

**THE HIGH COURT  
AN ARD-CHÚIRT**

**[2023] IEHC 357  
[2022 No. 31 EXT]**

**IN THE MATTER OF AN APPLICATION UNDER S. 16 OF THE EUROPEAN ARREST  
WARRANT ACT 2003, AS AMENDED.**

**BETWEEN**

**THE MINISTER FOR JUSTICE**

**APPLICANT**

**AND**

**MARCIN MIROSLAW GELO**

**RESPONDENT**

**JUDGMENT of Mr Justice David Keane delivered on the 19th June 2023**

**Introduction**

1. The Minister for Justice ('the Minister') applies under s. 16(2) of the European Arrest Warrant Act 2003, as amended ('the Act of 2003'), for an order directing the surrender of Marcin Miroslaw Gelo to the Republic of Poland, pursuant to a European Arrest Warrant ('the EAW') issued by the District Court in Krakow, as the issuing judicial authority in that Member State, on 4 July 2018.

**The EAW**

2. The EAW seeks the surrender of Mr Gelo to serve the sentence of three years imprisonment (less credit for 569 days of that sentence already served) imposed upon him the District Court in Krakow on 6 August 2009 and affirmed by the Appellate Court in Krakow on 15 December 2009 for an offence of robbery and an offence of armed robbery, that are the subject of case file III K 278/08. The EAW recites that one year, five months and ten days of that sentence remain to be served.
3. Shortly summarised, the particulars of the offence of robbery provided are that, on various unknown dates during the period between May and September 2007, Mr Gelo forced an identified minor victim to give him a sum of money, a mobile phone and a watch by assaulting and threatening to kill that person. The particulars of the offence of armed robbery provided are that, on 16 September 2007, Mr Gelo robbed the same identified minor victim of a sum of money by putting a knife to his chest.

**Background**

4. Mr Gelo was arrested on 11 February 2022 on foot of an alert ('the SIS II alert') issued under the second generation of the Schengen Information System, established by Council Decision 2007/533/JHA ('the SIS II Decision'), and was brought before the High Court

where, having heard the evidence of Detective Garda Eoin Kane, the Court (in the person of Biggs J) was satisfied in accordance with the relevant requirement under s. 14(3)(b) of the Act of 2003 that the person before it was the person named in the SIS II alert. The EAW was provided to the High Court when Mr Gelo was brought before it again on 24 February 2022. I am satisfied that the person before the court is the person in respect of whom the EAW was issued. Mr Gelo raises no issue in that regard.

5. By letters dated 2 March, 22 and 26 April 2022, the High Court requested the issuing judicial authority to provide it with certain specified additional information. The issuing judicial authority provided responses to those requests by letters dated 3 March, 17 May and 2 June 2022.
6. The points of objection originally delivered on Mr Gelo's behalf, pursuant to Order 98, rule 5 of the Rules of the Superior Courts ('RSC'), were undated – or at least those provided to the Court for the purpose of the hearing were. Mr Gelo's solicitor swore an affidavit on 22 April 2022, exhibiting certain material in support of them. Mr Gelo's written legal submissions on those points of objection were delivered on 22 April 2022. Mr Gelo himself swore an affidavit on 25 April 2022. Supplemental points of objection were delivered on his behalf on the same date. The Minister's written legal submissions in support of the application were delivered on 27 April 2022. Mr Gelo swore a supplemental affidavit on 24 June 2022. The Minister delivered supplemental legal submissions on 14 October 2022 in response to Mr Gelo's objection that his surrender is prohibited under s. 45 of the Act of 2003.

### **The issues**

7. While Mr Gelo puts the Minister on strict proof of the matters that it is necessary to establish under s. 16(2) of the Act of 2003 and while a wide range of objections to surrender are raised in his original and supplemental points of objection, at the hearing of the application before me on the 27 March 2023, counsel expressly abandoned all but two of them.
8. The two specific objections upon which Mr Gelo continues to rely are the following.
9. First, Mr Gelo submits that his surrender must be refused under s. 45 of the Act of 2003 because he was not present in person at the hearing that resulted in the affirmation of his conviction and sentence by the Appellate Court in Krakow on 15 December 2009 and none of the matters required in the alternative under point 3 of paragraph (d) of the form of warrant in the Annex to Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the Surrender Procedures between Member States (Council Framework Decision 2002/584/JHA), as amended by Council Framework Decision 2009/2999/JHA ('the EAW Framework Decision'), was invoked by the issuing judicial authority on the face of the EAW or is applicable on the evidence before the court ('the trial in absentia objection'). This objection is set out at paragraph 2 of Mr Gelo's supplemental points of objection.

