[2020] IEHC 6

THE HIGH COURT

[2019 No. 204 EXT]

BETWEEN

MINISTER FOR JUSTICE & EQUALITY

APPLICANT

AND

MARIUS BOGDAN ZARNESCU

RESPONDENT

JUDGMENT of Mr. Justice Binchy delivered on the 13th day of January, 2020

1. By this application the applicant seeks an order for the surrender of the respondent to Romania pursuant to a European Arrest Warrant dated 23rd January, 2018 *("the EAW")*. The EAW was issued by a judge of the Court of Onesti, as issuing judicial authority ("*IJA*").

2. The EAW was endorsed by the High Court on 20th June, 2019. The respondent was arrested and brought before the Court on 17th July, 2019. The application first opened before the Court on 16th October, 2019, and was then adjourned until 6th November, 2019, following upon a direction by this Court, pursuant to s. 20 of the European Arrest Warrant Act 2003 (as amended) (hereinafter "*the Act of 2003*"). On 6th November, 2019, the matter was further adjourned for the provision of yet further information, to 11th December, 2019, when the hearing concluded.

3. At the opening of the application, I was satisfied that the person before the Court is the person in respect of whom the EAW is issued, and in any case this was not denied by the respondent.

4. I was further satisfied that none of the matters referred to in ss. 21 A, 22, 23 and 24 of the Act of 2003 arise, and that the surrender of the respondent is not prohibited for any of the reasons set forth in any of those sections.

5. At para. B of the EAW, it is stated that the decision on which it is based is a sentence of the Onesti Court of Law of 19th April, 2017, which is then stated to be *"final and enforceable"* following a decision of the Bacau Court of Appeal on 22nd November, 2017.

6. At para. E of the EAW, it is stated that the warrant relates to two offences. The first is the offence of driving a vehicle without a driving licence, which carries a maximum penalty of up to three years' imprisonment or a fine. Accordingly, minimum gravity is established in relation to that offence.

7. The second offence is that of causing bodily injury, which carries a maximum penalty of up to five years' imprisonment. Minimum gravity is therefore established in relation to that offence also.

8. At para. E of the EAW it is stated that the respondent was first convicted of the offence of driving without a driving licence at the Onesti Court of Law on 19th April, 2017, and that this was affirmed by the Bacau Court of Appeal on 22nd November, 2017. It is stated

that he was sentenced to a term of imprisonment of eight months in respect of the offence of driving without a licence, in the village of Curita. It is also stated that at the time of the commission of this offence his driving licence was suspended, since 28th September, 2015.

9. It is stated that at the same time, the court ordered the revocation of the suspension of a conditional sentence of imprisonment of one year imposed by the Onesti Court of Law in respect the offence of causing bodily injury (which I shall hereafter refer to as *"the earlier offence"*), and ordered that this sentence of one years' imprisonment was to be served together with the eight-month sentence imposed in respect of driving without a licence. The earlier sentence had been handed down by the Onesti Court on 4th December, 2012, and was subsequently affirmed by the Bacau Court of Appeal in 2013, although the exact date is not provided. It is stated that that suspension was conditional for a period of three years. As stated above, the EAW states that this sentence related to the offence of *"bodily injury",* and in this regard it is stated that on 6th June, 2011, the respondent hit another party causing her bodily injuries. The suspension of the sentence was revoked because the respondent was convicted of the offence of driving without a licence within the three year period.

10. At this juncture I should state that no issue was raised as to correspondence in this jurisdiction with the offences with which the EAW is concerned, and it is clear that the acts of the respondent as described in the EAW (in relation to either offence) would correspond to offences in this jurisdiction.

11. At para. D of the EAW, it is stated that the respondent did not appear in person at the trial resulting the decision. Paras. D.3.1b and 3.2 are then ticked, so that the EAW states that the respondent, while not summonsed in person, was by other means informed of the scheduled date and place of trial, and further that he had given a mandate to a *"legal counsellor*" to defend him at the trial and was indeed defended by that counsellor at the trial.

12. Para. D.3.4 of the EAW is also ticked, and states that the respondent will be personally served with the decision upon his surrender, and will be informed of his right to a retrial or appeal affording him the opportunity to overturn the convictions giving rise to the EAW.

