

THE HIGH COURT

[2022] IEHC 294
[2021 No. 095 EXT.]

BETWEEN

MINISTER FOR JUSTICE

APPLICANT

AND

MACIEJ JAN RUDNICKI

RESPONDENT

JUDGMENT of Mr. Justice Paul Burns delivered on the 9th day of May, 2022

1. By this application, the applicant seeks an order for the surrender of the respondent to the Republic of Poland ("Poland") pursuant to a European arrest warrant dated 4th June, 2020 ("the EAW"). The EAW was issued by Joanna Wieczorkiewicz-Kita, Judge of the Regional Court in Szczecin, as the issuing judicial authority.
2. The EAW seeks the surrender of the respondent in order to enforce a sentence of 6 years and 6 months' imprisonment imposed upon him on 25th January, 2018 (Case Reference Number II K 5/17) and upheld on appeal on 11th September, 2018 (Case Reference Number IV Ka 708/18), all of which remains to be served. The sentence in question is an amalgamated sentence in respect of 5 previous sentences imposed upon the respondent. The amalgamated sentence was imposed at the request of the respondent, made through his lawyer in Poland, following his arrest in Ireland in October 2015 on foot of an earlier European arrest warrant seeking his surrender in respect of 4 of those previous sentences.
3. The respondent was arrested on foot of a Schengen Information System II alert and brought before the High Court on 20th April, 2021. The EAW was produced to the High Court on 30th April, 2021.
4. I am satisfied that the person before the Court, the respondent, is the person in respect of whom the EAW was issued. No issue was raised in that regard.
5. I am satisfied that none of the matters referred to in ss. 21A, 22, 23 and 24 of the European Arrest Warrant Act, 2003, as amended ("the Act of 2003"), arise for consideration in this application and surrender of the respondent is not precluded for any of the reasons set forth in any of those sections.
6. I am satisfied that the minimum gravity requirements of the Act of 2003 have been met. The sentence in respect of which surrender is sought is in excess of 4 months' imprisonment.
7. At part D of the EAW, it is indicated that the respondent appeared in person at the trial resulting in Case Reference Number II K 96/14 but did not appear in person at the trial in Case Reference Number II K 5/17 and did not appear at trial before the second instance court in Case Reference Number IV Ka 708/18. The reference to Case Reference Number II K 96/14 was subsequently indicated to be an error. The issuing judicial authority has

invoked the equivalent of point 3.1.b. of the Table set out at s. 45 of the Act of 2003 as follows:-

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

8. The issuing judicial authority has also invoked the equivalent of point 3.1.c. of the Table to s. 45 of the Act of 2003 as follows:-

"c. 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."

It is further indicated by the issuing judicial authority that *"the person did not request a retrial or appeal within the applicable timeframe"*.

9. The issuing judicial authority has also stated at part D of the EAW:-

"This person was informed correctly by way of substituted service under Article 339 of the Polish Code of Criminal Procedure. He failed, however, to collect a notification about the dates of the trials which resulted in the decisions. His defence counsel, who was notified correctly, collected the notifications. Nevertheless he also failed to appear at the trials before the District Court in Świnoujście and before the Regional Court in Szczecin."

10. At part E of the EAW, it is indicated that the warrant relates to 16 offences in total which appear to have been initially dealt with by way of 5 separate sets of proceedings. Correspondence was not put in issue by the respondent. I am satisfied that correspondence can be made out between the offences to which the EAW relates and offences under the law of the State as follows:-

1. Theft contrary to s. 4 of the Criminal Justice (Theft and Fraud Offences) Act, 2001;
2. a), b), c) – theft contrary to s. 4 of the Criminal Justice (Theft and Fraud Offences) Act, 2001;
3. a), b), c), d), e), f), g), h), i), j) – burglary contrary to s. 12 of the Criminal Justice (Theft and Fraud Offences) Act, 2001 and/or theft contrary to s. 4 of the Criminal Justice (Theft and Fraud Offences) Act, 2001 and/or the offence at common law of attempts to commit the aforesaid statutory offences;
4. Burglary contrary to s. 12 of the Criminal Justice (Theft and Fraud Offences) Act, 2001 and/or theft contrary to s. 4 of the Criminal Justice (Theft and Fraud Offences) Act, 2001; and

5. Robbery contrary to s. 14 of the Criminal Justice (Theft and Fraud Offences) Act, 2001 and/or theft contrary to s. 4 of the Criminal Justice (Theft and Fraud Offences) Act, 2001.

