THE HIGH COURT

[2022] IEHC 735

[2021 No. 37 EXT.]

BETWEEN

MINISTER FOR JUSTICE AND EQUALITY

APPLICANT

AND

ROBERT LECH PRZBYLSKI

RESPONDENT

JUDGMENT of Ms. Justice Caroline Biggs delivered on the 10th 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 1st of February 2021 ("the EAW"). The EAW was issued by Circuit Court Judge Joachim Wieliczuk, as the issuing judicial authority.

2. The EAW seeks the surrender of the respondent in order to enforce a sentence of two years imprisonment which was imposed on the 17th of November 2006. The warrant seeks the surrender of the respondent to serve the cumulative two-year sentence imposed in his absence for twenty, mostly fraud and driving-type offences.

3. The EAW was endorsed by the High Court on the 15th day of February 2021 and the respondent was arrested and brought before the High Court on the 18th day of February 2022.

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, and 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. The sentence in respect of which surrender is sought is in excess of four months' imprisonment.

7. The respondent objected to surrender on a number of extensive grounds, however, Counsel for the respondent confirmed during the oral hearing and in his written submissions, that the only grounds being relied upon were as follows:

I. Non-compliance with Section 45 of the Act of 2003:

The proposed surrender of the respondent, for the offences set out in the EAW, is in breach of Section 45 of the European Arrest Warrant Act of 2003 (as amended) because the respondent did not appear in person at the trial of the offences or when the sentence or detention order was imposed in respect of which the EAW was issued. The trial of the respondent took place, *in absentia*. The respondent did not receive any notification regarding a date for a Court hearing and he did not receive the judgment from the Court. The European Arrest Warrant Act 2003 as amended, does not disclose with sufficient particulars and sufficient clarity how the final sentence came into being and on that premise the surrender of the respondent should be refused.

II. Undue interference with the respondent's Article 8 rights, particularly on the ground of delay:

The proposed surrender of the respondent in respect of the said offences to the issuing State is prohibited by Section 37 of the Act of 2003 (as amended), because it constitutes, *inter alia*;

(i) A breach of his constitutional rights to fair procedures, *inter alia* because of the cumulative inordinate and unjustified delay in issuing, endorsing and executing the within warrant.

8. The respondent swore an affidavit dated 4th April 2022 wherein he averred to the following:

- The respondent moved to Ireland in August 2006 and has lived here ever since. His two children, now aged 24 and 22, live with him and his wife.
- He recognises the voluntary submission to penalty provided by the Polish authorities on the 1st April 2022, dated the 29th May 2006. He confirms that he signed that notice. He did so on the advice of a lawyer, Maciej Luczynski, who told him that if he did this, he would receive a suspended sentence. He asked the lawyer to represent him. He now understands that the lawyer did not represent him at the sentence hearing and that a sentence of two years was imposed on him.
- He never received any notification of the imposition of this penalty or any information about his capacity to appeal.
- In 2006, the respondent's father lived with his step-mother at ul. Bohaterow Westerplatte 6/3 in Gorzów Wlkp. He did not live there. He had previously resided at ul. Czartoryskiego 18/3 in Gorzów Wlkp. He rented that property from the local council between 2001 and 2003. When his National ID card issued on the 23rd October 2001, this was the address at which he resided and this address features on his then issued ID card. Between 2003 and 2005 he lived at Oginsekiego 14D/12 in Gorzów Wlkp, a house he had purchased. He sold this property to repay money taken in the criminal offences which are the subject of the warrant. Between 2005 and leaving for Ireland in 2006, his

wife lived with her mother. He was working as a mechanic in Germany (close to the Polish border). He was initially contacted by Police about these offences in October 2005. He returned to Poland every second day to sign in at the Police station in Gorzów Wlkp for a period but he cannot, at this point, be certain of when this requirement stopped. It certainly stopped after he signed the voluntary submission to penalty.

- Between signing the voluntary submission to penalty form in May 2006 and the hearing on the 17th November 2006, he never received any notice informing him of the hearing date. He was unaware of the hearing date. At all times, he understood that he would receive a suspended sentence.
- Since moving to Ireland, the respondent has worked as a truck driver. His wife and children (then aged 8 and 6) came to Ireland in the weeks after he did. His children have been educated in Ireland. His son, aged 24 commenced a course of study in September 2022. His daughter, aged 22, is currently studying Psychology.
- The respondent's wife raised their children in Ireland. She is 49 years of age. Last year, she was diagnosed with lung cancer. The respondent understands that the form of lung cancer she suffers with is called Adenocarcinoma, which is an aggressive form. She has received treatment in the Mater Hospital and in the Beacon Hospital. In the last month, she was treated in hospital for almost two weeks and had an operation which involved the removal of a portion of one lung. She is currently recuperating at home but requires assistance and will continue to require assistance. The respondent is now her principal carer and this illness, coupled with these proceedings, are causing him a great deal of stress.

- The respondent avers that he is unaware of the reason for the delay in seeking his surrender. His father, who lived at ul. Bohaterow Westerplatte 6/3 in Gorzów Wlkp, knew that he had moved to Ireland. He lived at that address until his death in 2016. He states that he does not understand how it has taken over 15 years to seek his surrender to Poland.

9. <u>Is surrender prohibited by Section 38 of the Act of 2003?</u>

The 'Fraud' box has been ticked under Part E.1. of the warrant pursuant to Article 2.2. in relation to the first fifteen offences. No manifest error is apparent. There remains five offences for which correspondence must be established. This Court finds correspondence between four of those offences in the EAW and offences in this jurisdiction, as follows:

- Offences 16 and 17 correspond to the offence of Driving whilst Disqualified under Section 38 of the Road Traffic Act 1961 (as amended).
- Offence 19 corresponds to the offence of Forgery under Section 25 of Criminal Justice (Theft and Fraud Offences) Act 2001, or Attempted Forgery contrary to Common Law.
- Offence 20 corresponds to an offence of Threat to Kill under Section 5 of the Non-Fatal Offences Against the Person Act, 1997.

