THE HIGH COURT

[2024] IEHC 748

BETWEEN **Record No 2024 EXT 176**

MINISTER FOR JUSTICE

APPLICANT

v.

KATHLEEN SHARINA MC CARTHY

RESPONDENT

JUDGMENT of Mr. Justice Patrick McGrath delivered on 17 December 2024

1. In this application, the applicant seeks an order for the surrender of the respondent to the United Kingdom on one Trade and Co-Operation Agreement warrant ('TCAW').

2. The Respondent was convicted in absentia Lewes Crown Court on the 27 November 2017 of 17 offences of converting criminal property and 2 offences of attempting to convert stolen property. She is now sought so that she can be sentenced for these offences.

3. This warrant was endorsed by the High Court on the 14 August 2024. The Respondent was thereafter arrested and brought before the High Court on the 21 August 2024 and has been remanded in custody pending the outcome of these proceedings.

4. No issue is taken in relation to identity, and I am satisfied the Respondent is the person named in the Warrant.

5. I am satisfied that there are sufficient particulars set out in the Warrant such that it complies with s. 11 of the 2003 Act and the requirements of the Framework Decision.

6. I am satisfied that none of the matters referred to in sections 22, 23 and 24 of the European Arrest Warrant Act, 2003, as amended ("the 2003 Act"), 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.

7. The TCAW was issued by His Honour Judge Van Der Zwat at Lewes Crown Court on the 12 August 2024, an issuing judicial authority within the meaning of the 2003 Act and the Trade and Co-Operation Agreement.

8. At Part (e) of the Warrant there is set out a description of the conduct which led to the conviction of the Respondent in respect of:-

    a. Seventeen offences of Converting Criminal Property contrary to section 327(1)(c) of the Proceeds of Crime Act, 2002, and
    b. Two offences of Attempting to Convert Criminal Property contrary to the Criminal Attempts Act, 1981.

9. The TCAW is a Warrant issued in accordance with Article LAW.SURR.112 of the Trade and Co-Operation Agreement. It is therefore necessary to demonstrate correspondence in accordance with s. 38 of the 2003 Act.

10. 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'.*

11. The relevant principles for showing correspondence are now 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 48

12. I am satisfied that the acts or omissions that constitute the offences on the warrant correspond with offences in Ireland, including:

    a. Money Laundering contrary to s. 7 of the Criminal Justice (Money Laundering) Act 2010
    b. Theft contrary to s. 4 of the Criminal Justice (Theft and Fraud Offences) Act, 2001
    c. Attempted Theft contrary to Common Law

13. The minimum gravity requirement under the European Arrest Warrant Act 2003 (as amended) ['the 2003 Act'] is met as the maximum sentence in respect of these offences.

Grounds of Objection

14. The sole ground of objection pursued at the hearing of this application was one pursuant to s. 45 of the 2003 Act. The Respondent was tried *in absentia* and it is submitted that she cannot be surrendered as compliance with s. 45 cannot be shown.

15. At Part (d) of the Warrant, the issuing judicial authority relies upon Box 3.1(a), namely that, whilst the Respondent did not attend at the *'trial resulting in the decision'* , she *'was summonsed in person on 18 October 2016 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'*

16. A request for further information was sent to the IJA on the 26th of September 2024 as follows:-

    'The TCAW indicates that the Respondent was convicted in her absence. She has objected to her surrender on the basis that she was not notified of the date of her conviction – 27 November 2017 as per the TCAW. She also points out a

bench warrant issued for her arrest on 04 Jaunary 2017 and it is unclear how she came to be tried in her absence after the bench warrant had issued

At part (d) of the TCAW box 3.1(a) is ticked indicating that the Respondent was 'was summonsed in person on 18 October 2016 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

In circumstances where the Respondent denies that she was so notified please address the following:-

1. *Please indicate the nature of service effected upon the Respondent on 18 October 2016*
2. *Please provide details as to what was served upon the Respondent*
3. *Please indicate the date upon which the Respondent was summonsed to serve*
4. *Please provide any other relevant information as to how the Respondent was made aware of the schedule date and place of the trial which resulted in the decision and how she was informed that a decision may be handed down if she did not appear for the trial'*

17. A reply was received from the CPS on behalf of the issuing state as follows:-

(i) On the 18 October 2016 the defendant Kathleen McCarthy was charged with the offences which are the subject of the application, in person. She was granted bail to appear at Crawley Magistrates Court on 7 December 2016 at 10.00am. She signed the charge sheet acknowledging that she may commit an offence if she did not appear at Crawly Magistrates Court on 7 December 2016 at 10.00am. A copy of the signed charge sheet accompanied this response.

