THE HIGH COURT

[2021 No. 347 EXT.]
[2022] IEHC 457

IN THE MATTER OF THE EUROPEAN ARREST WARRANT ACT, 2003, AS AMENDED

BETWEEN

MINISTER FOR JUSTICE

APPLICANT

AND

ANDI BALI

RESPONDENT

JUDGMENT of Ms. Justice Mary Ellen Ring delivered on the 13th day of May, 2022

1. By this application, the Applicant seeks an order for the surrender of the Respondent Andi Bali to Belgium pursuant to a European Arrest Warrant dated 3rd October 2019 ("the EAW"). The EAW was issued by Marc Verhelst, as the issuing judicial authority.

2. The EAW seeks the surrender of the Respondent in order to enforce a sentence of eleven (11) years imprisonment imposed upon the Respondent on the 26th day of June 2019, of which 3396 days remain to be served.

3. The Respondent was arrested on the 14th of December 2021, on foot of a Schengen Information System II alert, and brought before the High Court on the 14th of December 2021. The EAW was produced to the High Court on the 21st of December 2021.

4. I am satisfied that the person before the court, the Respondent, is the person in respect of whom the EAW was issued. No issue was raised in that regard.

5. I am satisfied that none of the matters referred to in ss. 21A, 22, 23 and 24 of the European Arrest Warrant Act, 2003, as amended ("the Act of 2003"), arise for consideration in this application and surrender of the Respondent is not precluded for any of the reasons set forth in any of those sections.

6. I am satisfied that the minimum gravity requirements of the Act of 2003 have been met. The sentence in respect of which surrender is sought is in excess of four months' imprisonment.

Uncertainty and breach of Section 11 of the Act of 2003; Correspondence and breach of Sections 38 & 5 of the Act of 2003:

7. The Respondent objects to surrender in the first instance on the basis that the EAW is void for uncertainty in that there are no facts in the EAW that link the Respondent to one of the requested offences, building a criminal gang. Further it is submitted that two of the listed offences are outside the scope of s.38(1)(b) of the Act of 2003, to wit, attempted extortion and building a criminal gang.

8. In particular it is contested that two of the offences set out in the EAW are not part of Irish law. At part e) of the EAW it is indicated that it relates to 5 offences committed in Voeren and elsewhere in Belgium between 1st July 2015 and 2nd October 2015. The offences are described as follows:

A. Theft by means of violence or threats, by means of breaking entrance, escalation or false keys, in a gang, with a vehicle, by showing weapons, with incapacity to work of more than 4 months as a consequence;

B.I. Hostage-taking with incapacity to work of more than 4 months as a consequence;

B. II. Hostage-taking of a minor person;

C. Attempted extortion, by means of violence or threats, in a gang, with a vehicle, by showing weapons;

D. Building a gang in view of committing crimes which are punishable by life imprisonment or detention of 10 up to 15 years."

The two contested offences are those at C and D of part e) of the EAW.

9. Section 38(1)(b) of the Act of 2003 provides that it is not necessary for the Applicant to establish correspondence between the offences to which the EAW relates and offences under the law of the State where the offences referred to in the EAW are offences to which Article 2.2. of the European Council Framework Decision dated 13th June 2002 on the European Arrest Warrant and the Surrender Procedures Between Member States, as amended ("the Framework Decision") applies and carry a maximum penalty in the issuing state of at least 3 years' imprisonment. In this instance, the issuing judicial authority has certified that the offences referred to at A., B.I. and B. II. in part e) of the EAW are offences to which Article 2.2. of the Framework Decision applies, that same are punishable by a maximum penalty of at least 3 years' imprisonment and has indicated the appropriate box for "Kidnapping, illegal restraint and hostage-taking" and "Organised or armed robbery" as being applicable. There is no manifest error or ambiguity in respect of the aforesaid certification such as would justify this Court in looking beyond same. A full description of the facts of the various offences is set out at part e) of the EAW.

10. In any event, as regards offence A., I am satisfied that same corresponds to the offence in this State of burglary contrary to s.12 of the Criminal Justice (Theft and Fraud Offences) Act, 2001 and/or aggravated burglary contrary to s.13 of the said Act and/or robbery contrary to s.14 of the said Act and/or theft contrary to s.4 of the said Act. I am satisfied that if necessary, correspondence can be established between the offences B.I. and B. II. in the EAW and the offence in this State of false imprisonment contrary to s.15 of the Non-Fatal Offences Against the Person Act, 1997.

11. As regards offence C., I am satisfied that same corresponds to the offence in this jurisdiction contrary to common law of attempted robbery contrary to s.14 of the Criminal Justice (Theft and Fraud Offences) Act, 2001, and/or the offence of extortion contrary to s.17 of the Criminal Justice (Public Order) Act, 1994.

