. (solicitor/barrister) Barbara Baranowska, attorney-in-fact in substitution for Adw. Rafal Baranowski (solicitor/barrister), duly authorised ex officio, power of attorney in substitution in the case files.

The defence counsel states that the live-in partner of the said sentenced person is 7 months pregnant. The defence counsel produces a list of money transfers in Euro

currency made from August 2010 to November 2011 to pay child maintenance (on a regular basis).

After the documents were read out they were returned to the lawyer.

The Reporting Judge made an oral report and disclosed the files of case II K 396 of the this Court and read out the request dated [1st November 2011] *along with the document enclosed with it and the probation officer's social inquiry report.*

The defence counsel reaffirms the request.

The probation officer accedes to the request.

The Court decided.

Pursuant to Art. 151 § 1 of the Penal Enforcement Code (kkw) to postpone the execution of the custodial sentence of 4 (four) years imposed on Marcin Minierski under the dianl and legally valid judgment rendered by this Court on the day of [14th November 2005], *file ref. II K 396/05, upheld by the judgment rendered by the Circuit Court of Law in Swidnica on the day of* [14th June 2006] – *for a period of 6 (six) months, i.e., until the 20th of June 2012.*

Reasons

In the present case Marcin Minierski was sentenced to imprisonment for a term of 4 years, the part of which he served when he had was remanded in custody from [29th November 2004] to [27th July 2005].

The official findings and the documents produced by the sentenced person show that having cut ties with the previous environment the said sentenced person moved his centre of life and interest to Ireland, where he had gone to look for work, where he entered into a live-in relationship, took up legal employment and continues to work for the same employer.

Working in the sawmill, on a regular basis the said sentenced person transfers cash to the bailiff's account to pay the child maintenance in arrears for his older daughter, provides for his live-in partner, who is heavily pregnant now, supports the family left behind in Poland (among others, by an ongoing financial aid and by paying for his mother's and his brother's stay in Ireland during Christmas holidays, including the payment for their travelling there by plane).

In this situation the effects of the immediate execution of the custodial sentence would be too severe both for the said sentenced person and for his family. Namely, in the situation of the inevitability of the execution of the sentence, make some organization and financial preparations for leaving his non-working live-in partner with their newborn baby in the country of their current stay, as well as reduce the amount of outstanding payments of child maintenance that have been taken from his earnings under an enforcement order so far."

30. Clearly, the above order was a temporary order dated the 20th of January 2012 with the intention of deferring:

"[The] inevitable imposition of a custodial sentence was made to allow him to put his affairs in order in circumstances where his partner is pregnant".

31. There was a further request for postponement made on the 20th of November 2012 which stated as follows:

"*In the name and on behalf of the sentenced person Marcin Minierski, referring to the attached power of attorney, I do request that*

- *The execution of the sentenced of 4-years imprisonment, imposed on the said sentenced person under th efinal and legally valid judgment of the District Court*

of Law in Wałbrzych, file. Ref. II K 395/05, be postponed for another period of six months.

Reasons:

Marcin Minierski was sentenced to imprisonment for a term of four years under the judgment rendered by the District Court of Law in Wałbrzych in case II K 395/05.

It should be emphasised that since the commission of the offences that he was convicted of and sentenced for there have passed a number of years in which he has completely recognised his life and his view of the world.

Having cut ties with the previous environment he entered into a live-in relationship with a woman, has tajen up permanent, legal, ongoing employment outside poland, where he permanently resides at the known address.

It ought to be raised here that despite the distance he supports the family left behind in Poland actively and in every way he has not come into any new conflict with the law.

Now that said sentenced person lives together with his live-in partner Lycyna Kostrzewa, whom he is maintaining."

This request was made roughly one year after the previous request, and five months after the expiry of the previous postponement.

32. In that judgment, from the petition dated the 20th of November 2012, the District Law Court of Wałbrzych, Judge Alina Starzyńska, who was the same judge who presided over the previous postponment application, ruled as follows on the 8th of January 2013:

"*The following ones appeared at the hearing – the sentenced person – Marcin Minierski – did not appear, according to the statement of the* [sic] *his defence*

counsel he has been notified about the scheduled date and subject matter of this hearing.

The defence counsel of the said sentenced person – Adw. Rafat Baranowski – a letter of power of attorney to represent in court proceedings in the case files – who stated that the said sentenced person has gone abroad and lives with his family there, that he supports the motion."

It is further stated:

"According to regulation Art. 6 § 2 of k.k.w. the applicant should prove the facts which are at the core of this application; here: a request for the postponment of the execution of the custodial sentence. Apart from laconically stating that the said sentenced person had left Poland after the expiry of the previous postponement he had been granted, before serving the sentence, the defence counsel of the said sentenceed person did not refer to any further circumstances pertaining to it, in particular, he did not provide any information on the place of residence/stay, place of work/employment, living conditions, or family circumstances, which renders it impossible to have the current image of the sentenced person disclosed in terms of the circumstances provided for in Art. 151 § 1 of k.k.w.

Notwithstanding the above, the sentenced person's going abroad before the commencement of a long-term prison sentence, after the postponement ended, is treated by the Court as a flight, which means that continuing the postponement of the execution of the sentence in this case would de facto legalize the said sentenced persons's unlawful conduct.. In the state of affairs like this, the Court finds no grounds to grant the request."

33. A Petition for Clemency was also furnished to the Court. Written in the first person, it is addressed to Mr. Bronisław Komorowski, the President of the Republic of Poland, and is dated the 19th of December 2011. In this letter, the Court notes that the author is the respondent's partner, Lucyna Kostrzewa, and the address is a Polish one - 58-160 Świebodzice ul. Pieasta 18/9. The document states as follows:

"The reasons for my request are as follows:

1. *Since the commission of the acts which Marcin Minierski was convicted of and sentenced for there has elapsed* [sic] *several years during which the said sentenced person completely reorganised his life and his view of the world. This change is the result of Marcin Minierski's cutting ties with his previous environment and his taking up permanent, legal, ongoing employment outside Poland where he permantly resides at the known address. What is more, that despite the distance the said sentenced person supports the family left behind in Poland actively and in every way, he has not come into any new conflict with the law;*
2. *The said sentenced person has entered into a live-in relationship with me and we still live together; moreover, I am expecting a baby and the pregnancy is with complications, in high risk of miscarriage, which the enclosed medical certificate confirms.*

   Dues to this situation, I am not able to earn my living and support myself and Minierski is the sole income earner in our household.

   For this reason, I do kindly ask for your acceding to my request."

Attached to this letter is a certificate from a Dr. Barry O'Reilly dated 4th August 2011, confirming that the partner of the respondent is at high risk of miscarraige:

"I, Dr. Barry O'Reilly

Certify that Lucyna Kostrzewa d.o.b., 08/07/1982 from the Waterside 1 Fermoy Co. Cork is in [her] *sixth week of pregnancy with complications.*

In my opinion her pregnancy is in high risk of miscarriage I suggest that she remains at home for at least 4 weeks.

She has to take her medications as prescribed and continued to come every week for check ups."

34. The respondent furnished a further affidavit dated the 29th of March 2022, wherein he averred to the following:

- That the respondent came to Ireland on or about the 5th February, 2006. Since then, he has lived and worked openly in County Cork and he has never once sought to conceal his whereabouts. He has not returned to Poland at any stage since he departed there in February 2006. It follows that he was not in Poland in June 2006 or any date thereafter. Before he travelled here, he was advised by a solicitor from Wroclaw that there was absolutely no restriction. He would not have come here if he had believed it was not permitted. He came here legitimately with the objective of working and moving on with his life. The Polish authorities were made aware that he was living and working in Ireland. He had absolutely no idea that there was any issue up until the time of his arrest in July 2010 under the 2009 European arrest warrant, which he submits came as a big shock.
- He says that the Polish lawyer, (Advocat) Rafał Baranowski, represented him in the initial court hearing before Wałbrzych District Court, at which he was convicted for something that he did not do. Other than what he has read in the additional information that has been provided to this Court, he is not aware of the

nature or the extent of the applications that he has since made or that he authorised other persons to make on his behalf in Poland. In relation to the proceedings in Poland, he engaged with lawyer Rafał Baronowski at the time of the 2009 EAW, and he undertook to resolve any outstanding issues. The respondent paid him through his brother in Poland and he sent his signature on blank pages. He never got an opportunity to properly discuss the issues with the lawyer and he did not explain what was to happen or what did happen but he understood all was in order. He notes that in the petition for postponement dated 1st November 2012, it was asserted that his partner, Lucyna Kostrzewa, was heavily pregnant with a "high-risk" pregnancy and in a petition for clemency dated 19th December 2011 on behalf of Lucyna, it is incorrectly stated that she was experiencing a complicated pregnancy with a high-risk of miscarriage. He also notes from the minutes of the Court hearing on 20th January 2012 that an application on his behalf was made by Barbara Baranowska, who, without his knowledge, was authorised by Rafał Baranowski to act for him, and where it was also incorrectly stated that Lucyna was seven months pregnant. He says that their first child was born in 2014 and their second was born in 2019. He does not know the origin of the medical certificate from Cork Women's Clinic that was submitted. It was not provided by them. He did not know that clinic existed. Lucyna was not a patient there and she was not pregnant at that particular time. They always attended a doctor in Fermoy. However, the certificate contains Lucyna's personal details, including their address in Fermoy. The information about him working at the sawmill and living in Ireland, paying child maintenance and about his mother and brother visiting is true. He believes he provided that information when discussing fees.

He believes he also sent his bank statement which contained his address on it as the lawyer asked for that. He says that he is stunned by what he has read in the additional information.

- He was not aware of the hearing on 8th January 2013, but from the note of the judgment provided, the Polish court appears to be criticizing the dearth of information provided to it to support the applications made by Mr. Baronowski. It seems he did not meet the required threshold, however, the applicant's assertion, as made in the written submissions filed on her behalf, that the respondent instructed the lawyer not to reveal his whereabouts, is without foundation. He strongly disagrees and he says that nothing could be further from the truth. He says that he has always been upfront and open and he believes his whereabouts were well known. In that regard, he refers to the additional information, including the letter from Wałbrzych District Court on 22nd October, 2010, the petition for clemency dated 19th November 2011, and the minutes of the Court hearing of 20th January, 2012.
- He says he cannot comprehend how the Court could have concluded that he had left Poland after the previous postponement in circumstances where the court decision of 20th January 2012 was predicated on the fact that he had moved the centre of his life-interests to Ireland and that he was working here. He notes it is an erroneous assessment that he left Poland after the previous postponement that led to his departure being treated as "flight". He is advised that that may have had repercussions for him in the context of the issue of an arrest warrant or the statute of limitations.

- The respondent says he has tried to contact Mr. Baranowski by telephone call and by sending him messages, without avail. In February 2022, he managed to talk to him, and he asked him to answer the e-mail sent by his solicitor in these proceedings. He said that he would look at it but that he had little time and he stated that he would call the respondent later, or on another day. However, he has not done so. The respondent has tried to call him since but he either did not answer his phone or it was turned off. He wants to find out about the applications that were made in his name, but it seems that Mr. Baranowski does not want to engage with him.
- He believes that he came here lawfully, and he lived here openly and his whereabouts were well-known. He applied to renew his Polish passport in the Polish Embassy in Ireland in 2016 and that did not create any difficulty. They were planning a trip to Poland for last Christmas and it is when applying for his son's passport that the Gardaí noted the SIS alert. He has never resided in Germany and he did not break off contact with his family. As outlined in additional information received, his mother and brother visited them in Ireland. Furthermore, the arrangement of the apartment complex where his mother resides is such that it is a very close community and she, and all of her immediate neighbours, were aware that the respondent was residing in Ireland. He further believes that the fact that his Probation officer acceded to the request supports the view that his whereabouts were known to the Polish authorities.
- He says that he never hid or concealed his identity. He was very surprised by his arrest under the first European arrest warrant, and now, twelve years later,

he is back in the same position. The difference, he says, is that this time they have children, and they are absolutely devastated. He says that he is not a criminal and that he really did nothing wrong. He believes the delay in processing the European arrest warrant in this case is inexcusable. He just wants to raise his children and to live a peaceful life with his family in Ireland.

