APPROVED JUDGMENT
NO REDACTION NEEDED

THE COURT OF APPEAL

Record No. 138/2023

Neutral Citation Number [2024] IECA 119

Edwards J.

Kennedy J.

Burns J.

Between/

MINISTER FOR JUSTICE

Appellant/Applicant

V

RYSZARD SZLACHCIKOWSKI

Respondent

JUDGMENT of Mr. Justice Edwards delivered on the 10th day of May 2024.

Introduction

1. Before this Court is an appeal brought by the Minister for Justice (i.e., "the appellant" or "the applicant") against the judgment and consequent Order of the High Court (Stack J.) of the 24th of May 2023, by which a request, pursuant to Article 27.4 of Council Framework Decision 2002/584/JHA of the 13th of June 2002 on the European arrest warrant and the surrender procedures between Member States, as amended (i.e., "the EAW Framework Decision") and as implemented by s. 22(7) of the European Arrest Warrant Act 2003, as amended (i.e., "the Act of 2003"), for the consent of the High Court to proceedings being

brought against Mr. Ryszard Szlachcikowski (i.e., "the respondent") for the purpose of executing two sentences of imprisonment which were imposed on him in Poland in 2009, was refused by the court below.

2. The respondent, who had previously resided in Ireland, had earlier consented to his surrender to the Republic of Poland, which was sought by the Katowice Circuit Court on foot of an EAW (i.e., "the EAW"), in respect of seventy-seven fraud offences, which surrender took place on the 27th of October 2021. While remanded in custody there following his surrender in relation to those matters, a separate issuing judicial authority in the Republic of Poland, namely the Sosnowiec Circuit Court (i.e., "the issuing judicial authority"), by Decision and Request dated the 20th of June 2022, requested, via the Central Authority for the European Arrest Warrant in the Irish Department of Justice, that the Irish High Court (as "executing judicial authority") would consent to the execution of two sentences of imprisonment imposed on the respondent on separate dates in 2009, which were not covered by the EAW. It should be stated that the request conspicuously made no mention of the fact that the respondent was tried and sentenced *in absentia* in respect of the respective offences, which comprised file reference XI K 596/08 and file reference XI K 21/09, nor did it detail any of the procedural history of the cases.

3. The respondent objected to the High Court giving its consent to the execution of those further sentences in Poland. His opposition was originally founded on four grounds, but by an *ex tempore* judgment dated the 27th of January 2023 (in respect of which the respondent has not appealed), the High Court judge dismissed *in limine* three of those four grounds, which left a sole ground, which was concerned with the issuing judicial authority's compliance with the requirements of Article 4a of the EAW Framework Decision, transposed in Irish law by s. 45 of the Act of 2003, to be considered.

4. The relevant surviving ground of objection was pleaded in these terms in his Notice of Objection dated the 1st of November 2022:

> "***1.*** *The imprisonment of the respondent would be contrary to Part 3 of the EAWA and, insofar as it is applicable, the Framework Decision. In particular and without prejudice to the generality of the foregoing he submits that consent should not be given because :-*
>
> [...]
>
> ***(c)*** *His surrender would be prohibited by section 45 EAWA on the grounds that this Honourable Court does not have available to it any "Form D" or other details in relation to the trials that resulted in the sentences the subject matter of the request and/or the preceding trials that impacted on that sentence.*
>
> [...]".

5. The respondent was successful in opposing the application before the High Court. The respondent having been successful, the appellant lodged a Notice of Expedited Appeal to this Court in which she advanced the following grounds in support of her appeal.

> "*The trial judge correctly made findings of fact that the Respondent consciously and deliberately waived his right to be present at his trial. The trial judge erred in law in refusing consent pursuant to section 22(7) of the Act of 2003, in that:*
>
> 1. *The High Court erred in finding that where there is an unequivocal waiver of defence rights through a manifest lack of diligence as to service, there is a further conditional requirement that there must be an express indication to a respondent that a trial in absentia may proceed in the event that he knowingly absconds.*
> 2. *The High Court ought to have made an order for consent where it found a manifest lack of diligence as to service by the Respondent and a waiver of his*

right to be present at trial, notwithstanding whether statements at paragraph 3.1b of a putative Part (d) table were present or otherwise.

3. *The High Court ought to have made an order for consent where it found that the Respondent was aware of the likelihood that correspondence relating to criminal charges would be sent to the address he provided but consciously and deliberately avoided service, whether the Respondent had been expressly informed that a trial in absentia might proceed in the event that he were to abscond or otherwise*".

Background to the matter

File reference XI K 596/08

6. On the 3rd of April 2008, the respondent committed an offence contrary to Article 244 of the Polish Penal Code. The factual background to this offending was that he drove a motor vehicle contrary to the judgment and order of the Sosnowiec District Court of the 6th of July 2007 by which he was prohibited from driving any motor vehicle. In respect of this offence, he was sentenced by the said District Court on the 21st of January 2009 to 6 months' imprisonment.

7. The High Court was satisfied that there was correspondence between the said offence under Article 244 of the Polish Penal Code and an offence contrary to s. 38(5) of the Road Traffic Act 1961, as amended, which namely is the Irish offence of driving whilst disqualified.

8. The procedural history to this matter was in part described in a reply to a request dated the 6th of October 2022, pursuant to Article 15(2) of the EAW Framework Decision and s. 20(1) of the Act of 2003, for further information. The information provided by the issuing judicial authority, in a reply dated the 11th of October 2022, on foot of this request for further information, stated as follows:

"*In the case, the procedural steps were held at 3 dates of hearings. The accused Ryszard Szlachcikowski was notified about all three dates by sending a notification to the address he indicated in the preparatory proceedings. All three notices were upon the issuance of advice notes and were not collected. The accused did not appear at any of the dates, and the proceedings therefore proceeded in his absence. At the third hearing date, in the absence of the accused, a default judgment was passed. The judgment was sent to the address indicated by the accused, it was notified by the issuance of advice note and it was not collected. No appeal proceedings were pending*".

9. On the 30th of January 2023, further or additional clarifying information was sought, and to that end an additional request for information clearly stated the following questions on which it sought answers:

"*1. In relation to both Ref. file Sygn. XI K 596/08 and Ref file Sygn. XI K 21/09, please state the facts which establish that the requested person was actually aware of each of the hearing dates leading to the judgment?*

2. Please state any other facts which establish that the requested person waived his right to attend?

3. Please provide the address which was indicated by the requested person?

4. Please indicate the stage of the preparatory proceedings at which the requested person provided the address?

5. Please provide any available information that demonstrates that the requested person was resident at that address on the dates that the notifications of the relevant hearing dates were sent?

6. Please indicate the date of the hearings of the trial resulting in the decision?"

10. In reply to these questions, the issuing judicial authority stated by letter dated the 14th of February 2023:

> "*Circuit Court in Sosnowiec, X-th Division for Enforcement of Judgments - in reply to your letter of 2 February 2023 provides the relevant information concerning the case XI K 596/08:*
>
> 1. *There was one hearing date in the case on 21.01.2009, during which the procedural steps were carried out. There are no facts indicating that the accused was actually aware of the date of the hearing. The summons for the hearing was sent to the address he indicated, but despite two notifications, it was not received.*
> 2. *The accused was personally instructed during the preparatory proceedings that letters sent to the address indicated by him would be deemed delivered if he changed his place of residence without providing a new address or if he did not stay at the address indicated.*
> 3. *In the preparatory proceedings, Ryszard Szlachcikowski indicated as his address* [address redacted]
> 4. *Ryszard Szlachcikowski provided his address in the preparatory proceedings during questioning as a suspect*
> 5. *The accused person did not provide information that he was going to change his place of residence*
> 6. *There was one hearing date in the case on 21.01.2009, during which the sentence in default was pronounced*".