10. The respondent initially submitted that there was insufficient information to establish correspondence in relation to offence 18, which is described in the warrant as follows:

> *"On September 29, 2005, in Gorzów Wielkopolski, at the moment of apprehension by police officers of the 1st precinct in Gorzow Wielkopolski, Robert Przybylski was in possession of a driver's license issued in the name of Mariusz Fred, license No: 03950/04/0861 and F1215383, which had been lost in July 2005, which is an offence contrary to Article 276 of the Polish Penal Code."*

Further information was subsequently furnished in relation to offence 18. In the additional information dated 12th April 2022, the issuing judicial authority stated:

> *"With respect to the drivers licence included in the charge number 18, it appears from the explanations given by Robert Przybylski and recorded on sheet no. 116 that 'Regarding the documents found on me that belonged to Mariusz Fred, i.e. registration certificate and drivers licence, I borrowed a Nissan Pririo car from Mariusz Fred. He left those documents in the glove compartment and when I was going into the bank I took them from the glove compartment and put them in my wallet so that no one would steal them. On Thursday, I came to the bank by car borrowed from him. I have known Mariusz Fred for about 2 years. It is a good acquaintance.'*
>
> *On the other hand, when questioned as a witness, Mariusz Fred testified on sheet no. 105 as follows: 'I recall drinking a lot of alcohol at a party and I don't remember exactly what happened there, A few days after that party, i.e. after 2 days, I found that I did not have my driving license and it had been a new driving license. I did not report it to the police. At the Department of Motor Vehicles I applied for a duplicate of my driving licence and it was issued to me. That is all.'*
>
> *Robert Przybylski did not explain what he was going to do with that driving license."*

11. It is clear that the respondent took the driving licence without the owner's consent, knowledge or authority and did not return it to him. This was to the detriment of the owner who believed it to be lost (the respondent not having told him he took it) and had to apply for a duplicate. The respondent pleaded guilty to the offence.

12. On the basis of the information provided, this Court finds correspondence between

offence 18 and an offence of Theft under Section 4 of the Criminal Justice (Theft and Fraud Offences) Act 2001. The respondent conceded this point at oral hearing, and therefore, this ground of objection is dismissed.

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

Under Part D of the warrant, the issuing judicial authority has noted that the respondent did not appear in person at the trial resulting in the decision. The EAW states:

> "*[T]he 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*."

Under the section for additional information, the EAW states:

> *"Robert Lech Przybylski did not appear for the trial during which the judgement was announced, whose scheduled date he had been duly notified. Furthermore, he submitted an application for voluntary submission to penalty. He was represented by the defense* [sic] *counsel. No appeal was lodged against the judgment."*

14. Of importance, the issuing judicial authority states by way of additional information dated 15th March 2022:

> *"2.a [T]he convicted Robert Przybylski designated the following address at the address for service: ul. Bohaterów Westerplatte 6/3 in Gorzów Wlkp. [sheet no. 753]; [T]he notification of the date of the hearing was sent to the address mentioned above, however it was not collected by Robert Przybylski and was mentioned above, however it was not collected Robert Przybylski and was returned along with the annotation made by the post office clerk that the addressee did not live any longer at the designated address [sheet no. 1025], therefore, the notification was posted to the*

address previously designated by the convicted person, i.e. ul. Cazartoryskiego 18/3 in Gorzów Wlkp. [sheet no. 114], where it was not collected by the convict, although two advice notes were issued [sheet no. 1009] – that is why, the Court recognised that the notification of the convicted person [sheet no. 1032-1033] about the date of the hearing had been effective and the judgment of the conviction was pronounced consistent with the request filed by the Prosecutor's Office as well as by the convict under submitting himself voluntarily to the penalty [sic]*;*

b. [R]equest put forward by the convicted person to voluntarily submit himself to the penalty [sheet no. 882-883];

c. [T]he convicted person's defence counsel was the attorney Maciej Luczynski [sheet no. 181-182] – the attorney did not lodge an appeal against the judgment – although duly notified of the date of the hearing [sheet no. 1010], he was not present at the hearing [sheet no. 1032-1033];

3. Under point V., the first indent of the judgment, the Court found Robert Przybylski guilty of the offence described in point XVII, of the preliminary part of the judgment and imposed on him the penalty of deprivation of liberty for the period of 6 months;

4. [U]nder point VII. Of the judgment, the period of actual deprivation of liberty form 29.09.2005 until 29.10.2005 and on 23.03.2006 was regarded by the Court as a deduction with respect to the aggregate penalty of deprivation of liberty as ruled against the convicted person;

5. [T]he date of the hearing to review the request filed by the convicted Robert Przybylski to voluntarily submit himself to the penalty, under conditions previously agreed with the Public Prosecutor, was set on 17.11.2006 and pertained to all the charges brought against the convicted person by the Public Prosecutor – hence the aggregate penalty of deprivation of liberty imposed on the convict."

15. The issuing judicial authority further confirmed by way of additional information dated

12th April 2022:

"Robert Przybylski was represented by his defence counsel, who did not appear at the hearing. The defence counsel was authorised to represent Robert Przybylski by his wife Beata Przybylska (power of attorney – sheet no. 182)."

16. 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.

17. 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."