12. As regards offence D., it was submitted on behalf of the Respondent that the offence of *building a criminal gang in view of committing other crimes which are punishable by life*

sentence of detention of 10 up to 15 years was not made out against the Respondent on the Description of Facts in the EAW. For completeness the full description of events from the EAW is set out hereunder:

> *On 19/09/2015, at approximately 10:45 am, 5 masked men entered the house of the couple Jacobus KUNKELS and Antonia JESPERS located in Gielssestraat in Voeren. Presumably, one of the perpetrators came in the house via the cellar window and subsequently opened the door for his companions.*
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> *KUNKELS was pulled out of the shower by 2 men. He is tied up on the bed. The perpetrators ask for money, a 'safe' and 'brandschank'. When he informs the perpetrators that there is no safe, he is beaten. KUNKELS also gets a handgun pushed in his mouth as a result of which a tooth is damaged. Also JASPERS is tied up. The leader took a picture of her with his mobile telephone.*
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> *One of the perpetrators told that they were instructed to come there by a male who knew certainly that there was money in the house, an amount of 600 million was mentioned (= interview of JASPERS). Because the perpetrators are not able to find the large loot they were looking for, they clear off (taking some bank cards, a painting, ...). The couple can untie themselves at approximately 6:40 pm and raise the alarm.*
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> *Under the bed another cartridge from a firearm was found which is no property of the victims, which indicates that actually a weapon was used/shown. There is no trace from the perpetrators.*
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> *In the beginning of October, the file however develops rapidly when the Limburg Federal Judicik Police receives a telephone call from their colleagues in Liege.*
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> *On 02/10/15, Theophilus HERREGODT5S together with his girlfriend Jessica and their 9 months old daughter were taken hostage by 4 men in their house located in demand € 600,000. The perpetrators allow HERREGODTS to leave the house in order to withdraw money. Instead, HERREGODTS goes to the Police and files a report to the Maaseik Police.*
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> *Special Unites terminate this hostage-taking and arrest 4 Albanian individuals at the scene, namely Bashkim OSAJ, Eduard PERGJEGAJ, Ermal GJERGJl and Andi BALI. The men have false Greek ID cards. (OSAJ a false Greek driving license in the name of MOULAS Petros, PERGJEGAJ a false Greed driving license and ID card in the name of KANTELIS Konstantinos and GJERGJl a false Greek driving license and ID card in the name of KOKYTHAS Konstantinos).*
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> *Later HERREGODTS is given a taste of his own medicine. On 09/10/15, a confrontation between HERREGOTDTS and OSAJ takes place in the offices of the Liege Federal Judicial Police. Presumably, OSAJ must have not appreciated very much that HERREGODTS went to the Police. In his interview before the Liege*

Federal Judicial Police, he states that the theft with violence in Voeren was committed under instructions given by HERREGODTS.

OSAJ states that he normally is staying in Ireland. At a specific moment BERISHA Istref asked him to come to Germany, he had a job for him. Once in Germany, he meets HERREGODTS in BERISHA's office. During this meeting, also a certain Adera (- SADRIJAJ) was present. (In a previous interview, he states to know HERREGODTS already since 1999.) HERREGODTS had lost 1.7 million to his former girlfriend (= Odilia KUNKELS) and wanted to recover this money. This was also done via a Solicitor, yet things never got moving.

HERREGODTS knew and told that the parents of his former girlfriend (= the couple KUMKELSJASPERS living in Voeren) had a lot of money in diamonds at home. If this weren't so, he would pay himself. A reconnaissance of the victims' house was made then during which HERREGODTS indicated the house in Voeren.

There were about six times he had contact with HERREGODTS, Istref (= Berisha) and Adem (=SADRIJAJ); during the last meeting, Istref (= BERISHA) was not present, he was in Kosovo then. Each time they were talking about a robbery which had to take place in Voeren. Istref (-BERISHA) and Adem (= SADRIJAJ) would receive € 300,000 for their role.

HERREGODTS presumed that he would become a suspect after the robbery. According to OSAJ, HERREGODTS instructed him for this reason to tell a story to the victims during the robbery that the robbery was committed under instructions of an Armenian named David, and Russians. (This is also mentioned in the victims' statements.) Moreover, the Federal Judicial Police are able to find back an Armenian with David as his first name. It concerns David AMIRYAN, a political refugee who is a manager of a bar in Maasmechelen. AMIRYAN was interviewed; he is an acquaintance of the family KUNKELS. He did not know HERREGODTS personally; he did know that HERREGODTS used to be the boyfriend of Odilia KUNKELS. This once more shows that it is HERREGODTS who set up this robbery. How else would the Albanians have come up with this (first) name?

