THE HIGH COURT

[2024] IEHC 512

Record No. 2023 No. 161 EXT

BETWEEN

MINISTER FOR JUSTICE

APPLICANT

AND

MICHAL JERZY MALECKI

RESPONDENT

JUDGEMENT of Mr Justice Patrick McGrath delivered on the 31st of July 2024

1. In this application the Minister seeks the surrender of the Respondent on foot of a European Arrest Warrant issued by Judge Aleksandra Soltysinska, a District Judge in Krakow, Poland on the 4th of August 2023. Surrender is sought to serve a sentence of one year, 1 month and 28 days imprisonment.

2. The Respondent was arrested on 10 November 2023 and brought before the High Court on the same date. The Respondent was remanded in custody for the entirety of the proceedings. .

3. In his Notice of Objection, filed on the 1st of December 2023, the Respondent objected to his surrender on the following grounds:

a. He was not present, notified or represented at the trial in Poland such as to comply with the requirements of Section 45 of the European Arrest Warrant Act 2003, as amended, ['the 2003 Act'];
b. There is manifest error in the certification of compliance with Article 2.2 of the Framework Decision and correspondence must be shown,
c. To surrender the Respondent would, owing to the conditions of detention and his own medical needs, expose him to risk of breach of his rights under the European Convention on Human Rights ['the ECHR'] and the Constitution.

4. A number of section 20 requests were sent to the issuing judicial authority in relation to the matters raised.

Section 20 Request No 1

5. The first such request was sent on the 9th of October 2023 and raised two questions concerning: -

a. Firstly, how it was said that the facts outlined in the warrant were alleged to constitute an offence of organised or armed robbery under Polish law; and
b. Secondly, bearing in mind that the Respondent has been in custody in Ireland since 23rd November 2017, to confirm whether and on what dates he was present for his trial in Poland (at Part D of the EAW it had been stated that he appeared in person at the trial resulting in the decision but the decision / judgment appeared to have been given on the 17th of March 2021 and upheld on appeal on 4th May 2022

6. In the reply to this request, the issuing judicial authority did not deal with the first part of the request but said, in relation to the second part, that;

   '*…. the sentenced person Michal Malecki, did not appear for any of the court dates set by the court of first or second instance in case* [the relevant case] . *Michal Malecki had been duly served notice of each trial date: he never collected the notices within the time frame, following two attempted deliveries. At each hearing in the courts of first and second instance the defendant was represented by his defence counsel. Michal Malecki's defence counsel was informed personally of the date the verdict would be handed down by the court of first instance but was not present for it. Michal Malecki's defence counsel appealed the Verdict and was personally present for the judgement of the court of second instance'*

Section 20 Request No 2

7. A further s 20 request issued on the 14th of December 2023, referring to the answer received above and asking:-

   '1. Can you confirm whether the counsel who appeared in the court of first and second instance, was mandated personally by the respondent to defend him at the trial and if so what information is there that this was the position?

   2. Can you also confirm if counsel was mandated by the Respondent whether that counsel was appointed by the court or by the respondent?

   3. As the response of 26 October 2023 states that Michal Malecki was not present at the trial, can you provide a Part D reflecting that information?'

8. The reply was dated the 27th of December 2023 and said as follows:-

'[the Regional Court] *informs that the sentenced person, Michal Malecki, personally mandated a councillor in the above captioned case, Filip Curlyo, who was present for all the trial dates in the courts of first and second instance*

The sentenced person appeared in person for none of the trial dates in the above captioned case, either in the court of first or second instance

- *A certificate of service of a notice to attend court on 27 November 2019 returned with a note saying that two Miss Delivery Notes had been left and the papers were returned as unclaimed within the time frame*
- *Certificates of service of notices to attend court on 12 February 2020, 11 March 2020 and 5 February 2021 returned, each with a note that two Miss Delivery Notes had been left and the papers were returned as undelivered within the time frame*

Court was adjourned on 5 February 2021 therefore no further notice of the trial date was sent to the absent parties. At that date the trial was closed and sentencing was deferred until 17 March 2021. No notice to attend court for sentencing was sent to Michal Malecki. No copy of he judgment was served on him.
Certificates of service on Michal Malecki of notices to attend the Appellate Court on the 5 November 2021, 5 January 2022 and 4 May 2022 returned with notes, each saying that 'Two Miss Delivery Notes were left and the papers were returned as unclaimed withing the time frame'

S 20 Request No 3

9. A further request was sent on the 4th of March 2023 seeking information and assurances in relation to the conditions of detention / imprisonment in Poland should the Respondent be surrendered. The request asked where he was likely to be detained upon surrender if possible and general questions in relation to personal space, hygiene and sanitary facilities, medical facilities, access to fresh and light, how the authorities might deal with any threats to his safety in custody and also to confirm he would be medically assessed and provided appropriate treatment.