11. No part of the 6-month sentence imposed on the 21st of January 2009 in respect of the offence the subject matter of file reference XI K 596/08 was served by the respondent.

File reference XI K 21/09

12. On the 20th of March 2007, the respondent committed an offence contrary to Article 286 § 1 of the Polish Penal Code, in conjunction with Article 64 § 1 of the same instrument. The facts of this offending were that the respondent, within a five-year period from serving a sentence of at least 6 months' imprisonment for an intentional similar offence, acted in order to gain material benefit, through deception, and in so doing misled employees of a particular named bank (i.e., "the lending bank") as to the possibility of him meeting his financial obligations arising from loan instalments. In the course of so doing, he obtained the sum of 62,385.42 PLN (Polish złoty) for the purchase of a motor vehicle. In October 2007, the respondent was said to have appropriated a vehicle entrusted to him under the loan agreement with the lending bank, contrary to Article 284 § 2 of the Polish Penal Code. It was said that the effect of this deception was that the lending bank made a loss of 59,594.13 PLN. Arising from his conviction for this aggregate offending, the respondent was sentenced to a 1-year term of imprisonment on the 30th of January 2009.

13. The High Court was satisfied that there was correspondence between the above offending contrary to Articles 286 and 284 of the Polish Penal Code and s. 6 of the Criminal Justice (Theft and Fraud) Offences Act 2001, which namely is the Irish offence of obtaining a gain by deception.

14. Similarly to the requests for further information in relation to file reference XI K 596/08, and contained in the same correspondences as those requests, the High Court sought clarification of certain matters. The initial reply by the issuing judicial authority, which again was dated the 11th of October 2022, simply detailed:

> "*In the case, the procedural steps were held at 3 dates of hearings. The accused Ryszard Szlachcikowski was notified about all three dates by sending a notification to the address he indicated in the preparatory proceedings. All three notices were upon*

the issuance of advice notes and were not collected. The accused did not appear at any of the dates, and the proceedings therefore proceeded in his absence. At the third hearing date, the announcement of the judgment was postponed for a period of 3 days. The accused was not notified in writing about the postponement of the pronouncement of the judgment (Polish regulations do not provide for the obligation to notify the parties in writing in such a situation). The judgment was pronounced in the absence of the accused person, it was a default judgment. The judgment was sent to the address indicated by the accused, it was notified by the issuance of advice note and it was not collected. No appeal proceedings were pending".

15. Again, much like in the case of file reference XI K 596/08, further clarifying information was sought in relation to the above, and to that end the issuing judicial authority was asked the further questions which have already been detailed at para. 9 above. The issuing judicial authority duly responded, again on the 14th of February 2023, and furnished the High Court with the following answers:

"*Circuit Court in Sosnowiec, X-th Division for Enforcement of Judgments - in reply to your letter of 2 February 2023 provides the relevant information concerning the case XI K 21/09:*

1. *There was one hearing date in the case on 26.11.2009, during which the procedural steps were carried out. There are no facts indicating that the accused was actually aware of the date of the hearing. The summons for the hearing was sent to the address he indicated, but despite two notifications, it was not received.*
2. *The accused was personally instructed during the preparatory proceedings that letters sent to the address indicated to him would be deemed delivered*

if he changed his place of residence without providing a new address or if he did not stay at the address indicated.

3. *In the preparatory proceedings, Ryszard Szlachcikowski indicated as his address* [address redacted]
4. *Ryszard Szlachcikowski provided his address in the preparatory proceedings during questioning him as a suspect*
5. *The accused person did not provide information that he was going to change his place of residence*
6. *In principle, one hearing was held in the case on 26.11.2009 (earlier hearings were held, but on 26.11.2009 the proceedings were conducted from the beginning). The sentence was postponed until 30.11.2009. The sentence was given in default*".

16. The respondent served no part of the 1-year sentence imposed on the 30th of November 2009 in respect of the offences the subject matter of file reference XI K 21/09.

Relevant Legislation

17. Article 27(4) of Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (i.e., "the 2002 Framework Decision") provided as follows:

"*A request for consent shall be submitted to the executing judicial authority, accompanied by the information mentioned in Article 8(1) and a translation as referred to in Article 8(2). Consent shall be given when the offence for which it is requested is itself subject to surrender in accordance with the provisions of this Framework Decision. Consent shall be refused on the grounds referred to in Article 3 and otherwise may be refused only on the grounds referred to in Article 4. The decision shall be taken no later than 30 days after receipt of the request.*

For the situations mentioned in Article 5 the issuing Member State must give the guarantees provided for therein".

18. Article 3 of the 2002 Framework Decision specifies grounds for mandatory non-execution of a European arrest warrant. Article 4 of the same instrument specifies grounds for optional non-execution of a European arrest warrant; and Article 5 sets out the guarantees to be given by the issuing member state in particular cases. Article 5.1 set out the guarantees to be given before a person who had been tried *in absentia* could be surrendered.

19. By virtue of Framework Decision 2009/299/JHA of 26 February 2009 (the 2009 Framework Decision), which amended the 2002 Framework Decision, the original Article 5.1 was deleted, and it was replaced by the insertion of a new Article 4a in the 2002 Framework Decision. The newly inserted Article 4a provided:

"*Article 4a*

Decisions rendered following a trial at which the person did not appear in person

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 that trial in such a manner that it was unequivocally established that he or she was aware of the scheduled trial;

and

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

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".

20. Transposition of the 2009 Framework Decision, so as to incorporate the new Article 4a into Irish domestic law, while also taking account of the deletion of Article 5.1 from the 2002 Framework Decision, was achieved by means of amendments to s. 45 of the Act of 2003 (as originally enacted) effected by s. 23 of the European Arrest Warrant (Application to Third Countries and Amendment) and Extradition (Amendment) Act 2012 (i.e., "the Act of 2012).

21. Of further relevance is that amongst the changes wrought by the 2009 Framework Decision was the substitution of a new Part (d) in the Annex to the 2002 Framework Decision, such that the form provided for now incorporates a Table (which has been reproduced verbatim in s. 45 of the Act of 2003, as amended) for the purpose of seeking to elicit certain information from the requesting party of likely relevance to an executing judicial authority in determining whether, having regard to Article 4a, it is appropriate in the circumstances of a particular case to surrender a person who was tried in absentia. The Table is in these terms:

" *TABLE*

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

1. □Yes, the person appeared in person at the trial resulting in the decision.

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

3.If you have ticked the box under point 2, please confirm the existence of one of the following:

□ *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 re-examined, 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.

4.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:

[…]".

The High Court's judgment

22. In para. 11 of her judgment the High Court judge observed, correctly in our view, that:

"*Article 27.4 must therefore now be read as referring to Article 4a, as well as Articles 3, 4 and the remaining provisions of Article 5. In other words, consent pursuant to Article 27.4 may be refused in the case of a decision rendered in absentia unless the information 4 required by Article 4a is given. Any other reading of the Framework*

Decision would be inconsistent with its purposes which are, not only to provide for a mutual system of surrender but that such a system should be operated in conformity with the right of an accused to a fair trial: see recitals (1), (9) and (15) to the 2009 Framework Decision".

