THE HIGH COURT

[2024] IEHC 723

Record No. 2024 No. 033 EXT

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

BETWEEN

MINISTER FOR JUSTICE

APPLICANT

AND

MAKSYMILLIAN PRZEMYSLAW ANUSIEWICZ

RESPONDENT

JUDGMENT delivered by Mr. Justice Patrick McGrath on the 15 November 2024

1. In this application the Minister seeks the surrender of the Respondent on foot of a European Arrest Warrant issued by Judge Beata Krzysztofiak of the Regional Court in Zamosc, Poland dated the 12 July 2016. Part K of the Warrant confirms that this warrant 'was changed on 23 January 2024' but no issues arises therefrom.

2. The surrender of the Respondent is sought to serve the balance of a three-year sentence, imposed by Sad Rejonowy District Court on the 10 November 2015, which sentence became final on the 9 December 2015. The remaining balance to be served is 2 years 11 months and 27 days imprisonment.

3. The warrant was endorsed by this Court on the 7 February 2024. The Respondent was subsequently arrested on the 12 February 2024 and has been remanded on continuing bail pending the outcome of these proceedings.

4. I am satisfied that the Respondent is the person in respect of whom this EAW is issue and no issue is taken in relation to identity in this case.

5. The warrant was issued by a Judge assigned to the Regional Court in Zamosc, a 'judicial authority' within the meaning of s.2 of the European Arrest Warrant Act, 2003 ['the 2003 Act'].

6. I am satisfied that the surrender is not prohibited for any of the reasons set out in in s.21A, 22, 23 and 24 of the European Arrest Warrant Act, 2003 (as amended) ['*the 2003 Act'*]. I am further satisfied that is surrender is not prohibited under Part 3 of the 2003 Act.

7. The warrant is, so far as is practicable, set out in the form of the Annex to the Framework Decision and I am satisfied the information provided therein satisfies the requirements of s11 of the Act.

8. The offence of which the Respondent was convicted and sentenced is described at Part (e) of the Warrant as *'Article 280 s1 of the Penal Code in conjunction with Article 64 s 1 of the Penal Code – an offence against property – assault and robbery committed in circumstances of recidivism'* Further factual details of the conduct which led to this conviction is set out at Paragraph E2.

9. The offence is not a 'ticked box' offence as set out in Article 2.2 of the Framework Decision and it is therefore necessary to consider whether there is correspondence. Section 5 of the 2003 Act provides:-

> *'For the purposes of this Act, an offence specified in a European Arrest Warrant corresponds to an offence under the law of the state, where the act or omission that constitutes the offence so specified would, if committed in the State on the date on which the European arrest warrant is issued, constitute an offence under the law of the State'.*

10. The relevant principles for showing correspondence are well established. In assessing correspondence, the question is whether the acts or omissions that constitute the offence in the requesting state would, if carried out in this jurisdiction, amount to a criminal offence – *Minister for Justice v Dolny* [2009] IESC.

11. I am satisfied that the offence set out in the Warrant corresponds with offences under Irish Law being:

    a. Robbery contrary to Section 14 of the said Criminal Justice (Theft and Fraud Offences) Act, 2001; and / or
    b. Theft contrary to Section 4 of the said Act; and / or

12. The Respondent is sought in order to serve a sentence of 2 years 11 months and 27 days and therefore the minimum gravity requirements set out in s.38 of the Act are met.

13. Points of Objection were filed on the Respondents behalf on the 12 April 2024 and the Respondent therein set out three specific grounds of objection:

    a. The Respondent ought not be surrendered owing to a failure to comply with the requirements of s45 of the 2003 Act;
    b. His surrender is prohibited as there is a real risk that, if surrendered, he might be detained in conditions which are inhuman or degrading; and
    c. His personal and family circumstances ought to be considered, albeit in the context of applications ancillary to a surrender order.

Conditions of Detention

14. The Respondent objects to surrender pursuant to s.37 of the 2003 Act, Article 4 and 5 of the Charter of Fundamental Rights and Article 40.3.1 of the Constitution on account of conditions of detention in Poland.

15. The Respondent in this regard refers to a report of the National Mechanism for the Prevention of Torture for Poland, dated the 17 January 2023, which he says detailed alarming deficiencies in the conditions of detention in a particular prison, Barczewo prison, such that he claims a real risk of his being subjected to torture if surrendered. He further states that the said report demonstrates a real risk that he might be detained in a cell of less than 3m2 living space.