10. In a reply dated the 9th of April 2024, the Polish authorities indicated that they could not say where he would be detained upon arrival in Poland as that was a matter for the prison authorities. Comprehensive replies were given in relation to the particular issues raised in that reply including the issues of personal space, hygiene, personal safety and medical treatment.

S 20 Request No 4

11. On the 22nd of March 2024, a further request was sent to the issuing judicial authority which referred to a letter which had been provided to the Court from the said Mr Curlyo, the lawyers whom it had been stated was on record as acting for the Respondent during his trial and appeal in Poland. In that letter Mr Curlyo had disputed a number of matters stated by the issuing judicial authority. In the request it was said that Mr Curlyo had stated that:

'(a) Mr Malecki was acquitted on 17 May 2018

(b) The verdict was appealed by the prosecutor and a decision on 20 February 2019 revoked the District Court's verdict and referred the case to it for retrial

(c) This was appealed but the first re-hearing did not take place until 27 November 2019

1. *Can you confirm what date the decision of the District Court for Krakow – Srodmiescie II K 398/15/ S was appealed?*
2. *Was there an application made for postponement of these proceedings by Mr Malecki's representative?*
3. *As per Mr Curlyo's letter dated 15 February 2019, he states that the first hearing of case II K 1255/19/S was held on 27 November 2019. The warrant at Part B states that Judgement issued on 17 March 2021. Can you explain why there is such a delay in the proceedings?*
4. *A copy of the letter of Mr Curlyo is submitted herewith and you are invited to comment thereon if appropriate'*

12. By reply of the 2nd of April 2024, the issuing judicial authority confirmed the appeal of the original decision of the District Court in favour of the Respondent. They indicated that the delay thereafter was caused by delays in examination of witnesses and failure of some witnesses to attend on scheduled dates.

13. A further s 20 request was issued dated the 14th of June 2024 and in reply thereto, dated the 17th of June 2024, confirmed that the assurances previously given in relation to prison conditions applied to Mr Malecki.

Affidavits filed by Respondent

14. The Respondent has filed two affidavits in this case. In his first affidavit, dated the 15th of December 2015, he makes a number of points including:

- At paragraph 3 he says that having reviewed the EAW he was exonerated for these offences and, as far as he knew therefore, that was the end of the matter, and he had no need to engage further
- He points out that the contention in the EAW that he 'appeared in person at the trial resulting in the decision' is incorrect and he has been in custody in Ireland from a domestic matter since 23rd November 2017. He also refers to an EAW dated the 23rd March 2018 which had been previously issued by a judicial authority in Poland and to the fact that the covering letter sent with that warrant specifically referred to the fact that he was then in custody in Portlaoise Prison. An order for his surrender on that EAW was made on 29th November 2019 but postponed until he finished his domestic sentence in Ireland. That postponement was lifted on the 20th November 2023 once he completed the domestic sentence but there is a stay on the execution of that warrant until the completion of these proceedings
- He was never served with any notice of the dates for trial in relation to these matters as he was at all times in custody in Ireland. Furthermore, he never gave any mandate to any lawyer in Poland to represent him at the hearings as he believed he had been exonerated in relation to this case and the matter was at an end

15. In his supplemental affidavit, filed on the 7th of March 2024, the Respondent further stated:

- The letter from Mr Curlyo has now corroborated what he had stated in his first affidavit, namely that he did not instruct or give any mandate to him to represent him in the proceedings in Poland following his acquittal and that there was no contact between him and Mr Curlyo in the time following his acquittal by the District Courts