23. As the High Court judge also rightly points out in her judgment, while it is not necessary for a request pursuant to Article 27(4) to be in a particular form, it is nonetheless common for requesting judicial authorities to adopt, with appropriate modifications, the form provided for in the Annex to the 2002 Framework Decision for European arrest warrants (as amended by the 2009 Framework Decision) for the purposes of their request. That was done in this case. It is sensible because, as again the High Court judge pointed out, the substance of what must be considered on an application of this kind is not materially different from the matters which must be considered on an application for surrender. However, in this instance the requesting judicial authority, while adopting the majority of the standard form, omitted part D of the form which deals with trials *in absentia*. The High Court judge commented that having regard to the absence of any material hinting at the fact that the two sentences were rendered *in absentia,* and in circumstances where the requesting judicial authority had opted to use the form provided for in the Annex to the 2002 Framework Decision for European arrest warrants for the purpose of conveying its Article 27(4) request, the "*conscious decision*" to remove part D of the form was inappropriate.

24. The High Court judge went on to state that the information sought in the table at part D of the European arrest warrant form is designed to ensure that the executing judicial authority can be satisfied that recognition of a decision made in the course of the criminal proceedings conducted in the issuing EU Member State would see the fundamental rights of a requested person who has been convicted *in absentia* nonetheless respected; and she further noted that the fundamental rights in question have as their root both Article 5 of the EU

Charter of Fundamental Rights *and* Article 6 of the European Convention on Human Rights, the scope of the latter provision which guarantees the right to a fair trial being the subject of extensive jurisprudence of the European Court of Human Rights.

25. The High Court judge noted this Court's approach in *Minister for Justice v. Palonka* [2015] IECA 69, and she sought to adopt an analogous approach to Article 27.4 requests. She held that where a request pursuant to Article 27.4 is based on a decision rendered *in absentia* and the person was not personally informed of the date and time of trial (which corresponds to para. 3.1a of the Part (d) Table), or is not guaranteed a full rehearing (which corresponds to para. 3.4 of the same Table), then the issuing judicial authority must indicate the basis on which it is said it is entitled to enforce the decision rendered *in absentia*, and the information which establishes that entitlement. She noted that this principle found application in the present case in circumstances where ostensibly the issuing judicial authority purported to rely upon the condition contained in Article 4a(1)(a) of the Framework Decision.

26. The High Court judge's analysis of *Palonka* continued, and she noted that the logic which follows from the judgments in that case is clearly applicable to requests pursuant to s. 22(7) of the Act of 2003 / requests pursuant to Article 27.4 of the Framework Decision. She observed that s. 22(7) must be given a conforming interpretation "*so far as possible in light of the wording and purpose of the Framework Decision*" (Case C-105/03, *Pupino* [2005] E.C.R. I-05333) subject to the limitation that such an interpretation cannot result in an interpretation that is *contra legem.* Accordingly, the High Court judge was of the view that the court below must, in an application for consent pursuant to s. 22(7), "*consider all of the matters which would have been material had the application been one for surrender, and this includes whether the information provided by the issuing judicial authority is sufficient to satisfy Article 4a of the Framework Decision*".

27. The High Court judge further considered the implications of *Palonka* and noted that Finlay-Geoghegan J. at paras. 23-25 of her judgment in the Court of Appeal appeared to have rejected the suggestion that Article 4a does not require the giving by an issuing judicial authority of information at point 4 of the Part (d) Table. The High Court judge stated that in any event, she too was doubtful as to the correctness of such a suggestion, saying that it would appear to be rooted in an excessively technical reading of the provision. The High Court judge continued:

> "***24.*** [...] *Simply because the text of that Article does not go on to say in explicit terms that the underlying information on which reliance on the various options is based must be given, does not mean that the issuing judicial authority need not do so.*
>
> ***25.*** *Any such submission seems to be based on an interpretation of the Table as going beyond what was required by Article 4a of the Framework Decision. However, the purpose of the Table is to provide a convenient form for eliciting the information required by the text of Article 4a itself and is, in my view, an expression of what is necessarily implicit in Article 4a: if an issuing judicial authority is to rely on one of the conditions in Article 4a which required further elaboration, that is, those which equate to paras. 3.1b, 3.2 and 3.3 of the Table, then it must give the information as to the particular circumstances which entitle it to so rely in the case in question. If this information was not required in order to satisfy Article 4a, then the Table would not provide that it was to be given.*
>
> ***26.*** *The inclusion of para. 4 in the Table is not an accidental or superfluous matter, but one that appears to have been carefully included to ensure proper respect for the fair trial rights of an accused. If the essential information on which the issuing judicial authority claims to be in a position to satisfy Article 4a in the particular case were not given, this would reduce compliance with Article 4a, and consequently with*

Article 5 of the Charter, to a "box ticking exercise". It might be convenient to provide a form in which the relevant box is ticked, but enforcement of an in absentia judgment or sentence requires more than that if the fundamental right of an accused to a fair trial is to be respected".

28. The High Court judge further noted that the concern expressed by Peart J. at para. 37 of his judgment in *Palonka* to the effect that there is a potential for injustice if some basic information as to how it is said that points 3.1b, 3.2 or 3.3 of the Part (d) Table are said to apply is not given, so as to allow the executing judicial authority, i.e, the High Court, to satisfy itself that the requirements of the Framework Decision are satisfied. The High Court judge observed that in cases where the accused was not personally summoned and is not entitled to an appeal or review which entitles him or her to a re-examination of the decision on the merits, including the possibility of fresh evidence, the risk of the enforcement of a conviction in circumstances where an accused did not unequivocally waive his or her right to attend is higher. Accordingly, she was of the view that the essential facts and circumstances sufficient to allow the High Court as executing judicial authority to discharge its functions under the EAW Framework Decision and to allow the respondent to challenge the accuracy of the information must be given.

29. The High Court judge then considered the responses from the issuing judicial authority to the High Court's request for further information, and noted that in each case (file reference XI K 596/08 and file reference XI K 21/09) there were similarities, notably that the respondent was said to have been notified of all the relevant hearing dates for both sentences by the "*sending* [of] *a notification to the address he indicated in the preparatory proceedings*". He was also notified of each judgment in the same way. The High Court judge also acknowledged that in respect of file reference XI K 21/09 the respondent was not notified in writing about the postponement of the pronouncement of the judgment in

circumstances where, under Polish law, there was no obligation on the part of the sentencing court to so notify him in writing. In each case, no appeal proceedings were pending.

30. Having regard to the foregoing, the High Court judge remarked that it was clear that the Polish authorities were purporting to rely on the second part of Article 4a(1)(a)(i) which permits surrender where 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*". The High Court judge observed that where reliance is placed on this particular provision, the issuing judicial authority must also satisfy the executing judicial authority, by way of the furnishing of relevant information, that the requested person "*was informed that a decision may be handed down if he or she does not appear for trial*".

31. In relation to the responses received by the High Court from the issuing judicial authority, Stack J. noted the following. First, she noted that a concern arose out of the responses received that no details were provided therein which would allow the respondent to challenge the accuracy of the assertion advanced by the issuing judicial authority that he had been notified of the relevant hearing dates. In this context, reference to the judgments in *Palonka* was made once more, in particular the judgment of Peart J. paras. 8 and 9 thereof, which make clear that the purpose of the information is to permit a respondent to challenge it. To this end, the High Court judge analogised that information provided should include both the receiving address of the notifications and the approximate dates on which the notifications were sent. Otherwise, to again quote the High Court judge, "*it is difficult to see how a requested person could challenge the accuracy of what was asserted as demonstrated by his or her unequivocal waiver of the right to attend the hearing*".