13. At para. D.4 of the EAW it is stated that the respondent did not appear at any of the hearings of first instance, or at the appeal. The EAW states that he was represented by a chosen defender before the court of first instance. He also filed an affidavit by which he admitted the offence. This could only relate to the offence of driving without a licence. It is then stated that even if he did not receive communication of the conviction (at first instance) he filed an appeal through his chosen legal representative.

14. Further information was sought by the applicant (prior to the amendment of s. 20 of the Act of 2003) by letter of 22nd May, 2019. Four questions were asked:

1. Did the respondent instruct the lawyer who represented him in the appeal, and how is it established that he personally gave instructions to that lawyer to appear in court on his behalf?

2. The IJA was asked to identify the number of days that the respondent would have to request a retrial or appeal as this was not stated in the EAW.

3. The IJA was requested to provide details of the circumstances of the commission of the second offence (the earlier offence).

4. In relation to the earlier offence, the IJA was requested to clarify if the respondent was present at the trial leading to that sentence, and also whether or not the respondent was aware that the revocation of the suspension of that sentence would be considered during the course of the trial for the first offence (by which it is meant the first offence described in the EAW, which is actually the second offence in time, i.e. the offence of driving without a licence).

15. In its reply, the IJA stated that the respondent's appeal was filed by the same "*chosen*" lawyer. However, it goes on to say that the respondent himself wrote separately by letter dated 11th September, 2017, requesting an adjournment of the appeal hearing, which was scheduled for 12th September, 2017, in order to enable him to instruct a lawyer, and also owing to the fact that he could not be present in court on the date of which the appeal was scheduled. The IJA provided a copy of this letter (which actually bears two different dates, 9th and 11th September, 2017, but nothing turns on this, and for the purpose of this decision I will henceforth refer to it as the letter of 9th September, 2017). In the letter, the respondent provides his address in this country and also states that he has a domicile in Curita Village, Casin Commune, Onesti Town, in Romania. He concludes this letter by stating that he undertakes to present documents to the court on the next trial date.

16. The IJA then states that a new trial date was fixed to enable the respondent to hire a lawyer, but no documents were filed to indicate that he had done so. Accordingly, the appeal took place in the absence of the defendant, and without a lawyer. In a response to a second request for information dated 17th October, 2019, the IJA stated that, following the request for an adjournment received from the respondent, the court adjourned the hearing to 7th November, 2017, but neither the respondent nor a lawyer acting on his behalf was present in court on that date. The IJA further states that the respondent was "*summoned*" to that hearing, by communicating the documents to the domicile indicated in the request by the respondent of 9th September, 2017. The IJA then states that "*debates were closed*" on 7th November, 2017, and adjourned the matter for a sentence hearing on 22nd November, 2017, when it handed down its decision, being the decision that gave rise to the issue of the EAW. The IJA further states in this further information that since the respondent was not in any of the situations in which mandatory legal assistance was required, the court did not appoint any public defender. It refers to a provision in the Criminal Procedure Code which states that where a convicted person has appointed a retained counsel, he/she shall not be deemed tried in absentia if counsel

appeared at any time during the criminal proceedings. Since the respondent had been represented before the court of first instance, it was not necessary, under Romanian law, to appoint counsel for him for the purposes of the appeal.

17. By this further information, the IJA also states that since the respondent did not file a request to have the matter reopened in accordance with the applicable procedure, it could not assess whether or not he will be successful in any request to do so following upon his surrender.

18. In response to a further request for information, the IJA stated that the respondent was informed of the adjourned appeal court hearing of 7th November, 2017, by way of a summons communicated to the domicile indicated by him (in his letter of 11th September, 2017), i.e. Casin Commune, Curita Village, Bacau County, by mail, and that there was acknowledgement of receipt of this summons. It is stated that the summons was received by his father on 25th September, 2017, according to the proof of receipt.