OSAJ was looking for some companions to commit the facts; he stated that the robbery was committed by himself, the other 3 persons who were arrested in Spa and a 5th person staying in Germany.

Later OSAJ indicated the name of the 5th person: BARDHOKU Gzim. He was in Ireland together with BARDOKHU when he received the instructions. Together with BARDHOKU he purchased a Mercedes to drive to Germany. BARDHOKU after the facts travelled by airplane to Albania.

Because his companions did not find what they expected, they called him inside. (In order to prove to HERREGODTS that they actually did their job, JASPERS would have been filmed during the robbery by making use of his mobile telephone. OSAJ would have hidden this mobile telephone in BERISHA's offices in Monchengladbach. The Examining Magistrate transmitted a Rogatory Letter of Request to perform a house search, but this mobile telephone is not found.)

After the fact, they all drove up to Monchengladbach where they had a meeting at McDonalds wit Ishref (= BERISHA) and Adem (= SADRIJAJ).

Because the robbery had not produced in the slightest sense what was alleged by HERREGODTS to them, the decision was made to go to Spa in order to recover the money from HERREGODTS himself (after having addressed BERISHA and SADRIJAJ to compensate them for the lack of loot, which was refused by these two).

During a preceding meeting, HERREGODTS told that if "the job had not produced anything, he would compensate us for the work done". HERREGODTS would pay in that case € 600,000 out of his own pocket.

The file in Liege was added to the file in Tongeren.

In his initial complaint, HERREGODTS refers to 4 men who on 02/10/15 at 8:00 am were standing at the door of his holiday house in Spa. He knew the man who rang the doorbell from seeing him before. One of the men was holding his hand behind his back. HERREGODTS presumed that he was holding a pistol.

The man who rang the doorbell demanded € 600,000, he warned that his companion would shoot and kill him. The money had to be arranged for today and the suggested him to go and get the money, his child and girlfriend would be held hostage under restraint and, if necessary, they would be taken along. Jessica BREEDVELD did not notice any car. (Because later in Spa a weapon was found on which mixed profiles from GJERGJI and PERGJEGAJ were found, a weapon however is mentioned in the legal qualification.)

On 01/10/15, the day before, they also went up to HERREGODTS in Spa in 2 cars and rang the doorbell; the door was opened by HERRJEGODTS's girlfriend. Because she said that HERREGODTS was not at home, they left and returned the next day. That day the group consisted of OSAJ, BERISHA and SADRIJAJ, among others, they rang the doorbell. GJERGJI, PERJEGAJ and BALI stayed in their car.

BALI, GJERGJI and PERGJEGAJ denied in first instance by saying not to have been in Voeren and to have been in Spa by coincidence; OSAJ went there to visit an acquaintance of him. In HERREGODTS's briefcase there is an agenda. It

is conspicuous that on the date 19/09/15, the day of the robbery, there is an exclamation mark.

Subsequently, a house search was made in HERREGODTS's house in Spa. That is where a pistol ZASTAVA and an alarm pistol BRUNI were found.

In the afternoon of 19/9/15, after the robbery, BERISHA tried to contact HERREGODTS on several telephone numbers, which was unsuccessful. (This finding corresponds with OSAJ's statement that he asked BERICHA after the robbery to contact HERREGODTS about the loot which actually was not there.)

Telephone analysis will show that the mobile telephones from BERISHA, GJERGJI and PERGJEGAJ were actually registered in Spa on 1/10[/15].

Based on text messages, it can be deducted that BERISHA is playing the role of a go-between. It is mainly based on text messages (in code language) dating from after the facts that GJERGJI and PERGJEGAJ absolutely wanted to have their promised share (= money) and OSAJ contacts BERISHA because of this.

13. It is noted that the Respondent Andi Bali is mentioned in the above Description of Facts on three occasions. In the first instance it is stated that he was one of four individuals arrested on the scene on the 2nd of October 2015 in Spa, Belgium. I note that the Description says that "The men have false Greek ID cards." However, the list included of the individuals in possession of false Greek documents does not include Andi Bali. Reference is made later on in the passages that he was part of six men who went to the premises in Spa, Belgium on the previous day, the 1st of October 2015, but stayed in a car when others went and rang the doorbell of the Herregodts' home in Spa. Finally, Andi Bali is mentioned as being one of three persons who denied being in Voeren in Belgium on the 19th of September 2015. No statement is included in the Description of Facts tying Andi Bali to the events of the 19th of September 2015 or on any date from the 1st of July 2015 and his alleged involvement is dated from the 1st of October 2015 through to the 2nd of October 2015 in the recital of facts.