35. It is notable, in this regard, that no Affidavit has been forthcoming from any of the lawyers who represented the respondent, either in relation to the applications made for postponment and for clemency, or in relation to his being advised that he was free to leave Poland, despite the fact a lawfully imposed custodial sentence was in existence at the time of his departure, in 2006.

36. On the 12th of April 2022 Circuit Court Judge Bialek sent further additional information by way of letter dated 11th April 2022 from Judge Sylwia Poradzisz of the District Court of Law in Wałbrzych. Therein she stated:

"The judgment of conviction and sentenced rendered in respect of Marcin Minierski by the District Court of Law in Wałbrzych on the 14th of November 2005 (file reference II K 396/05) was challeneged by his defence counsel, who lodged an appeal within the prescribed time limit. The Circuit Court of Law in Świdnica heard the appeal filed by the defence counsel of Marcin Minierski and in its judgment handed down on the 14th of June 2006 (file reference IV Ka 290/06) it found the appeal groundless and upheld the original judgment of the District Court of Law in Wałbrzych dated the 14th of November 2005, which became final and legally valid on the day when the Circuit Court of Law in Świdnica issued its judgment.

Marcin Minierski did not appear at the trial before the Circuit Court of Law in Świdnica; he had been twice left a notice of the attempted ervice of a notification of the scheduled date of the trial and the notification was then deemed to have been served. Form D with an official note now enclosed."

37. A further letter dated 11th of May 2022 was received from Circuit Court Judge Zielinski, the issuing judicial authority, enclosing a letter dated the 10th May 2022 from Judge Sylwia Poradzisz. I state this for completeness sake, as the subject of this letter is more appropriately dealt with under the heading entitled "Section 45", below.

38. The respondent swore a further Affidavit dated 17th June 2022 wherein he averred to the following:

- The additional information of 11th May, 2022 provided by the Polish authorities in response to the request of this Court dated 5th May, 2022 includes what purports to be a photocopy of a document that it is said was provided to the respondent in the course of preparatory (pre-trial) proceedings and it is alleged that it was signed by him on 29th November 2004. He says that he did not sign that document then or on any other date. It does not bear his signature. He say that he does not know who signed it and he protests in the strongest terms at the suggestion that it bears his signature. He says that he is prepared to co-operate with any graphologist, handwriting expert or other examination ordained by this Court to substantiate the truth of his assertions. He says that he is very concerned that someone, or some agency and/or some judicial authority would seek to proclaim that he had signed the document. He is advised that this false assertion may constitute an abuse.
- He further notes that the transcript of the Circuit Court proceedings on 14th June 2006 records that he was represented by a trainee advocate, Sylwia Chmielinska, who undertook

to submit her Power of Attorney by post. He did not appoint her or any trainee lawyer to represent him at that appeal and he notes from the transcript provided that she did not make any significant contribution to his defence. He says that he believes that this is a more credible explanation for why box l (c) was not previously ticked in Part D. He does not accept that he received a fair hearing.

- He says that the lawyer, Rafał Baronowski Senior, represented him in the District Court proceedings but that he passed away whilst he was in prison. He believes it is his son, Rafał Baronowski Junior who acted for him in the later proceedings. When he was not satisfied with the fact that he was detained in prison for 8 months and convicted for something that he says he did not do, he made contact with a lawyer in Warsaw who advised him that he was free to travel to Ireland and to work here. He says that he believes that lawyer may be Karolina Knopik. He says that he travelled safe in that knowledge and he lived here openly since. He says he was not informed of, and did not know about the appeal hearing. He would have attended if he had received notice about it. His family in Poland did not received notice either.
- He says that this is all a nightmare and it is predicated on one big mistake. He says that he is innocent of the charge, but, nonetheless he was imprisoned for 8 months. He says that he has since lost everything from his old life, and, having moved on with his new life, this nightmare has returned. He does not think it is fair for him, his family, his partner or his children. His oldest child cannot understand why he may have to go away and she cries all the time, whilst his son, aged 3 years, will not remember him at all after a couple of years, if he is surrendered.
- He says that if he had done something wrong, he would not mind paying for it, that this would be right and fair. He says that he would not fight so strongly for justice. However, he says that he did not commit the crime and he is concerned that after

all these years, his surrender is still being sought to enforce this injustice, and, that forged documents are relied upon to support the Polish request. He says that the situation is destroying his life and his health. He is waiting for a hospital appointment for a colonoscopy because he is bleeding badly and he will probably need an operation. He prays that he will not be surrendered.

39. The Court also received a record of the suspect interrogation held on the 29th November 2004, which states:

"The suspect that has not been remanded in custody has to appear whenever summoned thereto in the course of the criminal proceedings and to inform the agency conducting the proceedings of any change of his/her residence or stay exceeding 7 days, should the suspect fail to appear without giving good reason or justification for his/her nonattendance, he/she can be arrested and brought by force (Art.75 §1 & §2 of kpk);

[I]f the suspect is staying/residing abroad, he/she has to appoint an agent for service in Poland; should he/she fail to do that, a writ sent to his/her last known address in Poland - or if there is no such address in Poland - will be attached to the case file and will be considered to have been duly served on him/her (Art.138 of kpk);

[I]f the suspect changes the place of residence or if he/she does not live at the address given to the appropriate agency as his/hers and he/she fails to inform the agency of his/her new address, a writ sent at his/her address known to the agency in the course of the preparatory (pre-trial) proceedings will be considered to have been served on him/her (Art.139 of kpk).

I hereby confirm the receipt of the written information on rights and obligations

before the first interrogation."

This appears to be signed by the respondent.

40. The respondent's solicitor swore an affidavit dated 22nd June 2022, wherein he averred to the following:

- The respondent has given firm instructions that he did not sign and he did not insert the location of the said signing, which seems to be in the same handwriting, on the "Instruction on the suspect's rights and obligations" [hereinafter Notice of Rights] that the authorities in Poland have provided by way of additional information under cover of letter dated 11th May, 2022. The respondent instructs that he could not have completed these details because he was not in Poland in November 2006. In that regard, he believes that the handwritten date at the bottom of the document is 29th November 2006 which he advises reflects the practice in Poland of noting the "year of 2006". Having regard to the fact that the official translation states the 29th November 2004, the respondent's solicitor arranged for a professional translation from *Transferendum.eu.* The relevant document and the respondent's instructions thereon were provided to the translation company and a response was received by email. He refers to a true copy of the notice of rights and the email from *Transferendum.eu,* which has been exhibited.

41. This Court has reviewed the exhibited document to this Affidavit and it adds nothing to the respondent's case. It says nothing more than that the date on the document suggesting he signed acknowledging his rights, could be dated either 2004 or 2006, but is not conclusive one way or the other. In this Court's view, the issue of seeking a handwritten expert is a matter for the respondent and his solicitor, and this Court notes that no effort appears to have been made by the respondent to initiate the process of seeking out a handwriting expert and no application

has been made to this Court to extend the legal aid custody issue scheme to cover any nominated handwriting expert.

42. The respondent swore a final Affidavit dated 1st July 2022 wherein he averred to the following:

- He states that he has had sight of the additional information received from Poland under cover letter dated 23rd June, 2022. He refers to same and, in reply he says that he met Karolina Kopik only once. He met with her in her office in Wroclaw city in November 2005. She informed him that she would look after everything and that he could travel to Ireland and work here. He states that he believed that he had secured good professional legal representation, and, as he had not committed the crime alleged against him, that everything would be fine. He was not informed of, and he did not know about the appeal hearing on 14th June, 2006. Neither he, or his family in Poland receive any notice of it. He signed an authorisation for Karolina Kopik to personally defend him, but he did not agree for any another lawyer to represent him. He gave no such mandate. He states that did not, and he would never have agreed to be represented by a trainee lawyer. Lest there be any doubt, he categorically states that he did not give a mandate either to advocate Agnieszka Kosarzycka-Minor or to trainee advocate, Sylwia Chmielinska, who, it seems, ultimately purported to represent him. He was not informed about that change of representation, and he believes that this was very unfair on him.
- Furthermore, he accepts that the mandate that authorised Karolina Kopik that has been provided by the Polish authorities, bears his signature, and he asks the Court to note that the significant difference between that signature and the signature on the "instruction on the suspect's rights and obligations" that the Polish authorities suggest he signed on

29th November 2004, an assertion that he strongly disputes. He states that he is very stressed about all that has gone on in this very old case and he prays that his surrender to Poland is refused so that he can continue to reside with his family in Fermoy.

43. <u>The Law on Delay/Article 8 Rights/Abuse of process</u>

Delay is a recognised factor which may weigh into a court's cumulative analysis as to whether Section 37, Article 8 ECHR or any other alleged breaches of rights, might ground a refusal to surrender. This principle is set out by the Supreme Court in *Minister for Justice and Equality v. J.A.T. (No. 2)* [2016] IESC 17. The Supreme Court subsequently set out the test which must be applied where an application for surrender is opposed on grounds of Article 8 ECHR in *Minister for Justice and Equality v. Vestartas* [2020] IESC 12.

44. In *Minister for Justice and Equality v. D.E.* [2021] IECA 188, the Court of Appeal summarised the caselaw to date in relation to cases involving assertions of violations of Article 8 rights and helpfully stated at para. 67 as follows; -

(i) In an application for surrender, the court is not carrying out a general proportionality test on the merits of the application. The court should apply the specific terms of the 2003 Act, albeit subject to a careful consideration of whether, if necessary, applying a proportionality test to Article 8 Convention rights, to order surrender would involve a violation of that ECHR right to the extent of being incompatible with the State's obligations under the Convention. (Vestartas).

(ii) Surrender (or extradition) presupposes an impact on the personal or family life of a requested person. Having regard to Article 8(2), surrender (or extradition) carried out pursuant to legislation is in principle an acceptable interference with the right to respect for those rights. (Ostrowski, JAT (No. 2), Vestartas).

(iii) When faced with an Article 8 objection to surrender, the function of the Court is to decide if the surrender is incompatible with the State's obligation under the European Convention on Human Rights. That requires a very high threshold. Any inquiry must bear in mind that s. 10 requires a court to surrender in accordance with the provisions of the 2003 Act and s. 4A of that Act obliges the court to presume that the issuing state has complied and will comply with its fundamental rights obligations. (Vestartas).

(iv) The evidential burden of proving incompatibility lies on the requested person. (Rettinger and Vestartas).

(v) The assessment of the claimed impact of surrender on personal and family rights must be a rigorous one. (Rettinger and JAT (No. 2)).

(vi) The evidence must be cogent and must reach the level of incompatibility (Vestartas).

(vii) Exceptionality is not the test for incompatibility, but it will only be in a truly exceptional case that surrender will be found to be incompatible with the State's obligations under Article 8 of the Convention. (JAT No. 2 and Vestartas).

(viii) For an Article 8 objection to succeed, there must be clear cogent evidence sufficient to rebut the presumption in s. 4A of the 2003 Act. (Vestartas).

