THE HIGH COURT

[2024] IEHC 722

2023 No. 194 EXT

2023 No. 198 EXT

2023 No. 199 EXT

2023 No. 200 EXT

2023 No. 201 EXT

BETWEEN

MINISTER FOR JUSTICE

APPLICANT

AND

MARIAN CANTEA

RESPONDENT

JUDGMENT of Mr Justice Patrick McGrath delivered on the 8 of November 2024

APPLICATION

1. By this application, the applicant seeks an order for the surrender of the respondent to Italy on foot of five European Arrest Warrants all dated the 17 June 2022 and issued by the Office of the Public Prosecutor at the Court in Udine. The Respondent's surrender is sought to serve a total custodial sentence in respect of all five Warrants of five years and 11 months, of which four years, 10 months and 17 days remain.

2. The Respondent was arrested on the 25 October 2023 on foot of an SIS alert and brought before the Court the following day with the Warrants thereafter produced on the 3 November 2023. The Respondent has remained in custody pending the conclusion of these proceedings.

3. A number of s.20 Requests were sent to the IJA and replies were received thereto over the course of period of months.

4. I am satisfied that the person named in the Warrants is the Respondent and I further note that no issue is taken on identity.

5. I am satisfied that none of the matters referred to in section 21A, 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.

6. I am further satisfied that the EAW was issued by a judicial authority within the meaning of the Framework Decision and the 2003 Act.

7. I am further satisfied that no issue arises which would prohibit surrender pursuant to Part 3 of the said Act.

8. I am satisfied that information contained in each of the EAWs, together with the additional information provided following requests made to the IJA pursuant to s.20 of the 2003 Act, is sufficient to meet the requirements of s.11 of the 2003 Act.

9. The Respondent is sought to serve a sentence of more than four months imprisonment in respect of the offences set out in each of the five EAWs and I am therefore satisfied that the minimum gravity requirements as set out in Section 38 (1) (a) (ii) of the 2003 Act are met.

10. In Part (e) of each Warrant the offences for which surrender is sought are set out and can be summarised as follows: -

    (i) The offences in the First EAW concern a. the Theft of 17 packages of cream and razor blades to the value of €255.70 and b. the Handling of stolen goods including bottles of alcohol, powdered tea and shaving refills, on the 14 December 2017.

(ii) The Second EAW relates to the Theft Razor Blades and bottles of alcohol on the 14 December 2017 with a total value of €940;

(iii) The Third EAW concerns the Attempted Theft of over €1600 worth of goods (coffee and razors) on the 11 September and the 7 October 2017;

(iv) The Fourth EAW concerns the Theft of Razor Blades with a value of €400 approximately on the 12 October 2012; and

(v) The Fifth EAW concerns the Theft of dental adhesives with a value of €621 on the 16 September 2016

11. The IJA has certified that the offence at b. in the First EAW above, namely the Handling of Stolen Goods, is a ticked box offence i.e. one of the offences which is set out in the various categories of offences for which it is unnecessary to show correspondence under Article 2.2 of the Framework Decision. In the absence of manifest error, such certification by the issuing state is conclusive and I find no such error.

12. The other eight offences described in the 5 Warrants consist of five offences of Theft and three offences of Attempted Theft. Having considered the conduct described as constituting the said offences at paragraph (e) of each of the said Warrants I am satisfied that the offences in question correspond with offences under Irish Law, including:-

(i) Theft contrary to Section 4 of the Criminal Justice (Theft and Fraud Offences) Act, 2001

(ii) Attempted Theft contrary to Common Law;

(iii) Possession of Stolen Property contrary to Section 18 of the 2001 Act; and

(iv) Handling of Stolen Property contrary to Section 17 of that Act.

GROUNDS OF OBJECTION

13. Five Notices of Objection were served in relation to each of the five warrants, objecting to surrender on the following grounds:

a. Each EAW does not meet the requirements of effective judicial protection and the effective remedy is refusal of surrender;

b. Each EAW is deficient in material particulars; and

c. Surrender is prohibited pursuant to s45 of the 2003 Act – this objection relates to the second, fourth and fifth EAWs only.

INSUFFICIENT DETAILS IN EAWS

14. The *'arrest warrant or judicial decision having the same effect'* [Paragraph (b) 1 of each EAW] is stated in each of the five EAWs as Order for the enforcement of concurring sentences no. 469/2021 SIEP issued by the Prosecutor of the Republic at the Court of Udine on the 10 November 2021 and the enforceable judgment for each of the five EAWs [Paragraph (b) 2 of each EAW] is set out thereafter. In a footnote to each of the EAWS, it is stated that where (as here) a person has multiple convictions, under the Italian Code of Criminal Procedure, the Public Prosecutor where the last judgment becomes final, has the authority to establish the sentence to be served. In this case such person was the Public Prosecutor at the Court of Udine. It should be further noted that there is no dispute that if the Respondent is surrendered on some but not all of the EAWs, he will only be required to serve the time in custody which has been imposed in respect of the offences in the EAWS where surrender is ordered.