16. The Applicant submits that the report referred to by the Respondent fails to reach the threshold of the first step in the so called *'Aranyosi'* test. The Minister submits that the report referred to by the Respondent relates only to one prison in Poland and does not provide evidence of systemic concerns or difficulties such that would necessistate this court to seek any specific assurances from the requesting state.

17. In *Minister for Justice v Rettinger* [2010] IESC 45, the Supreme Court accepted that prison conditions in the requesting state could give rise to a refusal to surrender under s.37 of the 2003 Act but stressed that where such an objection is raised:

> *'the burden rests upon the [respondent] to adduce evidence capable of proving that there are substantial grounds for believing that if he (or she) were returned to the requesting country he, or she, would be exposed to a real risk of being subjected to treatment contrary to Article 3 of the Convention'*

18. A summary of the principles which have emerged from the case law in this regard was provided by Burns J in *Minister for Justice v Angel* [2020] IEHC 699 where the court said as follows:

> *'(a) the cornerstone of the Framework Decision is that member states, save in exceptional circumstances, are required to execute any European arrest warrant on the basis of the principles of mutual recognition and trust;*
>
> *(b) a refusal to execute a European arrest warrant is intended to be an exception;*
>
> *(c) one of the exceptions arises when there is a real or substantial risk of inhuman or degrading treatment contrary to Article 3 ECHR or Article 4 of the Charter of Fundamental Rights of the European Union ('the Charter');*

(d) the prohibition on surrender where there is a real or substantial risk of inhuman or degrading treatment is mandatory. The objectives of the Framework Decision cannot defeat an established risk of ill-treatment;

(e) the burden rests upon a respondent to adduce evidence capable of proving that there are substantial / reasonable grounds for believing that if he or she were returned to the requesting country, he or she will be exposed to a real risk of being subjected to treatment contrary to article 3 ECHR;

(f) the threshold which a respondent must meet in order to prevent extradition is not a low one. There is a default presumption that the requesting country will act in good faith and will respect the requested person's fundamental rights;

(g) in examining whether there is a real risk, the Court should consider all of the material before it and if necessary, material obtained of its own motion;

(h) the Court may attach importance to reports of independent international human rights organisations or reports from government sources;

(i) the relevant time to consider the conditions in the requesting state is at the time of the hearing;

(j) ...

(k) a finding that there is a real risk of inhuman or degrading treatment by virtue of general conditions of confinement in the issuing member state cannot lead, in itself, to the refusal to execute a European arrest warrant. Whenever the existence of such a risk is identified, it is then necessary for the executing judicial authority to make a further assessment, specific and precise, of whether there are substantial grounds to believe that the individual concerned will be exposed to that risk;

(l) an assurance provided by the competent authorities of the issuing state that, irrespective or where he is detained, the person will not suffer inhumane degrading treatment is something which the executing state cannot disregard and the executing judicial authority, in view of the mutual trust which must exist between the members states on which the European arrest warrant is based, must rely on that assurance, at least in the absence of any specific indications that the detention conditions in a particular detention centre are in breach of article 3 ECHR or article 4 of the Charter; and

(m) It is only in exceptional circumstances, and on the basis of precise information, that the executing judicial authority can find that, notwithstanding

such an assurance, there is a real risk of the person concerned being subjected to inhuman or degrading treatment because of the conditions of that person's detention in the issuing member state.

19. The applicant has further referred to the case of *Minister for Justice v Kaleja* [2021] IEHC 206, where the Court emphasised the two stage process which had to be followed in considering such a claim, saying:-

> *'It is by now well established jurisprudence of the Court of Justice of he European Union ('the CJEU') that where an objection to surrender is raised on the basis of an asserted risk of a breach of article 3 ECHR that a two step approach is to be adopted by the court of the executing state. Firstly the court should have before it information that is objective, reliable, specific and properly updated which demonstrates deficiencies in detention conditions in the issuing state. Only on the basis of such information should the court proceed to a further assessment, specific and precise, as to whether there are substantial grounds to believe that the individual concerned will be exposed to that risk. See Aranyosi and Caldararu (C-404/15 and C-659/15 PPU) Minister for Justice Equality and Law Reform v Rettinger [2010] IESC 45 and Minister for Justice and Equality v Petronel Pal [2020] IEHC 143'*