11. It should be noted that the respondent was the subject of a previous surrender on foot of a European arrest warrant (proceedings bearing record number 2015/193 EXT). This previous warrant was issued on 14th October, 2014 and related to 4 separate sentences of 8 months, 10 months, 15 months and 42 months' imprisonment, respectively (making a total of 6 years and 3 months' imprisonment), in respect of 15 offences which had been dealt with by way of 4 separate sets of proceedings. The respondent was arrested on foot of the earlier warrant on 23rd October, 2015 and remanded in custody. He raised a number of objections to surrender and initiated an appeal in Poland and the surrender proceedings were adjourned from time to time. He was granted bail on 9th April, 2018 but this was revoked on 18th June, 2018, following which he was rearrested on 27th July, 2018 and remanded in custody. This earlier warrant was withdrawn on 31st October, 2018 as the sentences to which it related had, at the request of the respondent, been amalgamated into a new sentence which is now the subject matter of the current EAW. The respondent spent approximately 33 months in custody on foot of the earlier warrant.

12. The current EAW relates to an amalgamated sentence in respect of 5 earlier sentences, 4 of which form the basis of the 2014 warrant. The sentence in Case Reference Number II K 911/12 did not form part of the 2014 warrant.

13. By additional information dated 11th May, 2021, the issuing judicial authority furnished completed Tables D in respect of the various underlying proceedings which had led to the convictions as follows:-
 - (a) Case Reference Number IV K 1231/10 – the respondent was notified, he collected in person the notification of the judicial term of the trial resulting in the decision. A legal counsellor did not appear at the trial on his behalf;

 - (b) Case Reference Number III K 22/11 – the respondent appeared in person on 19th May, 2011 and the matter was adjourned until 28th June, 2011 due to the non-appearance of the public prosecutor, of which the sentenced person was informed and obliged to appear on the next judicial trial term. At the next judicial trial term on 28th June, 2011, the respondent did not appear and the court conducted the proceedings in his absence, convicting him. Reliance is placed upon the equivalent of point 3.1.a. of Table D of the Act of 2003 as follows:-
 - "a. *the person was correctly notified of the judicial term of the trial resulting in the decision.*"

It is indicated that no legal counsel appeared at the trial on behalf of the respondent.

- (c) Case Reference Number III K 1609/10 – the respondent did not appear in person at the trial resulting in the decision. Reliance is placed upon the equivalent of point 3.1.a. of the Table at s. 45 of the Act of 2003 as follows:-

"a. the person was notified, the notification was collected by the mother of the sentenced person. The sentenced person did not lodge for an adjournment of the judicial trial term. Moreover, the judgement was passed in the mode of the art. 335 of the code of criminal procedure, which means, that the sentenced person was aware of the conditions of conviction, and what's more he expressed his consent to them."

It is indicated that no legal counsel appeared at the trial on behalf of the respondent.

- (d) Case Reference Number III K 97/12 – the respondent did not appear in person at the trial resulting in the decision. Reliance is placed upon the equivalent of point 3.1.b. of the Table at s. 45 of the Act of 2003 as follows:-

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

It is indicated that no legal counsellor appeared on behalf of the respondent at the trial. It is further indicated as follows:-

"The person did not collect in person the notification of the judicial trial place and term. He was summoned at the correct, given by himself address. There came into being the conditions under the art. 139 of the code of criminal procedure, according to which, if a party to proceedings has changed their place of residence and failed to notify of their new address, or does not stay at the designated address - also as a result of imprisonment with regard to another case - a document dispatched to the address last designated by such a party shall be considered to have been served. This refers also to a party, which has applied for the carrying out of the services to the address of a marked post office box and did not notify the authority of a change of this address or the cessation of its use."