16. A full history of the proceedings in this case is set out in the letter from Mr Curylo, dated the 15th of February 2024. Much of what he says is now corroborated finally by the issuing judicial authority in the responses to the various s20 requests set out above. From that document the following emerges:-
    a. He was a defence attorney for Mr Malecki in this case before the District Court in Krakow Srodmiescie in Krakow, the Regional Court in Krakow and the Polish Supreme Court
    b. The case began in 2010 when there was a 'non final conviction' which was changed to a lighter sentence by the Krakow Regional Court. This was appealed to the Polish Supreme Court where the verdict was returned to the district court in Krakow for re-trial;
    c. On the 17th May 2018 the District Court acquitted Mr Malecki in case II K 398/5/S and Mr Malecki was aware of this verdict;
    d. This verdict was appealed by the prosecutor and the Regional Court of Krakow in case IV Ka 1304/18, in verdict of 20th February 2019, revoked the acquittal and sent the case back to the District Court for re-trial;
    e. The hearing in the District Court (under reference II K 1255/19/S) reconsidered the case). He had no contact with Mr Malecki at this point and had no idea if he was aware of the proceedings but, due to long standing

involvement in the case and consistent with ethical principles, he decided to defend him. The first hearing of this matter took place on the 27th of November 2019 and the minutes of the hearing indicate that Mr Malecki was not present but was notified by summons twice to the address he had previously provided. His previous testimony was read out and there is nothing from the record to indicate that he knew of the case. On 17 March 2021 the verdict was given, and he was convicted

f. The defence appealed the verdict and on 4th May 2022 the Regional Court heard the defence attorneys appeal and upheld the verdict. He still had no contact with him at this stage.

17. The above facts are set out in detail owing to the complex and lengthy procedural history of this matter, to fully understand the background and so as to address the submissions made by the parties as to whether firstly, there has been compliance with s45 of the 2003 Act or, if such compliance cannot be shown, there is evidence from which I can conclude that nonetheless Mr Malecki's defence rights were upheld and/or not violated in the proceedings which led to his conviction in Poland.

Correspondence

18. The Respondent submits that the offence set out in the EAW does correspond to an offence under the laws of this State. There is a contradiction in the EAW as to whether offence for which surrender is sought is or is not a 'ticked box' offence. If there is an

absence of clarity in this regard, I accept that the court must consider whether or not correspondence is demonstrated pursuant to s38 of the 2003 Act.

19. 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'.

20. 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

21. I am satisfied that the acts or omissions that are set out at Paragraph E.2 of the Warrant would be capable of constituting offences contrary to Irish Law. The facts as described therein clearly would amount to an assault contrary to Section 2 of the Non-Fatal Offences Against the Person Act, 1997 and / or an offence of Assault Causing Harm contrary to Section 3 of that Act.

22. I am therefore satisfied that correspondence has been established in this case.

Prison Conditions

23. The Respondent submits that the Country of Origin material which he has submitted and in relation to which he has prepared a precis shows a real risk of a breach of his rights such that surrender should be refused as there is a real risk he will be exposed to Inhuman and Degrading Treatment if surrendered to Poland and detained in a prison in that state.

24. The Respondent submitted that he had met the first part of the *Araynosi* test, and a letter should be sent to the issuing judicial authority seeking information in relation to specific matters raised by him. These matters included questions in relation to possible overcrowding, poor conditions in detention centres, inadequate health care etc. The parties agreed the formulation of such a request and the Court agreed to send the same to the issuing judicial authority. Despite having asked that this be sent to the issuing judicial authority the Respondent thereafter insisted that the answers had in fact to be received in a manner which indicated that they emanated from or were confirmed by the polish prison service, and this was done.

25. In that letter the issuing judicial authority were asked to indicate the prison in which the requested person would be detained or likely detained if surrendered to Poland. Information was also sought in relation to a series of matters including:

- The personal space allocated to prisoners in Polish prisons
- Sanitary and hygiene facilities available
- Food Standards
- Medical facilities
- Access to fresh air and daylight
- Out of cell time
- Steps which are taken to ensure the safety or prisoners in custody
- The availability of a medical assessment upon arrival and medical treatment during detention

26. A detailed and comprehensive reply was received from the issuing judicial authority which dealt with all of the issues raised comprehensively. Information and assurances were provided which stated that inter alia;

    a. It could not be said which prison a person would be detained in upon surrender,
    b. A minimum of 3m2 space per prisoner is provided and steps are being taken to improve this allocation of space,
    c. The amount of time an inmate spends outside his or her cell depends on their categorisation upon arrival, but they are entitled to no less that one hour of exercise per day,
    d. Free healthcare, medication and sanitary supplies are provided to inmates,
    e. Each institution run healthcare units, and some have hospital units and if treatment cannot be provided in prison, then treatment will be provided in specialised hospitals outside the prisons,
    f. Assessments are to be done upon arrival within 3 days,
    g. Facilities are appropriately and properly furnished,
    h. Minimum standards of hygiene and sanitation must be upheld,
    i. Every effort is made to ensure the safety of persons in custody in polish prisons.