20. The applicant here has sought to rely on one report made following one visit to one prison in 2022. The Respondent has not put before the Court any reports or other documents which suggest that the unacceptable and criminal behaviour reported during that single visit to Barczewo prison is behaviour which has occurred in any other prison in Poland. The Respondent has not even suggested there is any risk that he would be detained in this prison. The Respondent has not therefore put before the court any evidence to suggest that there is any real risk that he might be exposed to inhuman and degrading treatment. The burden set by the first part of the Aranyosi test is not met by simply putting before this court one report from a visit which took place to one prison over two years ago. Much more is required before this court, bearing in mind the presumption that Poland acts in compliance with its obligations under the Framework Decision and the Charter of Fundamental Rights, should seek an assurance from the requesting state.

21. Additionally, a s.20 request was sent to the IJA seeking:

a. An indication as to what institution or prison he might be detained in following surrender;
b. If surrendered that he would be
    - Provided with sufficient space wherever he is accommodated
    - Medically assessed on arrival and provided with appropriate medical treatment during detention
    - Detained in conditions which were clean and hygienic, where there was sufficient light and ventilation, where there was sufficient outdoor exercise and ventilation and proper food;
c. Comments on the report referred to by the Respondent relating to Barczewko prison

22. Having considered the response received from the Polish authorities, there is no basis to have any concerns in relation to prison conditions in the requesting state such that there is a risk that the Respondent would be exposed to inhuman and / or degrading treatment if surrendered.

23. Furthermore, as observed by the Applicant, this report is in fact made by a body which was established by Poland to ensure that its prisons meet the necessary minimum standards and indeed in the reply from the IJA dated the 7 June 2024, it is stated that the Regional Court in Zamosc has asked for information on how to eliminate the irregularities observed in Barczewko.

Non Compliance with s45 Requirements

24. The Respondent did not appear in person at the *'trial resulting in the decision'* , namely the hearing at which he was convicted and sentenced for the offence for which his surrender is now sought. The IJA seeks to rely upon the boxes at D 1.b or D 1.d of the Schedule to s.45 of the Act, namely:-

> *'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 at the trial'
'd. the person was served with the decision on 01/12/2015 and was expressly informed about the right to a retrial or appeal, in which he or she has the right to participate and which allows the merits of the case, including fresh evidence, to be re-examined and which may lead to the original decision being reversed'

25. It was then stated that he did not request a retrial or appeal within the applicable time frame. Further details are then given as to how the IJA says there is compliance in this case with D 1.b. At Paragraph D.2 of the Warrant, the following is stated:-
    a. A summons for the hearing scheduled for the 10 November 2015 was sent to the address he had provided when being questioned by the Prosecutor on the 13 October 2015. This was returned unserved twice;
    b. The Court then decided to proceed to hear the case in absentia deeming, pursuant to Article 374.1 of the Criminal Code of Poland, his presence not mandatory
    c. A copy of the Judgment of the Court was sent to the address he had provided and this was returned unserved twice;
    d. The Court thereafter, pursuant to Article 133.1 and 2 of the Code of Criminal Procedure deemed the judgement served as of the 1 December 2015

26. In addition inter alia the following is stated at Part F of the Warrant:-
    'Maksymilian Przemyslaw Anusiewicz knew about the proceedings conducted against him in case court file ref. NO II K 564/12. At the stage of preparatory proceedings he was presented with charges and interrogated as a suspect. He pleaded guilty to the charges. On the day he was questioned, he was instructed about the rights and obligations of a suspect.
    In spite of the fact that he had been duly instructed about the obligation to notify the agency conducting the proceedings about every change of his whereabouts or stay lasting longer than 7 days, he failed to do so……'

27. An affidavit was filed by the Respondent and at paragraphs 5 to 8 thereof he states:

a. He was arrested on the day of the assault and released from police custody. He was never questioned by a prosecutor or judge, never charged and never attended court in relation to the matter;
b. He was unaware that a trial was scheduled and that such could proceed in his absence and he was never served with any summons
c. He never instructed any lawyer in relation to this matter
d. He never received any notice about an appeal and he understands that an appeal is now impossible