18. The Table to Section 45 sets out in four numbered paragraphs, the circumstances in which a person tried *in absentia* can be surrendered with a view to identifying whether the person was aware of the scheduled date and the place of the hearing which resulted in the decision:

"3.1a. the person was summoned in person on . . . (day/month/year) and thereby informed of the scheduled date and place of the trial which resulted in the decision and was informed that a decision may be handed down if he or she does not appear for the trial;

OR

3.1b. the person was not summoned in person but by other means actually received official information of the scheduled date and place of the trial which resulted in the decision, in such a manner that it was unequivocally established that he or she was aware of the scheduled trial, and was informed that a decision may be handed down if he or she does not appear for the trial;

OR

3.2. being aware of the scheduled trial, the person had given a mandate to a legal counsellor, who was either appointed by the person concerned or by the State, to

defend him or her at the trial, and was indeed defended by that counsellor at the trial; OR

3.3. the person was served with the decision on… (day/month/year) and was expressly informed about the right to a retrial or appeal, in which he or she has the right to participate and which allows the merits of the case, including fresh evidence, to be re-examined, and which may lead to the original decision being reversed, and the person expressly stated that he or she does not contest this decision,
OR the person did not request a retrial or appeal within the applicable time frame; OR 3.4. the person was not personally served with the decision, but — the person will be personally served with this decision without delay after the surrender, and — when served with the decision, the person will be expressly informed of his or her right to a retrial or appeal, in which he or she has the right to participate and which allows the merits of the case, including fresh evidence, to be reexamined, and which may lead to the original decision being reversed, and — the person will be informed of the time frame within which he or she has to request a retrial or appeal, which will be . . . days."

19. The respondent submits that Section 45 of the Act requires that a person must be unequivocally informed of the date of hearing if the issuing state is to avoid offering a guarantee of retrial or appeal. In this case, there is no dispute that the respondent was aware of an investigation which could lead to the imposition of a penal sanction. The respondent has averred that in 2006 he signed the voluntary submission to penalty papers provided by the issuing judicial authority on the 1st day of April 2022. However, he submits that the signing of these papers on the 29th day of May 2006 is not sufficient to allow this Court to determine, unequivocally, that the respondent was aware of the hearing date, particularly where the respondent has averred, positively, that he was unaware of the date. It is further conceded by

the respondent that he had asked a lawyer to represent him at the hearing. It appears, however, that the nominated lawyer did not in fact attend at the hearing on the 17th day of November 2006.

20. In order to understand these submissions, the following chronology of events, derived from both the additional information received and the EAW itself, should be understood:

- On 29th May 2006, the respondent signed a voluntary submission to penalty of two years imprisonment for the twenty offences to which he had entered guilty pleas.
- The respondent knew that the two-year custodial penalty would be before the Polish Court on a future date. The respondent requested to be sentenced to two years imprisonment on that future date.
- As such, it appears that the respondent gave two addresses to the prosecuting authorities in relation to his prosecution for the offences contained within the warrant. The prosecuting authorities sent notifications of the hearing date to both of those addresses. The first was returned, stating that the respondent no longer lived at that address and the second was not collected. From the postal stamps, the notifications were sent in September/October 2006. The respondent avers he was living in Ireland from August 2006. There is no indication that the Polish authorities were informed that the respondent had moved to Ireland.
- The respondent chose not to appear at the sentence hearing and but did so in circumstances where a mandate had been given to a lawyer to appear on his behalf.

- The respondent left Poland for Ireland in August 2006. However, he did not notify the Polish authorities of this or of any means which could be used to contact him.
- In September and October (and November) 2006, the Polish authorities wrote to the respondent at the two addresses previously provided by him to notify him of the sentence date, but the correspondence was returned in the first instance and not collected in the other.
- The respondent's wife mandated a lawyer to come on record for the respondent in the proceedings and a Power of Attorney was signed (but undated) in this regard. This Power of Attorney was submitted to the District Court by the lawyer with a covering letter dated the 13th of October 2005.
- At the hearing on the 17th of November 2006 the respondent and a number of other accused did not appear. A lawyer appeared for one of the absent co-accused.
- The court record of the 17th of November confirmed that the lawyer for the respondent was notified of the hearing but he did not appear at the hearing.
- At answer no. 5 of Section 20 response dated 15th March 2022, the issuing judicial authority refers to the hearing of 17th November 2006 as:

  "…*[T]he hearing to review the request filed by the convicted Robert Przybylski to voluntarily submit himself to the penalty, under conditions previously agreed with the Public Prosecutor...".*

- It is evident that the voluntary submission to penalty is characterised as a request for the penalty agreed with the Public Prosecutor to be imposed. The Court did accept the agreed penalty and it was duly imposed on the respondent in his absence.

- The agreed sentence of two years imprisonment was imposed on the respondent at the sentence hearing on 17th November 2006.

21. Further additional and important information was furnished to this Court by the respondent's Solicitor by way of Affidavit dated the 26th of July 2022, wherein he averred:

- Following a court hearing in relation to this warrant held on the 28th June 2022, he wrote on the 29th June 2022 to the lawyer engaged by the respondent to deal with his case at first instance in Poland to ask why he was not present at the hearing, namely Mr. Maciej Luczynski. He did this by way of email addressed to "adwokat.pl@wp.pl." In his reply, Mr. Luczynski stated:

  "I really cannot tell why I was absent at that [sic] *day (17th November 2006) in court on* [sic] *Mr. Przybylski's court case. The time is just too long to remember this, to be exact and to be true."*

- On receiving this reply on the 19th July 2022, he sent a further email posing the following questions:

  i. Had you been given a mandate to represent Mr. Przybylski in case VII K 330/06? Has Mr. Przybylski paid fees to you for legal representation in respect of case VII K 330/06?

  ii. The minutes of the hearing on the 17th November 2006 indicate that you were "duly notified of the date of the hearing." Were you so notified?

  iii. Do you retain any records (paper or electronic) in relation to Mr. Przybylski and case VII K 330/06? If so, please let us know what steps would need to be taken by Mr. Przybylski to obtain a copy of these records?

