

THE HIGH COURT

[2023] IEHC 423  
[2022 No. 230 EXT.]

BETWEEN

MINISTER FOR JUSTICE AND EQUALITY

APPLICANT

AND

MICHAL ZBIGNIEW EWERTOWSKI

RESPONDENT

**Judgment of Mr. Justice Kerida Naidoo delivered on 24th day of March, 2023.**

1. By this application, the applicant seeks an order for the surrender of the respondent to The Kingdom of the Netherlands pursuant to a European Arrest Warrant dated 26th September 2022 ("the EAW"). The EAW was issued by an Examining Judge, as the Issuing Judicial Authority ("the IJA").
2. The EAW seeks the surrender of the respondent to enforce a sentence of 6 years' imprisonment imposed upon him on 25th July 2022 by a judgment of the Court of Appeal of 's-Hertogenbosch, of which 2187 days, which is in or about 5 years and 362 days', remains to be served.
3. The respondent was arrested on 16th November 2022, on foot of a Schengen Information System II alert and brought before the High Court on the same date. The EAW was produced to the High Court on 28th November 2022.
4. I am satisfied that the person before the court, the respondent, is the person in respect of whom the EAW was issued.
5. I am satisfied that none of the matters referred to in section 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 four months' imprisonment.
7. Pursuant to section 38(1)(b) of the Act of 2003, the Issuing Judicial Authority has certified that the offence referred to in the EAW is an offence to which Article 2.2 of the Framework Decision applies, that same are punishable by a maximum penalty of at least three years' imprisonment and has indicated the appropriate box for "*murder and manslaughter, aggravated assault*". There is no manifest error or ambiguity in respect of the aforesaid certification as would justify this court in looking beyond same.
8. I am therefore satisfied that no issue arises in respect of correspondence.

**Section 11**

9. In his notice of objection, the respondent objects to surrender on the basis that the EAW does not set out the time of the commission of the offence and therefore lacks the detail required by section 11 of the Act of 2003. This point was not pursued by him at the hearing.
10. I am satisfied that no issue arises under section 11 of the Act of 2003.

#### **Section 45**

11. The respondent objects to surrender on the grounds that the trial resulting in the decision upon which the warrant is based was held in his absence and that his surrender is therefore prohibited pursuant to section 45 of the Act of 2003.
12. The trial took place on 22nd April 2021. The enforceable judicial decision on which the warrant is based is the decision of the Court of Appeal of 25th July 2022. The respondent was not present or legally represented at that hearing.
13. The description of the offence provided at Part e) of the warrant is that *"On 26 May 2019 in Oosterhout, the person concerned attempted to deprive [the injured party] of life. The person concerned forcefully hit the aforementioned person several times against the face and against the head by using a hard and heavy object."*
14. Part D of the EAW indicates that the respondent did not appear in person at the hearing which resulted in the decision that is sought to be enforced. For the purpose of compliance with section 45 of the Act the Issuing Judicial Authority relies on Part D.3.1a of the warrant which says:  
  
*"3.1a the person concerned was summoned in person on 7 March 2022 and was thereby informed of the time and place of the trial leading to the decision and was informed that a decision may be made when he does not appear during the process"*
15. Part D.4 of the warrant says, *inter alia*, that the court *"informed the person concerned at the hearing of 7 March 2022 that he had to be present at the hearing of 1 July 2022. Subsequently, the person concerned did not appear at the court hearing of 1 July 2022. The person concerned was also not represented at this hearing by a lawyer or counsel."*
16. Part D.4 also says: *"an employee of the District Court of Zeeland-West-Brabant, authorized to do so by the specifically authorized counsel of the person concerned, lodged an appeal against the aforementioned judgment on behalf of the person concerned"*.
17. Based on the content of the warrant the history of the proceedings can be summarised as follows:
  - a. The respondent attended in person and was represented at the trial of the matter on 22nd April 2021.
  - b. Judgment was given on 6th May 2021 sentencing the respondent to 8 months' imprisonment.