19. Returning, however, to the response to the questions put to the IJA on behalf of the applicant in the letter of 22nd May, 2019, the IJA, in its response of 29th May, 2019, also addressed the questions regarding the earlier offence. This offence is stated to have occurred on 6th June, 2011. Particulars of the offence are provided. The particulars are indicative of an assault, and the acts attributed to the respondent are such that, if committed in this jurisdiction, they would constitute an assault. In any case, as I have stated earlier, no issue was raised as to correspondence between the acts giving rise to the convictions of the respondent with offences in this jurisdiction.

20. It is stated that the respondent was personally present at six different hearings of first instance. It is also stated that the respondent's attention was drawn to provisions of the criminal code which provide for the revocation of a conditional suspension if during the trial period the respondent commits a new offence.

21. Points of objection were delivered on 26th July, 2019. Five points were raised, two of which were pursued at the hearing of this application:

    1. The respondent was not properly served with a summons to court, and was not present in court, or represented in court, on the occasions when the Bacau Court of Appeal adjudicated upon the matter and handed down a sentence. Further, the respondent is not guaranteed a retrial to remedy this deficiency.

    2. The surrender of the respondent would constitute a contravention of Articles 38.1 and 40.4.1 of Bunreacht na hÉireann and/or would be incompatible with the obligations of the State under Article 6 of the European Convention of Human Rights, and is therefore prohibited by s. 37(1) of the Act of 2003. This plea was based upon the alleged denial of fair procedures to the respondent in relation to the process leading to the activation of the sentence relating to his conviction for assault, i.e. the earlier offence.

22. The respondent swore an affidavit dated 9th October, 2019, in support of his opposition to this application. In this affidavit, the respondent states that, while he was represented by an advocate (of his own choosing) in the proceedings before the Onesti Court of Law that led to his conviction on 19th April, 2017, he was not at any stage present during those proceedings. He claims that some five months later, he was made aware of the court's determination by his lawyer, who also informed him that he (the lawyer) had lodged an appeal on behalf of the respondent. The respondent states that the lawyer was not given any authority to file an appeal on his behalf. Accordingly, he wrote to the Bacau Court of Appeal on 9th September, 2017, seeking an adjournment of the scheduled appeal, in order that he could instruct another lawyer. The respondent avers that he explained in this letter that he could not attend court on the scheduled date owing to obligations of work, and this is consistent with the copy of the letter as provided by the IJA. He then avers that he received no reply or communication of any kind from the administrative offices of the Bacau Court of Appeal. Accordingly, he was not aware of the hearings before that court of 7th November, 2017, and 22nd November, 2017. He avers that he anticipated a *"return of correspondence*" following his letter of 9th September, 2017, by which he requested an adjournment.

23. He further avers that statements at paras. D.3.1.b and D.3.2 of the EAW are incorrect. Para. D.3.1b states that while he was not summoned in person to the trial resulting in the decision, he received notification of the same by other means. Para. D.3.2 states that the respondent had given a mandate to a legal counsellor to represent him at the hearing and that he was indeed defended by that counsellor at the trial. Both of these statements, the respondent avers, are incorrect. It is clear from the additional information furnished by the IJA that the respondent was not represented at the appeal hearing, and so the statement made at para. D.3.2 of the EAW is clearly incorrect. The position is less clear about para. D.3.1b, and I will address this later.

24. Furthermore, at para. D.3.4 of the EAW, it is stated that the respondent will be personally served with the decision upon his surrender, and informed of his right of appeal. However, the further information provided by the IJA in its letter dated 29th May, 2019, states that the respondent has already exercised his right of appeal. The respondent avers that this was exercised by a lawyer acting without his authority, and as a result, he has lost his right of appeal. A further query was raised by the applicant about the availability of a re-trial, by letter dated 17th October, 2019 (on the direction of this Court), and the IJA responded to this query by stating that it could not "*assess the admissibility of a possible request to reopen the criminal trial*" in the circumstances of the case. This means that the availability of a re-trial is at best uncertain, and the statement made in para. D.3.4 of the EAW is incorrect.

25. In relation to the revocation of suspension of sentence imposed upon him for the earlier conviction, the respondent avers that he was never informed that the suspension would be revoked upon conviction of the second offence. However, in its letter of 29th May, 2019 the IJA states that the respondent was so informed at the conclusion of the trial of the earlier offence, and that he was informed of the specific provisions of the Criminal

Procedure Code in this regard. The respondent further avers that he was advised by his advocate that the suspended sentence had expired. He further avers that it ought not to have been reactivated having regard to the dates of conviction, but he is now unable to challenge those aspects of the matter because his right of appeal has been "*usurped*". He avers that he has been denied fair procedures in connection with the revocation of the suspension of the sentence imposed on him in connection with the earlier offence.