(ix) No elaborate factual analysis or weighing of matters is necessary unless it is clear that the facts come close to a case which would be truly exceptional in nature thereby engaging the possibility that surrender may be incompatible with the State's obligations under the Convention. (JAT (No.2)).

(x) The requirement that the circumstances must be shown to render the order for surrender incompatible with the State's obligations under Article 8 necessitates

that the incursion into the private and family rights referred to in Article 8(1) is such as to supervene the limitations on the right contained in Article 8(2), and over the significant public interest thresholds set by the 2003 Act itself. (Vestartas).

(xi) Where the facts, assessed as set out above, come close to being truly exceptional in nature thereby engaging the possibility that surrender might be incompatible with the State's obligations, the Court will engage in a proportionality test of whether the high public interest in the prevention of disorder and crime (and the protection of the rights of others) is overridden by the personal and family circumstances (taken where appropriate with all the cumulative circumstances) of the requested person. That is a case-specific analysis which will be required in very few cases."

45. The respondent submits that in *Minister for Justice and Equality v. Bednarczyk* [2021] IEHC 316, the High Court (Burns J.) refused to surrender a respondent to Poland having found that there was an abuse of process in circumstances less egregious than those that pertain here. Mr. Bernarczyk's objection, which was upheld, was premised on the basis that his surrender had been ordered some seven years previously, but because he had not been surrendered within the operative timeframe, he was released from prison. He heard nothing further until he was arrested again seven years later in the context of a new EAW. Having analysed the relevant case law, including *dicta* from the Supreme Court in *Minister for Justice and Equality v. J.A.T.* (No. 2), Burns J. noted that Denham C.J. was satisfied with the evidential basis upon which the High Court had found an "abuse of process" and was satisfied not to interfere with that finding. This Court notes the following from the judgment of Mr. Justice Burns wherein he states at para. 34; -

"[34] In the current matter, there had been a significant lapse of time between the date of the alleged offending and the initial issuing of the EAWs of between 9 and 11 years. If the matters were coming before this Court for the first time, then bearing in mind the reasoning of the Supreme Court in Vestartas, I would not regard the said lapse as so egregious in itself as to justify refusal of surrender. Also, bearing in mind the reasoning of the Supreme Court in Vestartas, I would not regard the personal or family circumstances of the respondent as so exceptional in themselves as to justify a refusal of surrender.

[This is also a second application and the lapse of time between the alleged offences and the re-transmission of the EAWs is 17 years.]

[35] However, unlike Vestartas, in the current case there has also been very significant delay in the actual prosecution of the EAW proceedings. In effect, the current proceedings are an extension of the proceedings commenced in 2010 in respect of which surrender was ordered in 2012. It is difficult to see how a delay of 7 years in effecting surrender could be justified in this case and I do not believe it has been justified or even adequately explained. It may well be that even in such circumstances, the significant public interest in surrender could justify surrender as regards alleged offending of a particularly serious nature. In the present case it was conceded by the applicant that the alleged offending is not at the most serious level of offending."

46. In Bednarczyk, the High Court was satisfied that the request for surrender was allowed to go into abeyance for a prolonged period of time, and that there had been an abject failure on the part of both the issuing state, and the executing state authorities. The Court held as follows at para. 36; -

"[36] ...The re-transmission of the EAWs in the present instance must be considered along with, and in the light of, all relevant surrounding circumstances and must be assessed on a cumulative basis with such circumstances. Bearing in mind the reasoning of the Supreme Court in JAT No. 2, I consider that the facts of the present case, taken cumulatively, are exceptional and constitute a rare case where surrender should be refused on grounds of abuse of process.

To permit a lapse of 7 years to occur between the making of an Order for surrender and the giving effect to same, without any extenuating circumstances, is simply unjustifiable and amounts to an abuse of the process of this Court."

47. The respondent also relies upon the judgment in *Minister for Justice v. Robert Adam Lach* [2021] IEHC 632. Therein, the High Court refused another request from Poland to surrender a person to serve a sentence of imprisonment of one year and three months that had been imposed in June 1998. Mr. Lach had been the subject of a previous surrender request, but he had been released from custody in 2009 when the High Court (McCarthy J.) refused to extend time for his surrender. He heard nothing further in the interim, and the High Court sought an explanation from the Polish authority in relation to the lapse of time. That explanation in the Lach case detailed an unsuccessful "petition of grace" in 2013; a police search, the refusal by a first instance court to delay execution of the imprisonment penalty; the upholding of that decision by an appellate court; the issuance of the EAW; further refusals to delay the penalty; appeals upholding those refusals; the issue of a new EAW, and a further unsuccessful application to delay execution. In reference to the Bednarczyk case, it was submitted on behalf of Mr. Lach that it would be unconscionable to surrender him in circumstances where he had moved on with his life, had married and had a child. The Minister sought to distinguish Mr. Lach's case from the Bednarczyk case on the basis that the latter was

a prosecution case whereas Mr. Lach's case concerned a conviction and sentence warrant, and applications had been made to the Polish courts to delay execution of the sentence. Burns J. indicated in Lach, that if it was a matter that was coming before the Court for the first time, then, having regard to the authorities, he would not consider the lapse of time as so egregious in and of itself, as to justify refusal of surrender. Nor would he regard the personal or family circumstances of the respondent as so exceptional, in and of themselves, as to justify a refusal of surrender. However, he observed that unlike Vestartas, in the case of Mr. Lach, there had also been very significant delay in the actual prosecution of the EAW proceedings. He Held; -

> *"[…] In effect, the current proceedings are an extension or follow on from the proceedings commenced in 2008 in respect of which a final order for surrender was made in 2009. It is difficult to see how a delay of seven years in seeking to effect surrender could be justified in this case (taking the issue of the current EAW as the appropriate cut-off point). It is even more difficult to see how a delay of 11 years in seeking to effect surrender could be justified in this case (taking the arrest of the respondent on foot of the current EAW as the appropriate cut-off point)*
>
> *[…]*
>
> *Bearing in mind the reasoning of the Supreme Court in J.A.T. No. 2, I consider that the facts of the present case, taken cumulatively, are exceptional and constitute a rare case where surrender should be refused on grounds of abuse of process. An entitlement or obligation to persevere with attempts to effect surrender does not mean that issuing states or executing states are absolved from any obligation to act with expedition and treat applications for surrender as matters of urgency. There is a significant difference between (a) lapse of time between the date of commission of an offence or imposition of sentence and the commencement of a process seeking*

surrender in respect thereof, on the one hand, and (b) significant lapse of time within the course of an application for surrender or the execution of an order for surrender, on the other hand. I do not believe that Vilkas is authority for the proposition that an issuing state and/or the executing state may permit a prolonged and inexcusable delay in effecting surrender to occur so that some 11 years after a failure to effect surrender, the executing judicial authority is obliged in all circumstances to make a further order for surrender."

48. Burns J. concluded at para. 44; -

"[44] Bearing in mind the reasoning of the Supreme Court in J.A.T. No. 2, the facts of the present case must be taken cumulatively in order to ascertain whether same can reasonably be regarded as exceptional and constitute a rare case where surrender should be refused on grounds of abuse of process. In that regard, the following matters are of significance:-

- inordinate and inexplicable delay/lapse of time between the initial failure to effect surrender and the application for an order for surrender before this Court (approximately 11 years);

- the failure of the Polish authorities to transmit the EAW issued in 2016 to Ireland for execution, despite the fact that the respondent, to their knowledge, had been residing in Ireland at the time of the failure to effect surrender under the first European arrest warrant, and a simple enquiry with An Garda Síochána would have confirmed his continued residence in Ireland;

- the detention of the respondent in this jurisdiction on foot of the earlier EAW for approximately six months prior to the failure to give effect to the order for surrender;

- the respondent's changed family circumstances, although these are not particularly strong in this case; and

- the fact that the respondent on a number of occasions following the failure to effect surrender made applications to the Polish courts in respect of the sentence, the subject matter of this EAW.

Proceedings brought on behalf of an issuing state seeking the surrender of a person must be conducted with expedition. Such proceedings are to be treated as matters of urgency under the European Council Framework Decision dated 13th June, 2002 on the Surrender Procedures Between Member States, as amended ("the Framework Decision"). It is incumbent upon the parties to such proceedings, and the executing judicial authority, to ensure that such proceedings are determined with reasonable expedition.

In this instance, I do not regard the timetable or additional information provided by the issuing judicial authority as justification for the failure to attempt to give effect to the original surrender order with any degree of expedition or urgency.

The question remains as to whether the respondent's applications to the Polish courts to delay execution of sentence are to be regarded in some way as justifying or excusing the lack of expedition on the part of the Polish and Irish authorities or as effectively estopping the respondent from relying upon such lack of expedition. Certainly, if the respondent's applications to delay execution of the sentence had been successful, then clearly the delay would be explicable and justifiable by reference to the respondent's actions. However, on each and every occasion which the respondent attempted to obtain a delay in the execution of the sentence, his applications were refused and so such applications cannot be regarded as an explanation or justification for the failure

of the authorities to act with expedition in seeking to give effect to the original surrender order.

I am satisfied that to permit the lapse of time between the initial failure to effect surrender and the application to this Court for a fresh Order for surrender, without sufficient extenuating circumstances, would be unjustifiable and would amount to an abuse of the process of this Court. I should emphasise that the use of the phrase "abuse of process" is not intended to convey any mala fides on the part of the authorities or any conduct intended to oppress the respondent.

In light of the above, I refuse the application for an order for surrender."

49. The respondent has also referred the Court to the judgment in *Minister for Justice and Equality v. Palonka* [2022] IESC 6 wherein surrender was refused under Section 37, and Article 8 grounds. The Court notes the following from para. 19 of Charleton J.'s judgment;

"[19] One of the questions reverted to the High Court by this Court was as to the motivation or cause of apparently waiting until the failure of the request for surrender on the 2003 offence before the Polish authorities then sought a second extradition on the 1999 offence. This was analysed by Burns J who felt that that on enquiry "no simple or straightforward answer has been provided in respect of this question" by the Polish authorities. Burns J. noted the significant lapse of time as between the requests for the second 2003 offence, which resulted in the first EAW, and the second EAW which related to the 1999 offence. As Burns J held: "There undoubtedly was a significant lapse of time between the 2006 activation of the sentence in respect of the July 1999 offence and the issue of the EAW in respect of same." He summarised the documentation as indicating a breakdown of communications as opposed to any deliberate scheme."

Mr Justice Charleton, concluded at para. 31; -

> *"[31] This is not a case of potential infringement of fundamental rights. Rather, what is involved is a real, exceptional and oppressive disruption to family life in the most extreme and exceptional of circumstances. Of itself, that would not justify a refusal to surrender as delay does not create rights, but delay may enable the growth of circumstances where a new situation has emerged that engages Article 8 of the European Convention in a genuinely exceptional way as set in the context of the individual procedural circumstances of the case. Burns J could not definitively state as to why on the failure of the EAW for the 2003 offence, it was to the 1999 offence, after the exceptional delay described by him, that the authorities looked. While there is no requirement in European law which would support any argument that a requesting state should trawl up and centralise every potential offence for which a person might be requested, it was the answer to that question which this Court saw as central in seeking further information through the High Court.*
>
> *[32] It follows that the absence of information on that crucial matter brings into focus the 23-year delay involved, the long stasis through failing to revert to the earlier 1999 offence, the presence of the person sought in this jurisdiction since 2005, the establishment of roots and family life in this country, and, while balance is not in issue, this delay underlines the exceptional nature of what has been sought in the context of these cannabis offences. Surrender will therefore be refused."*

Similarly, Mr. Justice Hogan concluded at para 11; -

> *"[11] It is perfectly evident that each stage of the Polish judicial process and police investigations was beset by some degree of delay and confusion. I am perfectly prepared to accept that this unhappy sequence of events was caused by a series of*

understandable human errors. The net result, however, is that this Court is faced with executing an EAW warrant in respect of a (relatively) minor offence which was committed by Mr. Palonka some 23 years ago when he was just 18 years of age. The confusion of which I have spoken has meant that the Polish authorities did not avail of a number of opportunities to apply for an EAW in respect of this offence prior to making a belated application in this regard in 2019. Had the 6 Polish authorities acted otherwise it would have been entirely possible for them to have sought to have an EAW executed in either 2006 or 2007. Alternatively, one or more EAWs in respect of both the 1999 offence and the 2003 offence could have been processed by the Irish courts at the same time in 2012 and 2013 had the Polish authorities considered such an approach to have been appropriate."