27. 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 section 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'

28. 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 substantia 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'

29. The Respondent had submitted a precis of Country of Origin information which he submitted met the first part of the so called *Aranyosi* test.

30. Having considered the Country of Origin information, including the now frequently cited most recent report of the CPT published this year on Prison Conditions in Poland, the answers received from the issuing state and the submissions of the parties, I am satisfied that the Respondent has failed to demonstrate a real risk that, if surrendered, he will be exposed to inhuman and degrading treatment such that might lead to a breach of his rights under the Convention, the EU Charter on Fundamental Rights and / or the Constitution.

31. There is a default presumption that Poland will not act in a manner which will expose this respondent to inhuman and degrading treatment if surrendered and detained in a prison in that state. The respondent raised general issues in the Precis of Country of Origin information submitted. Some of these matters were historic, some localised to individual prisons or types of detention centres and some which were the subject of ongoing criticism by the CPT. Like any member state the prisons of Poland have been the subject of ongoing review and report by the CPT and there has for example been a continuing recommendation that each detainee be provided with a minimum space of 4m2 which has not been achieved in the Polish prison estate.

32. The request for information sent to the Polish authorities and their response thereto have been set out above. They have provided an assurance that, whatever prison he is detained in, he will not suffer inhumane and degrading treatment. Applying the principles of mutual trust and confidence, I must accept that assurance unless there is precise information in relation to conditions at specific detention centres which indicate a real risk of a breach of Article 3 of the ECHR or Article 4 of the Charter and there is a risk that this respondent would be exposed to such conditions. There is no such information and therefore there is no basis for me, acting in accordance with the

principles of mutual trust and confidence, to reject the assurances provided in this case by the Polish authorities.

33. This ground of objection is not therefore made out.

Submissions of the Respondent on s45 issue

34. The respondent submits that the fact that the Respondent was in custody at the time of the trials is an important consideration that cannot be overlooked in this case. He refers by way of analogy to the comments of Edwards J in *Minister for Justice v Surma* [2013] IEHC 681:

'... if an accused cannot attend his trial due to force majeure, he will not be regarded as having waived his right to attend in person.'

35. The Respondent refers to the case of ***Seliwak v Poland*** [Application No 3818/04 of 21st of July 2009, where the ECtHR was critical of Poland with regard to the service of documents on those in custody. There the Polish government had submitted that, as the applicant had been involved in about twenty sets of criminal proceedings, he himself ought to have been aware of the procedural steps in order to ensure the service of document on him and indeed in that case he had been present at the court of First Instance and gave evidence. The applicant stated that the District Court had assumed he had been living at home at the time and likewise the Regional Court, unaware he was in custody, had continued to send correspondence to his home address.

36. The ECtHR found that there had been a violation of Article 6.1 taken in Article 6.3 of the Convention. It stated that there is a duty on a member state to ensure that the courts have information on persons deprived of their liberty and to ensure that correspondence is served on persons in custody. The court also stated that there is a positive duty on the State to protect the right to a fair trial by verifying that information on the location of a person detained is properly updated to ensure that correspondence and notices are properly served. At paragraphs 60 and 62 the following comments were made:

'60….. the fact remains that the court correspondence concerning the proceedins before the court of appeal was sent by post to the applicant's home address. The courts were at all times unaware that the applicant had been arrested at some point during the proceedings and subsequently detained and that effective service of the court correspondence on him was only possible at the detention centre. In this connection, the Court reiterates that in the context of criminal proceedings it is essentially the responsibility of the courts to ensure that a trial is fair (Lala v the Netherlands, 22 September 1994, #34, Series A no 297 – A). It is therefore essentially the responsibility of the state to make available to the courts effective access to information about persons deprived of their liberty at the time of the trial. It was also for the court to ensure, by making the necessary administrative arrangements, that the court correspondence was served on the applicant who at the time of the trial remained in custody

…….