- He states that he received a reply dated the 22nd July 2022 which contained the following responses:

  (i) I had a mandate to represent Robert Przybylski in case VII K 330/06.

(ii) Paid.

(iii) I was notified about a court case on 17th of November 2006.

(iv) Have none. There are just the court files in Sąd Rejonowy Gorzowie Wlkp.

- He states that, for the avoidance of doubt, all communications he has had with Mr. Luczynski have been in English. He refers to a copy of the last email he received from Mr. Luczynski, which contains within its body all matters averred to in his Affidavit.

22. Relevant Legal Principles

In *Minister for Justice and Equality v. Palonka* [2015] IECA 69, Peart J. stated at para. 8; -

"[8] None of the other parts of the Table are relevant to this appeal, save paragraph 4 which, importantly for this case, states: "If you have ticked the box under points 3.1b, 3.2 or 3.3 above, please provide information about how the relevant condition has been

met:" and space is provided for such information to be inserted. However, in the .present case this space provided for information to be inserted into paragraph 4 has been left empty. No information has been provided as to how condition 3.2 has been satisfied in this case. The Court is left only with the facts stated in 3.2 which

follow the template provided for in the Table contained in section 45. If paragraph 4 had been completed, the Court - and the appellant of course - would know what facts are relied upon for the issuing judicial authority's statement in effect that the appellant

had engaged a lawyer to represent him at the Circuit Court in Poznan, and that the lawyer did so. The appellant would be in a position to decide whether there were grounds for disputing the accuracy of what was stated.

[9] It would not be difficult, for example, for the issuing judicial authority to state the means by which the appellant is considered to have become aware of the scheduled

date, and to state the name of the lawyer who was engaged to appear, and perhaps to go further and state that the court record has noted that the particular lawyer appeared before the court in Poznan and represented the appellant on the date in question. None of that information has been provided, and it is this lacuna which leads the appellant to now contend that the failure to provide this required information means that section 45 of the Act has not been complied with, and accordingly that the trial judge ought not to have been satisfied that the provisions of section 16(1)(c) of the Act were satisfied, and that he therefore had no jurisdiction to grant the application for his surrender to the authorities in Poland."

Peart J. continued at para. 26; -

"[26] It is undoubtedly correct that when interpreting the Act of 2003, in the face of some ambiguity between what is stated in the Framework Decision and what is provided for in the Act, a literal interpretation of the Act must yield to an interpretation which conforms to the stated aims and objectives of the Framework Decision, but only so far as the latter conforming interpretation is not contra legem – see Case of Pupino (Case C-105/03); [2005] ECR 1-05285. Where such a conforming interpretation leads to a meaning which is contrary to the clear meaning of the national law, the former must yield to the latter, since it is 'contra legem'.

[27] The trial judge concluded in the present case that the information which might be provided in point 4 of the Table was redundant information, and that no further information beyond that contained in point 3.2 was required in order to fulfil the objectives of the Framework Decision. He did on the other hand acknowledge in his judgment in Surma, and upon which he placed reliance in this case, that "the scheme clearly contemplates that the executing judicial authority must have some entitlement to review the assessment of the issuing judicial authority in those scenarios, otherwise

there is no logical reason why amplifying information would be required to be provided at point 4, and that "it was clearly envisaged that a person facing surrender should be able to challenge the information provided by the issuing judicial authority in support of its certification". However he went on to place the onus on the respondent to first adduce cogent evidence to contradict the certification before the Court could decide that the information certified was not factual, and go behind the certification.

[…]

[32] It must be recalled that these surrender applications are 'sui generis' in nature. They are regarded as inquisitorial rather than adversarial proceedings. It is the Court itself which inquires into the correctness or otherwise of the application for surrender, and whether all the requirements are met. A number of judgments have made this clear. In Attorney General v. Parke [2004] IESC 100, albeit a case under the Extradition Act, 1965 and not a European arrest warrant, Murray CJ (as he then was) stated:

"The burden of proof of facts which may rest on the applicant in these proceedings is not that of a criminal trial. I hasten to add that the learned High Court Judge did not approach this matter on such a basis and it is just that I consider it appropriate at this point to distinguish between extradition proceedings and other forms of proceedings, criminal and civil. An extradition proceeding pursuant to the relevant Acts has its own special features which in a certain sense makes it sui generis." Later in the same judgement, he stated:

"The role of the requested State, indeed its duty, is to give effect to a lawful request from a requesting State, once it is determined that the request fulfils the criteria laid down by the relevant legislation …. The responsibility for bringing a person named in

the warrant before the High Court clearly rests with the authorities in the State. Once that is done the task in determining whether all legal requirements for the making of an Order pursuant to section 47 [Extradition Act, 1965] are fulfilled rests with the High Court Judge. That is an inherently inquisitorial function".

[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.

[…]

[38] In my view, there is no onus upon a respondent to raise by cogent evidence an objection or contradiction in relation to the issuing judicial authority's certification before the executing judicial authority should concern itself with the failure by the issuing judicial authority to complete the warrant at point 4(d) where point 3.2 is relied upon. I respectfully agree with the statements of the trial judge as set forth in the preceding paragraph. Where the issuing judicial authority has indicated by ticking the appropriate box in the Table that it is relying upon point 3.2, it is required to amplify that certification by the provision of information in the space provided in point 4. If it fails to comply with that requirement, the executing judicial authority cannot properly fulfil its statutory function. Neither, for his own purposes, can the

respondent question the basis of the certification, as that basis has not been made apparent as required. It is reasonable in such circumstances that the issuing judicial authority should provide some detail as to the basis on which it certifies those facts, and, as previously stated in this judgment, it is a requirement, one would think, that is easily fulfilled on the part of the issuing judicial authority. The failure to provide this information is not an insubstantial failure or omission, since it inhibits the executing judicial authority from properly performing its task; and from a fair procedures point of view, it inhibits the requested person from asserting a focused contradiction to the facts so certified, or raising some issue in relation to it."