28. A copy of the Respondent's affidavit was sent to the issuing judicial authority and their comments sought thereon. In their reply dated the 17 May 2024, there was include the following information:-

i. The Respondent was questioned as a suspect in case Ref II K 546/12 by the prosecutor in Zamosc on 10 October 2011;
ii. He was advised by the Prosecutor orally and in writing of his rights, including right not to answer questions but admitted to committing the offence in question. On that same date the Prosecutor charged him with the offence of assault and robbery
iii. On the same day he signed a copy of a document on the rights and obligations of suspects which included an obligation to inform the authority conducting the proceedings of any change of residence of more than 7 days – he received a copy of this document
iv. Having been detained from the 8 to the 10 of October he was, after being charged, released. He did not attend any court hearing and he did not personally collect any summons as *'he was deliberately hiding from the Polish justice system'*
v. A temporary arrest order was made on 26 April 2012 after his failure to appear at court hearings and the proceedings were thereafter suspended for a number of years due to his hiding with an EAW also issued against him
vi. Polish procedural law then changed in 2015 resulting in the presence of an accused at the trial no longer being obligatory. As a result the suspended proceedings were re-activated by a District Court in Zamosc in on 12th October 2015

vii. The notice of the date of the court hearing was sent to the address previously indicated during his interrogation by the Prosecutor. He did not personally receive or collect the summons but the court assumed it had been properly served

viii. At the hearing of the 10 November, the Respondent did not attend and did not have an appointed defence counsel. The Judgment was not served on him as this was not required by Polish law

29. A further s.20 request was sent to the IJA on the 4 June 2024 seeking further clarification and pointing to what appeared to be inconsistencies in the replies received. In the response from the IJA, dated the 7 June 2024, the following additional information was provided:-

    a. A copy of the judgement with instructions on appeal procedures was sent to the Respondents last provided address and, despite two further subsequent advice notes being sent, he failed to collect this correspondence. By operation of Polish regulations, the judgment was deemed duly served as of the 1 December 2015;

    b. Referring to the document signed by the Respondent on the 10 October 2011, the document referred to at paragraph 26 iii above, the IJA states *'there is no information in these instructions about the fact that a judgement can be made in the absence of the accused person. However such information was included in the notice of the date of the main court hearing scheduled for 10 November 2015 addressed to the accused person, which he did not collect despite the fact that two advice notes had been issued'.*

    c. On the basis of Article 374.1 of the Polish Code of Criminal Procedure, the court decided to proceed with the hearing as his presence was considered optional

30. Attached to this reply of the 7 June 2024, was a copy of the document signed by the Respondent on the 10 October 2011. From that document it is clear that that Respondent:

    a. Was informed of his obligation to notify the authorities of any change of address which lasts longer than 7 days

    b. Was obliged to give an address for service of notices in Poland

c. Was informed that if, without providing notice of a change of address, the suspect changes address or does not reside at the address given, letters sent to the address given shall be deemed properly served
d. Was not informed that a case could proceed in his absence

31. In ***Minister for Justice v Zarnescu*** [2020] IESC 59 the Supreme Court reviewed the jurisprudence of the European Court of Justice in relation to Article 4(6) of the Framework Decision and set out a number of principles labelled (a) to (r) as set out below:-

(a) The return of a person tried in absentia is permitted;
(b) Article 4(6) of the 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, which is designed to give effect to Article 4(6) in Irish law, 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.

32. At paragraph 63 Baker J said:

"*In the light of the decision of the Court of Justice in Dworzecki and the language of the Frameworks Decisions, the requested court may examine the behaviour of a requested person with a view to ascertaining whether it has been unequivocally*

established that he or she was aware of a trial date and the consequence of non-attendance, with a view to ascertaining if an informed choice was made not to attend. This in practical terms means ascertaining whether the person has knowingly waived his or her rights to be present at trial."