(ii) Kathleen McCarthy appeared at Crawley Magistrate's Court on 7 December 2016. She was represented by a solicitor from Paul Martin & Co solicitors. The same firm represented her and the co accused and partner, now husband Oliver Boswell. The charges were sent to the Crown Court at Lewes for a pre-trial preparation (PTPH) on 4 January 2017. She was granted unconditional bail to

appear at Lewes Crown Court on 4 January 2017. She would have been told by the court at that time that she should attend at that date, or any other date as directed by the Crown Court. She was represented by a firm of solicitors at Crawley Magistrates Court. This was the same firm which represented her husband at the trial.

(iii) She did not appear at the PTPH at Lewes Crown Court on the 4 January 2017 and a warrant without bail was issued – there is no record that she ever appeared in court on that warrant. A trial date was fixed for her trial and that of her co-accused, Paul Boswell, for 23 October 2017.

(iv) All relevant documents were served on her solicitors in advance of the trial.

(v) As a defence statement had not been served, the matter was listed for mention on 9 June 2017 in Lewes Crown Court. The court was told that the defendant had not kept appointments with her solicitor, and they had lost touch with her. It seems she was bailed in her absence to 15 June 2017.

(vi) On 15 June 2017, she again failed to appear and a further warrant issued.

(vii) On the 25 October 2017 His Honour Judge Tain, at the request of the Prosecution, allowed the trial to proceed in her absence. In his written judgment granting this application HHJ Tain stated inter alia:-

- Her husband attended the Pre Trial hearing and pleaded guilty to a number of offences. He and the Respondent were still a couple at the time of the offences and appear to have left Wolverhampton together;
- The court could safely conclude she is aware of the proceedings and no doubt of the strength of the case against her and the likely outcome if found guilty;
- She had voluntarily absented herself from the trial process; and
- It was safe to assume she knew the case against her;

(viii) Bearing in mind the courts general powers relating to efficient trial management and balancing the interests of the absent defendant with those of her co-defendants, the prosecution and the victims, the Judge acceded to the application; and

(ix) Box 3.1a was ticked in error and Box 3.4 ought to have been ticked and the Respondent can, if surrendered, apply to the court to appeal out of time.

18. A further letter was then sent pursuant to s. 20 of the Act dated the 10 October 2024 where, having referred to the answers previously received, the IJA was asked:

> *'1. Which box (3.1a, 3.1b, 3.2, 3.3 or 3.4) is the issuing judicial authority stating ought to have been ticked ? It is noted that box 3.1a applies where the person was summonsed in person; and box 3.4 applies where the person was not served with that decision*
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> *2. If box 3.4 is the correct box please confirm the following matters:*
> *a. That the respondent will be personally served with the decision without delay after surrender;*
> *b. When served with the decision, the respondent will be expressly informed of her 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, and*
> *c. The Respondent will be informed of the number of days within which she has to request a retrial or appeal'*

19. In their reply dated the 14 October 2024, the IJA stated:

- Box 3.4 ought to have been ticked.
- She will be served with the Certificate of Conviction upon surrender.
- When surrendered and served with the decision, the Respondent will be informed *'that she has the right to apply to the Court of Appeal for leave to appeal out of time. She will also be told that if her application for leave to appeal out of time is granted that she will have the right to participate in the appeal and any subsequent retrial which may be allowed, which will allow the merits of the case, including fresh evidence to be re-examined and which may lead to the original decision being reversed'*.