- c. On 6th May 2021 the respondent lodged an appeal through his counsel.
  - d. On 7th March 2022, the appeal was listed for hearing before the Court of Appeal in the Netherlands.
  - e. The respondent attended on 7th March 2022 but was not legally represented. Because he was not represented the appeal was adjourned to 1st July 2022.
  - f. At the hearing on 7th March 2022, the respondent was informed that he had to be present on 1st July 2022 and that if he was not a decision could be made in his absence.
  - g. The respondent did not attend on 1st July 2022 and was not represented at the hearing.
  - h. The case was substantially dealt with on 1st July 2022.
  - i. On 25th July 2022, the respondent was sentenced *in absentia* to 6 years' imprisonment.
  - j. The respondent had 14 days to lodge an appeal. No appeal was lodged.
  - k. The sentence did not become final until 9th August 2022.
18. The respondent has sworn an affidavit dated 23rd January 2023 in which he avers the following:
- a. He confirms he attended the Court of Appeal on 7th March 2022.
  - b. He says: "*I left there with the understanding and belief that I was required to return there on 12th July 2022*".
  - c. He says he also had a road traffic matter before Gorey District Court on 10th March 2022, which was adjourned to 7th July 2022 and then further adjourned to 8th September 2022. He submits that his return to Ireland was to deal with that case.
  - d. He says he always intended to attend the appeal in the Netherlands and had a flight booked to travel to Eindhoven on 11th July 2022.
  - e. He says he went to Dublin Airport on 11th July 2022. He says his driving licence and passport were in a bag he was carrying and that he lost the bag. He says he reported that fact to Gardaí at Dublin Airport at around 2.30 a.m. on the morning of 11th July 2022. He says that when his bag and documents did not turn up he also reported the loss to Gardaí at Arklow Garda Station.

- f. He exhibits what he refers to as his flight ticket. He also exhibits a copy of the report made at Arklow Garda Station. The report says the passport was “Lost” and contains a handwritten note written by a member of the Gardaí to the effect that the passport was lost at Dublin Airport at around 2.30am on 11th July 2022. The note also says that the loss was reported to Gardaí at Dublin Airport.
19. Proof of compliance with section 45 of the Act rests with the applicant.
20. It is not contested that the respondent was neither present nor represented at the hearing on 1st July 2022. Based on the contents of his affidavit the respondent submits he wanted to attend his appeal but was unable to do so. The respondent therefore submits that the applicant is not entitled to rely on Part D.3.1a of the warrant. He says the EAW does not contain the details required by section 45 of the Act of 2003 and, as there is no basis for a finding of an “unequivocal waiver” of his trial rights, his surrender is prohibited by section 45 of the Act of 2003 in accordance with the principles in *Minister for Justice v. Zarnescu* [2020] IESC 59.
21. In *Zarnescu*, the Court held that the Act of 2003 is to be given a purposive interpretation. The logic of the respondent’s submission is that formal compliance with Part D.3.1a of the warrant is insufficient protection of his fair trial rights. The effect of the respondent’s argument is that even if the court in the Netherlands announced the correct date of the appeal on 7th March, the fact, on his account, that he intended to be present and missed it for the reasons given by him, means his surrender should be refused.
22. The applicant submits that the information provided by the issuing State is that on 7th March 2022 the respondent was correctly informed of the date of the appeal. That being so the respondent was summoned in person and thereby informed of the time and place of the trial leading to the decision. The applicant submits that the IJA is therefore entitled to invoke Part D.3.1a of the warrant and the fact the respondent was not present or represented is not therefore a bar to surrender.
23. On the applicant’s submission it is inexplicable why the respondent did not immediately attempt to get in contact with the court in the requesting State to explain that he would not be present on what he thought was the hearing date. The applicant therefore says that even if it is the case the respondent erroneously believed the next court hearing was on 12th July 2022, not 1st July 2022, and that the respondent had been unable to attend court for the reasons given in his affidavit, his surrender should not be refused.
24. There is no obligation on a respondent to adduce evidence to demonstrate that the requirements of section 45 of the Act have not been met. However, in this case the respondent’s legal argument and objection to surrender is premised on the court accepting the factual account averred to by him in his affidavit. In my view, the applicant is entitled to rely on Part D.3.1a of the warrant unless I find that the contents of the respondent’s affidavit are sufficient to satisfy me that he was misinformed or mistaken

about the date of the appeal and was then, for reasons outside his control, unable to attend on the date he believed it was to be heard.