62. The further notes the Government's submission that at the material time a number of different sets of criminal proceedings against the applicant were pending before various courts. The Court considers that in these circumstances the domestic court

should have been particularly attentive to the need to establish his correct whereabouts. For the Court, it falls to the State to ensure that information on all persons deprived of liberty is collected and updated and made available to courts conducting criminal proceedings in order to ensure that correspondence and summonses are properly served on defendants and the latter's procedural rights thereby safeguarded'

37. The Respondent referred to *Minister for Justice v Mocek (No 2)* [2021] IEHC 405 where Burns J said that great care had to be taken when determining whether a person in custody had waived the right to be present. At page 14 of the Judgment, he commented as follows:

' In the EAW, the issuing judicial authority indicated that it was relying on the equivalent of point 3.1.a of the table set out at s.45 of the Act of 2003 to the effect that the respondent had been summoned in person on 25th January, 2016 and informed of the date and place of the court hearing and was informed that a decision may be rendered in absentia. Normally such a notice would be sufficient to establish that the respondent could be taken to have unequivocally waived his right to attend the hearing if he did not attend same. In this case, however, the respondent was being detained in prison in Poland. This was known to the authorities as they served notice upon the respondent at the prison. The respondent had no way of appearing at the hearing unless he was to be bought there by the relevant Polish authorities. The relevant notice did not inform him of any right to be brought to the hearing. Particular care should be taken when determining whether a person in custody has waived his or her rights, in particular the right to attend court hearings'

38. The respondent submits that here it is clear that the purported service was done by operation of Polish law and there was not compliance with s45 of the Act or Article 4a of the Framework Decision. He submits that there is no compliance with Part D 3.1.b (the part relied upon by the issuing authority) as there is no evidence that:-

(a) The Respondent actually received official notification of the scheduled date and place of the trial,
(b) It was unequivocally established that he was aware of the scheduled trial date,
(c) The respondent was informed that a decision may be handed down if he did no appear for trial.

39. He submits that there was a positive duty on the issuing state, in circumstances where he is detained, and the State knew he was detained to verify his location so he could be served with the proceedings. Given he was in custody here at the time, there is no evidence from which it could be concluded he unequivocally waived his right to be present without notification and there could be no question of a lack of diligence.

40. Insofar as the Minister relies upon the fact that the Respondent was represented by a lawyer at both first instance and appeal, the Respondent says that that is insufficient in this case. He firstly says, for the reasons explained above, that he was unaware of the trial date and did not given any mandate to a lawyer to represent him at first instance or appeal.

41. Part D 3.2 requires that it be shown that the requested person being *'aware of the scheduled trial … had given a mandate to a legal counsellor'.* That did not happen in

this case and the Minister cannot therefore rely upon this provision. In this regard he refers to *Selewiak v Poland* App no. 51835/09 (ECtHR 18 December 2012) where the ECtHR had also found a breach of Article 6 in circumstances which included a legal aid lawyer having been appointed for the applicant but there having been no communication between the applicant and that lawyer for the purposes of lodging and preparing an appeal. At paragraph 63 it was stated:

' The Court further observes that in the present case the applicant was ultimately not represented before the appellate court by the lawyer who had represented him before the trial court, but by a new one. In the absence of any communication between the new legal aid lawyer and the applicant, who was deprived of the possibility of instructing the lawyer, the mere fact that the lawyer prepared the appeal and attended the hearing was not sufficient, in the Courts's view, to ensure that proceedings complied with the requirements of fairness'

42. The respondent further referred to *Minister for Justice v Sipka* [2021] IEHC 587, where Burns J refused surrender on s45 grounds. A lawyer had been appointed in the issuing state to attend the trial dates and the appeal but the Court found that the respondent had not given any mandate to that lawyer. This was one of a number of grounds which ultimately led to the court not ordering surrender in that case.

43. The Respondent submits that he was not present, not notified and gave no mandate to a lawyer to represent him at the hearings. He submits that in the circumstances surrender cannot be ordered.