20. It is therefore now clear, as accepted by the Applicant, that the Respondent, if surrendered, would not have an unequivocal right to an appeal or retrial sufficient to comply with the requirements of Article 601.1 (iii)(A) of the Trade and Co-Operation Agreement and Section 45 of the 2003 Act (Box D.4). This provides for an

unconditional right of retrial or appeal on the merits and the response from the IJA makes it clear that there is no such unequivocal right but rather a right to seek leave to appeal, which is not sufficient for the purposes of that sub-section.

21. A further s. 20 request issued to the IJA, dated the 26 November 2011. The following was stated therein:-

> *'The High Court has been referred to the decision of the UK Supreme Court in Bertino v Public Prosecutor's Office Italy* [2024] UKSC 9. *At paragraph 7 of the decision of Lords Stephens and Burnett reference is made to the Criminal Procedure Rules 2020 (SI 2020/759). It appears from that decision that rule 3.21.(2)(c) now provides that unless a defendant pleads guilty, the court must be satisfied that it was explained to the defendant that if they fail to attend, the trial may take place in their absence.*
> *Could you please clarify if the defendant was at any time informed that if she failed to attend for trial, the trial might proceed in her absence? If so, could you indicate how and when she was so informed?'*

22. In a reply of the same date, the CPS informed the court:-

> *'The requested person only made one court appearance in this case. That was on 7 December 2016 at Crawley Magistrates Court. There is no record in the prosecutors record for that date of her being warned that if she did not attend court on the next or subsequent occasions that the case might proceed in her absence. She did not attend the next hearing at Lewes Crown Court on 4 January 2017 or any further hearings before she was convicted. It is usual when bailing defendants to another date to warn them that the case may proceed in their absence / a warrant may be issued for their arrest or both. But this is not recorded on the prosecution file. There is no record of any such warning being subsequently sent to her by the Court. She was as I have said represented throughout by a solicitor'*

SUBMISSIONS OF THE PARTIES

Applicants Submissions

23. It is accepted by the Applicant that there is no direct evidence that the Respondent was made aware of the consequences of her failure to appear, namely that the trial might proceed in her absence.

24. The Minister submits that, having regard to the decisions of the Supreme Court in ***Minister for Justice v Zarnescu*** **[2020] IESC 59** and the decisions of the Court of Appeal in ***The Minister for Justice v Szamota*** **[2023] IECA 143** and ***Minister for Justice v Szlachcikowski*** **[2024] IECA 2024** , while it must be shown that a respondent was aware of the consequences of non-attendance, there is no absolute requirement for evidence that the Respondent was so *informed*. It is sufficient that his requirement can be established by other means.

25. The Applicant says that the Supreme Court in ***Zarnescu.*** having reviewed the jurisprudence of the ECJ, distilled a number of principles labelled (a) to (r)t below and submits that those most germane to the issues to be decided are those set out in **bold**.

(a) The return of a person tried in absentia is permitted;

(b) Article 4(6) of the 2002 Framework Decision permits the refusal to return where the requested state has a legitimate reason to refuse the EAW;

(c) A person tried in absentia will not be returned if that person's rights of defence were breached;

(d) Section 45 of the Act expressly identifies circumstances in which a person tried in absentia may be returned, primarily where there is evidence of service or where the person was legally represented or where it is shown that a right of retrial in the requesting state is available as of right;

(e) The examples outlined in section 45 as forming the basis of the analysis are not exhaustive, and **the requested authority may look to the circumstances giving rise to the non-attendance of the accused person at the hearing**;

(f) **The requested state has a margin of discretion in how it approaches the facts, and whether to refuse return**;

(g) **In so doing the requested authority must be satisfied that it has been established unequivocally that the accused person was aware of the date and place of trial and of the consequences of not attending**;

(h) **Actual proof of service is not always required, and an assessment may be made from extrinsic evidence that the requested person was aware but nonetheless chose not to attend**;

(i) Proof of service on a family member is not sufficient extrinsic evidence of that knowledge;

(j) **The assessment is made on the individual facts but there must be actual knowledge by the requested person**;

(k) **Whether actual knowledge existed is a matter of fact and can be shown from extrinsic evidence**;

(l) The purpose of the exercise is to ascertain whether the requested person who did not attend at trial has waived his or her right of defence;

(m) A waiver may be express or implicit from the circumstances, but an implication that a requested person has waived his or her rights to be present at trial is not to be lightly made and will not be made if it has not been unequivocally established that the person was aware of the date and place of trial;