10. Second, Mr Gelo submits that his surrender is prohibited under s. 37 of the Act of 2003 as a disproportionate interference with his right to respect for his private and family life under Article 8 of the European Convention on Human Rights ('the ECHR') and Article 7 of the Charter of Fundamental Rights of the European Union ('the Charter') ('the family life objection'). This objection appears to have been pursued under paragraph 5 of Mr Gelo's original points of objection, which contained the umbrella plea that his surrender may be prohibited under s. 37 of the Act of 2003 on 'such further grounds as may arise on receipt of further documentation.' While that seems a doubtful proposition, the Minister did not take any point on the issue.

11. I will deal with each of those arguments in turn.

**The trial in absentia objection**

12. Section 45 of the Act of 2003 stipulates that a person shall not be surrendered under the Act if he or she did not appear in person at the proceedings resulting in the sentence unless the warrant confirms the existence of at least one of the matters required by points 2, 3, and 4 of paragraph (d) of the standard form of European arrest warrant set out in the Annex to the EAW Framework Decision, as amended.

13. Those matters set out at point 3 of paragraph (d) of the standard form of European arrest warrant that are relevant to this case are the following:

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

OR

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

OR

3.2 being aware of the scheduled trial, the person had given a mandate to a legal counsellor, who was either appointed by the person concerned or by the State, to defend him or her at the trial, and was indeed defended by that counsellor at the trial....'

14. Article 4a(1)(a) and (b) of the EAW Framework Decision identify broadly the same circumstances as among those in which the executing judicial authority may not refuse to execute a European arrest warrant where a custodial sentence was imposed on a requested person who did not appear at trial.

15. In its judgment of 10 August 2017, *Tupikas*, (C-270/17 PPU, EU:C:2017:628), the Court of Justice ruled:

'Where the issuing Member State has provided for a criminal procedure involving several degrees of jurisdiction which may thus give rise to successive judicial decisions, at least one of which has been handed down in absentia, the concept of 'trial resulting in the decisions', within the meaning of Article 4a(1) of Council Framework Decision 2009/299/JHA of 26 February 2009, must be interpreted as relating only to the instance at the end of which the decision is handed down which finally rules on the guilt of the person concerned and imposes a penalty on him, such as a custodial sentence, following a re-examination, in fact and in law, of the merits of the case.'

16. In the material part of the affidavit that he swore on 25 April 2022, Mr Gelo tersely avers:

'I was not notified or otherwise aware of the appeal hearing which took place in 2009.... I had no idea an appeal was being pursued and I was not aware of the date of the in absentia appeal hearing. I did not mandate a lawyer to pursue an appeal. I have served the index sentence which resulted from the relevant Court of Appeal orders. I believe that I have always provided my mother's address for the delivery of court summonses and other similar important documents. My mother, Ms Miroslava Gelo, has a permanent address at Krakow-Now Huta, Os. Drzy (sic) Arce 22/68, 31845, Poland. I say and believe that my mother did not receive any relevant summonses at her home address.'

17. At paragraph D of the EAW in this case, the issuing judicial authority ticked the box at point 1 of paragraph (d), confirming that Mr Gelo appeared in person at the trial resulting in the decision.
18. On 2 March 2022, the Court requested the issuing judicial authority to confirm that Mr Gelo appeared in person at both the trial at first instance in the District Court in Krakow in August 2009 and in the Appellate Court in Krakow in December 2009.
19. The following day, the issuing judicial authority provided the following extensive additional information in response:

'A criminal complaint was lodged by the underage victims (sic) on 10 September 2007. Already at the stage of investigation the requested person fled from law enforcement for over a year, and the prosecutor ordered for him to be located, at the same time suspending the investigation. The requested person was duly served with summonses but failed successively to appear before the prosecutor for interviews, as a result of which an order was handed down on 10 September 2008 for him to be arrested and brought [to prosecution]. The order was carried out on 8 October 2008. The requested person was arrested and brought to the prosecutor. He was interviewed as a suspect and the charging decision was read

out to him. He did not admit the charges. Considering his conduct, police supervision was ordered and he was required to report three times a week.