50. The original conviction of the respondent herein dates back to 2005, some 16 years prior to his arrest on this EAW. In this regard, the respondent seeks to advance the argument that the timelines in his case, are not only akin to those in Lach, but are longer than those in Bednarczyk. Furthermore, he relies upon the fact that it has been 11 years since the proceedings in relation to the first EAW, were terminated in this jurisdiction. Therefore, he submits, that his case also involves a second request for surrender. He places significance on the fact that he was discharged from the original EAW proceedings in 2010, upon the application of the Minister, acting on a request from Poland, and thereafter he heard no more about surrender. He submits, much like the respondents in Bednarczyk and Lach, in the interim he has moved on with his life, and, as outlined in his Affidavit, he now has two children and he is in steady employment. He served 8 (eight) months in prison between 2004 and 2005, and he spent 2 (two) days in custody in Ireland in 2010 as a consequence of his arrest on the first EAW.

51. Counsel for the respondent submits that that at the time of the first EAW, the respondent

provided his full address abroad in Ireland as well as his Polish address, that he submitted a request for the postponement of the execution of the custodial sentence, that the Court "reinstated" the "stay", and withdrew the wanted notice. The respondent avers that he knew nothing of the postponement applications after the withdrawal of the first EAW in 2010.

52. Discussion

This case, in this Court's view, can be distinguished from the Lach and Bednarczyk and Palonka cases. In order to understand why this Court distinguishes this case from Lach, Bednarczyk and Palonka, a chronology of relevant events needs to be understood:

- **30th October 2004:** Date of offence referred to in the EAW.
- **14th November 2005:** Conviction and 10-months sentence of imprisonment imposed by the District Law Court at Wałbrzyc.h
- **14th June 2006:** Circuit Law Court in Swidnica rejects appeal filed by respondent and the 10-month sentence becomes valid and enforceable.
- **13th July 2009:** 1st EAW issued.
- **25th November 2009:** 1st EAW endorsed.
- **1st July 2010:** 1st EAW Arrest/Bail.
- **16th of September 2010 –** The respondent applied for a postponement through defence counsel. The request for postponment was made based on personal information relating to the respondent at that time, which, in this Court's view could only have come from the respondent.
- **2nd November 2010:** 1st EAW withdrawn / endorsement vacated / discharge and foot of respondent's postponement application.
- **20th of January 2011:** the Circuit Law Court of Świdnica did not postpone the execution of the sentence.

- **1st April 2011:** the respondent, through defence counsel, submits petition for pardon, the court issued a negative opinion.
- **1st November 2011:** Further application for Postponement of execution of sentence, submitted through defence counsel.
- **30th December 2011:** "Petition for Clemency" submitted in the name of respondent's partner. This was not considered as it was submitted within a year of the previous negative decision.
- **20th January 2012:** The application for postponement is granted, taking account of the "inevitability of the execution of the custodial sentence" but allowing for "some organizational and financial preparation" for the birth of a new baby. Money transfer handed into the Court showing child maintenance.
- **20th November 2012:** 3rd application for postponement of execution of sentence submitted on behalf of the respondent by his lawyer with his power of attorney.
- **8th January 2013:** 3rd application for postponement of execution of sentence refused. The defence counsel indicate that the respondent is notified about the date. The defence counsel has power of attorney Court determines "apart from laconically stating that the said sentenced person had left Poland after the expiry of the previous postponement had been granted, before serving the sentence, the defence counsel of the sentenced person did not refer to any further circumstances pertaining to it, in particular he did not provide any information on the place of residency, work/employment, living condition, or family circumstance which renders it impossible to have a current image of sentenced person." The respondent was deemed a "flight".
- **22nd May 2013**: Respondent placed under a wanted notice.
- **16th March 2016:** The Polish courts receive information suggesting that the respondent was in Germany.

- **6th June 2016:** 2nd EAW issued.
- **31st October 2021:** Respondent arrested on SIS re. 2nd EAW.

53. The delay that has occurred in this case, from 2010 to 2016, was caused by the respondent by virtue of his repeated applications for the postponement of the service of the term of imprisonment. Some of these applications were successful, including, importantly, a successful application that led to the previous EAW being withdrawn.

54. The first affidavit of the respondent avers to the fact that after 2010, the EAW was withdrawn, and that he was in complete shock when he was arrested in 2021 because he believed the proceedings were dormant. Clearly, these averments are impossible to reconcile with the fact that repeated efforts were made by, or on behalf of the respondent, to postpone the domestic proceedings after 2010. In his second Affidavit he states:

> *"Other than what I have read in the additional information, I don't know the nature or the outcome of the applications that were made to the Polish courts and I can't dispute what is said but there is absolutely no basis for the suggestion that had I left Poland in or about 2013 wihout giving my details."*

55. In addition, in his third Affidavit, he states that the first warrant came as a total surprise, and he was not aware of the nature and the extent of the applications that his lawyer has since made, or that he authorised other any other person to make. In this regard, his assertion that he knew little about the applications for postponement and clemency after 2010 are lacking in credibility. His inference that the application in 2012 was made with documentation which was false and not provided by him, is also lacking in credibility. This Court notes in this regard:

a. Firstly, the clemency application was made by his partner who is living with him in this jurisdiction.

b. Secondly, the petition for the clemency application appended a document signed by the respondent's partner's doctor confirming she was pregnant and at high risk of miscarraige. The respondent avers that this document is a fraudulent document, as his partner was not pregnant at that time, and that she never attended with that doctor. He infers that his lawyer must have put those documents falsely before the Court. This Court finds these averments to be lacking in credibiilty.

c. The minutes of the court proceedings of the 20th of January 2012 when he was represented by Adw. Barbara Baranowska and of the 8th January 2013 when he was represented by Adw. Rafał Baranowski, clearly show that submissions were made by his defence counsel.

d. The Minutes of the Hearing on the 8th of January 2013 confirm that it was stated by the lawyer that his client, namely, the respondent, was aware of the existence, and the date of those proceedings.

56. It is acknowledged by this Court that in 2010, the respondent had advised the Polish authorities of his place of residence in Ireland. However, contrary to his assertions, he did not provide the Polish authorities with his address in Ireland thereafter. The issuing judicial authority, and the Court ruling of the 8th of January 2013 confirms that from the perspective of the Polish authorities, one of the reasons for the refusal to grant any further postponement application, was because the whereabouts of the respondent were unknown. The respondent provides no documentation in support of his assertion in this regard post 2010, and further suggests that his previous lawyer is deliberately avoiding him.

57. In this Court's view, the delay between 2016 and 2021 was not the fault of the Polish

or the Irish authorities. The Polish authorities knew in 2010 of the respondent's address as per the letter dated the 6th of December 2021, and they knew that he was in Ireland at the time of execution of the first warrant. However, by the time of the second postponment application in 2013, the presiding judge took the view that there was no information available in relation to the address or whereabouts of the respondent. Furthermore, the issuing judicial authority confirms that at the time of issuance of the warrrant in 2016, they could not have sent the warrant to Ireland as they did not know the respondent's address and in fact, believed him to be in Germany, having made appropriate inquiries as to his whereabouts with family and friends.

58. In Bednarczyk, surrender was ordered and simply not effected due to a lack of communication and cooordination on the part of the authorities in Poland and Ireland. The lapse of time between the alleged offences and the readmission of the EAWs was between 21 and 24 years. Mr. Bednarczyck was sought for relatively minor offences and the respondent had a child with bipolar disorder. In this Court's view, the facts are very different in the present case.

59. Unlike Bednarczyk, Palonka and Lach, this case involves an extremely serious and violent assault resulting in significant injuries to the victim. The respondent had been present for his trial and conviction on a very serious charge of assault. He knew that he had received a four-year sentence in 2005 and averred to the fact that he came to Ireland in 2006. In this Court's view, he did so in the full knowledge that he was evading a lawfully determined sentence of imprisonment. The respondent exhausted his domestic avenues and knew that he must serve a sentence as consequence, however he sought to take advantage of those domestic avenues, and then sought to avoid serving that sentence by coming to Ireland.

60. Unlike the facts of Palonka, this is not a case that involves at each stage of the Polish

judicial process and police investigations, some degree of delay and confusion.

61. The minutes of the Court Order on the 20th of January 2012 stipulate very clearly, that the imposition of the sentence was inevitable but that it could be postponed to allow the respondent to:

> *"[M]ake some organizational and financial preparations for leaving his non-working live in partner with their newborn baby in the country of their current stay."*

The respondent simply had to have known that the postponement orders were temporary and would, inevitably, be lifted.

62. This Court reiterates the views expressed by Ms. Justice O'Malley in *Minister for Justice and Equality v. Smits* [2021] IESC 27, wherein she states; -

> *"A lawfully issued EAW in respect of a sentence does not somehow become legally invalidated by subsequent delay… A valid order does not, by passage of time, "become" either incorrect, unlawful or void. Use of the word "stale" does not assist with the legal analysis. It is well established that delay is not, in itself, a ground for refusal of surrender unless it is so egregious that the application for surrender amounts to an abuse of process."*

63. It is also worth remembering in this regard, para. 41 of Mr. Justice Burns' judgment in Lach (see above) wherein he stated; -

> *"It is undoubtedly the case that the issuing of a second warrant, where the initial warrant had been unsuccessful due to some technical defect, does not of itself amount to an abuse of process. Similarly, the re-transmission of a warrant where surrender has failed to take place is not in and of itself an abuse of process."*

64. This Court also derives assistance from the case of *Minister for Justice and Equality v. Artur Libera* [2020] IEHC 416, wherein Binchy J. noted at para. 36; -

"[36] While the respondent makes the point that the offences with which the EAW is concerned go back to December 2004, that is not the relevant time to consider any question of delay. In my opinion, the only delay that is of relevance to the objection of the respondent is the delay between the date of issue of the EAW i.e. 19th December, 2016, and the date of its endorsement by this Court, i.e. 11th February, 2019, even though the IJA was asked to explain a longer period of delay. I say this firstly because the respondent himself avers that he came to Ireland in 2006. So the requesting State then had to issue an EAW for his prosecution, which was not executed until 2013. While the respondent points out that the prosecution warrant did not issue until 2012, any complaint of delay associated with the issue of that warrant, should have been addressed at the hearing of the application for surrender made pursuant to that warrant, and not at the hearing of an application advanced pursuant to a later warrant, in this case the EAW.

[37] Secondly, it is clear from the information received from the respondent's lawyer in Poland that, from the date upon which his conviction and sentence became final on 28th December, 2013, the respondent was pursuing lines of redress in the courts in Poland up until at least 11th April, 2016 (see para. 11 above). So that while the respondent complains that the IJA delayed from in or about the time that his conviction was affirmed in December 2013, that complaint really cannot carry any weight up to mid-2016 when (according to his Polish lawyer) he himself was pursuing legal remedies through the courts in Poland.