(n) **The degree of diligence exercised by a requested person in receiving notification of the date and place of trial may be a factor in the assessment of his or her knowledge of the date of trial**;

(o) In a suitable case a manifest absence of diligence may lead a requested authority to the view that the accused person made an informed decision not to be present at trial, or where it can be shown that there was an informed choice made by the person to avoid service;

(p) The mere absence of enquiry as to the date or place of hearing in itself may not be sufficient, as it must be unequivocally shown that the requested person made an informed decision and, so informed, either expressly or by conduct waived a right to be present;

(q) It may in a suitable case be appropriate to weigh the degree of responsibility of the requesting state to notify an accused person of the date of trial against the accused's responsibility for the receipt of his or her mail;

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

26. Reference is then made to paragraph 63 of that Judgement where 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.*"

27. The Minister submits that the Court of Appeal in ***Szamota,*** having considered *Zarnescu* in light of subsequent judgments of the CJEU, confirmed that a relatively broad approach could approach could be taken to waiver, subject to the rights of the defence. The Applicant specifically refers to paragraphs 28 and 29 of the Judgment of Collins where he stated:

> "*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' (my emphasis). 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).*
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> *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."

28. The Minister then refers to ***Minister for Justice v Szlachcikowski*** **[2024] IECA 2024,** a case where the Court of Appeal considered *Zarnescu,* and *Szamota* and the decision of the UK Supreme Court in ***Bertino v Public Prosecutor's Office Italy*** **[2024] UKSC 9**. That 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."*

29. Having agreed that the jurisprudence of the European Court of Human Rights had been correctly interpreted by the UK Supreme Court, the Court of Appeal observed that:

> "*… 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)

30. Having concluded that on the facts of that case the evidence of the respondent having reasonable 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)

31. It is submitted by the Minister that the case law confirms that a 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 consequences of non-attendance. In the present case the Minister submits that, on the established facts and evidence, this Court can safely conclude that the Respondent was aware of the consequences of non-attendance.

    a. On 18 October 2016 the Respondent was charged and bailed to appear at Crawley Magistrates' Court on 07 December 2016. On this date she signed the charge sheet acknowledging that she would commit an offence if she failed to appear at Crawley Magistrates' Court on 07 December.

    b. The Respondent did in fact appear on 07 December at Crawley Magistrates' Court.

    c. The Respondent was represented by a solicitor.

    d. The Respondent was represented by the same firm of solicitors representing her then partner who did attend court to plead guilty. He later failed to appear and was arrested along with the Respondent following their deportation from the United States.

    e. The Respondent was granted bail to appear at Lewes Crown Court on 04 January 2017 where the case was listed for a pre-trial preparation hearing. The letter from the CPS dated 30 September 2024 says that "*she would have been told by the court at that time she should attend on that date, or any other date as directed by the Crown Court*". The Respondent has not disputed this.

    f. On 09 June 2017 defence counsel told the court that the Respondent had not kept appointments with her solicitor.

g. The Respondent's case was listed on 15 June 2017 where she failed to appear. The letter from the CPS dated 30 September 2024 says that she failed to attend despite having been made aware of this date (although it is not clear how she was made aware). Again, this has not been disputed.

h. In her affidavit the Respondent has been tellingly evasive as regards the information she chose to put before the Court. She says that she was unaware of her obligation to attend court on 27 November 2017; and that she did not receive any notice about her case thereafter. She omitted to mention crucial – and highly relevant - information that only came to light through the s.20 procedure i.e. that she had been present for two prior dates in court, and that she was present when the pre-trial date was fixed; and that she had retained legal representation. She has not disputed that she would have been informed of her obligation to attend nor does she state that she was unaware that the case could proceed in her absence.

32. It is the Applicants submission that, whilst there is nothing before the Court which categorically states that the Respondent was *informed* of the consequences of failing to appear, the Court can reasonably infer from the information that is before the Court that she was aware of the consequences of failing to appear. In circumstances where she was legally represented, it is a reasonable inference to draw. It is submitted that this is one of those cases where the requisite degree of awareness can be inferred from the totality of the circumstances and the conduct of the Respondent.