Submissions of Applicant on s 45

44. The Minister referred to the Judgments of Donnelly J in *Minister for Justice v Skwierczynski* [2016] IEHC 802 where the court considered surrender in circumstances where there had been a trial *in absentia* and where the Court had not been satisfied that there had been compliance with s45 of the Act. Relying on the decision of the CJEU in *Dworzecki* [Case C – 108/16], Donnelly J held that the executing judicial authority may take into account other circumstances and continued at para 102:

'The plain intention of the Oireachtas is that surrender must take place if the Court can be assured that the surrender of the person concerned does not mean a breach of his rights of defense….. the plain intention of the Oireachtas is that surrender is not to be refused simply on the basis that the requested person's situation does not come within one of the exceptions set out in Table s.45 provided that his surrender does not mean a breach of his rights of defence'

45. This approach was approved by the Supreme Court in *Minister for Justice v Zaranescu* [2020] IESC 59 where Baker J approved this passage of Donnelly J saying that s45 should be read in light of the Framework decision saying:

'Donnelly J was satisfied that s.45 of the 2003 Act was neither obscure nor ambiguous, but came to the conclusion, however, having regard to the fact that as the 2003 Act was enacted to implement the Framework Decision, and in light of the decision of the Court of Justice in Dworzecki, that a literal interpretation of section 45 would lead to an absurdity, would fail to give effect to the plain intention of the legislature, and would fail to achieve a harmonious interpretation of precisely the

same language in the Framework decision which is implemented and the because the concepts and autonomous European Union concepts'

46. Baker J went on to explain that surrender can still be ordered in a case even if s45 requirements are not expressly met stating at paragraph 65:
'..if the person sought to be returned under an EAW appears in person at the relevant hearing, that person is to be returned. If that person has not appeared in person or through nominated lawyers at the relevant hearing, but the circumstances meet those expressly identified in s.45, equally no impediment exists to return. This case concerns the third possible scenario, where the circumstances of the trial giving rise to the request for return do not fit within those expressed in the exceptions contained in s.45. Return may still be ordered, but only if the court is satisfied having made an appropriate inquiry that the rights of defense of the requested person have been met. As will be apparent then, the analysis of the facts must have as its aim the objective of ascertaining whether the rights of defence are sufficiently protected'

47. The applicant refers to a number of cases referred to by the Supreme Court in *Zarenescu,* namely *Tedeschi v Italy* [Application No 25685/06] and *Da Silvio v Italy* [Application 56635/13]. In *Tedeschi* it was held that the fact that a person is represented by a lawyer where it can be reasonably expected that the lawyer was made aware of the date of the hearing or of an adjourned date may be relevant to concluding that a person waived his right to be present – the Applicant says that in this case this clearly applies as, from replies to s20 requests, it is clear that Counsel on behalf of the Respondent was personally informed of the date of hearing.

48. In *Da Silvio* had unsuccessfully sought an adjournment of the hearing of the trial on the grounds of ill health and did not therefore appear at the adjourned date. A lawyer he had instructed, appeared at the hearing and entered a plea on his behalf. The court found that he was aware of the date initially set for his appeal and concluded that he unequivocally, albeit tacitly, waived his right to appear. The court held that whilst it was not clear whether he had taken any steps to confirm dates and results with his lawyers, his lawyers had been present at the adjourned hearing date.

49. In *Minister for Justice v Minerski* [2022] IEHC 634, the Respondent contended that he had received no notification for appeal, was unaware of the appeal and did not mandate counsel who appeared for him in Court. Following a number of s. 20 requests, it was confirmed that in fact a mandate had been given. Biggs J found that:

'the respondent unequivocally waived his rights to attend that appeal hearing, and that he did so in circumstances where he made himself unavailable for service. However, he unequivocally waived his rights in circumstances where he had given a mandate to a lawyer to represent him at hearing'

50. The Applicant further referred to the case of *Minister for Justice v Fiszer* [2015] IEHC 644, where the respondent had averred that whilst he had attended some trial dates, he did not attend further dates and because he did not have further contact with his lawyer, they did not have instructions to act. Donnelly J in her judgement stated: *'This court must place, and does place, mutual trust and confidence in the statements in the EAW and accompanying documentation provided by the issuing judicial*

authority. These documents indicate that this respondent had given a mandate to the lawyer. Furthermore, the Court is entitled to take into account that a lawyer will, in the normal course, only act on instructions. The bare reference by the respondent to not keeping in touch with the lawyer leading to the implication that the lawyer had no longer any instructions to act, does not amount to a direct statement that the instructions were actually withdrawn.'

51. The Minister submits that this is a case where, looking at all the circumstances, the Court should conclude that the Respondent had waived his right to attend by giving a mandate to his lawyer and his lawyer acted for him throughout the proceedings.