[38] Nonetheless, in the letter seeking additional information of the IJA, which was sent on 22nd January, 2020, the IJA was asked to explain the delay in sending the EAW for execution. It will be recalled that the EAW issued on 19th December, 2016,

but was not sent to the Central Authority here until 16th January, 2019. The IJA did not address the enquiry about this delay at all in its reply to the request for additional information, which was dated 14th February, 2020. There is therefore an unexplained period of delay, on the part of the IJA, from, at latest, December 2016 when the EAW issued, up to January 2019 when it was sent here, in progressing the application for surrender of the respondent. It has to be said that this is unsatisfactory, but the comments of MacMenamin J. in Vestartas about such a failure to explain fall well short of stating that this must give rise to a refusal to surrender, as the decision in Vestartas itself demonstrates. He did say that an explanation will often be necessary, in order for justice to be done (see para. 27 above, and para. 103 in Verstartas), *but he also said at para. 89 that, unless truly exceptional or egregious, delay will not alter ty he public interest. A delay from December 2016 to January 2019 does not in my view constitute such a delay. Furthermore, in my opinion the issue does not arise in this case in circumstances where the respondent must have known that he was required to serve his sentence in Poland, having exhausted all his legal remedies there by mid-2016."*

65. Ultimately, in this Court's view, the delay in this case is not so egregious as to amount to an abuse of process, particularly in circumstances where much of the delay was caused by the respondent. The process itself also cannot be said to constitute an abuse. Furthermore, in this Court's view, the respondent's familial circumstances do not go beyond the norm. There is no clear, cogent evidence sufficient to rebut the presumption in Section 4A of the 2003 Act.

66. Having considered all of the above, I am satisfied that surrender of the respondent is

not precluded by reason of Part 3 of the Act of 2003 or another provision of that Act, and I dismiss this ground of objection.

67. <u>Is surrender prohibited by Section 45 of the Act of 2003?</u>

Much of the information relevant to this issue is referred to in the preceding paragraphs. Having received and reviewed all of that additional information the respondent submits as follows:

(i) Part "D" of the EAW in the respondent's case indicates that he *"appeared in person at the hearing resulting in the decision"*. This is a palpably incorrect assertion that should not have been made. He was certainly not in attendance before the Circuit Court of Świndica on 14th June, 2006, as the EAW contends, and his assertions in that regard have since been confirmed by the replies received to the multiple Section 20 requests that this Court felt constrained to seek. Information from the issuing state indicates that he was not in attendance, he had not been notified of the trial date and he was only represented by a trainee lawyer, whom he says he did not mandate. The respondent submits that, in circumstances where it has been established that the issuing judicial authority has provided an incorrect narrative to this Court, and/or because the additional information provided by the issuing judicial authority demonstrates that the requirements of Section 45 have not been met, his surrender should be refused and he should be discharged.

(ii) Despite a specific Section 20 request and replies, the EAW still maintains that the respondent did not attend for his appeal hearing. That position has not been ameliorated by the additional information because, as the Polish lawyer retained on behalf of the respondent in the within proceedings, Witold Studziński,

describes it, in "an unknown procedure", the District Court in Wałbrzych has purported to correct the content of the European Arrest Warrant and to suggest that the issuing judicial authority, the Circuit Court of Świndica, made a "mere mistake" in failing to properly complete Part D of the EAW. The respondent submits that this purportedly amended "Part D'" of the EAW, as received under the cover letter from the issuing judicial authority dated 11th May, 2022, is invalid as a matter of Polish law, Irish Law and European Law, and it cannot be relied upon to remedy the defective EAW. It is submitted that surrender must therefore be refused.

(iii) The respondent also submits that, even if there was a valid "Form D" before the Court (which is denied) as Mr. Studziński notes, a photocopy of a power of representation is not effective as a matter of Polish law, if the original or a certified copy of the power of representation is not sent to the Court after it is presented. In that regard, notwithstanding the transcript of the appeal hearing on 14th June, 2006 recording that the power of representation was be sent to that court (*in futurum*), the Circuit Law Court of Świdnica nonetheless purported to uphold the lower court decision on the day of the hearing.

(iv) Furthermore, it is clear from the papers that the Circuit Court at Świdnica adopted what Mr. Studziński describes as a "legal fiction", and operated on the basis that the respondent had been notified of the hearing date, despite the fact that it was readily apparent that he had not received the letter that had been addressed to him. That "legal fiction" meant that the respondent was treated by that Court as if he had been notified of the date of the trial, when he had not been.

(v) Further without prejudice, the invalid "Form D" that was issued by the District Court in Wałbrzych purports to suggest that the respondent was legally represented by a lawyer whom he mandated. Whereas that "Form D" has no legal force or effect for the reasons already cited, and, it is in any event, an incorrect statement because the additional information provided by the issuing judicial authority states that he was only represented by a trainee lawyer, who had been appointed by another lawyer, who had been appointed by the lawyer whom the respondent had mandated. In the circumstances, his representation cannot under any guise be regarded as him in the first instance *being aware of the scheduled trial,* and secondly, as *having given a mandate to a legal counsellor, whom was either appointed by the person concerned or by the State, defend him or her at the trial, and was indeed defended by that counsellor at the trial.* Therefore, Section 45 is not satisfied and his surrender is prohibited.

(vi) The respondent relies on the observations made by Mr. Studziński and his recommendation as to the appropriate practice for a lawyer to adopt where it is deemed necessary to appoint a substitute. This did not occur in the respondent's case and, whatever the rights and wrongs of the appointments process here, as Mr. Studziński notes:

- It is the duty of the lawyer to provide the defendant with an effective defence aimed at protecting his interests. Accordingly, it is the lawyer's duty to prepare together with the client both for the writing of the appeal and for the hearing at which it will be heard.
- In preparation for the trial, the client should be informed about who will actually represent him at the trial. In criminal cases, which require the

utmost trust between the client and the lawyer, it is often the case that the client does not agree to the appointment of another lawyer to represent him at the trial. Mr. Studziński outlines the following:

The practice which I consider correct, however, and which should be regarded as prevailing, was that:

(1) the lawyer, in consultation with the client, prepares for the appeal hearing,

(2) the lawyer informs the client that he will not be able to appear in person at the hearing and that he will appoint a substitute. If the client expressly objects to the appointment of a substitute, the advocate informs the court of such objection and requests an adjournment of the hearing (if possible before it takes place), and if such a request is not granted, it is put forward by the defence counsel present at the hearing. The court is not obliged to grant it - it assesses each situation individually.

The respondent submits that this sensible approach did not occur here; that failure operated to the detriment of the respondent and it cannot now be reasonably contended that he mandated the trainee lawyer to represent him with knowledge of the scheduled trial.

Further, or in any event, having regard to the need for a uniform interpretation of the term “lawyer” in the context of the Framework Decision and with due regard to due process and Constitutional and Convention Rights, it is respectfully submitted that the term “lawyer” does not embrace a person who, albeit being well on the road towards that end,

still falls short of national qualification as a lawyer. There cannot be any equivocation and, should this Court not otherwise refuse surrender, an Art. 267 reference to the CJEU may be required.

68. Legislation

Article 4A of Framework Decision 2002/584 was inserted by Article 2 of Framework Decision 2009/299 and is entitled "Decisions rendered following a trial at which the person did not appear in person." Article 4A states:

"1. The executing judicial authority may also refuse to execute the European arrest warrant issued for the purpose of executing a custodial sentence or a detention order if the person did not appear in person at the trial resulting in the decision, unless the European arrest warrant states that the person, in accordance with further procedural requirements defined in the national law of the issuing Member State:

(a) In due time:

(i) Either was summoned in person and thereby informed of the scheduled date and place of the trial which resulted in the decision, or by other means actually received official information of the scheduled date and place of the trial in such a manner that it was unequivocally established that he or she was aware of the scheduled trial;

and

(ii) Was informed that a decision may be handed down if he or she does not appear for the trial;

or

(b) Being aware of the scheduled trial, had given a mandate to a legal counsellor, who was either appointed by the person concerned or by the State, to defend him or her at the trial, and was indeed defended by that counsellor at the trial;

or

(c) After being served with the decision and being expressly informed about the right to a retrial, or an appeal, in which the person has the right to participate and which allows the merits of the case, including fresh evidence, to be re-examined, and which may lead to the original decision being reversed:

(i) Expressly stated that he or she does not contest the decision;

or

(ii) Did not request a retrial or appeal within the applicable time frame;

Or

(d) Was not personally served with the decision but:

(i) Will be personally served with it without delay after the surrender and will be expressly informed of his or her right to a retrial, or an appeal, in which the person has the right to participate and which allows the merits of the case, including fresh evidence, to be re-examined, and which may lead to the original decision being reversed;

and

(ii) Will be informed of the time frame within which he or she has to request such a retrial or appeal, as mentioned in the relevant European arrest warrant.

2. In case the European arrest warrant is issued for the purpose of executing a custodial sentence or detention order under the conditions of paragraph 1(d) and the person concerned has not previously received any official information about the

existence of the criminal proceedings against him or her, he or she may, when being informed about the content of the European arrest warrant, request to receive a copy of the judgment before being surrendered. Immediately after having been informed about the request, the issuing authority shall provide the copy of the judgment via the executing authority to the person sought. The request of the person sought shall neither delay the surrender procedure nor delay the decision to execute the European arrest warrant. The provision of the judgment to the person concerned is for information purposes only; it shall neither be regarded as a formal service of the judgment nor actuate any time limits applicable for requesting a retrial or appeal.

3. In case a person is surrendered under the conditions of paragraph (1)(d) and he or she has requested a retrial or appeal, the detention of that person awaiting such retrial or appeal shall, until these proceedings are finalised, be reviewed in accordance with the law of the issuing Member State, either on a regular basis or upon request of the person concerned. Such a review shall in particular include the possibility of suspension or interruption of the detention. The retrial or appeal shall begin within due time after the surrender.'"

69. 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."

70. In part D of the EAW dated 6th June 2016, which is the subject matter of these proceedings, the issuing judicial authority had ticked:

"Yes, the person appeared in person at the trial resulting in the decision".

On the basis of the other information provided in the EAW, this appeared to relate to the hearing before the District Law Court of Wałbrzych on the 14th November 2005.

71. In the course of the proceedings before this Court, and as noted above further information was sought and provided to this Court.

72. In this regard on the 6th of July 2021 Circuit Court Judge Bialek provided a letter to this Court including a letter signed by a District Court Judge Slywia Poradisz dated the 7th of July 2021**.** This related to the history of the proceedings between the 1st and 2nd EAW.

73. On the 17th of January 2022 again this Court received a letter Circuit Court Tom Bialek providing information by way of a letter from District Court Judge Sylwia Poradisz dated the 12th January 2022. Judge Poradisz's letter including information and documentation in relation to the aforementioned proceedings.

74. On the 9th of February 2022 again under cover letter Circuit Court Judge Bialek provided information by way of a letter from District Court Judge Sylwia Poradisz dated the 9th of February 2022, including further documentation in relation to the aforementioned proceedings.