23. In Case C-270/17 PPU *Tadas Tupikas*, the Court of Justice of the European Union stated at para. 74; -

"[74] It must therefore be held that the concept of 'trial resulting in the decision', within the meaning of Article 4a(1) of Framework Decision 2002/584, must be understood as referring to the proceeding that led to the judicial decision which finally sentenced the person whose surrender is sought in connection with the execution of a European Arrest Warrant."

The CJEU further stated at para. 91; -

[91] Consequently, in a case such as that in the main proceedings, it is in relation to appeal proceedings of that kind that (i) the issuing judicial authority must provide the information referred to in Article 8(1) of Framework Decision 2002/584, and (ii) the executing judicial authority is empowered, in accordance with Article 15(2) of that Framework Decision, to request additional information which it considers necessary to enable it to take a decision on the surrender of the person concerned."

The CJEU continued at para. 96; -

"[96] Moreover, since Article 4a of Framework Decision 2002/584 provides for an optional ground for non-execution of the European arrest warrant, and as the cases described in paragraph 1(a) to (d) of that Article were conceived as exceptions to that optional ground for non-recognition, the Court has already held that the executing judicial authority may, even after it has found that those cases do not cover the situation of the person who is the subject of the European Arrest Warrant, take into account other circumstances that enale it to ensure that the surrender of the person concerned does not entail a breach of his rights of defence (see, to that effect, judgment of 24 May 2016, Dworzecki, C-108/16 PPU, EU:C:2016:346, paragraphs 50 and 51).

[97] Thus, Framework Decision 2002/584 does not prevent the executing judicial authority from ensuring that the rights of the person concerned are upheld by taking due consideration of all the circumstances characterising the case before it, including the information which it may itself obtain, provided that compliance with the deadlines laid down in Article 17 of that Framework Decision is not called into question."

24. In *Minister for Justice and Equality v. Zarnescu* [2020] IESC 59, Baker J. stated at para. 40; -

"[40] The net issue in the appeal is whether and in what circumstances a person who does not appear in person at the hearing leading to the decision to be enforced can be surrendered, notwithstanding that the facts do not fall within the exceptions identified in the Table to s. 45."

Baker J. further stated at para. 50; -

[50] It is useful to start with the decision in Dworzecki, a case concerned with service of a summons on an adult belonging to the household of the person whose surrender

was sought, and who had undertaken to pass the summons on to that person. The Court recognised a general right on the requested court to examine the circumstances leading to the non-attendance because:

'50. Furthermore, as the scenarios described in Article 4a(1)(a)(i) of [the Framework Decision] were conceived as exceptions to an optional ground for nonrecognition, the executing judicial authority may in any event, even after having found that they did not cover the situation at issue, take into account other circumstances that enable it to be assured that the surrender of the person concerned does not mean a breach of his rights of defence.

51. In the context of such an assessment of the optional ground for nonrecognition, the executing judicial authority may thus have regard to the conduct of the person concerned. It is at this stage of the surrender procedure that particular attention might be paid to any manifest lack of diligence on the part of the person concerned, notably where it transpires that he sought to avoid service of the information addressed to him.'

[…]

[52] The Court of Justice in Zdziaszek (Case C-271/17 PPU), EU:C:2017:629 held that article 4a(1) of the Framework Decision permits the executing authority to refuse surrender where the information provided either on the standard form or following request for further information does not establish the existence of one of the situations referred to in the express provisions of the article. The Court of Justice went on to state the general proposition that:

'However, the Framework Decision does not prevent that authority from taking account of all the circumstances characterising the case before it in order to ensure that the rights of the defence of the person concerned are

respected during the relevant proceeding or proceedings.'

The Court continued at para. 61; -

"[61] Recital 1 of the 2009 Framework Decision provides that the right of an accused

person to appear in person at trial is not absolute and that 'under certain conditions the accused person may, of his or her own free will, expressly or tacitly but unequivocally, waive that right.'

[…]

[63] In the light of the decision of the Court of Justice in Dworzecki and the language of the Frameworks Decisions, the requested court may examine the behaviour of a requested person with a view to ascertaining whether it has been unequivocally established that he or she was aware of a trial date and the consequence of nonattendance, with a view to ascertaining if an informed choice was made not to attend.

This in practical terms means ascertaining whether the person has knowingly waived his or her rights to be present at trial.

[…]

[65] This means that if the person sought to be returned under an EAW appears in person at the relevant hearing, that person is to be returned. If that person has not appeared in person or through nominated lawyers at the relevant hearing, but the circumstances meet those expressly identified in s. 45, equally no impediment exists to return. This case concerns the third possible scenario, where the circumstances of the trial giving rise to the request for return do not fit within those expressed in the exceptions contained in s. 45. Return may still be ordered, but only if the court is

satisfied having made an appropriate inquiry that the rights of defence of the requested person have been met. As will be apparent then, the analysis of the facts must have as its aim the objective of ascertaining whether the rights of defence are sufficiently protected."

Baker J. further stated at para. 70 as follows; -

"[70] That leads to another proposition that where a person has not been notified of a

date of hearing, a waiver of a right to appear cannot be inferred. In practice, this means that actual knowledge of the date must be shown, albeit as will be discussed below, actual knowledge can be shown from extrinsic evidence. A person charged with a criminal offence must not be "left with the burden of proving that he was not seeking to evade justice" (para. 88), although national authorities may assess whether

there exists good cause for a person's absence at a hearing.