25. In the circumstances, I would expect the respondent to have made every effort to provide this court with as complete a picture as possible of the circumstances that, on his account, meant he was not present at his appeal of a very serious offence. In my view, however, his affidavit is deficient in a number of material respects and is generally lacking the kind of factual detail and context the respondent should be in a position to provide.
26. The respondent contends he believed the appeal was to take place on 12th July, but his affidavit is silent as to why he apparently made no effort to tell the authorities in the requesting State that he would not be present at the hearing on that date or explain why he was unable to attend. Instead, the respondent says no more than that he left the appeal court on 7th March 2022 "*with the understanding and belief that I was required to return there on 12th July 2022*". The respondent is a Polish national, but he was assisted by an interpreter at the hearing, and he does not complain about the quality of the translation. He does not say whether, at the time, he harboured any uncertainty about what the court said. He does not say whether he confirmed the date with either the interpreter or the court. He does not even say what he thinks may have caused him to have formed the belief the appeal date was 12th July.
27. The reason for the adjournment from 7th March 2022 to 1st July 2022 was because the respondent was unrepresented at the March hearing. The respondent makes no reference to the reason for the adjournment. He does not say that he didn't know why the appeal was adjourned. He was represented before the court of first instance and if the appeal was adjourned to facilitate the respondent arranging representation at the appeal I would expect the respondent to have adverted to that in his affidavit.
28. The respondent was not represented on 1st July 2022. He was represented at his trial, and it appears the appeal was lodged on the application of his counsel at his request on the date of the hearing by the court of first instance. I would therefore expect him to explain why his counsel was not present on 7th March 2022 and whether he expected him to be there on the adjourned date. If he did not want to be represented, I would expect his affidavit to set out why he made that decision, given that he had been represented at the trial. The alternative is that he did want legal representation at the appeal but had not arranged for it prior to booking his flight to attend the hearing. Given the seriousness of the offence I do not find it plausible that he elected to be unrepresented at the appeal or, alternatively, that he left it to the day before the hearing to arrange representation.
29. If the respondent had made efforts to contact his legal representative in advance of the appeal, it would presumably have become apparent to him that he had the wrong date. Equally, if the respondent had attempted to arrange legal representation, that would likely have given rise to independently verifiable facts against which the veracity of his claim that he was mistaken as to the date of the hearing could have been tested. Such facts might have included the identity of the lawyer, when the respondent made contact

with them and whether the court in the Netherlands had been told that the respondent would be represented at the adjourned hearing date.