33. The Court of Appeal in ***Minister for Justice v Szamota*** [2023] IECA 143 considered *Zarnescu* in light of subsequent judgments of the CJEU. The Court confirmed that a relatively broad approach could approach could be taken to waiver, subject to the rights of the defence. Speaking for the Court, Collins J stated (at paragraphs 28 & 29):

> "*It is also relevant in this context that in LU & PH itself the CJEU was clear that the executing judicial authority may take into account other circumstances that enable it to satisfy itself that the surrender of the person concerned does not entail a breach of his or her rights of the defence and thus surrender that person to the issuing Member State, including (inter alia) ' the conduct of the person concerned, in particular the fact that he or she sought to avoid service of the information addressed to him or her or to avoid any contact with his or her lawyers'). That language, which picks up on statements made in TR, suggests that, for the purposes of Article 4a of the Framework Decision, the right to be present at one's trial may, in certain circumstances, be effectively waived even where the person concerned was not aware of the date and place of his or her trial (because they had taken steps which prevented notice of their trial being served upon them).*
>
> *It may therefore be the case that the concept of waiver in this context must be understood more broadly than the Supreme Court's decision in Minister for Justice and Equality v Zarnescu* [2020] IESC 59 *would appear to suggest. As Baker J made clear (at para 65), return may still be ordered even where the case does not fit within any of the exceptions to non-surrender set out in section 45 ' but only if the court is satisfied having made an appropriate inquiry that the rights of defence of the requested person have been met.' However, the court went on to read the ECtHR jurisprudence as requiring, as a condition of an effective waiver, that it be established unequivocally that the accused person ' was aware of the date and place of trial and of the consequences of not*

attending' (see para 90(g) as well as 90(m)). With respect, that may put the matter too far. The Strasbourg jurisprudence certainly appears to identify knowledge of the criminal proceedings as a pre-requisite to an effective waiver but it does not appear to make knowledge of the date and place of trial a necessary condition for waiver in all circumstances: see the authorities referred to in IR, §53, as well as ECtHR 13 September 2018, MTB v Turkey (Application no. 47081/06), §47 and following and the authorities referred to there. Zarnescu was, of course, decided before the CJEU's decisions in TR, IR and LU & PH, all of which appear to espouse a relatively broad approach to the issue of waiver, subject always to respect for the rights of defence."

34. In ***Minister for Justice v Szlachcikowski*** **[2024] IECA 2024** the Court considered *Zarnescu,* and *Szamota* and the decision of the UK Supreme Court in ***Bertino v Public Prosecutor's Office Italy*** **[2024] UKSC 9**. The Court concluded that for a waiver to be unequivocal and effective, ordinarily the accused must be shown to have appreciated the consequences of his or her behaviour. The Court begins its analysis by observing that while an accused has a right to attend their trial – "*it is a right not an obligation*" (par. 50). The following passage was quoted with approval from *Bertino*:

> "*Cases are fact specific. It leaves open the possibility of a finding of unequivocal waiver if the facts are strong enough without, for example, the accused having been explicitly being told that the trial could proceed in absence."*

35. The Court accepted that the jurisprudence of the European Court of Human Rights had been correctly interpreted by the UK Supreme Court and stated:

> "*… for a waiver to be unequivocal and effective, knowing and intelligent, ordinarily the accused must be shown to have appreciated the consequences of his or her behaviour. That will usually require the defendant to be warned in one way or another. I readily accept that it will not be necessary in every case for evidence to be adduced that the requested person was expressly advised of the potential consequences of not turning up for his trial. Awareness of consequences could be established in other ways*." (Par 72)

36. Having concluded that on the facts of that case there was no evidence of the respondent having reasonably foreseen the consequences of non-attendance, the Court added:

> "*I reiterate that I see no reason why in another case a court should not be able, from cumulative information provided and evidence as to attendant circumstances, to infer the necessary awareness.*" (Par 74)

37. Having considered the facts in relation to the trial in absentia in this case, I cannot be satisfied that the rights of the defence were upheld in the process which led to the conviction and sentence for which the Respondents arrest is now sought. In this regard there is no dispute in relation to the following facts:-

(a) After arrest the Respondent was interrogated by the Public Prosecutor in Zamosc and charged with the relevant offences on the 10th of October 2011. Prior to release he signed a document by which he acknowledged his obligation to inform the authorities of any change of address and furthermore was made aware therein that any documents served on that address would be deemed to be good service if he had not informed them of any new address
(b) He was not then informed that he could be tried in his absence if failed to appear at any future hearing;
(c) At the time when the Respondent was charged with these offences, it seems he could not in fact be tried in absentia under Polish law;
(d) Due to a change in Polish law in 2015, it became possible to try persons in absentia and, following the re-activation of these proceedings, a decision was made to try the Respondent in his absence;
(e) Notification of the trial and, following conviction and sentence, of the possibility of appeal was done by service of summonses and other documents on him at his last known address, an address he had given to the Polish authorities in 2011 at a time when he was charged in relation to these matters. In the summons then served advising him of the trial, it was indicated for the first time in the process that he could be tried in absentia;
(f) The Respondent did not appear at the trial and no lawyer, nominated by either the Respondent or the Court, acted on his behalf;

(g) The Respondent was tried and sentenced in absentia;

(h) The Respondent does not have an unqualified right of re-trial or appeal, if surrendered.