Submissions of the parties
Submissions of the Applicant

26. Firstly, it is submitted that the Court should take into account that the respondent entered a plea to the charges upon which the EAW is based, and that he was represented by a lawyer of his own choosing at the court of first instance. On his own account of events, the respondent claims that he was unaware of the outcome of the first instance hearing until shortly before the date on which his appeal was first scheduled for hearing. While he claims that he did not authorise his lawyer to file an appeal on his behalf, he then wrote to the court asking for an adjournment of the appeal hearing date in order that he could instruct another lawyer to represent him at the appeal.

27. However, the respondent did not then follow through by instructing a lawyer. While the additional information submitted by the IJA makes it clear that he was not notified of the appeal hearing dates of 7th November, 2017, or 22nd November, 2017, at his address in this country, which he had provided, he was notified of it at the address at which father resided in Romania, and he had provided this address as his domicile in that country.

28. The applicant acknowledges that there were errors in the EAW, but these have all been clarified by the additional information. The applicant relies upon the decision of the Court of Appeal in the case of *Minister for Justice & Equality v. Tomasz Skwierczynski* [2018] IECA 204. In that case the respondent had not been notified of the first instance trial date. However, he received notification of the judgment and exercised his right of appeal, in which he was unsuccessful. The question for both the High Court, and, on appeal, the Court of Appeal, was whether or not surrender is prohibited in circumstances where the situation of the person whose surrender is sought does not come within one of the exceptions set out in the table set out in s. 45 of the Act of 2003, as amended, i.e. none of the circumstances described in paras. D. 3.1a, 3.1b, 3.2, 3.3 or 3.4 of the table to s.45 of the Act of 2003, applied. The Court of Appeal held that the exercise by the appellant of his right of appeal cured any defect in the proceedings at first instance, and accordingly the surrender of the respondent in that case was not prohibited by s. 45 of the Act of 2003.

29. The applicant also relies upon the decision of this Court (Donnelly J.) in the case of *Minister for Justice & Equality v. Ladislav Schoppik* [2018] IEHC 584. In that case the respondent was convicted and sentenced in his absence, but he was represented at the hearing by a lawyer of his choosing. However, he maintained that the only mandate that the lawyer had at the hearing was to seek an adjournment, because he was physically unable to attend the hearing. The court did not accept the reasons put forward for his

inability to attend, and proceeded to deal with the matter in the absence of the respondent, but in the presence of his lawyer. Donnelly J. rejected the submission that the surrender of the respondent in that case was prohibited by s. 45 of the Act of 2003. The respondent had not put forward any evidence that the remit of his lawyer was restricted to applying for an adjournment only. Having found as a fact that the lawyer that he retained did not have the limited mandate which the respondent claimed, Donnelly J. was satisfied that he was represented at the hearing and that his surrender was not therefore prohibited by s. 45 of the Act of 2003.

30. Moreover, the applicant also relies on the decision of the Court of Justice of the European Union ("*CJEU*") in the case of *Zdziaszek*, Case C-271/17 PPU. In that case the CJEU held that Framework Decision 2002/584/JHA does not prevent an executing judicial authority from taking account of all the circumstances characterising the case before it in considering whether or not the rights of the defence of the person concerned are respected during the relevant proceeding or proceedings, even though the circumstances of the case may not fall neatly into those described in Article 4a(1)(a) to (d), being the provisions of the Framework Decision that correspond to the table set forth in s. 45 of the Act of 2003. At para. 107 of that decision it is stated that:

> *"Accordingly, 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 account of other circumstances that enable it to ensure that the surrender of the person concerned does not entail a breach of his rights of defence…"*

31. In relation to the arguments concerning the revocation of the suspension of sentence for the earlier offence, the applicant submits that it is clear from the EAW that he was present when convicted of that offence and that he was warned on that occasion that revocation of the conditional suspension of the penalty imposed upon him could occur if during the "*trial period*" the respondent committed another offence. The additional information provided by the IJA expressly states this to be so and gives details of the provisions of the Romanian Criminal Code which makes provision for revocation of suspension of penalty in such circumstances. It is submitted that this Court is obliged to accept such a statement from the IJA, in the absence of evidence to the contrary from the respondent.