75. It became clear from that additional documentation that there had, in fact, been an appeal hearing before the Circuit Law Court in Świdnica on the 6th June 2016. In a request for additional information dated the 4th April 2022, the Court requested that a new part D be

provided, if applicable. In a letter dated 12th of April 2022 from Circuit Court Judge Tom Bialek, he provided this information by way of a letter dated 11th April 2022 from Judge Sylwia Poradzisz, of the District Court of Law in Wałbrzych which was in following terms:

> *"The judgment of conviction and sentenced rendered in respect of Marcin Minierski by the District Court of Law in Wałbrzych on the 14th of November 2005 (file reference II K 396/05) was challeneged by his defence counsel, who lodged an appeal within the prescribed time limit. The Circuit Court of Law in Świdnica heard the appeal filed by the defence counsel of Marcin Minierski and in its judgment handed down on the 14th of June 2006 (file reference IV Ka 290/06) it found the appeal groundless and upheld the original judgment of the District Court of Law in Wałbrzych dated the 14th of November 2005, which became final and legally valid on the day when the Circuit Court of Law in Świdnica issued its judgment.*
>
> *Marcin Minierski did not appear at the trial before the Circuit Court of Law in Świdnica; he had been twice left a notice of the attempted ervice of a notification of the scheduled date of the trial and the notification was then deemed to have been served.*
>
> *Form D with an official note now enclosed."*

The following Part. D. was subsequently provided:

> *"Indicate if the person appeared in person at the trial resulting in the decision:*
>
> *[...]*
>
> *No, the person did not appear in person at the trial resulting in the decision.*
>
> *[...]*
>
> *b. the person was not summoned in person but by other means actually received official information of the scheduled date and place of the trial which resulted in the decision in such a manner that it was unequivocally established that he or she was aware of the*

scheduled trial and was informed that a decision may be handed down if he or she does not appear for the trial.

[…]

c. the person did not request a retrial or appeal within the applicable time frame.

[…]

On the scheduled day of the trial before the Circuiy Court of Law in Świdnica, on the 14th of June 2006, when the Court heard the appeal against the judgment of the District Court of Law in Wałbrzych, dated th 14th of November 2005, filed by the defence counsel of Marcin Minierski, the said sentenced person did not appear. He had been twice left a notice of attempted service of the notification by a postal operator and then the notification was deemed to hav been served. The said sentenced person was represented by his defence counsel."

76. In a further request for additional information, dated the 5th May 2022, this Court requested documentation showing that the respondent had been aware of his obligations regarding the provision of an address for service, a transcript of the appeal court proceedings of the 14th June 2006, and also queried why paragraph 1 (c) of the new part D had not been ticked, since it had been indicated that the respondent had been represented by his defence counsel at the appeal hearing. Further additional information was provided under cover letter from the issuing judicial authority Circuit Court Judge Jerzy Zielinski, enclosing a letter from District Judge Sylwia Poradzisz dated the 10th of May which stated:

"In response to the letter of 5 May 2022, ref. III Kop 55/16 (191/189/21) the District Court of Law in Wałbrzych, the 3rd Criminal Division is transmitting a photocopy of the documentation provided to Marcin Krzysztof Minierski in the course of preparatory (pre-trial) proceedings and a photocopy of the record of the proceedings, as requested

at points 1 and 2 in the said letter, and is also forwarding a corrected 'Part D' along with the official note – explaining that by mere mistake paragraph 1 (c) has not been tricked in the previous version thereof."

The Official Note attached therein states:

"When heard in the course of the preparatory (pre-trail) proceedings Marcin Minierski provided his address for service in Poland. I.e. 103/8 Wroclawska Street, Wałbrzych, and he was advised, among others, of the obligation to appear when summoned thereto, or the obligation to inform the agency conducting the proceedings of every change of his residence or stay lasting longer than 7 days (Article 75 paragraph 1 of the Code of Criminal Procedure), and also of the requirement to provide his new address because if he fails to do so, a writ sent to the original address will be deemed to have been effectively served (Article 139 paragraph 1 of the Code of Criminal Procedure).

When informing Marcin Minierski of the scheduled date of the appeal trial the Circuit Court of Law in Świdnica sent the relevant notification to the address provided by the said sentenced person. The notification was returned to the sender after two notices of attempted service had been left for the addressee by a postal operator and after that it was deemed to have been served. At the trial before the Circuit Court of Law in Świdnica on the 14th of June 2006 Marcin Minierski was represented by his defence counsel. At this trial the Circuit Court of Law in Świdnica issued a judgment which upheld the original judgment rendered by the District Court of Law in Wałbrzych on the 14th of November 2005."

The following Part D. was provided and signed by District Court Judge Sylwia Poradzisz:

"Indicate if the person appeared in person at the trial resulting in the decision:

[...]

No, the person did not appear in person at the trial resulting in the decision.

[…]

b. the person was not summoned in person but by other means actually received official information of the scheduled date and place of the trial which resulted in the decision in such a manner that it was unequivocally established that he or she was aware of the scheduled trial and was informed that a decision may be handed down if he or she does not appear for the trial.

[…]

c. Being aware of the scheduled trial, the perosn had given a mandate to a legal counsellor, who was either appointed by the person concerned or by the State, to defend him or her at the trial, and indeed defended [sic] *by that cousellor at the trial."*

[…]

c. the person did not request a retrial or appeal within the applicable time frame.

[…]

On the scheduled day of the trial before the Circuiy Court of Law in Świdnica, on the 14th of June 2006, when the Court heard the appeal against the judgment of the District Court of Law in Wałbrzych, dated th 14th of November 2005, filed by the defence counsel of Marcin Minierski, the said sentenced person did not appear. He had been twice left a notice of attempted service of the notification by a postal operator and then the notification was deemed to hav been served. The said sentenced person was represented by his defence counsel."

77. Also enclosed therein, was proof that the respondent had been aware of his obligations in relation to the provision of an address. The respondent denies that he signed the document in question. Proof was also provided that that there *had* been a mandate from the

respondent to a lawyer in relation to appeal proceedings and a formal chain of substitutions between lawyers thereafter.

78. The respondent has provided an expert report from a Polish lawyer which confirms that the mandate provided contained no restriction on substitutions, that those substitutions were lawful and that the trainee lawyer who ultimately represented the respondent lawfully did so.

79. A chronology of events provided by the Minister of the period relevant to the Section 45 issue is helpful in this regard:

- **29th November 2004 –** At his interrogation by police, the respondent signs to acknowledge receipt of written information on rights and obligations, including regarding provision of address for service.
- **14th November 2005 –** Conviction and sentence of 4 years imprisonment (with 3 years and 4 months remaining to serve) imposed by the District Law Court in Wałbrzych.
- **17th November 2005 –** The respondent meets his lawyer Karolina Kopik-Naglowska at her office in Wroclaw and signs an authorisation for her to defend him in his appeal. This authorisation has no restriction on the substitution of lawyers. Ms. Kopik-Naglowska, lodges an appeal against the conviction from the 14th November 2005.
- **5th February 2006 –** The respondent moves to Ireland from Poland without notifying the relevant Polish authorities of this or of his new address. It is unclear whether the respondent provides details of his new address to his lawyer. There is no evidence to suggest that the respondent, makes any further enquiries with Ms. Kopik-Naglowska as to how his appeal is proceeding or what the outcome is.

- **14th June 2006 –** The respondent's appeal is rejected by the Circuit Law Court in Świdnica. Attempts to notify him personally of the scheduled date and time of the appeal hearing had failed. He was represented in Court by a trainee lawyer, Ms. Sylwia Chmielinska, who has been lawfully mandated through a process of substitution, whereby lawyer Ms. Agnieszke Kosarzycka-Minor was formally substituted for Ms. Kopik-Naglowska, and Ms. Chmielinska was then formally substituted for Ms. Kosarzycka-Minor.

80. The respondent, through multiple affidavits, avers (see and reviewed above) in summary that he knew nothing of the appeal process or date in relation to these matters. He nonetheless avers that he did engage a lawyer to assist him generally in relation to proceedings but the lawyer who actually appeared for him at the hearing was not the one he originally instructed.

81. The important additional information supporting the above chronology in relation to this issue is set out in a number of letters received by this Court:

(i) In a letter dated 11th April 2022, the following information was received by this Court:

"The judgment of conviction and sentence rendered in respect of Marcin Minierski by the District Court of Law in Wałbrzych on the 14th November 2005 (file ref. II K 396/05) was challenged by his defence counsel, who lodged an appeal within the prescribed time limit. The Circuit Court of Law in Swidnica hear the appeal filed by the defence counsel of Marcin Minierski and in its judgment handed down on the 14th June 2006 (file reference IV Ka 290/06) it found the appeal groundless and upheld the original judgment of the District Court of Law in Wałbrzych dated the

14th of November 2005, which became final and legal valid on the day when the Circuit Court of Law in Swidnica issued its judgment.

Marcin Minierski did not appear at the trail before the Circuit Court of Law in Swidnica; he had been twice left a notice of the attempted service of a notification of the scheduled date of the trial and the notification was then deemed to have been served."

(ii) The issuing judicial authority also provided the Authorisation to Defend:

"The undersigned, Marcin Minierski, does hereby authorise advokat (solicitor/barrister) Karolina Kopik-Naglowska of Solicitor/Barrister's Office in Wroclaw to defend him in courts of 2nd instance in criminal proceedings of file ref. II K 396/05."

(iii) The issuing judicial authority provided the Power of Attorney for a substitute attorney:

"I, the undersigned, solicitor/barrister Karolina Kopik-Naglowska do hereby authorise solicitor/barrister Adnieszka Kosarzycka-Minor to run the case of the following person before courts of all instances."

This document is stamped with the name of Ms. Kosarzycka and there is a further appointment of Sylwia Chmielinska to appear and act in this case as substitute attorney.

(iv) The Court Record of the Appeal Trial dated the 14th June 2006 details:

"The Circuit Court of Law in Swidnica, the 4th Appellate Criminal Division

[…]

Marcin Gruba, Marcin Minierski, and Andrzej Talar charged with an offence under Art.158 §2 et alia following the appeals lodged by the defence counsel of

the accused A. Talar, by the defence counsel of the accused M. Minierski, and by the accused M. Gruba against the judgment rendered by the District Court of Law in Wałbrzych on the 14th of November 2005.

The following person appeared at the trial: the accused Marcin Gruba – brought from the Wałbrzych Reman Prison, his ex officio defence counsel - adw. (solicitor/barrister) Renata Makarska appeared; the accused Andrzej Talar and his defence counsel - adw. (solicitor/barrister) Wojciech Koncewicz both appeared; the accused Marcin Minierski did not appear - notified about the scheduled date of the appeal trial, his defence counsel - apl.adw. (trainee solicitor/barrister) Sylwia Chmielinska substituting adw. (solicitor/barrister) Karolina Knapik - appeared - submits a photocopy of the PoA for a substitute attorney stating that the original document of power of attorney will be sent by post."

82. <u>Discussion</u>

This Court is satisfied that the respondent was present on the date of his conviction and sentence, on the 14th of November 2005. The respondent was clearly aware of the sentence imposed on the 14th of November 2005 as he was present on that date. He had a defence lawyer act for him during the appeal process. The respondent asserts that he knew nothing about the appeal proceedings. This begs the question as to what he could have possibly thought happened to his sentence that was received on the 14th of November 2005. The respondent's repeated assertion that he knew nothing about the appeal, is fundamentally at odds with the documents furnished by the issuing judicial authority. Most emphatically, it is at odds with the document detailing an authorisation to defend the respondent given to Karolina Kopik Naglosska in the

courts of second instance in criminal proceedings of File Ref. IIK 396/06. This is clearly a reference to the appeal process, and it is signed by the respondent. It is also dated the 17th of November 2005, which is three days after his sentence date.