38. As noted above the IJA seek to rely on the box D 1.b and / or D 1.d of the Schedule to s.45 of the Act. These provide:-

> *'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 at the trial'*
>
> *'d. the person was served with the decision on 01/12/2015 and was expressly informed about the right to a retrial or appeal, in which he or she has the right to participate and which allows the merits of the case, including fresh evidence, to be re-examined and which may lead to the original decision being reversed'*

39. From the facts in this case I cannot be satisfied that D1.b is met. It has been specifically acknowledged by the IJA that the Respondent was not informed that he could be tried in absentia at the time he was interrogated and charged. In addition, the IJA has indicated that he could not at that time be tried in absentia and the decision to try him in absentia was made a number of years later in 2015. It was only in 2015 that notice was sent to the address he had given to the Prosecutor and police some four years earlier (a) of the date and place of trial and (b) of the fact that he could not be tried in absentia. There is simply no basis upon which this court could conclude that, irrespective of any default on his part in not informing the Polish authorities of his change of address, it is established he unequivocally waived his right to attend the trial, with knowledge of the possible consequences – namely that he could be proceeded against in his absence. Not only was he not so informed when he was charged and advised of his obligation to tell the authorities of any change of address, but at that time in 2011 he could in fact not have been tried in absentia.

40. The terms of D 1.d are not met in this case as it is now clear that he does not enjoy a right to retrial or appeal if surrendered to Poland.

41. Finally this is a not case where, having conducted an appropriate inquiry into the facts of the case, it can be said that the rights of the defence were met. From the judgements in *Zaranescu, Szamota* & *Szlachcikowski* it is clear that even if a case does not fall within one of the boxes in Part D of the Schedule to s45 of the Act, surrender may be affected where a person was tried in absentia provided the rights of the defence were not breached.

42. Here the Respondent was not actually served with notices in relation to the trial resulting in the decision. But he did fail to comply with the obligation to inform the Polish authorities of his change(s) of address following his being charged in 2011. He knew of this obligation and he knew that, were he not to so inform the authorities, letters relating to the case sent to the address he had provided would be deemed served. In this case, in circumstances where he signed the document *'Instructions concerning the rights and obligations of a suspect'* , there is evidence from which this court can conclude that:
    a. There was a manifest absence of diligence on his part in receiving notification of the documents concerning these proceedings as he had simply left the address he provided and did not provide any other address to the Polish authorities with full knowledge that documents served at this address would be deemed served upon him in such circumstances; and
    b. He made an informed decision to avoid service of documents in relation to this case

43. The Respondent however was not explicitly informed at the time of his being charged that the case could proceed in his absence and there is no evidence that he was ever thereafter explicitly so informed.

44. Furthermore this is not one of those cases where there is an evidential basis to conclude that, though there is no direct evidence of his actually being made aware of the possibility of a trial proceeding in his absence, from the cumulative information available it could reasonably be inferred he was aware a trial could proceed in his absence.

45. A waiver by an accused of his right to attend a trial may be express or implicit but, as indicated by Baker J in *Zaranescu*, an implication that a requested person has waived his or her rights to be present at trial is not to be lightly made. This is not a case where, on all the evidence, it is possible to conclude that the Respondent made an informed choice not to attend his trial knowing that he might be convicted in his absence. The evidence to permit such an inference to be drawn does not exist and in fact such evidence as exists points towards the Respondent not being made aware that a trial may proceed in his absence, namely

    a. The fact that, although he was informed of other obligations and duties, he was not so informed in the document *'Instructions concerning the rights and obligations of a suspect'*
    b. The law at that time did not permit his trial in absentia

46. For these reasons I am refusing to make an order directing the surrender of the Respondent to Poland on this Warrant.