14. A request under section 20 of the Act of 2003 ("section 20 request") from the Central Authority in Dublin on the 11th of January 2022 sought further information as to the precise role that the Respondent played and his degree of participation in each of the five offences the subject of the EAW. A response was received dated the 20th of January 2022 from the Prosecutor General's Service, Antwerp. In that response further information was supplied as to the role of Andi Bali in the following terms:

On 19 September 2015, Kunkels Jacobus and Jaspers Antonia, an elderly couple of which the woman was having serious health issues, became victims of a theft with violence in their residence. Five men entered the couple's residence, looking for money, jewellery and a safe. They were all wearing balaclavas and gloves. OSAJ Bashkim confesses that he committed this robbery together with BALI Andi, among others, under instruction of HERREGODTS Theophilus. Other

accused persons confirmed that it actually took place like that. BALI Andi was one of the offenders.

On 9 October 2015, the investigating Police Officers received information about an on-going investigation about a hostage-taking of HERREGODTS Theophilus (also accused in this case), his girlfriend Breetveld Jessica and their baby in their residence in Spa on 2 October 2015. Four Albanians were arrested, including BALI Andi. During a confrontation between HERREGODTS Theophilus and OSAJ Bashkim, OSAJ Bashkim stated that he had committed the robbery at the residence of the couple Kunkels-Jaspers under instruction of HERREGODTS Theophilus. The interviews later showed that OSAJ Bashkim had to recover money and/or valuables at the residence of the couple Kunkels-Jaspers at the request of HERREGODTS Theophilus in order to pay back a debt which the daughter of the couple would have had to HERREGODTS Theophilus. Regardless of the result of the robbery, HERREGODTS Theophilus would compensate OSAJ Bashkim and his accomplices for the job, but he did not keep that promise. That is the reason why he received a visit from BALI Andi and others. An amount of money of €600.000 was demanded. Awaiting the payment, HERREGODTS, his girlfriend and baby were taken hostage in the residence in Spa. During the robbery, the perpetrators were not afraid to utter threats and to use violence and weapons. Building this criminal gang is shown by appropriate and organised actions taken by all accused persons of which each had his own task while it was BALI Andi's role to execute and to participate in committing the robbery together.

15. Two other persons arrested in relation to these events in 2015 have come before the Irish High Court on foot of European Arrest Warrants on prior occasions.

16. The first matter to be dealt with is the case of the Gzim Bardhoku who is stated to have been named by the accused Bashkim Osaj as being involved in the above Description of Facts. Mr. Justice Hunt delivered his judgment in the matter on the 6th of September 2021.

17. Mr. Bardhoku contested the application to be surrendered to the Belgium authorities on the single offence of "Building a criminal gang in view of committing other offences than those which are punishable by a lifetime sentence or an imprisonment of 10 to 15 years or more." The Description of Facts in that case were similar to the matters set out above. Among the issues contested on behalf of Mr. Bardhoku was the issue of correspondence with the offence recited in the EAW and an offence under the law of the State. Mr. Justice Hunt was satisfied in his judgment that the EAW in that case did not provide sufficient information to establish correspondence with an offence under the law of the Irish State. In particular he found that while the EAW alleged the Respondent was a perpetrator between the 1st of July 2015 and the 11th of September 2015 the only allegation against the Respondent was that he was in the company of another accused, Mr. Osaj, on a date

unspecified, when Mr. Osaj received instructions, again not specified. Mr. Justice Hunt noted in his judgment that:

> *The corresponding offences suggested by the Minister require that the conduct alleged amount either to a conspiracy to commit a serious offence, or to direct the activities of a criminal organisation. The suggested conspiracy offence requires proof of an agreement to commit a serious offence. This requires that there are two parties to the agreement. On the information available in this case, the only possible parties to an agreement are the respondent and Mr. Osaj. So far as these two individuals are concerned, this information is limited to the respondent being present when Mr. Osaj received unspecified instructions, to the joint purchase of a car, presumably in Ireland, and to driving of that car to Germany. I do not see how this evidence could amount in this jurisdiction to proof of a conspiracy to commit a serious offence. It is not made clear how these activities were temporally or factually connected with the commission of the serious offences described in the EAW, (of which the respondent was acquitted on appeal). Equally, I do not see how it could amount to an offence of directing the activities of a criminal organisation. There is no evidence that the respondent issued any directions to any other member of any criminal organisation. The scant information available tends to suggest, if anything, that the respondent followed instructions or directions that were received by Mr. Osaj.*
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> *One of the requirements of the Act, as set out in s. 11 (1A) (f), is that the EAW set out the circumstances in which the offence was committed, including the time and place of commission, and the degree of involvement of the person in the commission of the offence, the issue of correspondence demands such clarity. Sub-paragraph (f) also requires that the EAW state the nature and classification of the offence under the law of the issuing state. Therefore, reading the EAW as [a] whole, the information therein is insufficient to establish the correspondence required by s. 5 of the Act with either of the domestic offences suggested by the Minister …*

18. On the 6th of December 2021, Mr. Justice Paul Burns delivered judgment in two extradition applications relating to the aforementioned Bashkim Osaj. In the No. 2 judgment given on the 6th of December 2021, the requesting authority was the Kingdom of Belgium and the application related to the alleged offences referred to in the Bardhoku application but expanded on in relation to the alleged involvement of Mr. Osaj. The offences in that application are the same offences as set out against the Respondent in the current application as opposed to the single offence in the Bardhoku case.