Submissions on behalf of the Respondent

32. On behalf of the respondent it is submitted that his surrender should be refused on the ground that it is prohibited by s. 45 of the Act of 2003. The respondent was not present for the hearing of his own appeal, which resulted in a conviction and sentence of imprisonment. Nor was he summonsed in person to the trial, and nor did he receive official notification of the date and place of the trial and nor was he aware of the same. He was not represented by a lawyer at the trial and he does not have a right to a retrial or appeal, if he is surrendered. Accordingly, none of the exceptions provided for in s. 45

of the Act of 2003 apply, and the surrender of the respondent must be refused, because s. 45 is mandatory in its terms, providing, as it does, that:

> *"a person shall not be surrendered under this Act if he or she did not appear in person at the proceedings resulting in this sentence… unless… [one of the exceptions set forth in the table to s. 45 applied]"*

33. It is accepted that the respondent was aware of the initial date of the appeal hearing being 12th September, 2017. Upon becoming aware of that date, he wrote to the court and requested an adjournment so that he could instruct another lawyer to act on his behalf in connection with the appeal. While this request was granted, the appellant was not informed that it had been granted and nor was he informed of the date to which the hearing was adjourned. Moreover, the respondent provided a postal address in this country, where he was residing, and the court office failed to communicate with him at that address, either in relation to the hearing of 12th November, 2017, or the final hearing on 22nd November, 2017, when sentence was passed down.

34. Insofar as the additional information requested by this Court establishes that a summons for the hearing on 7th November, 2017, was sent to the address described by the respondent in his letter to the court offices of 11th September, 2017, as his "*domicile*" in Romania, and further states that the summons was received by his father who acknowledge receipt in writing, this does not meet the requirements service as determined by the CJEU in the case of *Dworzecki*, Case C-108/16 PPU. In that case, the CJEU determined that:

1. Article 4a(1)(a)(i) of Council Framework Directive 2002/584/JHA of 13th February, 2002, on the European Arrest Warrant and the surrender procedures between Member States, as amended by Council Framework Decision 2009/299/JHA of 26th February, 2009, must be interpreted as meaning that the expressions *"summoned in person" and "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*" in that provision constitute autonomous concepts of EU Law and must be interpreted uniformly throughout the European Union.

2. Article 4a(1)(a)(i) of Framework Decision 2002/584, as amended by Framework Decision 2009/299, must be interpreted as meaning that a summons, such as that at issue in the main proceedings, which was not served directly on the person concerned but was handed over, at the latter's address, to an adult belonging to that household who undertook to pass it on to him, when it cannot be ascertained from the European Arrest Warrant whether and, if so, when that adult actually passed that summons on to the person concerned, does not in itself satisfy the conditions set out in that provision.

Decision

35. Following upon the several requests for further information, the facts giving rise to this application have been clearly established and, for the most part, are not in dispute. These may be summarised as follows:

1. The respondent was initially convicted of the offence of driving a vehicle without a driving licence at the Onesti Court of Law on 19th April, 2017, and, although he was not in attendance, he was represented by his chosen lawyer at that hearing, at which he pleaded guilty to the offence;

2. His lawyer filed an appeal on his behalf, although the respondent denies instructing him to do so. The appeal was first listed for hearing before the Bacau Court of Appeal on 12th September, 2017. The respondent wrote to the court by letter dated 11th September, 2017, requesting an adjournment of the case and a new trial date in order that the respondent could hire a different lawyer, and because, he claimed, he was unable to be in court on 12th September, 2017.

3. The court received this letter (which presumably must have been sent by way of fax or by email) and adjourned the hearing to 7th November, 2017. The respondent was notified of this hearing date (or perhaps summonsed, it is unclear which) by way of a letter sent by the court to an address described by the respondent in his letter of 11th September, 2017, as his domicile. However, the same letter states that he resides in Ireland and provides his exact address in this country. This letter was received by the respondent's father who signed an acknowledgment of receipt.