Respondents Submissions

33. The Respondent refers to the lack of care and attention paid in the preparation of the TCAW warrant, which she says has led to serious errors in the proceedings. Reference is also made to the alleged apathy of the police in in the UK in seeking to notify the Respondent of her trial and what are said to be material mistakes by the trial judge in the application of the underlying facts that led him to proceed with the *in absentia* trial of the Respondent.

34. The Respondent relies upon the same case law as the Respondent (namely *Zaranescu, Bertino, Szmota* and *Szlachcikowski*) but submits that, on the facts of this case, surrender cannot be ordered as the Court cannot find or infer actual knowledge on the part of the respondent of the consequences of nonattendance.

35. The respondent says that it is clear from the jurisprudence that a lack of diligence or avoidance is not and cannot be a substitute for actual knowledge. The emphasis is on the requirement to establish unequivocally that an accused was aware of the date and place of hearing and therefore that a waiver can safely be inferred. The following comments of Baker J in *Zaranescu* are cited in this regard:

> *'That leads to another proposition that where a person has not been notified of a date of hearing, a waiver of a right to appeal cannot be inferred.*
> *In practice, this means that actual knowledge of the date must be shown, albeit as will be discussed below, actual knowledge can be shown from extrinsic evidence. A person charged with a criminal offence must not be 'left with the burden of providing that he was not seeking to evade justice' (para 88), although national authorities may assess whether there exists good cause for a persons absence at a hearing.*
> *While the word 'unequivocally' and its cognates was used throughout the judgement, the language used by the court points to its view that the evidence on which a requesting state seeks to rely must go much further than mere inference from a series of facts, and while it does not require to be established as a matter of certainty that there was a certain waiver, the standard of proof is high and the emphasis was on the requirement to establish facts that could lead to an inference, rather than to establish an inference from argument.*
> *Whilst the conduct of an accused person is an element in that analysis, the right to be present plays such a fundamental part of the right to a fair trial, that any departure from that principle by the hearing and determination of a criminal matter in the absence of an accused person must be scrutinised'.*

36. The Respondent criticises the reasoning of HHJ Tain in his judgment acceding to the application by the prosecution to have this case tried in her absence. Having set out the rationale of the Crown Court Judge for such a decision, the respondent submits that this

judgment suffers from errors in relation to bench warrants (how many and when the same were issued), the question of legal representation and the issue of the inquiries carried out with the Irish authorities to seek to locate the Respondent. It is also said that the Judge erred in his assessment of the strength of the case against Ms McCarthy when considering the application.

37. The Respondent then refers to inter alia the following facts:-

- The Respondent was unaware of scheduled date and place of her trial (her Affidavit)
- The TCA warrant as originally sent wrongly asserted that she was so aware
- There is no table in the TCA warrant and does not therefore indicate the matters required by Paragraph 1(1) of the Trade and Co-Operation Agreement and s45 of the 2003 Act
- She was not informed a decision may be handed down in her absence and the only warning she was given was that she may commit an offence if she did not appear at the Magistrates Court
- The duty is on the requesting judicial authority to prove to the criminal standard that the appellant had unequivocally waived her right to be present at the trial and this it has failed to do
- The Respondents trial was fixed in her absence on the 4th of January 2017 and it cannot therefore be said that she was on notice of the trial proceeding in her absence let alone that she was aware of the scheduled time and date of trial
- The rationale of HHJ Tain allowing the trial to proceed in her absence contains factual errors and does not withstand close scrutiny
- Inadequate efforts were made to locate the Respondent. The bench warrant was issued in January 2017 and her trial was in November 2017. No explanation was given for the failure to seek the surrender of the respondent other than it was *'tbe best view of the police that they will not be able to locate her'*

38. I would also, in addition to the factual matters cited by both parties, refer in this regard to the most recent reply from the issuing state. In that reply of the 26 November 2024,

the CPS state that on the only date that the Respondent attended in Crawley Magistrates Court, being the 7 December 2016 *'there is no reference in the prosecutor's record for that date of her being warned that if she did not attend court on the next of subsequent occasions that the case might proceed in her absence'.* Having noted that she did not thereafter appear at any further date the case was listed in either the Magistrates Court or the Crown Court, the following is then stated;- *'it is usual when bailing defendants to another date to warn them that the case may proceed in their absence / a warrant may be issued for their arrest or both'*