19. The issue of correspondence was not really contested in that application and the alleged participation in the offences occurring initially in Voeren in September 2015 and in Spa in October 2015 of Mr. Osaj was more specific. Mr. Justice Burns was satisfied that offence D "Building a gang in view of committing crimes" corresponds with the offence in this

jurisdiction of participating in a criminal organisation contrary to s.72 of the Criminal Justice Act, 2006 and/or conspiracy contrary to s.71 of the said Act.

20. The Applicant submits that the reasoning in the Osaj case is one this Court can apply to the Respondent having regard to the level of involvement of the two men which is of a higher level than found in the Bardhoku case.

21. The degree of involvement alleged in the current application against Andi Bali is to a higher level than that found in the Bardhoku case. Mr. Bali was arrested along with others on the 2nd of October 2015 at the scene of the hostage taking in the house in Spa, Belgium. He with five others had gone in two cars to the same house the previous day. One of the people named as being along with Andi Bali on the 1st of October 2015 was Bashkim Osaj who was also with Andi Bali on the 2nd of October 2015 when they and others were arrested at the house in Spa, Belgium. Andi Bali was also identified as being a perpetrator who, with others, was involved in the criminal incident in Voeren in Belgium involving the Kunkels-Jaspers.

22. Having reviewed the Description of Facts, the response to the request for further information under section 20 dated the 20th of January 2022 and the circumstances of the co-accused in the Bardhoku and Osaj judgments, I am satisfied that offence D at part e)of the EAW corresponds with the offence in this jurisdiction of conspiracy contrary to s.71 of the Criminal Justice Act, 2006 and/or participating in a criminal organisation contrary to s.72 of the Criminal Justice Act, 2006.

Breach of section 45 of the Act of 2003, Breach of Article 6 of the European Convention on Human Rights and abuse of process:

23. At part d) of the EAW, it is indicated that the Respondent did not appear in person at the hearing but asserts that he had been "*summoned in person on 05/11/18, has been informed of the date and place of the hearing which led to the decision, and has been informed that a decision can be made if he will not appear at the hearing*."

24. The Respondent swore an affidavit dated the 13th of January 2022 in which he states at paragraph 14:

> *I was arrested in Belgium on 15th October 2015, detained, released and re-arrested on 21st October 2015 outside the prison and I then served a period of time in relation to these offences in a Belgian prison. I was granted bail and served with an Order to Leave the Territory with Hold in View of Removal dated 7th June 2017 from the Belgium authorities …. I say that as a result of this Order to Leave the Territory with Hold in View of Removal, voluntary departure was denied and my detention at the disposal of immigration services was authorised and, ultimately, I was flown by the Belgian authorities, with other prisoners, to Albania. I say that I immediately left Albania due to the persecution I faced there. …*

25. At paragraph 15 the Respondent continued:

I was not summoned in person on 5th November 2018. I did not receive official information of the scheduled date and place of that trial and I was not aware of the date and place of that trial. I had been deported from Belgium, on foot of the Order to Leave the Territory with Hold in View of Removal dated 7th June 2017, on 5th November 2018 and so attendance at the hearing was an impossibility. ***I was also the subject of an Entry Prohibition Order which banned my entry into Belgium for a period of three years and which is dated 7th June 2017… Being the subject of a prohibition order meant that I could not re-enter Belgium for the purposes of attending a hearing****. (Emphasis added).*

Translations of the relevant Deportation Order and Entry Ban have been provided during the hearing of this application. As the judgment seeking to be enforced was made by the Belgium Court of Appeal in Antwerp on the 26th of June 2019 it is apparent that the Order was made during the currency of the three-year Entry Prohibition Order.

26. A further request under s.20 was made to the Belgium authorities dated the 15th of February 2020 seeking comment on the above averments and in particular asking "If it is the case that the requested person was indeed the subject of a Deportation Order and three-year Entry Ban pre-dating the date of the hearing, how was he expected to attend the hearing?".