- (e) Case Reference Number II K 911/12 – the respondent did not appear in person at the trial resulting in the decision. Reliance is placed upon the equivalent of point 3.1.b. of the Table at s. 45 of the Act of 2003 as follows:-

"b. the person was not summoned in person but by other means actually received official information of the scheduled date and place of the trial which

resulted in the decision, in such a manner that it was unequivocally established that he or she was aware of the scheduled trial, and was informed that a decision may be handed down if he or she does not appear for the trial;"

It is indicated that no legal counsel appeared at the trial on behalf of the respondent. It is further indicated as follows:-

"The person did not collect in person the notification of the judicial trial place and term. He was summoned at the correct, given by himself address. There came into being the conditions under the art. 139 of the code of criminal procedure, according to which, if a party to proceedings has changed their place of residence and failed to notify of their new address, or does not stay at the designated address - also as a result of imprisonment with regard to another case - a document dispatched to the address last designated by such a party shall be considered to have been served. This refers also to a party, which has applied for the carrying out of the services to the address of a marked post office box and did not notify the authority of a change of this address or the cessation of its use."

14. In a separate letter dated 6th May, 2021 it is indicated that, in Case Reference Number IV K 1231/10, the respondent had been notified of the scheduled date of 18th November, 2010 and a notification was served on the respondent in person. He did not appear and he did not apply for an adjournment. On 18th February, 2013, in Case Reference Number III Ko 1842/12, the execution of the penalty of deprivation of freedom in respect of the respondent was ordered on the grounds of Article 75.1 of the Polish Criminal Code. The respondent was notified of the judicial sitting by way of notice to the address indicated by himself. The respondent did not appear at the sitting and did not seek an adjournment.
15. In a separate letter dated 10th May, 2021, the District Court in Walbrzych indicated as follows:-
 - As regards Case Reference Number III K 22/11, the respondent pleaded guilty in the course of preparatory proceedings and indicated an address for delivery. On 23rd April, 2011, the respondent in person collected the summons together with a copy of the bill of indictment and instruction on the necessity to notify the court of each change of the address and that a neglect of this duty can cause a recognition by the court of the summons sent to the last address as had been served. At the trial on 19th May, 2011, the respondent did not appear in person. Due to the absence of the appropriate prosecutor, the matter was adjourned to 28th June, 2011 which was announced to the respondent, putting him under the obligation to appear at the next judicial trial term. There is a separate summons instructing him on the consequences of an unjustified non-appearance. On 28th June, 2011, the respondent did not appear.

- Case Reference Number III K 1609/10 – the respondent in the course of preparatory proceedings pleaded guilty and indicated an address. With the respondent’s consent, the public prosecutor’s office moved on 20th October, 2010 for a declaration convicting the respondent without a trial and the presiding judge scheduled the sitting of the court for 29th November, 2010. Notification of the sitting together with the bill of indictment and copy of the motion were sent to the respondent at the address given by him. The notice was collected by his mother on 18th November, 2010. He did not appear at the sitting. The judgment together with instructions in relation to appeal were sent to the respondent on 1st December, 2010. The inmate’s correspondence was collected by his mother on 3rd December, 2010.