4. A hearing took place before the Bacau Court of Appeal on 7th November, 2017, at which, according to the IJA, "*the debates were closed*". The matter was then adjourned to 22nd November, 2017, on which date a decision was given and a sentence was handed down. On the same date, the Court of Appeal revoked the suspension of the sentence of imprisonment imposed in respect of the earlier offence, and as a result the respondent received a combined custodial sentence of one year and eight months, the period of one year relating to the earlier offence and the eight months relating to the offence of driving without a licence. The respondent contends that he received no notice of and was unaware the hearing dates of 7th November, 2017, and 22nd November, 2017. As a matter of fact, he was neither in court nor represented in court on either of those dates.

5. It is clear that the respondent did not take any steps to instruct a new lawyer for the purposes of his appeal notwithstanding that this was one of the reasons that he gave to the court when seeking an adjournment. This is apparent from the information given by the IJA wherein it is stated that the court did not appoint a public defender to act on his behalf because of his expressed intention to engage his own lawyer, and also because he was not "*in any of the mandatory legal assistance situations provided by Article 90 of Criminal Procedure Code*". Moreover, the respondent himself did not, at the hearing of this application or in his affidavit

in opposition to the same contend that he had engaged a lawyer to represent him at the appeal, or even made any effort to do so.

6. Nor did the respondent suggest that he made any effort at all to find out what transpired before the Court of Appeal on 12th September, 2017, in response to his request for an adjournment. He claims in his affidavit that he was waiting to hear from the Court of Appeal in response to his request. So it appears therefore that, having requested the court to adjourn his appeal hearing at the eleventh hour in order that he could engage a new lawyer to represent him, he did nothing at all subsequent to that request to find out whether or not it had been granted, or to engage a new lawyer to act on his behalf.

36. The CJEU in the case of *Dworzecki* held that the service of a summons on an adult belonging to the household of the person whose surrender is sought, and who undertakes to pass the summons on to that person, does not of itself satisfy the conditions set out in Article 4a(1)(a)(i) of the Framework Decision. This is because service in such a manner cannot "*unequivocally*" establish that the person whose surrender is sought was aware of the scheduled trial. More is required in order to arrive at that conclusion.

37. Counsel for the applicant relies on paras. 50 -51 of the decision of the CJEU in *Dworzecki* in which it is stated as follows:

"50. Furthermore, as the scenarios described in Article 4a(1)(a)(i) of Framework Decision 2002/584 were conceived as exceptions to an optional ground for non-recognition, 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 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."

38. Counsel for the applicant further submits that even if the Court of Appeal of Bacau had addressed its letter to the respondent at his residence in Ireland, this would not have satisfied any of the scenarios described in Article 4a(1)(a)(i) of the Framework Decision, as reflected in the table to s. 45 of the Act of 2003. Counsel for the applicant submits that there has been a lack of diligence on the part of the respondent and that the Court should order surrender even if it finds that the situation does not come within any of the scenarios set out in the table to s. 45 of the Act of 2003, because it is clear that there has been no breach of the respondent's rights of defence in the proceedings before the courts in Romania.

39. If the Court were to determine this matter on the basis of the terms of the Framework Decision as interpreted by the CJEU in *Dworzecki*, and in particular by reference to paras. 50 and 51 of that decision referred to above, then I would have no hesitation making an order for the surrender of the respondent. The respondent has, for all intents and purposes, orchestrated the state of affairs that has come to pass. He was on notice of the date on which the appeal was originally scheduled to be heard, and he requested an adjournment, which request was granted. He then took no further steps either to engage a lawyer or to acquaint himself with the new hearing date. The court, on the other hand, notified him of the new hearing date by way of a letter addressed to the respondent at his Romanian domicile, which he himself provided to the court in the letter seeking an adjournment.

40. However, it hardly needs pointing out that *Dworzecki* is concerned only with the interpretation of the Framework Decision, and not the Act of 2003. The respondent is relying upon s. 45 of the Act of 2003, as amended, which requires the Court to refuse surrender unless the EAW 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, which is set out in full in s. 45. While some of these matters were indicated in the EAW as originally provided, the additional information provided by the IJA made it clear that paras. D.3.2 and D.3.4 were indicated in error, and did not apply.