27. The reply to the section 20 request was by Memo dated the 22nd of February 2022 and states as follows:

> *Dear, I can confirm that BALI Andi has been deported from Belgium on June 7th – this was a decision of the immigration service. However, at the process he was represented by his solicitor, whom he has appointed himself, so he did have knowledge of the process.*
>
> *BALI Andi was summoned on the 5th of November 2018 by certified letter via the process server. Also, his solicitor was aware of the details of the hearing, so he is supposed to communicate this to his client. Kind regards, …*

28. A further request under section 20 was made again by the Irish Central Authority on the 15th of March 2022 seeking information about the deportation and three-year Entry Ban on the Respondent along with further information about the summons process employed in the case. By reply dated the 23rd of March 2022 it was confirmed that:

> *The deportation order was a decision of the Belgian Immigration Service. The reason why BALI Andi has been deported on June 7th, 2017 to the closed centre of Vottem (Belgium) in order to assure his removal of the Belgian territory is not known by the public prosecutor. This is a decision only made by the Belgian Immigration Service.* ***We haven't any knowledge of a three-year Entry Ban.*** *If this was the case, he could not attend his hearing, but in Belgium this is not necessary and the representation by his lawyer is enough. During the*

process, BALI Andi was represented by a lawyer and the judgement has been pronounced in contradiction. (Emphasis added).

29. Other documents provided with this reply confirmed the payment of bail monies and the service of the summons by a summons server. The summons was sent to a general address in Albania which appears to be a neighbourhood as it was noted that there was no place of residence, address or chosen place of residence of the Respondent known to the summons server. There is no evidence as to receipt of the summons by any person. It was further confirmed that the bail money was paid by the lawyer for the Respondent. The reply of the 23rd of March 2022 confirmed the identity of the lawyer and that he had attended the appeal on behalf of the Respondent. It is noted that "When a lawyer is acting without instructions, he mostly notifies this, and he does not attend the hearing. In this case, his lawyer Pieter Gielen did attend the hearing, so it is assumed that he was attending with instructions."

30. The Respondent had filed a supplemental affidavit dated the 7th of March 2022 in which he stated that he had met a lawyer, "Piotr Gilan", who was assigned to his case and the Respondent had attended court at the pre-trial stage on a few occasions with the lawyer. He noted that the parties had been speaking Flemish and said that there was no interpreter during the proceedings. The Respondent confirmed paying fees of €1,000 but that he was asked for a further €2,000 for an appeal which he was not in a position to pay. The Respondent says he was not present at the substantive hearing in Belgium, so he does not know what occurred. He asserts that as he was not present at the trial, he could not properly mount his defence. The Respondent further asserts that the appeal proceeded without his instructions and notes that the sentence was increased from eight years to eleven years at the appeal.

31. The Respondent further asserts that an application to lift the Entry Ban was made on his behalf by his lawyer so that he could attend court but says he was told by the lawyer that this was refused by the court. It is noted in the section 20 response dated the 23rd of March 2022 that the prosecuting authorities in Belgium replied "*We can not confirm the application of Piotr Gilan to lift the Entry Ban, since this application is not made to the Court of Appeal Antwerp*."

32. Email contact has been made between the solicitor in Dublin for the Respondent, Mr. Leonard Leader, and Mr. Gielen in Belgium. The response confirmed the following:

> *Dear Mr. Leader, Thank you for your message. It is indeed true that I assisted/represented Mr. Bali in het (sic) proceedings of first instance and higher appeal. Despite the fact that I always kept my obligations/promises, this cannot be said for your client. I am absolutely to help you further (sic), but then you will want to remind you (sic) client of the outstanding invoice of €2.000,00 (ex VAT) that he 'forgot' to pay. Your client will want to understand that he has to fulfil his part of the deal before expectations are met on my side. With kind regards, Pieter Gielen.*

33. The Respondent objects to surrender on the basis that he was denied his fair trial rights and submits that sections 45 and/or 37 of the Act of 2003 prohibit his surrender having regard to Article 6 of the European Convention on Human Rights (ECHR) along with Article 47 of the EU Charter of Fundamental Rights and the rights guaranteed under Article 38 of the Irish Constitution.

34. The Court was referred to Recital 1 of the Framework Decision 2009/299 which confirms:

> *The right of an accused person to appear in person at the trial is included in the right to a fair trial provided for in Article 6 of the [ECHR], as interpreted by the European Court of Human Rights. [That] Court has also declared that the right of the accused person to appear in person at the trial is not absolute and that under certain conditions the accused person may, of his or her own free will, expressly or tacitly but unequivocally, waive that right.*

35. The facts in this case confirm that the Respondent was not present for neither his trial nor his appeal. Further there is evidence that a lawyer appeared at the relevant hearings. What is contested is whether the evidence provided in this application is enough to confirm that the non-attendance was on the basis of a waiver of the right as provided for in the Framework Decision and whether the Respondent's fair trial rights were fully vindicated.