32. The High Court judge noted that in the response received in respect of the further request for additional information, it was indicated in relation to both sentences the subject of the Request that while there were no facts indicating that the accused was actually aware of the date for hearing, he was personally instructed in the preparatory proceedings. From this, the High Court judge inferred that such instructions would have included that letters sent to the address indicated by him would be deemed delivered if he changed his place of residence without providing a new address or if he did not stay at the address indicated. She noted that the respondent had indicated a particular address and subsequently had never provided any information that that address had changed. She further noted that dates for hearing were detailed in the second response from the issuing judicial authority. Arising from this information, the High Court judge was satisfied that the respondent had had, in these proceedings, an adequate opportunity to challenge the correctness of the information; and she further noted that notwithstanding his incarceration in the issuing Member State, there had been more than adequate time for arrangements to be made to take instructions from him and to swear an affidavit in these proceedings. She observed that the information received in the second response from the issuing judicial authority indicated that no notification of change of address was received from the respondent, and that the respondent had not disputed that he gave the address the issuing judicial authority stated that he gave, nor had he disputed that he was in fact resident at this particular address at the relevant times. The High Court judge further observed that notwithstanding omission in the information received of the approximate dates on which the various notifications were sent, it was necessarily implicit in the information received that the notifications were sent in advance of the stated hearing dates. Accordingly, the High Court judge was prepared to infer that the respondent was aware of the likelihood of correspondence relating to criminal charges, and that he consciously and

deliberately either did not respond to the advice notes sent to the address which he gave, or he did not update the authorities as to his whereabouts.

33. The High Court judge's view was that the foregoing satisfied the requirements of Article 4a(1)(a)(i) of the EAW Framework Decision. She noted the dicta of the CJEU in Case C-108/16 PPU, *Dworzecki* (24th of May 2016) wherein the CJEU held at para. 51 of its judgment:

> "*In the context of such an assessment of the optional ground for non-recognition, 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*".

34. The High Court judge observed that the foregoing dicta suggested that a finding that Article 4a is satisfied could be justified where the requested person sought to avoid service of information addressed to him, even where it cannot be established that the requested person was in fact aware of the date and time of hearing. She noted that the present case involved a requested person who was served by way of a notification to the address he had provided for purpose of service of documents relating to a criminal prosecution in circumstances where he was, or must have been, aware that the address provided would be used for that very purpose. The High Court judge stated that in such circumstances, and where notification of the date and time of criminal proceedings was sent to the address provided but was not collected, it appeared that the requirements of Article 4a(1)(a)(i) were satisfied.

35. The High Court judge observed that the foregoing conclusion was so, notwithstanding the express words of Article 4a suggesting that the requested person must actually become aware of the date and time of trial. She noted in this regard that the CJEU had adopted the

approach of the ECtHR where Article 6 of the ECHR is not regarded as being breached even where the accused was not in fact aware of the date and time of trial but where it had been established that there is an "*unequivocal waiver*" of the right to be present at trial.

36. The High Court judge stated that the information received from the issuing judicial authority was sufficient to establish the circumstances in which the respondent gave his address to the Polish authorities. She noted that the respondent was under questioning as a suspect such that it must have been obvious to him that the address was being furnished for the purpose of criminal proceedings being served including notification of the trial itself. In circumstances where the respondent did not dispute furnishing his address, and where he did not dispute that the address he provided was correct, then subject to compliance with Article 4a(1)(a)(ii), the High Court was entitled to find that the respondent had consciously and deliberately waived his right to be present at his trial.

37. However, the sticking point for the High Court judge, and which ultimately resulted in her refusal of the appellant's application, was that the requirement under Article 4a(1)(a)(ii) that the respondent "*was informed that a decision may be handed down if he or she does not appear for the trial*", i.e., that a executing judicial authority could be satisfied that he was aware that as a consequence of not turning up for his trial he could be tried *in absentia,* did not appear to be satisfied in the light of the information received by the High Court from the issuing judicial authority. The High Court judge observed that all that said information stated on this point was that the letters sent to the address provided by the respondent would be "*deemed delivered*"; it was silent on whether the respondent was informed that a decision would be rendered *in absentia*. The High Court judge lamented that the issuing judicial authority did not, as requested by the Minister in her letter of the 6th of October 2022, simply refer to the requirements of the Part (d) Table as setting out what was required. She added:

"*The requirement to confirm that the requested person was informed that a decision might be handed down in absentia is clearly stated at para. 3.1b of the Table and had the additional information stated that the notification had included this information also, then that would have satisfied Article 4a and consent could well have been granted pursuant to Article 27.4*".

38. The High Court judge continued:

"***44.*** *In addition, in the request for further information dated 30 January, 2023, an open ended question asking the Polish authority to "state any other facts which establish that the requested person waived his right to attend". Knowledge that a decision may be rendered in absentia if an accused does not ensure to give the correct address, to update it as required, and to collect notifications once an advice note is sent to the correct address is knowledge required for the type of waiver required to comply with the fair trial rights which Article 4a seeks to protect. If an accused is not informed of the consequences of a failure to give and, if necessary, to update his address, or of failing to respond to advice notices sent to that address, it cannot be established that, by failing to collect the advice notices sent to the address given, he is waiving his right to be present at his criminal trial*".

39. Accordingly, the High Court judge refused the application for consent.

The Arguments on Appeal

Submissions on behalf of the appellant

40. Counsel on behalf of the appellant (i.e., "the Minister") placed heavy reliance on the judgment of Baker J. (with which Clarke C.J., MacMenamin, Charleton and O'Malley J.J. agreed) in the Supreme Court case of *Minister for Justice and Equality v. Zarnescu* [2020] IESC 59, and in particular paras. 61 to 65, and 90 thereof; as well as the judgment of Collins

J. (with which Birmingham P., and Edwards J. agreed) in this Court in *Minister for Justice and Equality v. Szamota* [2023] IECA 143, and in particular paras. 19 through 30 thereof, wherein Collins J. considered the judgment in *Zarnescu* as well as the CJEU's judgments in *Dworzecki* (Case C-108/16 PPU), *LU & PH* (Joined Cases C-514/21 and 515/21), *T.R.*(Case C-416/20 PPU) which post-dated *Zarnescu*, and *I.R.* (Case C-569/20).

41. Baker J., at paragraphs 61 - 65 of her judgment in *Zarnescu*, having examined the approach taken to Article 4a(1), and possible waiver of the right to appear in person at trial, by the CJEU in *Dworzecki*, also in *Zdziaszek* (Case C-271/17 PPU) and by this Court in *Minister for Justice and Equality v. Skwierczynski* [2016] IECA 204, summarised the position thus:

> "*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".*
>
> *62. That recital finds expression in article 4a of the Framework Decision, quoted at para. 17 supra. The waiver must be unequivocal, but it can be implied from conduct. This flows from the decision of the Court of Justice in Melloni (Case C-399/11), EU:C:2013:107, where, at para. 49, it said that: "The accused may waive that right of his own free will, either expressly or tacitly, provided that the waiver is established in an unequivocal manner, is attended by minimum safeguards commensurate to its importance and does not run counter to any important public interest. In particular, violation of the right to a fair trial has not been established, even where the accused did not appear in person, if he was informed of the date and place of the trial or was defended by a legal counsellor to whom he had given a mandate to do so".*

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.

64. The primary debate between the sides then comes down to the correct approach to the circumstances when none of the specific opt out provisions can be met. Again, there is broad agreement between the parties that when the court comes to engage this more general jurisdiction to order surrender notwithstanding that the identified exemptions cannot be shown, it must have regard to the overriding principle that a person may not be so rendered if his or her rights of defence have been breached.