She went on to state 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)

[77] The Court held that whilst it was not clear whether he had taken any such steps, his counsel was present at the adjourned hearing date."

Baker J. concluded at para. 90; -

"[90] From this analysis the following emerges:

(a) The return of a person tried in absentia is permitted;

(b) Article 4(6) of the 2002 Framework Decision permits the refusal to return where the requested state has a legitimate reason to refuse the EAW;

(c) A person tried in absentia will not be returned if that person's rights of defence were breached;

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

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

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

(g) In so doing the requested authority must be satisfied that it has been

established unequivocally that the accused person was aware of the date and place of trial and of the consequences of not attending;

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

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

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

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

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

(m) A waiver may be express or implicit from the circumstances, but an implication that a requested person has waived his or her rights to be present at trial is not to be lightly made and will not be made if it has not been unequivocally established that the person was aware of the date and place of trial;

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

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

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

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

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

25. 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. His trial continued into August 2008, and he averred that his lawyer did not have instructions from him to act. Whilst he provided an Affidavit setting out events in the domestic proceedings from his prospective, 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."

26. The Court has also considered the judgment of Hedigan J. in *Minister for Justice and Equality v. Skwierczynski* [2018] IECA 204, wherein he states at para. 54; -

"[54] In the appellant's grounds of appeal at para. 4 it is claimed that the evidence did not support the learned High Court judge's finding that the appellant had had the benefit of a full appeal. In his submissions at para. 19, the appellant claims that there was no evidence whatsoever to show that he had been entitled to or availed of a full appeal. In submissions in court, Mr. Munro, senior counsel on his behalf submitted that there was no evidence of a proper appeal. He pointed out that the Polish authorities initially stated that the appellant had not applied for an appeal but now stated that he did and that it was rejected. Finally, the appellant in his submissions at para. 40 argues that the appeal described in the EAW referred to a factual

consideration of the matter and the admission of new evidence. He argues that this does not equate to a full appeal on the merits and on the law.

[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."

27. In *John v. Rees* [1970] 1 Ch 345, Megarry J. Held that a failure to afford natural justice in the form of an opportunity to make representations, even in a case which appeared to be open and shut, would still render a decision void. Therein, he stated; -

"It may be that there are some who would decry the importance which the courts attach to the observance of the rules of natural justice. "When something is obvious," they may say, "why force everybody to go through the tiresome waste of time involved in framing charges and giving an opportunity to be heard? The result is obvious from

> *the start." Those who take this view do not, I think, do themselves justice. As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change. Nor are those with any knowledge of human nature who pause to think for a moment likely to underestimate the feelings of resentment of those who find that a decision against them has been made without their being afforded any opportunity to influence the course of events."*

This element of Megarry J.'s judgment was quoted with approval by O'Flaherty J., giving the judgment of the Supreme Court in *Gallagher v. Revenue Commissioners (No. 2)* [1995] 1 I.R. 95. It was further quoted with approval by O'Donnell J. (as he then was) in *Kelly v. Commissioner of An Garda Síochána* [2015] IEHC 279.

28. In *Minister for Justice and Equality v. Tokarski* [2012] IEHC 148, the respondent had signed a similar form to the instant case on which a penalty of one year and two months was agreed between the police/prosecutor and the respondent. This was subsequently confirmed before a Court where the respondent was not present. Mr. Justice Edwards Held therein, that this was not a trial within the meaning of Section 45 of the Act and that notwithstanding the respondent's presence at the police station and subsequently with the prosecutor when this plea was indicated, the respondent had been tried *in absentia* (at p.11):

> *""Trial" as is understood in Irish law imports a determination of guilt or innocence by a properly constituted court of law, i.e., by a judge appointed either under the Constitution of the state in question or otherwise in accordance with its laws; alternatively, where the law of the relevant state permits it, by a jury following a trial in an indictable matter before both judge and jury. Pleas of guilty are, of course,*

commonplace in Ireland but they are entered before a judge following an arraignment of the accused in court and the judge, assuming he is prepared to accept the plea (in rare circumstances he can refuse to do so and direct the entry of a plea of not guilty on behalf of the accused), then records the conviction. In Ireland there are no circumstances in which either the police, or an official such as a prosecutor, can receive a plea of guilty from an accused and have a conviction recorded on the basis of it. At most, all that can be received is an indication from the accused as to his intentions upon arraignment when he is brought before the Court of trial.

Secondly, the Court believes that the evidence contained in the additional information dated the 22nd of February 2012 establishes that that is also the position in Poland. When the document in question refers to the fact that the respondent "pled guilty" before the police, and again later on before the state prosecutor, it is manifest that he merely agreed that when brought before a court he would plead guilty in return for the authorities recommending to the court the imposition a specific pre-agreed penalty. It is abundantly clear that he was not actually arraigned.

[…]

In all the circumstances of the case the Court is satisfied that the respondent was in fact tried and convicted in absentia, and in the absence of a s.45 undertaking it must refuse to surrender him."

This approach was subsequently confirmed by the Supreme Court (Murray C.J.) at page 20 of the judgment in *Minister for Justice and Equality v. Tokarski* [2012] IESC 61; -

"*But since the court clearly had to be satisfied that the evidence as to the admission of guilt (and agreement of the sentence) could be relied upon, one can reasonably infer that such a person could raise an issue concerning the validity of any written agreement to admit the offences and accept the sentence whether on the ground of*

undue duress or improper pressure to do so, or the like. In any event, irrespective of any such inference, it is clear that the Polish court had to make a judicial decision as to whether it would accept the evidence tendered by the prosecution as to the respondent's admission, and therefore whether or not to convict. In my view, that issue, as to whether he should be convicted by the court, was clearly an issue which was tried, even if on the narrow basis as to whether his written admissions should be accepted as valid and justifying a conviction.