36. The Supreme Court reviewed the position of a person tried and convicted in absentia in the case of *The Minister for Justice and Equality v. Marius Bogdan Zarnescu* [2020] IESC 59. In her decision Ms. Justice Marie Baker reviewed the Framework Decision of 2002, the Act of 2003, the further Framework Decision of 2009 and relevant case law in this jurisdiction and in Europe. She notes at paragraph 90 of the judgment:

> ***Summary of principles***
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> *90. From this analysis the following emerges:*
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> *(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 I 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.

37. The unique aspect of the Respondent's case is that he was legally banned from entering the country where his trial and then appeal was held. The practical effect of that is to unequivocally interfere with the right to attend court and participate in his defence. And what then of the issue of a waiver in circumstances where an accused person is banned from entering the country in the first instance? In the current case there is unsatisfactory evidence of the Respondent being summoned to court where there is no evidence that any person ever received the relevant document(s). There is evidence that his lawyer attended at the hearing at first instance and then the appeal but there is no clear evidence from either party as to what was advanced on behalf of the Respondent as to his non-attendance and the three-year Entry Ban from the 7th of June 2017. In the reply to the section 20 request dated the 23rd of March 2022 it is confirmed by the Belgium prosecution authorities that they did not have any knowledge of a three- year Entry Ban as this was a decision of the Belgium Immigration Service and acknowledge the effect was that he could not attend his hearing. What is not addressed by the Belgium authorities is the requirement for a voluntary waiver to meet the Framework Decision criteria. The fact that the Respondent was represented by a lawyer is not in itself sufficient to allow the court to find a waiver in circumstances where the Respondent was in any event legally banned from attending at the court hearings.

38. Counsel on behalf of the Respondent submits that the changing information about service of the summons – initially personal service was asserted in the EAW but later confirmed as service by a summons server who did not have an address for Mr. Bali – is totally unsatisfactory as proof of service on Mr. Bali in advance of his appeal. It is noted from the summons supplied during the hearing of this application (and duly translated) that the required date of attendance was the 14th of November 2018, having been summonsed on the 5th of November 2018. The judgment of the Court of Appeal being sought to be enforced and set out in the EAW was on the 26th of June 2019 with no clarification as to the date of the appeal whether on the 14th of November 2018 or another date between then and the 26th of June 2019 inclusive. The summons was accompanied by an Order made on the 24th of October 2018 which confirmed that "*At the court session mentioned above, the case will not be reviewed on the merits, yet the Court, taking into account the required court session time, to determine the date on which the case will actually be reviewed. Your presence therefore, will be desired*." Understanding this to mean that a future date was to be set on the 14th of November 2018 for the hearing of the appeal there is no further evidence of any contact with the Respondent as to the fixed date for hearing. In any event the documents in question were not received by the Respondent.

39. It is noted that when sending the above-mentioned summons, it was clear that the Belgian authorities were aware that the Respondent was not in custody, the summons being addressed to him in Albania. It is not clear from the application as to how this knowledge arose. Further it is clear that the Respondent was not in custody following the hearing at first instance. The earlier bail referred to was taken up on the 6th of June 2017 and he was then served with the Deportation Order dated the 7th of June 2017. In the body of the Deportation Order it is noted "…. The person concerned was placed under arrest warrant from 21/10/2015 to date on the charge of extortion, weapons were used or shown, robbery with violence or threats, trespassing, criminal conspiracy, participation by two or more person in an offence, or hostage taking**. All of these are offences for which he can be convicted**." (Emphasis added.) Also, on the order it is noted as to the motive for the decision that "It is apparent from his prison record that he is deemed dangerous with a potential flight risk." As part of the motive for the Entry Ban also dated the 7th of June 2016 reference is made to the fact that he was charged with the above offences "for which he can be convicted." Taking these matters together it is reasonable to conclude from the documentation of the 7th of June 2017 the Respondent was awaiting trial, had taken up bail pending trial and was then deported and served with an Entry Ban. It remains unclear from the documentation provided by either party when the hearing at first instance took place. Further, in light of the Entry Ban imposed while he was awaiting trial in the first instance it is unclear how the public prosecutor was asserting as recently as the 23rd of March 2022 that "We haven't any knowledge of a three-year entry ban."

40. The Respondent relies on the provisions of s.45 of the Act of 2003 and the rights to a fair trial guaranteed under Article 6 of the European Convention on Human Rights in asserting that the inability of the Respondent to attend at his appeal due to a three-year Entry Ban was an interference in the aforementioned rights. Also, it is asserted that while a person may waive the right to attend at a hearing and the court in question is entitled to impose a judgment in absentia such waiver does not apply in the circumstances of this application.