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*".

[Emphasis added by Edwards J.]

42. Later in her judgment, Baker J. reviewed the jurisprudence of the ECtHR concerning how rights of defence are to be protected where judgment, sentence and conviction are imposed *in absentia,* and also considered the sub-topics within that context of diligence and waiver. Her review included *Sejdovic v. Italy* (Application No. 56581/00), *Booker v. Italy* (Application No. 12648/06), *Di Silvio v. Italy* (Application No. 56635/13), *MTB v. Turkey* (Application No. 47081/06), *Tedeschi v Italy* (Application No. 25685/06), *Gaga v Romania* (Application No. 1562/02) and *Hennings v. Germany* (Application No. 12129/86). Importantly, in the context of the present case, she determined *inter alia* from her review that:

> "*89. Mere absence of diligence* […] *cannot in itself amount to evidence of an informed choice to waive a right to be present at trial,* […]".

43. At para. 90 of her judgment Baker J. provided a summary of the principles which she had gleaned from her review of the relevant jurisprudence. She stated:

> "***Summary of principles***
>
> *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" (emphasis added).

44. In his judgment in *Szamota*, Collins J. considered further developments in the jurisprudence, post-*Zarnescu*, and in particular the judgments of the CJEU in *LU & PH* and

in *T.R*, as well as that in *I.R.*, which while not concerned with Article 4a of the Framework Decision (it was instead concerned with Articles 8 and 9 of Directive (EU) 2016/343 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings, a Directive that Ireland has not opted in to), was considered by him to be nonetheless relevant to the interpretation and application of that provision. The thrust of this jurisprudence in Collins J.'s assessment was that a relatively broad approach could be taken to the issue of waiver, subject always to respect for the rights of defence. He observed:

> "*29. It may therefore be the case that the concept of waiver in this context must be understood more broadly than the Supreme Court's decision in Minister for Justice and Equality v Zarnescu [2020] IESC 59 would appear to suggest. As Baker J made clear (at para 65), return may still be ordered even where the case does not fit within any of the exceptions to non-surrender set out in section 45 "but only if the court is satisfied having made an appropriate inquiry that the rights of defence of the requested person have been met." However, the court went on to read the ECtHR jurisprudence as requiring, as a condition of an effective waiver, that it be established unequivocally that the accused person "was aware of the date and place of trial and of the consequences of not attending" (see para 90(g) as well as 90(m)). With respect, that may put the matter too far. The Strasbourg jurisprudence certainly appears to identify knowledge of the criminal proceedings as a pre-requisite to an effective waiver but it does not appear to make knowledge of the date and place of trial a necessary condition for waiver in all circumstances: see the authorities referred to in IR, §53, as well as ECtHR 13 September 2018, MTB v Turkey (Application no. 47081/06), §47 and following*

> *and the authorities referred to there. Zarnescu was, of course, decided before the CJEU's decisions in TR, Page 27 of 34 IR and LU & PH, all of which appear to espouse a relatively broad approach to the issue of waiver, subject always to respect for the rights of defence*".

45. Further, Collins J. noted at para. 30 of his judgment in *Szamota* that a broad approach to waiver is also evident in the caselaw from England and Wales, citing as examples, *Dziel v. District Court in Bydgoszcz, Poland* [2019] EWHC 351 (Admin), *Bertino v. Public Prosecutor's Office, Italy* [2022] EWHC 665 (Admin) and *Stafi v. Judecatoria Roman, Romania* [2023] EWHC 429 (Admin). In regard to the *Bertino* case, he recorded:

> "*It should also be noted that the Supreme Court has agreed to hear an appeal in Bertino (the particular issue in Bertino appears to be whether there can be a tacit waiver of the right to attend one's trial only if the requested person was told that if (s)he did not attend, the trial could proceed in their absence)*".

46. Since the hearing of the appeal before this Court in the present case, the United Kingdom Supreme Court (i.e., "UKSC") has given judgment in the appeal in *Bertino*. See the joint judgment of Lord Stephens and Lord Burnett of the 6th of March 2024, [2024] UKSC 9. The appeal was allowed and the UKSC overturned the earlier decision of Swift J. in the Queen's Bench Decision of the High Court of England and Wales. I will refer in more detail to this decision later in this judgment.

47. Returning to the circumstances of the present case, counsel for the appellant's complaint, in substance, is that the High Court judge in this case did not take the relatively broad approach to the issue of waiver, subject always to respect for the rights of defence, that the appellant believes she was required to take. It was argued that in the case of the respondent it was to be inferred that he had unequivocally waived his right to be present in person, and to defence, by his conduct; and in particular by his manifest lack of diligence and

the active steps taken by him (such as not updating the address he had provided for correspondence relevant to his trial and failing to collect correspondence sent to that address) to avoid being told the time and date of his trial, and of being provided with other information. A submission was also made by counsel for the appellant referencing the fact that the respondent had previous criminal convictions in Poland, and on the basis of this contending that it might be inferred therefore that he had knowledge and experience of the Polish criminal justice system, including that as a consequence of not turning up for his scheduled trial he could be tried *in absentia*.

Submissions on behalf of the respondent

48. Counsel for the respondent maintains that the High Court judge was right in her approach, i.e., that it was necessary before she could conclude that there had been unequivocal waiver for her to be satisfied that the appellant was aware of the potential consequences of failing to update his address, of failing to respond to notices sent to the address he had provided, and of not turning up for his trial; namely that he might be tried *in absentia*, and that on the evidence before her there simply was no basis for the drawing of an inference that he was so aware.

Analysis and Decision

49. There is a net issue to be decided on this appeal, namely, in circumstances where the High Court judge was satisfied that there was the aforementioned lack of diligence on the part of the respondent, was she correct in determining that, notwithstanding that lack of diligence, there was insufficient evidence before her to allow her to be satisfied, either directly or by way of inference from the respondent's conduct, that this represented an unequivocal waiver by the respondent of his right to be present in person, and of his right to defend the case?

50. It has long been the jurisprudence of the ECtHR that an accused person has a right to appear in person at their trial. However, this is a right not an obligation. Consistent with this view it has also long been understood that under certain conditions the accused person may, of his or her own free will, expressly or tacitly but unequivocally, waive that right.

51. In *Jones v. United Kingdom* (2003) 37 EHRR CD 269, an accused who had been committed for trial before a court in England and Wales, on bail, had been arraigned and had pleaded not guilty. However, he failed to turn up for his trial. The trial proceeded after attempts to locate him had proved unsuccessful and he (together with a co-accused) was convicted. Not only had Jones been absent throughout the trial, he had also been unrepresented. It was contended in subsequent appeal proceedings that the trial court had failed to vindicate his rights under Article 6 ECHR in various respects. The case ultimately ended up before the ECtHR. In a judgment of the Fourth Section, the Strasbourg court noted that a trial in the defendant's absence would not be incompatible with Article 6 ECHR "*if the person concerned can subsequently obtain from a court which has heard him a fresh determination of the merits of the charge, in respect of both law and fact*". It went on to say:

> "*Moreover, it is open to question whether this latter requirement applies when the accused has waived his right to appear and to defend himself. In order to be effective for Convention purposes, such a waiver must be established in an unequivocal manner and must be attended by minimum safeguards commensurate to its importance* […]. *For example, the court considers that before an accused can be said to have impliedly, through his conduct, waived an important right under Art 6 it must be shown that he could reasonably have foreseen what the consequences of his conduct would be*".