Equally, it is clear that the Polish court had, at the same hearing, to try an issue as to the sentence which should be imposed on the respondent. The judicial authority has pointed out, in the information provided, that the Polish court had jurisdiction to impose a greater sentence than that which had been agreed, having considered all the matters before it, including the facts recited in the indictment. If it did do so it would have had to adjourn the matter to allow, or ensure, the presence of the accused. Consequently, it appears to be open to a Polish court in cases such as the present to conclude that a person should not be convicted or should be given a sentence different from that which had been agreed with the prosecutor, if the circumstances of the case lead it to such a conclusion.

In short, the Polish District Court had to determine whether, in all the circumstances on the basis of the matters placed before it, the respondent should be convicted and, if so, what the sentence should be. The fact that the court determined in this case that the conviction and sentence should be in accordance with the earlier formal admissions he made to the police and prosecutor and the agreed sentence does not take away from the fact that those issues were tried and determined by it."

29. In summary, and in light of the above case law, this Court notes the following:

a. The words of Mr. Justice Peart in Palonka wherein he states; -

"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. In this case, the issuing judicial authority has provided information and detail in relation to the basis upon which it certifies Part D. Namely, that the respondent did not attend the hearing, but was duly notified according to Polish law. Further, the issuing judicial authority confirms in the EAW that the respondent submitted to a specified penalty and during the course of this process, he was represented by counsel. The issuing judicial authority later confirmed that this penalty previously agreed, was imposed by a Court on the 17th of November 2006. The respondent's lawyer though notified did not attend the Court hearing.

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

d. Whilst the conviction and sentence were in accordance with the earlier formal admissions he made to the police and prosecutor, the agreed sentence was tried and determined by a Court. Thus, the date of same, the 17th of November 2006, was a trial date for the purposes of Section 45 of the Act of 2003.

e. Looking at the EAW and the additional information as whole, it is clear that the respondent made himself unavailable for service of the summons in

relation to the hearing on the 17th of November 2006. He thus unequivocally waived his right to attend. However he did so in circumstances where the respondent mandated a lawyer to attend the hearing of the 17th of November 2006. His lawyer did not attend.

f. As to the reason why this lawyer did not attend, no further documentation or information can be provided in relation to this issue by the issuing judicial authority. As it would apply to any such situation in this jurisdiction, legal professional privilege prevents any further steps being taken by the issuing judicial authority in seeking out such information.

g. The Court is entitled to take into account that a lawyer will, in the normal course, only act on instructions.

h. The High Court must be satisfied of the matters set out at Section 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.

i. With the consent of the respondent, the lawyer mandated by him was contacted. Although this lawyer confirms that he was paid by the respondent, that he was mandated to appear for the respondent, and that he was aware of the hearing date, he did not attend, and can give no explanation to the Court as to why he did not attend.

j. This Court has considerable concerns about the credibility of the respondent insofar as he avers that he was to receive a suspended sentence, however, his averment that he mandated a lawyer to attend the said hearing is borne out by the information from the issuing judicial authority.

k. Whilst it can be said that the respondent may have put his head in the sand after the hearing, and elected not to seek out relevant information in relation to the

hearing, this Court notes the words of Ms. Justice Baker in Zarnescu, in this regard wherein she stated at para. 85; -

"[85] In Dworzecki, the United Kingdom government argued that attention could be paid to the diligence exercise by a person in order to receive information addressed to him or her. The Court of Justice rejected that argument, albeit it accepted that regard may be had to the conduct of the person concerned: "In the context of such an assessment of the optional ground for nonrecognition, the executing judicial authority may thus have regard to the conduct of the person concerned. It is at this stage of the surrender procedure that particular attention might be paid to any manifest lack of diligence on the part of the person concerned, notably where it transpires that he sought to avoid service of the information addressed to him." (para. 51)

[86] While the conduct or diligence of a person may be relevant, its relevance is to the question of whether there has been knowledge, and the Court fell far short of stating a proposition that the lack of diligence in, for example, following up correspondence is sufficient to permit the imputation of knowledge and a consequential decision that there has been an implicit waiver of the right to appear."

l. In this Court's view, and in accordance with the judgments of Zarnescu and Tupikas (cited above), it is the duty of this Court to ensure that the rights of the respondent are upheld. This is achieved by taking due consideration of all the circumstances characterising the case before it, including the information which it may, itself, obtain.

m. The respondent mandated a lawyer to act and appear for him at the hearing of this matter. That lawyer did not turn up to the hearing and can provide no

explanation as to why that was. The respondent has acted candidly and openly in relation to this aspect of matters, with the assistance of his solicitor in this jurisdiction.

n. This Court must apply a purposive interpretation to the legislation.

o. The respondent waived his right to attend the hearing but did so in circumstances where his participation was to be through a lawyer that was mandated to attend on his behalf. The respondent was not defended by that his lawyer. His lawyer can provide no good reason for his failure to attend.

p. In all of the circumstances there has been a breach of the respondent's defence rights under Section 45 of the Act of 2003 and therefore surrender is prohibited by that section.

30. It, therefore, follows that this Court will make an order refusing the application for surrender to the Republic of Poland.

31. **Is surrender prohibited by Section 37 of the Act?**

For completeness sake, this Court will deal with this ground of objection. The respondent came to Ireland in August 2006 and has been here for over 15 years. His family is based in Ireland. His father in Poland has died, and his wife is receiving intensive medical treatment for an aggressive disease. It is submitted by the respondent that the delay of 15 years in seeking the surrender of the respondent requires explanation.