39. As already noted by the Applicant the Respondent has not specifically disputed that she would have been informed to the obligation to attend nor does she say that she was unaware the case could proceed in her absence. Whilst the onus rests on the Applicant to show, whether directly or by inference from all the evidence, that the court can conclude an unequivocal waiver on her part of her right to attend her trial, her failure to specifically take issue with this information further points to her evasiveness and this is a matter to which this Court can have regard.

DECISION

40. It is common case that there is no direct evidence that the Respondent waived her right to be present at her trial in relation to the offences for which surrender is sought. The question in this case is, therefore, whether there is evidence from which this court can infer that she waived her right to attend at her trial for these offences.

41. It is clear from the case law that a lack of diligence on the part of an accused person to make him or herself aware of the date of trial, is not of itself sufficient in order to constitute a waiver of the right to attend. The onus rests on the Applicant to show that, in all the facts and circumstances, it can be inferred that he or she chose to absent him or herself from the trial.

42. I also however note the comments of Collins J at paragraphs 28 and 29 of his Judgment in *Szamota* (as set out above), to the effect that in light of the Judgments of the CJEU and ECtHR referred to by him, a relatively broad approach is to be taken to the concept of waiver in this regard. Whilst it is therefore necessary to establish that the requested

person had knowledge of the criminal proceedings for the purposes of an effective waiver of the right to be present at trial, it is not always necessary to show that he or she was aware of the actual date and place of the trial.

43. Furthermore, as stated at paragraphs 74 & 75 in *Bertino*, whilst generally it will be possible to prove that the person was aware of the consequences by adducing evidence that he or she was so warned in advance of the hearing, such knowledge or awareness may be established in other ways. And whilst there may not be direct evidence of awareness, a court may be able to infer such awareness from attendant circumstances and the cumulative information available.

44. While, as indicated by Baker J in *Zaranescu*, it is not the case that the onus rests on the accused person to demonstrate that he or she was not seeking to evade justice, the court is nonetheless entitled to consider all the facts and circumstances, including the conduct of the requested person, in assessing whether there is evidence from which an unequivocal waiver can be inferred.

45. Having considered all the circumstances and the cumulative information available, I am satisfied that this is a case where the Respondent make a knowing choice not to attend at her trial. It is a case where, on the evidence, it can be properly inferred that she knowingly waived her right to be present at her trial.

46. The following facts are established by direct evidence:-

    (i) The Respondent was charged with these offences and bailed to appear at the Magistrates Court in Crawley at an early stage of the proceedings. At that point she was clearly aware that criminal proceedings were being pursued against her in this regard;
    (ii) She attended in answer to her bail at Crawley Magistrates Court on the 7 December 2016 when she was bailed to attend on the 4 January 2017. The Respondent was aware of her obligation to attend at that next hearing;
    (iii) The Respondent was represented by a solicitor throughout these proceedings;
    (iv) Her husband, who attended at his trial, was represented by the same solicitor;

(v) It was then the usual practice of the Court to inform a defendant that, if he or she did not attend as required in answer to bail, then a warrant might issue for his or her arrest, the case might proceed in their absence or both. No record of this usual warning having been given by the Court is recorded on the prosecution file;

(vi) The Respondent has not specifically stated on affidavit that she was unaware of either her duty to attend court and / or the fact that, should she not attend the trial might proceed in her absence. She has not stated that, although such a warning might normally be given to a defendant when being bailed, this did not happen in her case when she attended Court.

47. In circumstances where she was legally represented this is a case where, although there is no direct evidence of this, I can reasonably infer that the Respondent was aware there were legal proceedings against her, that she was under a continuing obligation to attend and there was a possibility that her trial might proceed in her absence. She made an informed choice, by not attending court or maintaining contact with her solicitors, to avoid being informed to the specific date of her trial, but she was aware that this could proceed in her absence.

48. In the circumstances I am satisfied that the defence rights were upheld, and this ground of objection is dismissed.