30. The circumstances in which the respondent asserts he missed the flight that he says he booked to the Netherlands for 11th July 2022 are likewise devoid of any contextual detail. Although he does exhibit the report about losing his luggage, passport and driving licence, again he gives no detail about the surrounding circumstances in his affidavit. The respondent does not say how, when or where he thinks he lost the bag, what he did to find it or when it was returned to him, if ever. He does not exhibit any record of the original report he says he made in Dublin Airport and the document he exhibits as his flight ticket is just a single sheet of paper. Even if a flight was booked, that does not automatically lead to the conclusion that the respondent had booked it because he thought the appeal was listed for 12th July 2022.
31. Furthermore, considering all the information before me, including the contents of the respondent's affidavit, I do not find it credible that the respondent took no steps to alert the authorities in the requesting State that, on his account, he would be unable to attend the appeal that he says he believed was happening on 12th July 2022. He says he arrived in Dublin Airport at around 2.30 am on the morning of 11th July 2022. In my view, had his intention been to attend the appeal he would have taken immediate steps to inform the authorities in the requesting State of his difficulties attending the following day as a matter of urgency. If, for some reason not explained by him, the respondent was unable to do so before the appeal, there is no explanation as to why he did not make efforts to contact them as soon as possible thereafter.
32. The principle of mutual trust and confidence means I am bound to accept the contents of the warrant unless there is good reason for me to believe they are inaccurate, incomplete or insufficient. Reading the information in its entirety, I am satisfied that the respondent was informed in person on 7th March 2022 that the appeal was being adjourned to 1st July 2022, that he had to be present at that hearing and that a decision could be made in his absence if he did not appear. I am also satisfied that the respondent was assisted at the hearing on 7th March 2022 by an interpreter in the Polish language and that the hearing was adjourned to 1st July 2022 because he was not represented on 7th March.
33. The respondent does not explicitly say that on 7th March 2022 the appeal court in the requesting State gave the respondent the wrong date for the adjourned hearing of his appeal. I appreciate that the respondent's case is not that the court necessarily gave him the wrong date, it is that for an unexplained reason he believed it was listed on a different date. For the reasons set out above, I find the explanation offered by the respondent as to why he did not attend the appeal on 1st of July 2022 not to be sufficient to cause me to believe the information in the warrant is not correct or that the respondent made a mistake about the date of his appeal.

34. It follows that the applicant is entitled to rely on Part D.3.1a of the warrant. The fact that the respondent did not appear at the hearing of his appeal and was not represented is not therefore a bar to surrender.
35. The finding that the IJA is entitled to rely on Part D.3.1a of the warrant is determinative of the section 45 argument. The respondent's argument based on the *Minister for Justice v. Zarnescu* [2020] IESC 59 decision therefore does not arise for consideration. Had it been necessary to address the respondent's *Zarnescu* argument it seems to me that it is subject to the same frailty as the argument on Part D.3.1a of the warrant, because it is likewise dependent on my being satisfied about the contents of his affidavit.
36. In that regard, it is apparent from his own version of events that from early on the morning of 11th July 2022 the respondent knew he was not going to be present on the date he says he thought the appeal was going to be heard. As highlighted earlier, the respondent's affidavit is silent as to why he made no effort to tell the authorities in the requesting State that he would not be able to attend the hearing on 12th July and is similar lacking any explanation about why he did not explain his absence after the event.
37. Judgment was not given by the Court of Appeal in the Netherlands until 25th July 2022 and did not become final until 9th August 2022. If the respondent had contacted the court, in person, by electronic mail or through the lawyer who had represented him previously, and explained what he says happened, the court may have been able to address his contended for issues before judgment was given. Alternatively, based on Part D of the warrant it appears he would have been able to appeal the decision before it became final. There was no point in this court requesting additional information about what would have happened had the respondent contacted the court in the requesting State, because he made no effort to do so.
38. Therefore, had the respondent's *Zarnescu* argument arisen for consideration, in the circumstances I am satisfied the respondent demonstrated a striking lack of diligence and had in fact made a decision not to participate in the appeal hearing on the date he says he believed it was to take place, or at all. In those circumstances there was no breach of his fair trial rights.
39. I therefore dismiss the respondent's objection to surrender based on section 45 of the Act of 2003 and Article 4A of the Framework Decision.

### **Section 37**

40. In his points of objection, the respondent objected to surrender under section 37 of the Act of 2003 on the grounds of the breach of his Constitutional and Convention Rights. This point is no longer being pursued otherwise than to the extent that it is part of the section 45 argument, which I have dealt with above.

### **Framework Directive 2008/909/JHA**

41. In his notice of objection, the respondent objected to surrender on the grounds that Ireland is currently in breach of its obligation to implement Framework Directive 2008/909/JHA. This point is no longer being pursued.
42. I am satisfied that surrender of the respondent is not precluded by reason of Part 3 of the Act of 2003 or another provision of that Act.
43. It, therefore, follows that this court will make an order pursuant to section 16 of the Act of 2003 for the surrender of the respondent to The Kingdom of the Netherlands.