32. The issuing judicial authority provided an explanation for the delay in relation to this warrant in a letter dated the 12th of April 2022 as follows:

"The European Arrest Warrant (EAW) was issued on 08.03.2011. It could not be inserted in the SIS because the Public Prosecutor's Office had conducted a search for the convicted person and their SIS Alert had been issued earlier. On 31.03.2011 the Public Prosecutor's Office removed the entry on the search from the SIS and the

EAW was entered on the same day. On 12.09.2014 the alert was updated following the amendment of the SIS II Requirements. On 20.10.2020 the National Police Headquarters in Warszawa informed the Court that Robert Przybylski was in Ireland and in consequence, the EAW, Ireland-focused, was sent. On 01.02.2021 the EAW alert was updated using the new form."

33. The Polish authorities did not become aware that the respondent was living in Ireland until 20th October 2020. This is clear from the additional information received from the issuing judicial authority dated 12th April 2022, which states that it was only at this time that the EAW, which was issued on 8th March 2011, became "Ireland-Focused". It was received by the Central Authority in Ireland on 11th November 2020 and came before this Court for endorsement on 25th January 2021 under record number 2021/14 EXT.

34. The Court queried whether the warrant complied with certain statutory provisions, such as Section 45 of the Act, and consequently, the Central Authority wrote to the Polish Authority on 26th January 2021 requesting further information under Section 20 of the Act. By way of response, on 1st February 2021 a new EAW issued and on 15th February 2021, the new warrant was endorsed by this Court. It was assigned record number 2021/37 EXT and the previous warrant bearing record number 2021/14 EXT, was withdrawn. The respondent was arrested on foot of the new warrant on 18th February 2022, and brought before this Court pursuant to Section 13 of the Act.

35. The Supreme Court set out the test which must be applied where an application for surrender is opposed on the grounds of Article 8 of the ECHR. In *Minister for Justice and Equality v. Vestartas* [2020] IESC 12 MacMenamin J. stated at para 89; -

"[89] Though a matter of legitimate concern, in this case the delay is to be viewed against the respondent's private and family circumstances. Unless truly exceptional or egregious, delay will not alter the public interest, although there may come a point

where the delay is so lengthy and unexplained as to constitute an abuse of process, or to raise other constitutional or ECHR issues. The High Court judgment holds that there had been a significant dilution of the public interest which would ordinarily apply (para. 37). It posed what was characterised there as a modified and weakened public interest in surrender, evidenced by the elapses of time and other factors. Against this, it posed the private and family factors in the case (para. 38). But for the reasons set out above, there was a misapprehension as to the nature of the assessment. This is not a balancing exercise where public and private interests are placed equally on the scales. It is nonetheless necessary to have regard to the circumstances."

MacMenamin J. went on to state at para 94; -

"[94] The contrast with the exceptional facts in J.A.T. is plain. For an Article 8 defence to succeed, it can only be on clear facts based and cogent evidence [sic]*. The evidence must be sufficient to rebut the presumption contained in s.4A of the Act (see, para. 41 above). The circumstances must be shown to be well outside the norm; that is, truly exceptional. In the words of s.37(1), they must be such as would render an order for surrender ―incompatible with the State's obligations under Article 8 of the ECHR. This would necessitate that the incursion into the private and family rights referred to in Article 8(1) was 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."*

36. In *The Minister for Justice and Equality v. Smits* [2021] IESC 27, the Supreme Court noted at para. 62; -

"[62] Dealing with the issue of the elapse of time, McMenamin J. noted indications that the trial judge might have thought this could in itself suffice to defeat an EAW

application, by reference to the decision of this Court in Finnegan. However, the decision in Finnegan had clearly been limited to the unusual facts of that case. Delay could not alter the public interest considerations unless it reached a point where it was so lengthy and unexplained as to amount to an abuse of process, or to raise other constitutional or ECHR issues. On the facts in Vestartas, delay was a matter of legitimate concern but was to be viewed against the background of private and family circumstances that fell very far short of those in J.A.T. (No.2)."

It was further stated by O'Malley J. at para. 80; -

"[80] […] It is not obvious that a person who absconds in the knowledge that he or she is subject to a final order of imprisonment should thereby become entitled to a level of court protection not available to those who commence their sentences but might wish to have it reduced after some passage of time. In this jurisdiction, when an appeal has been disposed of, and the final order made, the criminal justice process is complete so far as the criminal courts are concerned. If there is an issue as to the lawfulness of a person's imprisonment, that issue will be dealt with by courts exercising a different jurisdiction."

37. In *Minister for Justice and Equality v. D.E.* [2021] IECA 188, the Court of Appeal stated at para. 67; -

"[67] The questions certified by the High Court were as follows: "In the context of proceedings under the European Arrest Warrant Act 2003 as amended, where a respondent objects to surrender on the basis that same is precluded by s. 37 of the said Act as it would be in breach of the respondent's rights under art. 8 ECHR and having particular regard to the provisions of art. 8(2) ECHR:

1. Can personal or family circumstances, in and of themselves, provide a basis upon which surrender might be precluded by s. 37 of the Act of 2003?

2. What is the appropriate test to be applied by the Court in determining whether such an objection is sustained and that surrender should be refused?

3. In so far as exceptionality may be a relevant factor in determining such an objection, what is the appropriate test to be applied by the Court in determining whether the circumstances found to exist are so exceptional as to justify refusal of surrender"

For the reasons set out in this judgment, it is appropriate to answer all three questions by repeating the principles set out at para 59 above:

(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."

38. In the circumstances, and in light of the above, this Court finds that there is no culpable delay on the part of the executing or the issuing judicial authority. While this Court of course has sympathy for the respondent and his family, his circumstances do not go beyond the norm and the presumption in Section 4A of the Act of 2003 has not been rebutted. This ground of objection is therefore dismissed.