- Case Reference Number III K 97/12 – the respondent in the course of preparatory proceedings pleaded guilty. He indicated an address for delivery. On 14th September, 2011, in Case Reference Number II Kp 154/11, the District Court in Lubliniec applied a preventative measure in the form of provisional arrest of the respondent for the period of 2 months’ imprisonment until 12th November, 2011. On 29th December, 2011, the respondent, in the course of preparatory proceedings, pleaded guilty to all charges and by virtue of the decision of 11th January, 2012 in the District Court in Lubliniec in Case Reference Number II K 16/12, the preventative measure was revoked. On 26th January, 2012 in Case Reference Number II Ko 14/12, the case against the respondent was remanded to the District Court in Walbrzych. The respondent did not appear at the trial in that court which was scheduled for 25th July, 2012 although the summons had been sent to the address indicated by him in the preparatory proceedings on 17th May, 2012 and 25th May, 2012. The court decided to proceed without the participation of the respondent. Once he had been summoned for the trial, he did not appear and did not excuse his non-appearance or ask for an adjournment. The court regarded the summons as having been served on him on 1st June, 2012 as he was sporadically staying at the indicated address. Judgment was passed on 1st August, 2012. A copy of the judgment together with instructions on appealing were sent on 20th August, 2012 to the address given by the respondent and was collected by his mother on 21st August, 2012.

16. The respondent opposes surrender on the following grounds:-

- (i) The EAW does not contain sufficient information to comply with s. 11 of the Act of 2003;
- (ii) Surrender is precluded by reason of s. 45 of the Act of 2003;
- (iii) Surrender is precluded by reason of s. 37 of the Act of 2003 due to the lack of, or inadequate respect for, the rule of law in the issuing state;

- (iv) Surrender is precluded as it would amount to an abuse of process in circumstances where a previous European arrest warrant was withdrawn in relation to the same offences and in respect of which the respondent spent a period in custody; and
 - (v) Surrender is precluded by reason of s. 37 of the Act of 2003 and would amount to a disproportionate interference with the respondent's right to a family and private life as recognised by Article 8 of the European Convention on Human Rights, particularly in light of the withdrawal of the previous warrant.
17. As regards the amalgamated sentence, the Court sought additional information by way of letter dated 8th July, 2021. By reply dated 20th July, 2021, the issuing judicial authority enclosed replies from the District Court in Swinoujscie and enclosing documentation from the District Court in Walbrzych. By letter dated 14th July, 2021, the District Court in Swinoujscie indicated that Article 138 of the Polish Code of Criminal Procedure provides that a party is obliged to designate an address for the service of documents in Poland and, if they fail to do so, a document sent to their last known address in Poland will be deemed to have been served. Similarly, a failure to notify of a change of address would have the same effect. Neither the respondent nor his counsel indicated a new address for the respondent. Counsel for the respondent was collecting the correspondence and was aware of the judicial term of every trial both at first instance and before the Regional Court. Furthermore, counsel for the respondent informed the court that he and the respondent expressly consented to the covering by a cumulative judgment of the convictions not included in the European arrest warrant of the Regional Court in Swidnica. It is indicated that the amalgamation of the penalties at the trial of first instance in Case Reference Number II K 5/17 was carried out at the request of counsel for the defence and a copy of his request is enclosed. It is indicated that the amalgamation of the 5 penalties at the trial in the second instance in Case Reference Number IV Ka 708/18 was carried out in consequence of the appeal against the judgment of the court of first instance by the lawyer for the respondent. It is indicated that the counsel for the defence was appointed by the respondent and it was his lawyer who requested the passing of a cumulative judgment. It is confirmed that the respondent has exhausted the possibility to appeal against the judgment as his counsel lodged an appeal in consequence of which the judgment of first instance was changed.
18. By letter dated 23rd August, 2021, the Court sought clarification as to whether the respondent had requested that the sentences imposed in Case Reference Number III K 97/12 and Case Reference Number II K 911/12 were to be included in his application for amalgamation of sentences and seeking documentary evidence of same. The Court also sought clarification as to the nature of the process involving the amalgamation of sentences as the respondent's lawyer did not appear to have attended at the actual hearing concerning same. Further details concerning some of the underlying initial sentences were also sought. By reply dated 27th August, 2021, it is indicated the motion to pass a cumulative judgment was lodged by the respondent's counsel but, in the motion, reference is only made to judgment IV K 1231/10, III K 1609/10 and III K 22/11. This may have been due to an oversight or a tactical decision. Under the Polish Code of