An indictment in this matter was submitted to the District Court in Krakow on 16 October 2008 and entered under case no. III K 278/08. The first court date was scheduled for 5 February 2009 but the accused person did not attend court having not collected the summons sent to the mailing address he had provided. The trial was attended by the counsel the court appointed for the requested person. Pursuant to Article 133.2, the summons was duly served: it was sent to the address he had provided for service of process. However, the court did not hear the case and ordered for him to be brought forcibly [to the court]. The next trial date was set for 27 March 2009, and the requested person was brought to the court by police, and his court appointed counsel was in attendance too. In his proof of evidence, the requested person denied the charges again. The next trial date was set for 27 April 2009 but the requested person did not attend, having been duly served notice in the course of the previous hearing. His court-appointed counsel did appear though. For the next court date on 19 June 2009, [the requested person] did not appear, and the summons was again returned with information that it had not been claimed within the timeframe. His court-appointed counsel did appear though. The same situation repeated on 30 July 2009. On 6 August 2009, a verdict was handed down yet neither the requested person nor his counsel appeared for court on that day. The requested person received the sentence described in the EAW i.e. an aggregate prison term of three years.

The requested person's counsel filed a motion for written reasons for the judgment and on 9 October 2009 he appealed the judgment. The case was then transferred to the Appellate Court, which dismissed the appeal as demonstrably ungrounded, and upheld the verdict of the trial court. The requested person did not appear for the appellate hearing (he had failed to claim the summons). Attendance at the appellate hearing is not mandatory. His court-appointed counsel did appear though. Given that, the judgment was finalised, and on 20 April 2010 [the requested person] was committed to prison to serve the sentence as he had not surrendered voluntarily.

The requested person served his sentence until 9 November 2011, when he was put on conditional early release. The conditional release was subsequently revoked by order of the District Court in Krakow Fifth Penitentiary Division on 22 November 2012, case ref. V Kow 1996/12. The reason for the revocation was that he had breached his obligations, especially by evading probation officer's supervision. Despite several calls he failed to surrender to prison to serve the rest of his term so on 30 September 2013 a domestic wanted notice issued. As he was not successfully arrested, the enforcement process was suspended a year later, which tolled the statute of limitations.'

20. On 22 April 2022, the Court wrote to the issuing judicial authority requesting, among other matters:

'It is noted that the requested person was represented at first instance and before the Appellate Court by a court-appointed counsel. You might kindly confirm that the counsel who appeared for the requested person both at first instance and before the Appellate Court was one and the same person throughout.'

21. The issuing judicial authority replied on 17 May 2022, stating:

'The requested person was defended before the trial and appellate courts by the same counsel, solicitor Mateusz Rzeszuta. He was substituted at the trial before Appellate Court by articled clerk Krzysztof Ros, who nevertheless represented the same solicitor throughout.'

22. Upon receipt of Mr Gelo's affidavit sworn on 25 April 2022, containing the averments quoted at paragraph 16 above, the Court wrote to the issuing judicial authority once more the following day, requesting, in material part, the following further additional information:

- '(a) You might kindly confirm what address the requested person provided for service on him.
- (b) It is noted that the requested person was arrested on 8 October 2008 and interviewed. You might kindly confirm whether an address for service was provided by the requested person. You might kindly furnish any documentation confirming the address given by the requested person at the time of interview.
- (c) You might kindly confirm whether the requested person was notified of the appeal hearing on 15 December 2009 and the manner in which he was so notified.
- (d) You might kindly confirm whether there is any information and/or documentation confirming that the court-appointed counsel who appeared at first instance also appeared at the appeal stage on foot of the requested person's instructions.'