41. The Applicant submits that the requirements of s.45 of the Act of 2003 have been met by the evidence of the summons server in circumstances where Albania was last known place of domicile of the Respondent and where the Respondent was represented by his lawyer. It is submitted by the Applicant that as the Respondent had chosen the lawyer himself it was to be expected that the parties would keep each other informed of all relevant matters in relation to his initial hearing and subsequent appeal. It is further submitted that the most recent correspondence from Mr. Gielen confirms his involvement with the court on behalf of the Respondent. It is submitted by the Applicant that the decision to deport the Respondent and impose an entry-ban should not serve to displace the right of the requesting state to seek to have the Respondent returned to serve the sentence imposed on the 26th of June 2019.The Applicant denies any abuse of process in the request for surrender of the Respondent. Further reliance is placed on the attendance of a lawyer on behalf of the Respondent who it is assumed was attending with instructions.

42. The Applicant also relies across the application before the Court on the provision of s.4A of the Act of 2003. This provides:

> *It shall be presumed that an issuing state will comply with the requirements of the Framework Decision, unless the contrary is shown.*

43. In the decision of the Supreme Court of the 2nd of April 2020 in the case of *The Minister for Justice and Equality v. Mantas Vestartas* [2020] IESC 12, Mr. Justice McMenamin at paragraph 103 states:

> *I would wish to add, however, that the EAW system is predicated on mutual trust. If central authorities in an executing state request information about factors such as the elapse of time, a full explanation will not only be helpful to the court in an executing state, but will often be necessary for justice to be done…. The absence of proper and necessary information, even in response to direct requests, is not conducive to mutual trust and confidence.*

In that case the Supreme Court found that while there had been unsatisfactory responses to requests for further information, "they are of insufficient weight to be determinative." In that case surrender had been refused in the High Court on the basis of interference with Article 8 of the European Convention on Human Rights and family grounds. It is noted however at paragraph 31 of the Supreme Court's judgement that:

> *At one level, seen alone, this provision (Section 4 A) constitutes a simple evidential presumption future compliance by the issuing state with the Framework Decision. It deals with the duties and obligations of such states concerning the manner in which they will deal with the person if surrendered and after such surrender has taken place. If there is cogent evidence of non-compliance, then issues may arise which an Irish court night have to address. However a mere assertion of non-compliance, or the possibility of non-compliance, will not be sufficient to dislodge the presumption…*

Conclusion:

44. Noting the Summary of Principles set out in the Zarnescu decision at paragraph 90(f) and (g), the Court has a margin of discretion in how it approaches the facts in this case and the Court must be satisfied that it has been established unequivocally that the Respondent was aware of the date and place of trial. Further at paragraph 90(l) the purpose of the exercise is to ascertain whether the Respondent waived his right to attend at his trial and appeal. In evaluating the evidence in this case, the aim as set out at paragraph 90(r) is to assess whether the Respondent's rights of defence have been breached.

45. I am not satisfied on the evidence as produced in this application that it has been established unequivocally that the Respondent was aware of the date and place of the appeal in this instance. In seeking to ascertain whether the non-attendance of the Respondent at his appeal arose from a waiver. I am also not satisfied of that fact. This is

particularly so having regard to the evidence that on the relevant date or dates the Respondent was banned from entering Belgium. If he had actively sought to attend his appeal, he would not have been permitted entry into the country. The Entry Ban prohibited the Respondent from attending at the court and participating in the proceedings and instructing his lawyer throughout the hearing. That being so it is difficult to assess how any waiver in those circumstances could have been seen as knowingly and intelligently given on the facts of this case. I am satisfied that the appeal took place in circumstances where there was a breach of the Respondent's fair trial rights guaranteed under Article 6 of the European Convention on Human Rights. As the Respondent did not appear at his trial in the aforementioned circumstances to surrender him as requested would be a breach of section 45 of the Act of 2003.

46. Noting the provisions of section 4 A of the Act of 2003, Recital 1 of Framework Decision 2009/299 states:

> *The right of an accused person to appear in person at the trial is included in the right to a fair trial provided for in Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, as interpreted by the European Court of Human Rights. The Court has also declared that the right of the accused person to appear in person at the trial is not absolute and that under certain conditions the accused person may, of his or her own free will, expressly or tacitly but unequivocally, waive that right.*

I am satisfied on the evidence and matters decided above that in this instance the submissions on behalf of the Respondent went beyond a mere assertion of non-compliance with the Framework Decision. Further I am satisfied on all the evidence in the matter that the presumption in s.4A has been dislodged in this instance.

47. Having regard to the findings above it is not necessary to decide whether any breach of Article 8 of the European Convention on Human Rights occurred in this case.

48. Accordingly, for the reasons set out above there will be an order refusing to surrender the Respondent to Belgium.