Criminal Procedure, the Court is not bound to deal only with the sentences referred to in the motion but is under an obligation to cumulate all of the existing judgments rendered against the sentenced person even if they have not been included in the motion. The motion to pass cumulative judgment was transferred from Walbrzych to Swinoujscie because the last judgment subject to accumulation (Case Reference Number II K 911/12) had been rendered in Swinoujscie. The District Court of Swinoujscie sought consent to accumulate the judgments which were not covered by the European Arrest Warrant and the respondent's lawyer gave such consent on 1st June, 2017 and on 8th August, 2017. It follows from this that the respondent's lawyer and the respondent himself must have been aware of the other judgments (in particular, Case Reference Numbers II K 911/12 and III K 97/12) and consented to their accumulation. It is indicated that the presence of the counsel for the defence is not obligatory at an accumulation process, which is mainly of a written character and based on the documentation from the various cases. This is so both at first instance and even more so at second instance. It is indicated that the respondent was arrested in person as a suspect on 6th June, 2012. Before questioning, he received instructions including instructions that documents sent to the address given by him would be deemed to have been effectively served and notice of his obligation to inform of any change of place of residence or stay outside the jurisdiction. Many attempts were made to notify the respondent in respect of Case Reference Number II K 911/12 using the services of the post and the police and at various addresses. The documentation in relation to the application cumulative judgment including consent to having matters other than those included in the EAW dealt with is enclosed. Documentation in relation to attempts to serve the respondent is also included.

19. I am satisfied that the amalgamated or cumulative sentence in respect of which the surrender of the respondent is sought was imposed at the specific request of the respondent through his mandated lawyer in Poland. I am satisfied that the respondent's interests were protected by that mandated lawyer and that the respondent consented to all 5 previous sentences being amalgamated into the single amalgamated sentence. In such circumstances, I am satisfied that the requirements of s. 45 of the Act of 2003 and Article 4A of the European Council Framework Decision dated 13th June, 2002 on the European Arrest Warrant and the Surrender Procedures Between Member States, as amended, have been adequately met and the defence rights of the respondent were adequately protected.
20. I am not convinced that in the peculiar circumstances of this case it is necessary for the Court to look beyond the judgment which is sought to be enforced and to inquire into the 5 previous sentences amalgamated into that judgment. However, for the purpose of completeness the Court did request further details concerning those 5 prior sentences.
21. As regards Case Reference Number IV K 1231/10 and Case Reference Number III K 22/11, I am satisfied that the respondent was personally notified of the scheduled date and place of the respective trials resulting in the sentences imposed.