23. The issuing judicial authority replied on 2 June 2022, stating in material part:

- 'A. Throughout the proceedings, [the requested person] consistently provided the same mailing address: os. Przy Arce 22/68. I have enclosed the requested person's statement of 22 May 2008, which he filed with the Kraków-Sródmieście Wschód District Prosecutor's Office for the Investigation. [In the enclosed signed handwritten statement and its typed English translation, Mr Gelo confirmed 'I reside, stay and receive correspondence at the address: os. Przy Arce 22/68'.]
- B. At arrest, the requested person provided the above address, so he did when he was interviewed on 8 October 2008 (copies of both reports are attached). What is more, the same day the prosecutor made a decision to put [the requested person]

under police supervision. The supervision is executed at the police station appropriate for the place of residence. In this case, the designated police unit was Police Station VII in Krakow, which is located closest to the residential address given by the requested person. [The attached arrest report and its English translation record the place of arrest as 'os. Przy Arce 22/68, Kraków' and the requested person as a resident of 'os. Przy Arce 22/68 Kraków.' The attached transcript of defendant interview and its English translation record that the defendant gave as his 'permanent address' and his 'living address', 'os Przy Arce 22/68, Kraków'.]

- C. [The requested person] was informed by post of the appellate hearing scheduled for 15 December 2009. All papers addressed to him (sent to the address for service of process which he had consistently provided throughout the proceedings i.e. os. Przy Arce 22/68), were unclaimed within the timeframe and as such were recognised as duly served, in line with the Polish Code of Criminal Procedure (a scan of the envelope is attached). Additionally, the defendant's presence at an appellate hearing is not mandatory and is absolutely voluntary under Polish law.
  - D. Defence counsel was appointed for defendant in the course of judicial proceedings, the counsel represented him throughout the process before the courts of first and second instance. The representative appealed the judgment on behalf of the defendant and represented him in the appellate proceedings at court. The case file does not show if defendant contacted his counsel with regard to the appeal or if was solely counsel's initiative. However, a court appointed attorney is expected to defend their client's interests so if they do not agree with a judgment, they appeal it.'
24. In essence, Mr Gelo submits that, on those facts, the court should be satisfied that the 'trial resulting in the decision' was that before the Appellate Court; that that was a trial in absentia; and that the warrant fails to confirm the existence of any of the circumstances under point 3 of paragraph (d) of the standard form European arrest warrant that nonetheless require the court to order his surrender, so that his surrender must be refused under s. 45 of the Act of 2003.
25. In considering that submission, the first point to note is that, under s. 45C of the Act of 2003, surrender shall not be refused if the court is satisfied that no injustice would be caused to the requested person even if: (a) there is a defect in, or omission of a non-substantial detail in the relevant arrest warrant or any accompanying document grounding the application; (b) there is a variance between any such document and the evidence adduced on the part of the applicant at the hearing of the application, so long as the court is satisfied that the variance is explained by the evidence; or (c) there has been a technical failure to comply with a provision of the Act of 2003, so long as the court is satisfied that the failure does not impinge on the merits of the application.
26. On that basis, I must consider whether any of the circumstances contemplated under Article 4a(1)(a) and (b) of the EAW Framework Decision (as reflected in points 2, 3 and 4

of the standard form European arrest warrant annexed to the EAW Framework Decision) has been established such as would require the court to order the surrender of Mr Gelo on the basis of all of the evidence before the court, including the additional information that I have already summarised.

27. I do not understand any of the relevant legal principles to be in controversy between the parties. Rather, the dispute between them is whether the application of those principles to the evidence before the court requires the refusal of surrender under s. 45 of the Act of 2003.

**i. the proper construction of s. 45 of the Act of 2003**

28. In *Minister for Justice v Skwiercynski* [2016] IEHC 802, (Unreported, High Court, 24 October 2016), Donnelly J explained:

‘102. ... [T]he plain intention of the Oireachtas in enacting s. 16 and s. 45, and taking into account the entirety of the Act, was to give effect to the Framework Decision. This optional ground for refusal to surrender a requested person was transposed almost entirely in accordance with the wording of the relevant article in the Framework Decision. The Act of 2003 also requires this Court to refuse to surrender if his ECHR rights or constitutional rights will be violated on surrender. The plain intention of the Oireachtas is that surrender must take place if the Court can be assured that the surrender of the person concerned does not mean a breach of his rights of defence.