41. As far as para. D.3.1b is concerned, the IJA also ticked this box in the EAW. While the Court must normally accept information provided by an IJA as being correct, it can hardly do so where the information provided is undermined by other information provided by the same IJA. In this case, the Court has been provided with full details of the facts relied upon by the IJA relation to service of notice of the court proceedings of 7th November on the respondent. The Court is effectively being invited by the applicant, in reliance upon the conduct of the respondent and his lack of due diligence, to conclude that para. D.3.1b applies. This paragraph states:

> *"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."*

42. Assessing the matter in the light of the conduct of the respondent (as per para. 50 of the judgment of the CJEU in *Dworzecki*), in my view the most that can be said is that it is likely that the respondent was aware of the re-scheduled hearing date of 7th November, 2017, because it is likely that his father would either have forwarded his post to the respondent, or would have opened it and advised the respondent of its contents. I consider it likely that one of these events would have occurred not least because the respondent himself nominated his Romanian domicile in his letter to the Bacau Court. However, being satisfied that something is likely to have occurred falls some way short of being "*unequivocally*" satisfied as to its occurrence, and the latter is required by s. 45 of

the Act of 2003. In effect, what the Court is being invited to do is to deem as good service on the respondent, the service of court documents at his domicile, in circumstances where these documents were received by the respondent's father. There is a difference between deeming service good and being unequivocally satisfied that service on a party has occurred.

43. So, for an example, the respondent's father might or might not have forwarded his post to his son. There is no way of knowing whether or not he did so, and if he did, whether or not the letter was received. And if the respondent's father opened his post and informed him of the contents of the letter, there is no way of knowing if he informed the respondent that a decision might be handed down if he did not appear for the trial. Presumably, it is for these kind of reasons that the CJEU concluded as it did, in *Dworzecki*, that service on an adult member of a household was not of itself sufficient to establish unequivocally that the person to whom the letter was addressed subsequently received the same. The comments of the CJEU in paras. 50 and 51 of its judgment do not in my view, in this case at least, enable this Court to arrive at a different conclusion based on the conduct of the respondent.

44. The Court is obliged to refuse the application if the respondent did not appear in person at the proceedings resulting in the detention order, unless the matters required by paras. D. 2, 3 and 4 of the EAW are indicated. While some of those paragraphs were indicated, i.e. ticked, it is clear (and not disputed) that they were ticked in error and the only outstanding matter upon which the applicant can rely is that referred to in para. D.3.1b of the EAW. For the reasons given above, the Court cannot in this case rely on the ticking of this box in the EAW, and must instead be satisfied that the requirements of para. D.3.1b of the form of warrant have been met, i.e. that it has been unequivocally established that the respondent was aware of the scheduled trial, and that he was informed that a decision might be handed down if he did not appear at the trial. For the reasons given above, I consider that these requirements have not been met. All of that being the case, and since the respondent did not appear at the trial resulting in the sentence imposed on him, this application must be refused.

45. I should add that, insofar as the applicant relies upon the decision of the Court of Appeal in *Skwierczynski*, it seems to me that the facts of that case were altogether different insofar as in that case the court found that a defect in the service of the summons in connection with the trial of first instance was cured by the subsequent appeal filed by the respondent in that case. While it is not entirely clear from that decision, it seems implicit that that appeal was prosecuted and then dismissed.

46. I have arrived at my decision by reason of the unambiguous language of s. 45 of the Act of 2003. I have to say however that I do so with considerable misgivings having regard to the conduct of the respondent. He is, in effect, benefitting from the fact that the Bacau Court of Appeal accommodated him in his request for an adjournment of the proceedings, as well as his own subsequent inaction. Had the Bacau Court of Appeal refused his application for an adjournment, and dealt with the matter when the case was first listed

on 12th September, 2017, then there is every likelihood that this application would have succeeded, because the respondent was aware in advance that the matter was listed for hearing on that date. Some modification to s. 45 of the Act of 2003 is, in my view, necessary in order to avoid such undesirable outcomes.