52. In the subsequent case of *Sejdovic v. Italy* (Application No 56581/00) the ECtHR reiterated these principles, and specifically at para. 87 of its judgment repeated the

observation in *Jones* that before concluding that a right to trial in person has been implicitly waived "*it must be shown that he could reasonably have foreseen what the consequences of his conduct would be*".

53. The concept of "*reasonable foreseeability*" in that context was subsequently considered in a series of cases involving Russia that came before the Strasbourg court, namely *Pishchalnikov v. Russia* (Application No. 7025/04); *Sibgatullin v. Russia* (Application No. 143/05); *Idalov v. Russia* (Application No. 5826/03); and *Ananyev v. Russia* (Application No. 20292/04). These are helpfully referenced and reviewed by the Supreme Court in the United Kingdom in its judgment on the appeal in the *Bertino* case previously referenced in this judgment at para. 46 above.

54. In *Pishchalnikov* (which concerned the right under Article 6 ECHR to legal assistance during questioning in the context of confessions made during interview) the ECtHR observed, at para. 77, that "*A waiver of the right, once invoked, must not only be voluntary, but must also constitute a knowing and intelligent relinquishment of a right*".

55. In *Sibgatullin* (which concerned the right to examine witnesses) the ECtHR stated, at para. 47:

> "[…] *there can be no question of waiver by the mere fact that an individual could have avoided, by acting diligently, the situation that led to the impairment of his rights. The conclusion is more salient in a case of a person without sufficient knowledge of his prosecution and of the charges against him and without the benefit of legal advice to be cautioned on the course of his actions, including on the possibility of his conduct being interpreted as an implied waiver of his fair trial rights*".

56. Continuing at para. 48, they added:

"*The Court further observes that as a matter of principle the waiver of the right must be a knowing, voluntary and intelligent act, done with sufficient awareness of the relevant circumstances. Before an accused can be said to have implicitly, through his conduct, waived an important right under Article 6, it must be shown that he could reasonably have foreseen what the consequences of his conduct would be (see Talat Tunç v Turkey, no 32432/96, 27 March 2007, § 59, Page 21 and Jones v the United Kingdom (dec.), no 30900/02, 9 September 2003). It is not to be ruled out that, after initially being advised of his rights, an accused may himself validly renounce them and agree to proceed with the trial without, for instance, being afforded an opportunity to examine witnesses against him. The Court, however, considers that the right to confront witnesses, being a fundamental right among those which constitute the notion of fair trial, is an example of the rights which require the special protection of the knowing and intelligent waiver standard. The Court is not satisfied that sufficient safeguards were in place in the present case for it to be considered that the applicant had decided to relinquish his right. There is no reason to conclude that the applicant should have been fully aware that by leaving Uzbekistan he was abandoning his right to confront witnesses, or, for that matter, that he understood the nature of that right and could reasonably have foreseen what the consequences of his conduct would be (see Bonev v Bulgaria, no. 60018/00, § 40, 8 June 2006, with further references, and Bocos-Cuesta v the Netherlands, no 54789/00, § 66, 10 November 2005)*".

57. Both the *Idalov* and *Ananyey* cases were concerned with trials proceeding in the absence of defendants who had misbehaved in court. In *Idalov*, the Grand Chamber of the Strasbourg court, citing both *Jones* and *Sejdovic*, restated the need to establish that the applicant could reasonably foresee the consequences of his improper conduct. As the trial

judge had not adjourned the case for a short period with a warning to the defendant of the potential consequences of his behaviour, or to allow to compose himself, the court found a breach of Article 6 ECHR. In *Ananyey,* the defendant had had been excluded after threatening people present in court. The ECtHR accepted that he had been properly removed but said it was incumbent on the presiding judge established that the applicant could reasonably foresee the consequences of his conduct. He had not been made aware of the consequences of his actions. Accordingly, the Strasbourg court held there was no unequivocal waiver of his right to be present in person or to be represented.

58. In the *Zarnescu* case, Baker J. in the Supreme Court (at sub-paras. 90(g) and 90(m) of her judgment) read the ECtHR jurisprudence as requiring, as a condition of effective waiver, that it be established unequivocally that the accused person "*was aware of the date and place of trial* ***and of the consequences of not attending***" (my emphasis). In the subsequent *Szamota* case, Collins J. in this Court (with whom Birmingham P. and Edwards J. agreed) observed:

> "*29.* [...] *With respect, that may put the matter too far. The Strasbourg jurisprudence certainly appears to identify knowledge of the criminal proceedings as a pre-requisite to an effective waiver but it does not appear to make knowledge of the date and place of trial a necessary condition for waiver in all circumstances: see the authorities referred to in IR, §53, as well as ECtHR 13 September 2018, MTB v Turkey (Application no. 47081/06), §47 and following and the authorities referred to there. Zarnescu was, of course, decided before the CJEU's decisions in TR, Page 27 of 34 IR and LU & PH, all of which appear to espouse a relatively broad approach to the issue of waiver, subject always to respect for the rights of defence*".

59. In their joint judgment in the recent UK Supreme Court decision in *Bertino*, Lord Stephens and Lord Burnett (with whom Lord Hodge, Lord Sales and Lord Burrows agreed) having reviewed the jurisprudence of the Strasbourg Court, commented, at para. 39, that that court had carefully avoided "*drawing hard lines*", referencing language used by it at para. 99 of the judgment in *Sejdovic* in illustration of their point. They observed:

> "*Cases are fact specific. It leaves open the possibility of a finding of unequivocal waiver if the facts are strong enough without, for example, the accused having been explicitly being told that the trial could proceed in absence. In Sejdovic, given that the argument for unequivocal waiver was based on no more than the applicant's absence from his usual address, coupled with an assumption that the evidence against him was strong, the court considered that the applicant did not have sufficient knowledge of the prosecution and charges against him. He did not unequivocally waive his right to appear in court: see paras 100 and 101*".

60. Their lordships further noted the jurisprudence of the CJEU in the *I.R.*, and *Dworzecki*, cases to which reference has been made earlier in this judgment.

61. The *Bertino* case is of importance to this appeal because it directly engages with the core issue on this appeal. While it is not a binding authority insofar as the Irish Court of Appeal is concerned, it is the judgment of the highest court in the neighbouring jurisdiction, which, notwithstanding Brexit, continues, in effect, to operate the European arrest warrant system through the Trade and Co-operation Agreement between the UK and the EU. It is therefore appropriate to have regard to it for its potential persuasive influence.

62. The facts in *Bertino* are summarised at paras. 3 to 5 inclusive of the joint judgment, as follows:

> "*3. The appellant's extradition is sought pursuant to an EAW issued on 6 February 2020 by the public prosecutor's office of the Court of Pordenone ("the requesting*

judicial authority") seeking to enforce a sentence of one year's imprisonment imposed following a trial in the Court of Pordenone in his absence. He was convicted and sentenced on 16 April 2018, with the sentence being activated on 27 January 2020. The offence was one of sexual activity with an under-age person contrary to article 609 of the Italian Criminal Code, through grooming a 14-year-old girl by sending her WhatsApp messages asking for oral sex. The sentence provided that if compensation were paid it would be suspended. The compensation was not paid.