22. By letter dated 6th December, 2021, the Regional Court in Szczecin enclosed a letter dated 3rd December, 2021 from the District Court in Swinoujscie confirming that the reference to 29th February, 2013 in its letter dated 27th August, 2021 should instead have read 29th April, 2013. As regards Case Reference Number II K 97/12 and Case Reference Number II K 911/12, the letter enclosed a copy of the instructions for the suspect on his rights and obligations dated 6th June, 2012 together with a copy of the instructions for the suspect and the possibility of sentencing without a hearing. The instructions for the suspect on his rights and obligations expressly state that he is to appear at every summons during the penal proceedings and is to notify the authority which conducts the proceedings of any change of his residence or stay over 7 days. It further states that if the suspect stays abroad, he is obliged to indicate an address for service in Poland and, if he fails to do so, the writ is sent to his last address known in Poland or, if such an address has not been given, the writ is annexed to the dossier and deemed served. It is further indicated that if the suspect fails to give his new address and changes his place of residence and does not stay under the address indicated earlier, thereby, a letter to the latter address in the course of preparatory proceedings is deemed served. Also enclosed with the letter is a signed request by the respondent to be sentenced through plea bargaining to a custodial sentence of 1 year and 6 months' imprisonment suspended conditionally for 3 years, a fine of 100 daily rates of PLN 10 each, the duty to address the damage caused by the offence on a joint and several basis and supervision by a probation officer. Also enclosed is a copy of the envelope and confirmation of receipt in Case Reference Number III K 1609/10 confirming receipt by the respondent's mother and a copy of the envelope and confirmation of receipt in Case Reference Number III K 97/12, confirmation of receipt unsigned and a number of letters setting out the attempts to serve the respondent from 2012 to 2014 in respect of Case Reference Number III K 97/12 and Case Reference Number II K 911/12. It should be noted that the receipt of notification by the respondent's mother is not sufficient to satisfy the requirements of s. 45 of the Act of 2003 and Article 4A of the Framework Decision.
23. Additional information dated 6th December, 2021 also enclosed documentation making reference to the arrest of the respondent together with a number of other men on 2nd April, 2014 in Ireland on suspicion of theft and burglary in Ennis, County Clare. It would appear that it was this arrest which led to the issue of the original European arrest warrant in 2014.
24. Additional information dated 14th February, 2022 from the Regional Court in Szczecin enclosed a letter from that court dated 10th February, 2022 which, in turn, enclosed a letter dated 10th February, 2022 from the District Court in Swinoujscie. This confirms that, in Case Reference Number II K 911/12, during questioning, the respondent provided his permanent address and also a second address and confirmed that he did not stay at any other address for service in Poland. The letter also indicates that the respondent was informed of his obligation to appear at the proceedings and to notify the authorities of any change of residence or stay over 7 days and that, if staying abroad, he was obliged to indicate an address for service in Poland. He was advised that, in the event of him failing to provide a new address or not stay at the address indicated, the letter sent to that

address would be deemed served. The letter enclosed signed acknowledgments from the respondent as regards same.

25. Additional information dated 28th February, 2022 enclosed a letter dated 22nd February, 2022 from the Regional Court in Szczecin, which in turn enclosed a letter from the District Court in Walbrzych dated 15th February, 2022. This confirmed that, in Case Reference Number III K 1609/10, the respondent in the course of questioning was instructed about the duty to provide a correspondence address and the legal consequences of failing to collect correspondence. He provided an address. He had agreed a penalty with the public prosecutor so as to negate the need for a trial. As regards Case Reference Number III K 97/12, again, the respondent was informed about his obligations and duties to provide an address and the consequences of failure to do so. Unfortunately, the relevant documentation was not enclosed with the letter.
26. By further letter dated 7th March, 2022, the Regional Court enclosed a letter from the District Court dated 1st March, 2022 in which the relevant documentation confirming the information provided to the respondent and his acknowledgement of same in respect of Cases Reference Numbers III K 1609/10 and III K 97/12 was enclosed.
27. It is accepted by both parties to these proceedings that none of the options set out in the Table at s. 45 of the Act of 2003 are directly applicable to the factual situation as regards Cases Reference Numbers III K 1609/10, III K 97/12 and II K 911/12. However, in light of the Supreme Court decision in *Minister for Justice and Equality v. Zarnescu* [2020] IESC 59, it is now clear that a literal interpretation is not the correct approach to be taken by the Court, but rather a purposive interpretation is to be adopted in respect of s. 45 of the Act of 2003. In *Zarnescu*, Baker J. analysed the relevant authorities as regards surrender of persons convicted or sentenced in absentia and the proper application of s. 45 of the Act of 2003 and held, inter alia, at para. 90: -