83. The respondent averred that he longer wished to have the services of his previous lawyers. It is clear from the information received from the issuing judicial authority that in the court of first instance, and the appeal, he nominated a Karolina Knopnik, who is the lawyer on record for the appeal hearing, and he signed a power of attorney allowing her to represent him. This again confirms the fact that the respondent had full knowledge of these proceedings. Karolina Knopnik nominated another attorney, Agnieszka Kosarzycka Minor to act for the respondent by means of a Power of Attorney by Substitute Attorney. Ms. Kosarzycka seems, from this document, to work for Kancelaria Adwokocka. Ms. Kosarzycka subsequently appoints Slywia Chmielinska to appear, and act in her name, as a substitute attorney.

84. In this Court's view the respondent was aware of the appeal. As frequently happens in this jurisdiction, and no doubt many other jurisdictions, a lawyer may ask a colleague to stand in for them. This is often due to the mere exigencies of a busy legal practice or due to personal difficulties. Indeed, it seems that such a substitution occurred in the petition hearings on the 20th of January 2012 wherein Barbara Baronowska was:

> "*[T]he attorney in fact as substitution for Rafal Baranowski, duly authorised ex officio. Power of attorney in substitution in the case files."*

85. As noted above, this Court was referred to a report from an expert, Witold Studziński which set out the legal position in Poland. Therein he stated:

> *"[T]he authorisation to defend is signed by the defendant and does not contain in its content any restrictions as to the possibility of appointing substitutes. The content of*

this power of attorney clearly indicates that it concerns the defence of the defendant in the second instance."

The report continues:

"Therefore, from a formal point of view, it must be assumed that the defendant's defence counsel was authorised to grant substitution to another lawyer. From the formal side, it is also correct that the second lawyer established in the case gave further authorisation to the trainee lawyer.

Such action was therefore lawful, all the more so since the defence mandate of 17th November 2005 did not contain in its wording a restriction on the right to appoint a substitute in the case (which, although rare, is sometimes practiced in Poland)."

The report also comments that it would be best practice to ensure that such substitution is discussed with any client:

"[A] lawyer who is out of contact with his or her client at the appeal stage should act with particular caution and consider in particular a request for an adjournment of the hearing or, if unable to agree a defence, terminate the authorisation to defend."

However, italso notes:

"[N]o provisions of the law oblige Polish Courts to determine and confirm whether a substitute acts with the consent or implied consent of the client it is up to the initiative of defence counsel to inform the court that the does not agree to be represented by a lawyer other than the man lawyer appointed in the case."

Ultimately, the report concludes:

"Therefore, I see no fault in the fact that the court heard the appeals at a hearing on 14 June 2006 – all the more so as none of the litigants requested an adjournment of the hearing."

He further states:

> *"Here, we are navigating an area in which there is no legislation that clearly establishes patterns of behaviour. The practice which I consider correct, however, and which should be regarded as prevailing, was that: (1) the lawyer, in consultation with the client, prepares for the appeal hearing, (2) the lawyer informs the client that he will not be able to appear in person at the hearing and that he will appoint a substitute. If the client expressly objects to appointment of a substitute, the advocate informs the court of such objection and requests an adjournment of the hearing."*

This Court bears in mind the fact that this expert has no information as to whether the defendant was in contact with his counsel at the appeal stage. He has not taken up the said files to provide an in depth examination of the case file, nor does he appear to have been asked to do so by the respondent.

86. As previously stated, this Court also finds that the respondent was aware of the conviction and sentence to four years dated the 14th of November 2004. This is also clear from the fact that his lawyer lodged an appeal. This Court notes that during the preparatory proceedings, he provided his address for service in Poland. Of significance, in this regard, is the fact that the issuing judicial authority confirms:

a. He was advised of his obligation to appear when summoned.
b. He was advised of his obligation to inform the Polish authorities of any change of address.
c. He was advised of the fact that if he did not provide a new address that a writ would be sent to a previous address that the writ will be deemed to have been effectively served.
d. The respondent signed documents confirming knowledge of these duties.

e. The Circuit Court of Law Świdnica sent the notification of the scheduled date of the Appeal hearing to the address previously provided by the respondent.

f. Two attempts were made to do so, and the notifications were returned.

87. The respondent avers that he knew nothing of the appeal, and that he knew nothing about the appeal process. This Court, for reasons as set out above, finds this assertion to be lacking in credibility, and rejects same.

88. This Court finds that the respondent unequivocally waived his rights to attend that appeal hearing, and that he did so in circumstances where he made himself unavailable for service. However, he unequivocally waived his rights in circumstances where he had given a mandate to a lawyer to represent him at the hearing.

Relevant legal principles

89. This Court derives considerable assistance from a number of relevant judgements delivered in relation to this issue.

(i) In *Minister for Justice and Equality v. Palonka* [2015] IECA 69, Peart J. stated at para. 33; -

"[33] Applications under the European Arrest Warrant Act, 2003, as amended, are no different in nature. They are sui generis and inquisitorial in nature as opposed to adversarial. The executing judicial authority must be satisfied that the requirements of the Act are fulfilled by the warrant which has been forwarded by the issuing judicial authority, and it does this independently of the parties to the application, albeit with the assistance of submissions made by one or both parties. In such circumstances, it is hard to see how the onus can be placed upon a respondent to raise a matter in relation to non-compliance with the requirements

of the Act before the Court would be obliged to consider for itself whether the requirements of the Act have been met.

(ii) In *Minister for Justice and Equality v. Skwierczynski* [2016] IEHC 802, Ms. Justice Donnelly stated at para. 102; -

"[102] The plain intention of the Oireachtas is that surrender is not to be refused simply on the basis that the requested person's situation does not come within one of the exceptions set out in the Table to s. 45 provided that the High Court can be assured that his surrender does not mean a breach of rights of defence."

(iii) In the appeal of the said case, *Minister for Justice and Equality v. Skwiercczynski* [2018] IECA 204, Mr. Justice Hedigan stated at para. 28; -

"[28] It is submitted that it is appropriate to apply section 5(1)(b) of the Interpretation Act 2005 as was done by the learned High Court judge in this case, resulting in a purposive interpretation of section 45. This means that surrender may be ordered where none of the exceptions in section 45 apply, provided that the trial judge can be satisfied that surrender would not result in a breach of defence rights. In the present case, where the Appellant has already availed of an appeal from the in absentia conviction, it is clear that his defence rights would not be breached by his surrender."

He continued at para. 55; -

"[55] In considering this appeal it is useful to observe that the role of the High Court in dealing with EAW matters is in the nature of an inquiry. The High Court must be satisfied of the matters set out at s. 16 of the EAW Act. There is however in this regard a duty of candour on the part of the person whose surrender is sought. It is of some significance that the appellant has remained silent on what has become one of the

central points in the case i.e. did he or did he not appeal. The issuing authority initially in the EAW form opted for the subparagraph that indicated the appellant did not appeal. Subsequently by a letter of the 13th April 2016, the issuing authority stated that he had lodged an appeal but it was dismissed. When the inconsistency of this was pointed out by the Irish authorities, the issuing authorities responded by providing a mail receipt acknowledgment slip signed by the appellant. This demonstrated that he had in fact been served with the judgment which included instructions on his right to appeal. He acknowledged his signature. This was notwithstanding his previous sworn statement that the last he ever heard of the case was when he left the police station following his arrest and that he was not served with notice of the judgment. This inevitably calls his credibility into question."

(iv) In *Minister for Justice and Equality v. Zarnescu* [2020] IESC 59, Baker J. stated 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."

Baker J. continued at para. 76; -

"[76] More recently in Di Silvio v. Italy (Application No. 56635/13), a judgment delivered on 20th October, 2015, the applicant had sought an adjournment of the hearing of the trial on the grounds of ill health, and did not appear at the adjourned date, although a lawyer instructed by him presented a plea on his behalf. The Court found that he had been informed of the date of the proceedings at first instance and

of his conviction and had appealed that through a lawyer of his choice. It also found that he was aware of the date initially set for the appeal and concluded that he had unequivocally, albeit tacitly, waived his right to appear:-

"In these circumstances, the Court considers that it was for the applicant to contact the counsel of his choice to find out whether the requested postponement had been granted and, if so, what date had been set for the appeal proceedings…the person concerned could also have contacted the registry of the Court of Appeal for information on the progress of his trial." (para. 34)

She further stated at para. 81; -

"[81] The fact that a person is represented by a lawyer where it can reasonably be expected that the lawyer was made aware of the date of hearing or an adjourned date may be relevant to the conclusion that a defendant waived his right to be present: Tedeschi v. Italy (Application No. 25685/06), delivered 28 September 2010."

(v) In *Minister for Justice and Equality v. Schoppik* [2018] IEHC 584, Donnelly J. stated at para. 32; -

"[32] The respondent submits that his surrender would be in breach of s. 45 of the Act of 2003 as he did not appear in person at the proceedings resulting in the sentence order in respect of which the EAW was issued. He submits this in circumstances where he had not given a mandate to a legal counsellor to defend him at the trial as suggested at part (d)3.2 of the European arrest warrant. He submits that the sentence was ordered by decision of the High Court in Olomouc on the 4th May, 2004, in his absence.

[33] Part (d)3.2 of the EAW states that the respondent "being aware of the scheduled trial, the person had given a mandate to a legal counsellor, who was either appointed by the person concerned or by the State, to defend him or her at the trial, and was indeed defended by that counsellor at the trial". Section 45 of the Act of 2003 prohibits surrender if a person did not appear in person at the proceedings resulting in the sentence or detention order in respect of which the EAW was issued unless the EAW indicates the matters required by points 2, 3 and 4 of part (d) of the form of the warrant in the Annex to the 2002 Framework Decision as amended by the Framework Decision of 26th February, 2009, on the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial ("the 2009 Framework Decision").

[34] It is important to state that in the present case the only issue that arose under s. 45 concerned the final hearing of his case before the High Court in Olomouc on 4th May, 2004. His presence at relevant earlier hearings was not in dispute.

[35] In his affidavit, the respondent states at para 14 that: "I agree that I had instructed a counsel to appear at the appeal hearing as I was unable to attend myself due to my recent back surgery, but I had only instructed him to inform the Court that I could not attend in the hope that the matter would be adjourned to a date when I was fit to attend. My lawyer notified me on the 18th May 2004 that he had notified the Court in writing that I was unable to attend because of medical reasons but the Court had proceeded in my absence and convicted me and increased the sentence and increased the level of prison security to medium security. I say that I was not represented at the hearing by any lawyer who was instructed by me."

Decision

[36] Part (d) of the EAW states that the respondent did not appear in person at the trial on 4th May, 2004, during which the judgment was pronounced. Under the 2002 Framework Decision, each member state may choose to prohibit surrender where there has been a trial in absentia unless certain conditions have been met. Ireland chose that option and did so by means of s. 45 of the Act of 2003. The circumstances in which that opt-out is to be exercised formed the basis for the 2009 Framework Decision. By an amendment to s. 45 of the Act of 2003, Ireland implemented the newly inserted Article 4a provisions regarding this optional ground for refusal to surrender.

[37] Part (d)3.2 of the EAW have been relied upon by the issuing judicial authority, these being equivalent to paragraphs 3.2 of the Table set out in s. 45 of the Act of 2003 and of the amended standard form EAW provided for in the 2009 Framework Decision. [38] Information as to how this condition is met is set out at part (d)4 of the EAW as follows: "The person was aware of the trial. - Schoppik was present in the trial on 28th November 2003… - Notice of public hearing…before the High Court in Olomouc …was delivered into Schoppik's own hands on 24th March 2004; - Schoppik apologized through his counsel for his absence in open court for medical reasons; - The judgment of the High Court in Olomouc of 4th May, file no.4 To 25/2004 was delivered into Schoppik's own hands on 19th May 2004." That (d)4 goes on to explain: "He empowered his counsel to represent him. - Filed Power of Attorney of 2nd September 2002 in which Schoppik authorized Mgr. Hana Milatova to represent him in this criminal case; - JUDr. Ladislav Lochman substituted Mgr. Hana Milatova in open court on 4th May 2004 before the High Court in Olomouc where the judgment was awarded by the High Court in Olomouc ."""