103. Therefore, the Court is satisfied that it must give a construction which reflects the plain intention of the Oireachtas. That intention is plain from the sections and the Act as a whole. This is a section which reflects the concepts set out in the Framework Decision. Those concepts are autonomous concepts of E.U. law to be interpreted uniformly throughout the European Union. The plain intention of the Oireachtas is that surrender is not to be refused simply on the basis that the requested person's situation does not come within one of the exceptions set out in the Table to s. 45 provided that the High Court can be assured that his surrender does not mean a breach of [that person's] rights of defence.’

29. That decision, which resulted in part from a careful consideration of the judgment of the Court of Justice of 24 May 2016 in C-108/16 PPU *Dworzecki* (EU:C:2016:346) (*‘Dworzecki’*), was upheld by the Court of Appeal ([2018] IECA 204) and its approach to the construction of s. 45 of the Act of 2003 was expressly approved by the Supreme Court in *Minister for Justice and Equality v Zarnescu*, [2020] IESC 5, (Unreported, Supreme Court, 28 September 2020) (*‘Zarnescu’*) (per Baker J at para. 57).

30. In *Dworzecki*, the Court of Justice stated (at paragraphs 42 and 43):

‘42. In that regard, it should be borne in mind that, although the right of the accused to appear in person at his trial is an essential component of the right to a fair trial, that requirement is not absolute. The accused may waive that right of his own free



will, either expressly or tacitly, provided that the waiver is established in an unequivocal manner, is attended by minimum safeguards commensurate to the gravity of the criminal offence with which the accused is charged and does not run counter to any important public interest. In particular, breach of the right to a fair trial has not been established, even where the accused did not appear in person, if he was informed of the date and place of the trial or was defended by a legal counsellor whom he had instructed to defend him (see, to that effect, judgment of 26 February 2013 in Melloni, C 399/11, EU:C:2013:107, paragraph 49).

43. The right to a fair trial enjoyed by a person summoned to appear before a criminal court thus requires that he has been informed in such a way as to allow him to organise his defence effectively. Article 4a(1)(a)(i) of Framework Decision 2002/584 is designed to achieve that objective, but does not constitute an exhaustive list of the means that can be used to that end. In fact, in addition to a summons in person, the conditions set out in that provision are satisfied if the person concerned was actually given official information of the date and place fixed for his trial by 'other means'.
31. Later in the same judgment, the Court of Justice went on to state (at paragraphs 50 and 51):
    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.'
  - ii. **'summoned in person' or otherwise 'unequivocally aware' of the Appeal**
  32. In *Zarnescu*, the Supreme Court provided the following summary of the principles that govern the circumstances in which a person who did not appear in person in the proceedings that resulted in the sentence may nonetheless be surrendered in accordance with the terms of s. 45 of the Act of 2003, properly construed (per Baker J at paragraph 90):
    - '90. From this analysis the following emerges:
      - (a) The return of a person tried in absentia is permitted;

- (b) Article [4a] 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.'

**iii. defence at trial by a court appointed legal counsellor with a mandate**

33. As already noted, one of the circumstances in which, under s. 45 of the Act of 2003, the Court may not refuse to surrender a person who was tried in absentia is where 'being aware of the scheduled trial, the person had given a mandate to a legal counsellor, who was either appointed by the person concerned or by the State, to defend him or her at the trial, and was indeed defended by that counsellor at the trial'.

**iv. Conclusion on whether surrender should be refused under s. 45 of the Act of 2003**

34. In this case, to ground the submission that none of the relevant circumstances is present, Mr Gelo tersely avers that he was not notified or otherwise aware of the appeal hearing in 2009; did not know an appeal was being pursued; was not aware of the date of that appeal; and did not mandate a lawyer to pursue an appeal.