Conclusion on s 45 Objection

52. In my view the following are the established facts relevant to this issue:-

    a. The Respondent was not present at the trial at first instance which resulted in conviction and sentence (the hearing was on 27/11/19 and Judgment 17/3/21) or at the unsuccessful appeal (04/05/22) where his conviction was upheld. He was in custody in Ireland during that time;
    b. The Respondent was unaware of the first instance and understandably believed this matter was at an end thereafter the hearing or the appeal. He had been acquitted in relation to this matter on the 17th May 2018 and not unreasonably assumed that was the end of the matter;
    c. The Respondent had no contact with his lawyer. Mr Curlyo, after his acquittal in relation to these matters in 2018. He did not give any mandate to Mr Curlyo

to act for him at the retrial in 2019 or indeed at the appeal in 2021. Mr Curlyo had no contact with the respondent prior to or in the course of acting for him in the trial at first instance or the appeal. Mr Curlyo simply continued to act for him as, having acted for him previously in relation to this matter which had resulted in the Respondents acquittal, he considered he was under an ethical obligation to represent him;

d. The Respondent was at all material times, being at the time of the trial and the appeal, in custody in Ireland in relation to domestic matters. The Polish State were aware that he was in custody in Ireland at that time as they had, within the relevant times, served another EAW upon him and this matter had been processed through the Irish Courts with an order for his surrender thereon made on the 27th of November 2019

53. Referring to the three scenarios which can arise where s45 is in issue, as identified by Baker J at paragraph 60 of *Zaranescu* (see para 46 above) the following can be stated:

a. The respondent did not attend at the 'trial resulting in the decision' and this is not a case covered by her first scenario;

b. The respondent was not actually aware of that trial date or of the appeal or of the consequences of not attending at that trial or appeal (including the possibility that there might be a judgement against him) nor did he mandate a lawyer to act for him at that trial or appeal. This is not a case therefore which comes within the terms of s 45 of the 2003 Act; and

c. The question which remains to be considered therefore is whether, having conducted an inquiry into all of the relevant facts and circumstances, this court can conclude that the rights of defence of the requested person were met in the

procedures adopted in Poland which led to the conviction which is the subject of this EAW. Having considered all of the facts in this case, for the reasons set out below, I do not consider that the rights of the defence were met in this case.

54. As pointed out by Donnelly J in *Fiszer,* this court must and does place mutual trust and confidence in the statements received from the issuing judicial authority and that authority have indicated that the respondent was at all times represented by Mr Curlyo. I am also entitled to proceed on the basis that a lawyer will, in ordinary course, act on the instructions of his or her client. Here however there is evidence from Mr Curlyo, which I accept and does not appear to be in dispute, that following the acquittal of the respondent in relation to these matters, he received no further instructions from Mr Malecki when the prosecution successfully appealed the acquittal and the matter proceeded to retrial and appeal. I also accept that Mr Curlyo had no contact with Mr Malecki and acted out of a sense of ethical obligation in those proceedings. That being the position, this is not a case where there is simply a bare reference by the respondent to not staying in touch with Mr Curlyo after his acquittal but is one which is confirmed by his solicitor in Poland. It is also readily understandable that the respondent would, following acquittal, have believed the matter was at an end and no fault can be attached to him for not keeping in touch with Mr Curlyo thereafter.

55. This is also of course a case where the Respondent could not physically attend his trial as he was in custody in Ireland at the time of the relevant hearings. As pointed out by Burns J in *Mocek (No 2)* particular care must be exercised where it is said that

a person in custody waived his or her rights and in particular his or her right to be present at a hearing. Not only was the respondent unaware of the trial or appeal dates and not only had he not given a mandate to a lawyer to act for him, he was in custody here and this was a fact known to the 'Polish State'. I say the 'Polish State' as during these times, a separate EAW was served on Mr Malecki in prison, and this proceeded to conclusion before the High Court whilst he was in custody. In this regard I note the comments in *Seliwak* in relation to the duties and obligations on the authorities where a person is in custody as set out above.

56. As already mentioned, this is a case where the Respondent was acquitted in relation to these matters in 2018. He avers that he believed that was the end of the matter and clearly saw no necessity to maintain any contact with his lawyer. This was not an unreasonable attitude for him to adopt following acquittal.

57. Bearing in mind all of the facts and circumstances of this case, as summarised above, this is a situation where I cannot conclude that the rights of the defence were met. This ground of objection is therefore made out.