She continued at para. 42; -

"[42] Having rejected the respondent's excuse for not showing up for his public hearing, the Czech High Court went on to substitute the respondent's new lawyer for the previously mandated counsel to represent the respondent in absentia. In his own affidavit, the respondent states that the only role of his legal counsel was to seek an adjournment for the public hearing on the basis that he was physically unable to attend the public hearing in Olomouc. Having satisfied that duty, the Czech High Court substituted JUDr. Ladislav Lochman to represent the respondent at the trial to represent the respondent under the terms of the mandate. 43. The primary issue at the oral submissions at the hearing of the matter was whether the respondent had to provide a mandate to JUDr. Ladislav Lochman before he could represent him at the appeal hearing. In my view part (d) 3.2 of the 2009 Framework Decision incorporated in s. 45 of the Act of 2003 makes clear that the respondent is entitled to give a mandate to a legal counsellor, either as appointed by him, or, appointed by the State. Whether the lawyer is appointed by the person or by the State, the mandate has to be given. In this case, there is no dispute that a mandate was actually given to a lawyer. The issuing judicial authority has relied upon that mandate and its existence is not disputed by the respondent. The EAW then states that there was a substitution of the lawyer made in open court. 44. It is common place for an accused to be represented by different lawyers, perhaps in the same firm or perhaps as cover by those in other firms. Indeed, it is an everyday occurrence in Ireland for different solicitors and even counsel to represent an accused on different occasions during the trial. In the present case, this substitution took place in open court. The EAW is clear that this was a substitution of a lawyer

rather than a different mandate. In those circumstances, there can be no breach of s.45 of the Act of 2003 on the face of the EAW as all the relevant information has been given."

(vi) In *Minister for Justice and Equality v Fiszer* [2015] IEHC 664, the respondent averred that whilst he had attended some trial dates, he had left Poland in May 2008, and because his trial continued into August 2008, his lawyer did not have instructions from him to act. While he provided an Affidavit setting out events in the domestic proceedings from his perspective, his averments were deemed to be disingenuous. Donnelly J. stated at para 31 therein; -

"[31] I am satisfied that the respondent had undoubtedly given a mandate at the outset of the trial to the lawyer who appeared for him. Nonetheless, the respondent submitted that this trial lawyer had no mandate to appear for him. He relied upon his averment that he did not keep in touch with the lawyer "…who did not have any instructions to act after this date." This averment is quite disingenuous in its careful obfuscation of the issue. It is not an indication that he withdrew his mandate to the lawyer. In fact, it is really stating the opposite, there was no positive withdrawal of the mandate, there was simply a failure on his part to keep in touch with his lawyer. The respondent's statement concerning lack of instructions is inextricably linked to his statement that he did not keep in touch with his lawyer. In those circumstances, the claim that the lawyer did not have any instructions to act after that date is an inadequate response to the statement in the EAW that the lawyer did have a mandate to act and did indeed act.

[32] This Court must place, and does place, mutual trust and confidence in the statements in the EAW and accompanying documentation provided by the issuing

judicial authority. These documents indicate that this respondent had given a mandate to the lawyer. Furthermore, the Court is entitled to take into account that a lawyer will, in the normal course, only act on instructions. The bare reference by the respondent to not keeping in touch with the lawyer leading to his implication that the lawyer had no longer any instructions to act, does not amount to a direct statement that the instructions were actually withdrawn."

(vii) In *Minister for Justice and Equality v. Jefisovas* [2019] IEHC 248, Donnelly J. concluded at para. 61; -

"[61] In the present case, based upon the law in Hermi, the respondent has not established that his absence from the hearing before the court of cassation was a breach of his fair trial rights within the meaning of Article 6 of the European Convention on Human Rights. The lack of an entitlement to be present at a court of cassation hearing, where his rights to fair trial were fully respected at his trials at first and second instance, does not amount to a breach of those fair trial rights. He has not made any evidential case that the cassation appeal was unfair because his lawyer failed to follow instructions or anything of that nature. In fact, he has failed to engage with the information from the issuing judicial authority at all about his actions in the cassation appeal or his subsequent knowledge of the outcome of those proceedings. While a respondent may not have to engage with the facts where he makes a claim of a breach of s. 45 rights (see the Court of Appeal decision in Minister for Justice v Palonka [2015] IECA 69), he must actively provide cogent evidence to the High Court where he seeks to sustain a point that surrender is prohibited because of a breach of fundamental rights" [emphasis added].

This Court notes that the appeal in Jefisovas, being a cassation appeal was not an appeal hearing covered by Article 4A (1) of the framework decision. Nonetheless, of note, is Ms. Justice Donnelly's words at para 69 wherein she states; -

"[69] Furthermore, I am also satisfied that even if I were to be wrong in my understanding of the decision in Tupikas, the CJEU would follow its findings in both Tupikas at para. 96 (following on from its decision in Dworzecki), to the effect that it is a matter for an executing judicial authority to take into account other circumstances that enable it to ensure that the surrender of the person concerned does not entail a breach of his rights of defence. In those circumstances, where no defence rights have been breached in this particular case, there is also no further reason to seek the preliminary reference."

90. In light of the above caselaw, and in considering all of the information in this case this Court finds:

a. That it acknowledges, and is bound, by the dicta in the judgement of Mr. Justice Peart in Palonka, as affirmed in Jefisovas, wherein he stated:

"The executing judicial authority must be satisfied that the requirements of the Act are fulfilled by the warrant which has been forwarded by the issuing judicial authority, and it does this independently of the parties to the application, albeit with the assistance of submissions made by one or both parties. In such circumstances, it is hard to see how the onus can be placed upon a respondent to raise a matter in relation to non-compliance with the requirements of the Act before the Court would be obliged to consider for itself whether the requirements of the Act have been met."

b. The information in the case comes from the issuing judicial authority, or is endorsed by the issuing judicial authority or emanates from other judicial sources, whose *bona fides* this Court entirely accepts.

c. This Court must, and does, place mutual trust and confidence in the statements of the issuing judicial authority.

d. In this Court's view, and in accordance with the judgements of Zarnescu and Tupikas, it is the duty of this Court to ensure that the rights of the person are upheld by taking due consideration of all of the circumstances characterising the case before it, including the information which it may itself obtain.

e. Looking at the EAW, and the additional information as whole, at a bare minimum, it is clear that the respondent attended the court of first instance. He did not attend the appeal hearing brought by the respondent, but a lawyer represented him at same.

f. This Court is satisfied to rely upon the information that confirms the salient features of the domestic process that would ordinarily form part Part D of the warrant, but said information can of course come in other forms.

g. The High Court must be satisfied of the matters set out at s. 16 of the EAW Act. There is, however, in this regard, a duty of candour on the part of the person whose surrender is sought.

h. This Court finds the averments of the respondent to be lacking in credibility, particularly in respect of his knowledge of the appeal process, and insofar as he avers that his lawyer told him he was free to move to another country despite his pending sentence. The former suggestion is entirely at odds with the contents of the documentation furnished by the issuing judicial authority, and it is in that

which this Court must place its trust. In short, the respondent has not been honest in his dealings with this Court.

i. This Court is entitled to take the view that a lawyer will in the normal course only act on instructions.

j. The respondent's solicitor has averred:

"[That] he has made efforts to contact Karolina Kopik but has not as yet managed to make contact with her".

This Court is not aware of how significant those efforts were. While the contact details of almost any solicitor can now be obtained by a simple Google search, it is not clear if emails were sent, if letters were sent, whether they were in English or Polish or whether telephone calls were made. If calls were made, how many? In what language? It is not clear what, if any other steps were taken. No adjournment was sought by the respondent to allow his solicitor to make further or better efforts. More importantly, no efforts have been made by the respondent's solicitor to contact the lawyer who represented the respondent at the appeal hearing.

k. Obviously, it is not possible for the issuing judicial authority to provide any information that touches upon matters the subject of lawyer client privilege.

l. In relation to the complaint about a different lawyer acting for the respondent at the appeal hearing, in this Court's view, the judgment given by Donnelly J. in Schoppik gives clear guidance on this issue, particularly para. 44 therein which states; -

"[44] It is commonplace for an accused to be represented by different lawyers, perhaps in the same firm or perhaps as cover by those in other firms. Indeed, it is

an everyday occurrence in Ireland for different solicitors and even counsel to represent an accused on different occasions during the trial. In the present case, this substitution took place in open court. The EAW is clear that this was a substitution of a lawyer rather than a different mandate. In those circumstances, there can be no breach of s.45 of the Act of 2003 on the face of the EAW as all the relevant information has been given."

This guidance is based on sound law and logic.

m. This Court must apply a purposive interpretation to Section 45 of the Act of 2003 in looking at all of the circumstances of the case.

n. This Court finds that although the lawyer engaged by the respondent changed, his mandate did not.

91. In summary, the respondent states that the EAW in this application did not contain the correct Part D information, the EAW must have referred to the court of first instance and in so far as there was no reference to an appeal. He is correct in this regard. The respondent submits that the final Part D which is furnished, despite being sent under cover letter by the issuing judicial authority it is not signed by the issuing judicial authority. This assertion is also correct. However, these issues do not prohibit surrender.

92. The first question that this Court must ask itself is whether it can reliably determine what occurred on the relevant dates of the domestic hearings. In that regard, this Court has an abundance of additional, reliable information from the issuing judicial authority. This Court has received same, along with other information which is either endorsed by the issuing judicial authority or by other judicial sources, such as to allow this Court to conclude, without equivocation, as follows:

a. The respondent was present for the District Court hearing on the 14th of November 2005.

b. The respondent was not present for the Circuit Court hearing on the 14th of June 2006, but his defence counsel was.

c. The latter can be determined with or without assistance from Part D of the EAW or the Part D furnished on the 11th of April 2021 or the Part D of the 10th of May 2021.

93. The respondent submits that there is no evidence that the respondent was aware of the date of the hearing of the 14th of June 2006 and he is correct in that regard. Again, however, this does not prohibit surrender. As it appears to this Court, the respondent took positive steps to be unavailable for service of notification of the appeal hearing. This, however, is not the central issue. Rather, the central issue is that he unequivocally waived his right to attend, in circumstances where he had given a mandate to a lawyer to appear on his behalf.

94. The respondent submits that he was represented by a trainee lawyer and not the lawyer that he had originally instructed. Once again, he is correct in this regard. However, such circumstances do not in and of themselves present as a bar to surrender.

95. As I have stated above, the Court must apply a purposive interpretation to Section 45 of the Act of 2003, and in so doing, must consider all of the circumstances of this case. In light of the foregoing, this Court finds that the act of entrusting a substitute trainee lawyer to act for the respondent at oral hearing cannot in itself be considered a bar to surrender. Nor do the surrounding circumstances of this case raise any question that it might be so. In this Court's view, from the information put before the Court, the rights of the respondent under Section 45 of the Act of 2003 have been fully vindicated. As a consequence, this ground of objection is dismissed.

96. Surrender of the respondent is not prohibited by Part 3 of the Act of 2003 or any part of that Act.

97. It therefore follows that this Court will make an order pursuant to Section 16 of the Act of 2003 for the surrender of the respondent to the Republic of Poland.