4. The offence was alleged to have taken place on 19 June 2015 in the Province of Venice at a holiday camp at which the appellant was working as an entertainer. The police were informed promptly of the allegation and attended the appellant's place of work. His phone was seized. The formal information provided by the requesting judicial authority in response to a request for further information issued by the Crown Prosecution Service confirms that the appellant was not arrested or questioned formally at the time, although it appears from the appellant's own account that he went to the local police station. The appellant was sacked from his job and returned to Sicily from where he came. He later voluntarily attended the police station in Spadafora, Sicily on Page 3 23 July 2015. He signed a document which recorded that he was under investigation. The document invited the appellant to elect domicile in Italy. The document stated that "as [the appellant] is being investigated, he is under an obligation to notify any change of his declared or elected domicile by a statement to be rendered to the judicial authority". It also warned "that if [the appellant] does not notify any change of his declared or elected domicile … the service of any document will be executed by delivery to the defence lawyer of choice or to a court-appointed defence lawyer." The appellant elected his domicile by giving an address

in Venetico, Messina. He also indicated on the form that he "will be assisted by a defence lawyer that will be appointed by the court." The document was read to him by the judicial police officer. Both he and the police officer signed the document of which the appellant was given a copy.

5. The appellant left Italy in November 2015 and came to the United Kingdom. He found work and moved from time to time. The prosecution in Italy was commenced on 8 June 2017. A writ of summons for the hearing set by the judge was issued on 12 June 2017. It summoned the appellant to appear at the Pordenone Court on 28 September 2017 and included a warning that non-attendance without "lawful impediment" would "lead to a judgment in absentia". The appellant did not receive the summons. By that date the requesting judicial authority knew that he was no longer at the address he had provided in July 2015. In information provided by the requesting judicial authority to the High Court of England and Wales dated 16 January 2022 it confirmed that "service of the judicial document failed because the addressee was untraceable ...[T]he writ of summons was served on the court-appointed defence counsel ... because Mr Bertino had failed to notify any change of address." The requesting judicial authority made various unsuccessful attempts to trace the appellant in Italy between 2016 and 2019. They eventually obtained contact details at an address in England in January 2019 and were given his mobile telephone number by his mother. These factual details are found in further information provided by the requesting judicial authority during the extradition proceedings. The appellant's unchallenged evidence before the District Judge was that he notified the authorities of his departure to the United Kingdom for family law

purposes (his marriage was failing and arrangements had to be made for the children) but not the police in connection with the investigation".

63. In the EAW forming the basis of the request for Mr Bertino's surrender, which was in the prescribed form, none of the boxes in Part D were ticked. The UKSC noted, at para. 8 of the joint judgment, that

"*There was no personal service of the summons, nor could it be shown that the appellant was unequivocally aware of the place and date of his trial. On the contrary, the information provided by the requesting judicial authority, to which we have referred, confirms that he was unaware of the date and place of trial and, indeed, that he was unaware that a decision had been taken to prosecute him. Thus points 3.1a and 3.1b could not be in play; neither could point 3.2, despite the fact that the appellant was represented at the trial by a court appointed counsellor. There was no suggestion at the extradition hearing that the criteria in point 3.3 or point 3.4 could be satisfied, but in any event the relevant boxes were not ticked*".

64. Mr Bertino opposed his surrender to Italy, on the grounds that he had been tried *in absentia* and the requesting state had neither provided a guarantee of a re-trial, nor established that any of the conditions that would otherwise allow him to be surrendered obtained. A Deputy Senior District Judge concluded that he had "*deliberately absented himself from his trial*" in Italy for the purposes of section 20(3) of the UK's Extradition Act 2003 and so should be extradited to serve his sentence despite not having an entitlement to a retrial. That conclusion was upheld on appeal in the High Court by Swift J. in [2022] EWHC 665 (Admin), i.e. in the judgment referenced by Collins J. in this Court in the *Szamota* case. Mr Bertino then further appealed to the UKSC on a certificate which asked that Court to address the question:

"*For a requested person to have deliberately absented himself from trial for the purpose of section 20(3) of the Extradition Act 2003, must the requesting authority prove that he had actual knowledge that he could be convicted and sentenced in absentia?*"

65. That certified question, in substance, and adapting the statutory reference to the Irish legislative context, mirrors the question with which we are concerned in the present case.

66. The UKSC judgment observed that:

"*The procedural history of this claim is unusual in that the EAW identified that the appellant was absent from his trial but failed to rely upon any of the criteria which, if established, would nonetheless have required his extradition pursuant to the Amended Framework Decision. When the EAW is used properly to convey information which demonstrates that one of the criteria is satisfied that is ordinarily determinative and forecloses an endless factual exploration*".

67. In the present case, the EAW did not even identify that the appellant was absent from his trial, although that was later established. However, as in *Bertino*, there was no express reliance upon any of the criteria which, if established, would nonetheless have required his extradition.

68. The judgment in *Bertino* goes on to conclude that the phrase "*deliberately absented himself from his trial*" in s. 20 (3) of the UK's transposing Act should be understood as being synonymous with the concept in Strasbourg jurisprudence that an accused has unequivocally waived his right to be present at the trial. Such an interpretation ensured that s. 20(3) conformed with the Amended Framework Decision and with the right to be present at trial guaranteed by Article 6 ECHR, which itself was at the heart of the Amended Framework Decision.

69. The *ratio* of the decision in *Bertino* is to be found in paras. 49 to 55, which bear quotation in full:

> "*49. In this case, the appellant was under investigation. He had not been charged and, in fact, had never been arrested or questioned in connection with the alleged offending (with the attendant right to legal assistance) when he provided his details to the judicial police in July 2015. The decision to initiate criminal proceedings was made in June 2017. As the district judge himself recognised in his ruling, in July 2015 a prosecution was no more than a possibility. The appellant was never officially informed that he was being prosecuted nor was he notified of the time and place of his trial.*
>
> *50. The appellant's dealings with the police both in Venice and Sicily fell a long way short of being provided by the authorities with an official "accusation". He knew that he was suspected of a crime and that it was being investigated. There was no certainty that a prosecution would follow. When the appellant left Italy without giving the judicial police a new address there were no criminal proceedings of which he could have been aware, still less was there a trial from which he was in a position deliberately to absent himself. In those circumstances we conclude that the District Judge and Swift J erred in reaching the conclusion that he had deliberately absented himself from his trial.*
>
> *51. His conduct was far removed from the sort envisaged by the Strasbourg Court in Sejdovic at para 99 or the Luxembourg Court in IR at para 48 (see paras 38 and 39 above) which might justify a contrary conclusion. That is sufficient to dispose of this appeal.*
>
> *52. It was implicit in the decisions in both the Magistrates' Court and the High Court, to use the language of Jones, that the inference that the appellant had "unequivocally*

and intentionally" waived his right to be present at his trial included a finding that "he could reasonably foresee what the consequences of his conduct would be", namely that the trial would proceed in his absence. In this context it should be noted that the concepts of waiver and reasonable foreseeability take their meaning from the Strasbourg case law. They are not synonymous with the same concepts in English private law.

53. The issue of reasonable foreseeability feeds into the submission, rejected by Swift J, that an accused must be told that the trial may proceed in his or her absence in the event of non-attendance in accordance with the notification of trial. We have summarised the Strasbourg jurisprudence on what is meant by reasonable foreseeability for this purpose at paras 34 and 35 above. In Jones the court had concluded that an unrepresented defendant could not have been expected to foresee that failing to attend his scheduled trial would result in a trial in his absence. In Pishchalnikov the Strasbourg Court equated reasonable foreseeability with "a knowing and intelligent relinquishment of a right." That concept was elaborated in Sibgatullin at paras 47 and 48, quoted above. The absence of legal advice warning on the possibility of a defendant's conduct being interpreted as an implied waiver of article 6 rights was a factor. The person concerned needed sufficient awareness of the circumstances to waive a right by a "knowing, voluntary and intelligent act" but "having been advised of his rights" may validly renounce them. In both Idalov and Ananyev the defendant in criminal proceedings was excluded from his trial as a result of disruptive behaviour, which is itself consistent with article 6, was not taken to have waived the right to be present at the trial without more. In each case the failing identified was in the judge not warning the defendant that the trial might proceed in his absence.