35. Those bare and carefully drafted averments tend to obfuscate as much as they purport to clarify. They ignore the fact that Mr Gelo was represented for the duration of the first instance proceedings by a court-appointed lawyer who plainly had a mandate to do so, given that there is no suggestion that Mr Gelo objected to that representation either when forcibly brought before the court in the presence of that lawyer on 27 March 2009 or at any other time. They fail to engage with the question of why it might be supposed, much less concluded, that Mr Gelo's court-appointed legal counsellor did not have an initial mandate sufficient to cover the prosecution of an appeal on Mr Gelo's behalf without the need for a further specific mandate to that effect. There is certainly no suggestion that Mr Gelo withdrew the mandate of that court-appointed lawyer at the conclusion of the first instance proceedings, much less is there any suggestion either that Mr Gelo gave a mandate to another legal counsellor to pursue an appeal against the conviction recorded or three-year sentence imposed at first instance or that he decided not to appeal against

that conviction or sentence. Thus, I conclude that Mr Gelo had given a mandate to a court-appointed legal counsellor to defend him at the trial, including any appeal, and was indeed defended by that counsellor at the trial and appeal.

36. For completeness, I should add that I do not accept the submission – tentatively advanced – that there was a breach of Mr Gelo’s fair trial rights because he was represented at the appeal by a counsellor described by the issuing judicial authority, in the English translation of the additional information it provided, as ‘an articulated clerk’ of the ‘solicitor’ appointed to defend him at trial. There is no evidence before me that the person concerned was not properly qualified to represent Mr Gelo for the purpose of that proceeding. I must proceed upon the presumption that the trial and appeal leading to the conviction in question were fair in respect of the respondent’s fundamental rights; see, for example, *Minister for Justice, Equality and Law Reform v. Marjasz* [2012] IEHC 233 and *Minister for Justice and Equality v. Rostas* [2014] IEHC 391.
37. Nevertheless, Mr Gelo does baldly aver that he was not aware of the date of the appeal hearing or, indeed, of the existence of the appeal. In referring to his state of knowledge in the past tense, I presume that Mr Gelo means that he was not aware of the appeal brought on his behalf at the time when it occurred i.e. on or before his conviction was affirmed by the Appellate Court on the 15 December 2009. Given that he was committed to prison to serve the sentence on 20 April 2010, having failed to surrender voluntarily, and remained there until his early conditional release on 9 November 2011, it is difficult to accept that he would not have been apprised of the earlier affirmation of his conviction on appeal at the commencement, or in the course, of that imprisonment. However, it is not difficult to accept that Mr Gelo demonstrated the same attitude to the fact and circumstances of his appeal as he did to the fact and circumstances of his trial at first instance, from which he absented himself on each of the five occasions when he was not forcibly brought before the court.
38. In attempting to establish that his asserted ignorance of the appeal proceedings was not wilful, Mr Gelo avers that he has always provided his mother’s address for the delivery of court summonses and other similar important documents, before going on to aver to his belief that his mother did not receive any relevant summonses at her home address. Those averments ignore the fact that the address he identifies as his mother’s is the one at which he was residing, staying, and receiving correspondence at the material time, according to the signed, handwritten statement he provided to the District Prosecutor’s Office, is the address that he provided as his own ‘permanent address’ and ‘living address’ at interview and is the address at which he resided while under police supervision, so that it was on that basis, rather than on the basis that he had elected to give that address as his mother’s address for the delivery of important documents, that all summonses and other court documents were sent to that address for the purpose of the proceedings.
39. Considering those uncontroverted facts, Mr Gelo’s manifest absence of diligence in receiving notification of the date and place of trial at the address that he had repeatedly nominated as his place of residence for that purpose leads ineluctably to the conclusion

that he made an informed choice to avoid service and, thus, an informed choice not to be present at his appeal. Further, and for the reasons I have already given, I am satisfied that his defence rights were adequately protected – that is to say, were not breached - either at trial or on appeal.

40. Hence, Mr Gelo’s objection that his surrender is prohibited under s. 45 of the Act of 2003 fails.

**The family life objection**

41. Mr Gelo submits that his surrender is prohibited under s. 37(1)(a) of the Act of 2003 as a disproportionate interference with his right to respect for his private and family life under Article 8 of the ECHR (and Article 7 of the Charter).
42. The relevant averments in the affidavit that Mr Gelo swore on 25 April 2022 are characteristically brief and may be summarised as follows. He has lived in Ireland with his family since 2012. He is stepfather to his partner’s two teenage children and the father of an infant born last Autumn. He has consistently worked since his arrival in the State in a creche as caretaker, in a pizzeria, and as a cleaner for a contract cleaning company.
43. As this ground of objection was not dealt with at all in Mr Gelo’s written submissions and only briefly mentioned in the oral submissions put forward on his behalf, I do not propose to address it any great length.
44. The principles that govern the assessment of an objection to surrender, under s. 37 of the Act of 2003 on the ground that it would be in breach of the rights of the requested person or of his family members to respect for his or their private and family life under Article 8 of the Convention were recently reiterated by Donnelly J in *Minister for Justice and Equality v D.E.* [2021] IECA 188, (Unreported, Court of Appeal, 1 July 2021) (at paragraph 59). They are as follows:

(i) In an application for surrender, the court is not carrying out a general proportionality test on the merits of the application. The court should apply the specific terms of the 2003 Act, albeit subject to a careful consideration of whether, if necessary, applying a proportionality test to Article 8 Convention rights, to order surrender would involve a violation of that ECHR right to the extent of being incompatible with the State's obligations under the Convention. (*Minister for Justice and Equality v Vestartas* [2020] IESC 12 ('Vestartas').

(ii) Surrender (or extradition) presupposes an impact on the personal or family life of a requested person. Having regard to Article 8(2), surrender (or extradition) carried out pursuant to legislation is in principle an acceptable interference with the right to respect for those rights. (*Minister for Justice and Equality v Ostrowski*, [2013] 4 IR 206 ('Ostrowski'); *Minister for Justice and Equality v JAT* (No. 2) [2016] 2 ILRM 262 ('JAT (No. 2)'); *Vestartas*).

(iii) When faced with an Article 8 objection to surrender, the function of the Court is to decide if the surrender is incompatible with the State's obligation under the European Convention on Human Rights. That requires a very high threshold. Any inquiry must bear in mind that s. 10 requires a court to surrender in accordance with the provisions of the 2003 Act and s. 4A of that Act obliges the court to presume that the issuing state has complied and will comply with its fundamental rights obligations. (*Vestartas*).

(iv) The evidential burden of proving incompatibility lies on the requested person. (*Minister for Justice, Equality and Law Reform v Rettinger*, [2010] 3 IR 783; *Vestartas*).

(v) The assessment of the claimed impact of surrender on personal and family rights must be a rigorous one. (*Rettinger*; *JAT (No. 2)*).

(vi) The evidence must be cogent and must reach the level of incompatibility (*Vestartas*).

(vii) Exceptionality is not the test for incompatibility, but it will only be in a truly exceptional case that surrender will be found to be incompatible with the State's obligations under Article 8 of the Convention. (*JAT No. 2*; *Vestartas*).

(viii) For an Article 8 objection to succeed, there must be clear cogent evidence sufficient to rebut the presumption in s. 4A of the 2003 Act. (*Vestartas*).

(ix) No elaborate factual analysis or weighing of matters is necessary unless it is clear that the facts come close to a case which would be truly exceptional in nature thereby engaging the possibility that surrender may be incompatible with the State's obligations under the Convention. (*JAT (No.2)*).

(x) The requirement that the circumstances must be shown to render the order for surrender incompatible with the State's obligations under Article 8 necessitates that the incursion into the private and family rights referred to in Article 8(1) is such as to supervene the limitations on the right contained in Article 8(2), and over the significant public interest thresholds set by the 2003 Act itself. (*Vestartas*).

(xi) Where the facts, assessed as set out above, come close to being truly exceptional in nature thereby engaging the possibility that surrender might be incompatible with the State's obligations, the Court will engage in a proportionality test of whether the high public interest in the prevention of disorder and crime (and the protection of the rights of others) is overridden by the personal and family circumstances (taken where appropriate with all the cumulative circumstances) of the requested person. That is a case-specific analysis which will be required in very few cases.