"90. *From this analysis the following emerges:*

- (a) *The return of a person tried in absentia is permitted;*
- (b) *Article 4(6) of the 2002 Framework Decision permits the refusal to return where the requested state has a legitimate reason to refuse the EAW;*
- (c) *A person tried in absentia will not be returned if that person's rights of defence were breached:*
- (d) *Section 45 of the Act expressly identifies circumstances in which a person tried in absentia may be returned, primarily where there is evidence of service or where the person was legally represented or where it is shown that a right of retrial in the requesting state is available as of right:*
- (e) *The examples outlined in section 45 as forming the basis of the analysis are not exhaustive, and the requested authority may look to the circumstances giving rise to the non-attendance of the accused person at the hearing;*

- (f) *The requested state has a margin of discretion in how it approaches the facts, and whether to refuse return;*
- (g) *In so doing the requested authority must be satisfied that it has been established unequivocally that the accused person was aware of the date and place of trial and of the consequences of not attending;*
- (h) *Actual proof of service is not always required, and an assessment may be made from extrinsic evidence that the requested person was aware but nonetheless chose not to attend;*
- (i) *Proof of service on a family member is not sufficient extrinsic evidence of that knowledge;*
- (j) *The assessment is made on the individual facts but there must be actual knowledge by the requested person;*
- (k) *Whether actual knowledge existed is a matter of fact and can be shown from extrinsic evidence;*
- (l) *The purpose of the exercise is to ascertain whether the requested person who did not attend at trial has waived his or her right of defence;*
- (m) *A waiver may be express or implicit from the circumstances, but an implication that a requested person has waived his or her rights to be present at trial is not to be lightly made and will not be made if it has not been unequivocally established that the person was aware of the date and place of trial;*
- (n) *The degree of diligence exercised by a requested person in receiving notification of the date and place of trial may be a factor in the assessment of his or her knowledge of the date of trial;*
- (o) *In a suitable case a manifest absence of diligence may lead a requested authority to the view that the accused person made an informed decision not to be present at trial, or where it can be shown that there was an informed choice made by the person to avoid service;*
- (p) *The mere absence of enquiry as to the date or place of hearing in itself may not be sufficient, as it must be unequivocally shown that the requested person made an informed decision and, so informed, either expressly or by conduct waived a right to be present;*
- (q) *It may in a suitable case be appropriate to weigh the degree of responsibility of the requesting state to notify an accused person of the date of trial against the accused's responsibility for the receipt of his or her mail;*

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

28. In the present case, the applicant accepts that it cannot be established unequivocally, either by personal service or extrinsic evidence, that the respondent had actual knowledge of the scheduled hearings in respect of Cases Number III K 1609/10, III K 97/12 and II K 911/12. At sub-para. (m) as quoted above, Baker J. in the Supreme Court has expressly stated:-

"90. ...

(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.*" (emphasis added)

This appears to be an absolute prohibition on implying a waiver where the fact of knowledge of the date and place of trial cannot be established by personal service or extrinsic evidence. However, the Supreme Court went on to consider the issue of lack of diligence on the part of a requested person in terms of that being a factor in assessing the requested person's knowledge of the date of trial. It pointed out that manifest absence of diligence could support a view that the requested person had made an informed decision not to be present at trial or to avoid service, so as to unequivocally establish that an informed decision had been made by the requested person to waive the right to be present at the hearing, as per sub-paras. (n)-(q). It is necessary in conducting an enquiry into the alleged lack of diligence on the part of a requested person to always bear in mind that the aim is to assess whether rights of defence have been breached or were adequately protected, as opposed to a general enquiry into the behaviour of the requested person, as per sub-para. (r).

29. At first glance, it may seem difficult to reconcile the seemingly absolute requirement of actual knowledge for a waiver to be found, as set out at sub-para. (m), with the enquiry as to diligence referred to in the later sub-paragraphs, as clearly any lack of diligence is only relevant where actual knowledge cannot be established. On closer perusal, while the lack of diligence issue may feed into an assessment of knowledge, it may also be relevant as to whether the requested person has brought about a situation of deliberate or wilful ignorance of the date and place of trial. However, even where the Court finds such deliberate or wilful ignorance has been brought about by the requested person, it should not simply find a waiver of the right to be present, but should still consider whether the rights of defence were adequately protected or breached.