54. It is apparent from these cases that the standard imposed by the Strasbourg Court is that for a waiver to be unequivocal and effective, knowing and intelligent, ordinarily the accused must be shown to have appreciated the consequences of his or her behaviour. That will usually require the defendant to be warned in one way or another. A direct warning was expected from the judges in the exclusion cases. The Amended Framework Decision, reflecting an understanding of the obligations imposed by article 6, requires the summons to warn the accused that a failure to attend might result in a trial in absence. In Sibgatullin there was no reason to conclude that the applicant should have been fully aware of the consequences of his actions.

55. It appears from the reasoning of the district judge that he may have regarded a general manifest lack of diligence which results in ignorance of criminal proceedings as itself being sufficient to support a conclusion that an accused had deliberately absented himself from trial (in the language of section 20(3) of the 2003 Act) or unequivocally waived his right to attend (in the language of the case law on article 6 of the Convention). Dworzecki, to which he referred (see para 40 above), is not authority for that proposition. Indeed, Sibgatullin makes clear at para 47 that "there can be no question of waiver by the mere fact that an individual could have avoided, by acting diligently, the situation that led to the impairment of his rights".

70. In the present case the respondent attended the preparatory proceedings described in the additional information dated the 11th of October 2022 and the 30th of January 2023 (in the case of file no. XI K 596/08), and dated the 11th of October 2022 and the 14th of February 2023 (in the case of file no. XI K 21/09), and could reasonably be expected to have appreciated that he was charged (or, if not actually charged at that point, was about to be charged) with criminal conduct, and that it was intended to place him on trial. He was

expressly advised that he needed to provide a residential address and that letters in connection with the intended proceedings would be sent to him at that address. He was further told that letters sent to the address indicated by him would be deemed delivered if he changed his place of residence without providing a new address or if he did not stay at the address indicated. The respondent duly provided an address, and notification of his intended trial was sent to that address. No notification of any change of address was received by the Polish police. It was accepted by the issuing judicial authority that there are no facts indicating that the accused was actually aware of the date of the hearing. The summons for the hearing was sent to the address he indicated, but despite two notifications, it was not received. It is a reasonable inference, in circumstances where it is now known that at some point he left Poland, and took up residence in Ireland, that the respondent moved from the address that he had provided to the police without supplying them with a new address, and further did not collect correspondence addressed to him at the address he had provided. The High Court judge was satisfied that the respondent had exhibited a manifest lack of diligence in moving address without notifying an updated address, thus ensuring that he could not, personally, be served and notified of the time and date of his trial. So far, so good. I am satisfied that these were conclusions that were open to the High Court judge on the evidence having regard to the jurisprudence reviewed earlier in this judgment.

71. The High Court judge was not satisfied, however, that simply because there was evidence of a manifest lack of diligence on the respondent's part in moving address without notifying an updated address, thus ensuring that he could not, personally, be served and notified of the time and date of his trial, that it could further be said that he had impliedly, through his conduct, unequivocally waived his right to be present in person, and to a defence. She considered, rightly in my view, that she required to be further satisfied that he could

reasonably have foreseen the consequences of his said conduct, namely that he could be tried *in absentia*.

72. The jurisprudence of the ECtHR, which I am satisfied has been correctly interpreted by the UKSC, establishes that for a waiver to be unequivocal and effective, knowing and intelligent, ordinarily the accused must be shown to have appreciated the consequences of his or her behaviour. That will usually require the defendant to be warned in one way or another. I readily accept that it will not be necessary in every case for evidence to be adduced that the requested person was expressly advised of the potential consequences of not turning up for his trial. Awareness of consequences could be established in other ways. However, as is made clear in the *Sibgatulin* case (at para. 47) "*there can be no question of waiver by the mere fact that an individual could have avoided, by acting diligently, the situation that led to the impairment of his rights*". Thus, while manifest lack of diligence can certainly contribute to a justified conclusion of unequivocal and effective waiver, it is hard to see how it could justify such a conclusion *per se*. More is required. However, depending on the circumstances of the case, a manifest lack of diligence, coupled with other circumstances, might cumulatively would support an inference of unequivocal and effective waiver. For example, if without spelling out the potential consequences in detail at the time, the relevant authorities had told the suspect that he could expect in due course to receive a document at the address nominated by him that would set out such information, and the person concerned had by manifest lack of diligence ensured that he had not received that document, that might possibly be enough to allow a court to conclude that there had been an unequivocal waiver.

73. The difficulty in the present case is that the information provided by the issuing judicial authority is totally silent on the issue of ensuring that the respondent would be aware of the potential consequences of not turning up for his trial. There is no evidence of any warning having been given as to consequences, or even a suggestion that the respondent

could expect that advice as to consequences might be sent to him at the address provided. Moreover, while there was evidence that details of the time and date of his trial were sent to him at the address provided, there was no evidence of any other information being sent to him at that address, and specifically advice as to consequences. There was not even evidence as to the usual practice in that regard, even if there was no one who could testify to what specifically occurred in the respondent's case. There was a total deficit of evidence in regard to the provision of information as to consequences, or as to how a person in the respondent's position might be expected to become aware of consequences. I expressly reject the suggestion of counsel for the appellant that the fact that the respondent had a prior criminal record and previous experience of the Polish criminal justice system is relevant. There was no evidence that he was previously warned as to the consequences of not turning up for his trial, or that he might be tried *in absentia.* There was no evidence that he was actually tried *in absentia* on a previous occasion, or that anyone known to him was tried *in absentia*. There was simply no evidence, either of a direct kind, or arising by reasonable inference, that this respondent by a knowing, voluntary, and intelligent act, but "*having been advised*" of the consequences of that act (to use the words of the Strasbourg court), or being otherwise aware of those consequences, renounced his entitlement to be present in person, or to be represented. It is clear that he deliberately absented himself from his trial, but for all we know that might well have been merely for the purpose of putting off a day of reckoning. It does not follow from the fact that he did so that he necessarily appreciated, or in the words of the Strasbourg jurisprudence must "*reasonably have foreseen*", that by doing so he was relinquishing his right to be present in person, and that he could be tried *in absentia*.

74. All of that having been said, I reiterate that I see no reason why in another case a court should not be able, from cumulative information provided and evidence as to attendant circumstances, to infer the necessary awareness. However, in my belief the High Court in this

case was faced with an evidential deficit that simply did not permit the required inference to be drawn. The gap between the information provided, and what was required to be established was too wide and was not bridged. The High Court judge could only act on direct evidence, and/or inferences reasonably arising from circumstantial evidence, adduced before her. She was not entitled to speculate, and she was correct not to do so in my judgment.

Conclusion

75. The jurisprudence of the ECtHR, which the CJEU fully respects in its parallel jurisprudence, is clear. For a waiver to be unequivocal and effective, knowing and intelligent, ordinarily the accused must be shown to have appreciated the consequences of his or her behaviour. This was acknowledged in substance by Baker J. in the Supreme Court in *Zarnescu*. The High Court judge correctly concluded on the evidence before her that she could not be so satisfied. I would therefore dismiss the appeal.

Kennedy J.: I agree.

Burns J.: I also agree.