45. While it is acknowledged on Mr Gelo's behalf that there is nothing in the circumstances of his personal or family life that, in and of itself, would render the impact of his surrender

pursuant to the Act of 2002 an unacceptable interference with his right to respect for those rights, he relies on the cumulative effect of two further features of his case that, he submits, establish it as truly exceptional in nature. The first is the lapse of time between his arrival in the State (on an unspecified date) in 2012 and his arrest on 11 February 2022. The second is the failure of the State to implement Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentence or measure involving deprivation of liberty for the purpose of their enforcement in the European Union ('The Transfer of Sentences Framework Decision'). In that regard, Mr Gelo relies on the observation of Baker J, in giving judgment for the Supreme Court in *Minister for Justice and Equality v Kairys* [2022] IESC 53, (Unreported, Supreme Court, 22 December 2022) (at paragraph 89) that the failure of the State to transpose the Transfer of Sentences Framework Decision could in a suitable case give rise to consideration by a court whether exceptionalism does exist for the purpose of resisting surrender on Article 8 ECHR grounds, by reason of the non-availability of the option to serve a sentence in Ireland, sufficient to meet what is undoubtedly the very high bar required to resist surrender having regard to the mandatory nature of the EAW process, and the fact that a defence to surrender based on Article 8 can succeed only on cogent and very strong grounds.

46. On the lapse of time point, I cannot overlook the fact that, without informing the authorities, Mr Gelo left Poland in 2011 or 2012 while on conditional release subject to the supervision of a probation officer and never afterwards informed the authorities of his whereabouts. The additional information provided by the issuing judicial authority established that it was not until 20th March 2018, when a report was received from the Polish police that Mr Gelo might be in Ireland, that the issuing judicial authority was in a position to take any further steps. The EAW duly issued three months later, after the necessary documentation had been compiled. Accordingly, it is difficult to dispute the issuing judicial authority's assertion that any delays in this case were caused by Mr Gelo who fled justice at every stage of the process.
47. Nor am I persuaded that the non-availability of the option to serve the remainder of his sentence in Ireland due to the failure of the State to implement the Transfer of Sentences Framework decision is sufficient on the particular facts of this case to establish a truly exceptional case, thereby engaging the possibility that surrender may be incompatible with the State's obligations under the ECHR.
48. It follows that Mr Gelo has failed to satisfy me that his surrender to Poland, in accordance with the requirements of Article 10 of the Act of 2003, would involve a violation of the right to family life under Article 8 of the Convention to the extent that it would be incompatible with the State's obligations under the Convention. This is not a truly exceptional case. There is no clear or cogent evidence that is sufficient to rebut the presumption under s. 4A of the Act of 2003 that the issuing Member State will comply with the requirements of the Framework Decision.

49. For that reason, Mr Gelo's objection that his surrender is prohibited under s. 37(1)(a) of the Act of 2003 also fails.

**Necessary proofs under s. 16(2) of the Act of 2003**

50. On the information and evidence before me, I am duly satisfied that:

- (a) the EAW, including – by way of additional information – the matters required by s. 45 of the Act of 2003, has been provided to the court,
- (b) the person before the court is the person in respect of whom the EAW issued (upon which no dispute has been raised),
- (c) I am not required under s. 21A, 22, 23 or 24 of the Act of 2003 to refuse to surrender Mr Gelo under that Act (as none of the matters referred to in those sections arise).
- (d) The surrender of Mr Gelo is not prohibited under any of the provisions of Part 3 of the Act of 2003. I have rejected Mr Gelo's arguments that his surrender is prohibited under ss. 37 and 45 of the Act. I am satisfied that the first offence in respect of which his surrender is sought corresponds to an offence under the law of the State, specifically, that of robbery contrary to s. 14 of the Criminal Law (Theft and Fraud Offences) Act 2001; that the offence is punishable in the issuing state by imprisonment or detention for a period of not less than 12 months (namely, by one of up to ten years); and that a term of imprisonment of not less than four months (specifically, one of three years imprisonment) has been imposed on him for that offence, of which one year, five months and 10 days remains to be served, and I am further satisfied that the second offence is one to which paragraph 2 of Article 2 of the Council Framework Decision applies, namely one of organised or armed robbery (as the relevant box has been ticked at paragraph E.2 of the EAW) and that that offence is punishable in the issuing state by a custodial sentence of at least three years (specifically, one of up to 12 years), so that his surrender is not prohibited under s. 38 of the Act in either instance. None of the other matters referred to in Part 3 of the Act of 2003 arises.

**Conclusion**

51. It follows that, having due regard to the obligation to surrender under s. 10 of the Act of 2003, I will make an order under s. 16(2) of that Act, directing the surrender of Mr Gelo to such person as is duly authorised by the Republic of Poland to receive him.