30. I am satisfied that the respondent, in full knowledge that proceedings were in being against him in Poland, decided to leave Poland and come to Ireland, notwithstanding the existence of such proceedings. I am satisfied that in full knowledge of his obligation to

provide details of a change of address within Poland or an address in Poland for service if he left Poland, the respondent did not provide any such details. I am further satisfied that the respondent had been informed and understood that in the absence of providing such details, then service at the address on the case file would be sufficient service.

31. Having carefully considered all of the materials before the Court and bearing in mind the Supreme Court decision in *Zarnescu* and the authorities referred to therein, I am satisfied that this case falls within the category of cases set out at sub-para. (o) of para. 90 of Baker J.'s judgment in *Zarnescu*:-

"(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."

32. I am satisfied that this is such a suitable case in circumstances where I find:-

- (1) At all material times, the respondent knew that proceedings had been, or were to be, brought against him;
- (2) In full knowledge of his obligation to provide details of a change of address within Poland or an address in Poland for service if he left Poland, the respondent did not provide any such details;
- (3) The respondent had been informed and understood that in the absence of providing such details, then service at the address on the case file would be sufficient service;
- (4) In such circumstances, it can be, and is, inferred that the respondent had made an informed decision to bring about a state of affairs in which it was not possible for the Polish authorities to effect personal service upon him;
- (5) In such circumstances, it can be, and is, inferred that the respondent had made an informed decision to deliberately and effectively avoid service;
- (6) In such circumstances, it can be, and is, inferred that the respondent made an informed decision not to take any further personal part in the processes including attending any hearing in respect thereof; and
- (7) Upon his arrest in Ireland on 23rd October, 2015 on foot of a European arrest warrant seeking his surrender in respect of 4 of the underlying judgments herein, the respondent, through his lawyer in Poland, initiated an amalgamation of his sentences which resulted in a single sentence. This in turn led to the withdrawal of the original European arrest warrant in respect of the underlying sentences and the issue of the current EAW in respect of the amalgamated sentence.

33. I have not come to above conclusions lightly and I have taken a step back to consider whether, in the circumstances, I can be satisfied that the rights of defence have not been

breached and were adequately protected. I am satisfied that the respondent's defence rights were adequately protected and were not breached. I am satisfied that the surrender of the respondent is not precluded under s. 45 of the Act of 2003.

34. As regards the respondent's objection to surrender based upon rule of law issues in Poland, this was not pursued.
35. As regards the respondent's objection to surrender based upon s. 11 of the Act of 2003 this was not vigorously pursued in light of the additional information furnished and I dismiss such objection.
36. I turn to the respondent's submission that surrender would amount to an abuse of process by virtue of the fact that the respondent had served a significant period in custody on foot of a previous European arrest warrant issued in respect of 4 of the previous sentences included in the current amalgamated sentence, which had been withdrawn. I am satisfied that there is no merit in this submission. The original European arrest warrant was issued in respect of 4 of the previous sentences. The respondent was arrested on foot thereof and was granted bail. Bail was revoked, presumably by virtue of the respondent's failure to abide by the terms of same. It was the respondent's successful application to have the sentences amalgamated into a single sentence which led to the withdrawal of the original European arrest warrant and the issuing of a fresh warrant. The respondent, in effect, requested the Polish authorities to impose a single sentence upon him, which request was acceded to and, thus, he can have been under no misapprehension but that he had a sentence to serve. In such circumstances, I do not see how any abuse of process can be said to have arisen.
37. The respondent did not pursue the objection based on family circumstances.
38. I am satisfied that surrender of the respondent is not precluded by reason of Part 3 of the Act of 2003 or any provision of that Act.
39. Having dismissed the respondent's objections to surrender, it follows that this Court will make an order pursuant to s. 16 of the Act of 2003 for the surrender of the respondent to Poland.