15. By letter of request dated the 11 December 2023 (see Q1 thereof), additional information was sought in relation to whether the decision of the Court of Udine of the 10 November 2021, enforcing the various concurrent sentences, was a judicial hearing or administrative decision. In its reply of the 22 December 2023, the IJA stated:

    a. Under Italian law, the public prosecutor is in charge of the enforcement of custodial sentences imposed by a Court;
    b. The public prosecutor attached to the Court which delivers conviction issues the enforcement order whereby he or she orders that the convicted person be detained;
    c. Where there are multiple convictions, the public prosecutor of the court which delivered the last judgment of conviction issues the order for enforcing concurrent sentences, together with an enforcement order;
    d. The relevant order here, namely that of the 10 November 2021 of the Office of the Public Prosecutor of Udine, as the court of the last conviction, is an administrative act whereby the public prosecutor enforces the sentence(s) imposed by the court;

e. There was no new determination of the quantum or nature of the custodial sentences previously imposed on the Respondent;
f. The office of the Public Prosecutor in Udine had no discretion to vary or modify the quantum of the sentence previously imposed; and
g. The sentence to be enforced was determined by adding together the sentence imposed by each judgement of conviction and by deducting the periods spent in pre-trial detention before each judgment of conviction was handed down.

16. All that has been done in this case is that each of the five respective sentences were added together to give a total sentence and this was in turn reduced by giving credit to the Respondent for any time spent in custody. What the Public Prosecutor in Udine has done is simply an administrative act to enforce convictions and sentences already handed down by other courts.

17. Pursuant to Article 8(1)(c) of the Framework Decision (Council Framework Decision 2002/584/JHA of 13 June 2002) an EAW must contain inter alia evidence of an enforceable judgment, an arrest warrant or any other enforceable judicial decision having the same effect and the penalty imposed, if there is a final judgment. It is clear that each of the five EAWs in issue in this case, comply with these requirements.

18. Section 11(1) of the 2003 Act provides that the EAW shall '*in so far as is practicable'* be in the form set out in the Annex to the Framework Decision as amended. Section 11(1)(A) provides further that the EAW shall specify inter alia that:

> *'(e) that a conviction, sentence or detention order is immediately enforceable against the person, or that a warrant for his or her arrest, or other order of a judicial authority in the issuing state having the same effect, has been issued in respect of one of the offences to which the relevant arrest warrant relates……*
> *(g)(iii) where that person has been convicted of the offence specified in the relevant arrest warrant and a sentence has been imposed in respect thereof, the penalties of which that sentence consists'*

19. It is of course permissible for provision of the required contents under Section 11 to be provided by way of additional information from the requested state. I am satisfied that the above requirements are met here in relation to all five of the EAWs.

20. Insofar as it was submitted that there was some lack of clarity in the EAW, this is a ground that is clearly not made out. As has been made clear in a number of decisions of since *Minister for Justice v Stafford* [2009] IESC 83, there is no requirement that the details in the warrant and additional information establish a prima facie case against a Respondent. What is required is sufficient information as to the circumstances under which the offences were committed, including the time and date of the offences and the degree of involvement of the Respondent in such offences. Such information is required so that the requested person might know the nature of the charges against him, allow this Court to perform its functions under the Act and the Framework Decision and permit the Respondent challenge surrender on grounds such as specialty, extraterritoriality, or lack of correspondence.

21. The Respondent has not pointed to any difficulties caused to his challenging surrender on the basis of any want of detail in the Warrants. The Warrants contain sufficient detail such as to make the respondent aware of the nature of the offences of which he has been convicted. There is sufficient available information to allow this Court to carry out its functions under the 2003 Act. This ground of objection is therefore dismissed.

22. Finally, insofar as this ground of objection is concerned the respondent seeks to rely upon the judgment of the Court of Justice in *Bob – Dogi Case C – 241/*05. The facts in that case were very different to those in issue here. There no national arrest warrant issued prior to and separate from the EAW. The Court held that the term ‘arrest warrant’ as used in Article 8(1)(c) of the Framework Decision must be interpreted as meaning a national arrest warrant separate to that of the EAW. The Court concluded inter alia that where the executing judicial authority concludes that an EAW was issued in the absence of a national arrest warrant, such EAW is not valid and therefore cannot be enforced. The situation here is clearly different as there is reference to an underlying arrest warrant, issued by a court in each case.

EFFECTIVE JUDICIAL REMEDY / LACK OF JUDICIAL OVERSIGHT

23. As already noted above the IJA, by information dated the 22 December 2023, confirmed that the order of the 10 November 2023 (at Paragraph (b) 1 of each EAW) of the Office of the Public Prosecutor in Udine was simply an administrative act in the terms set out already. In reply to the second question raised, the IJA continued in its reply of that date to confirm that that said Public Prosecutor:
    - Participates in the administration of justice in Italy and acts independently;
    - An enforcement order or an order for the enforcement of concurrent sentences issued by the public prosecutor may be subject to an objection to enforcement raised by the convicted person at any time both before and after surrender as well as during the enforcement of the sentence;
    - The decision to issue an EAW is that of the Public Prosecutor and is not subject to any control of review by a judge;
    - If an enforcement order or an order for the enforcement of concurring sentences is change it will also affect an EAW which must then reflect such change; and
    - The respondent did not raise any objection to enforcement in respect of the order for the enforcement of the concurring sentences;

24. I agree with the submissions made by the Applicant that the requirements of 'effective judicial protection' are met in this case. The warrants are conviction warrants which seek the surrender of the Respondent to serve sentences imposed by various courts in Italy following convictions imposed by the said courts. There has necessarily been judicial oversight / protection in the process leading to the issue of these EAWs by the Public Prosecutor in Udine. The situation is, as correctly submitted by the applicant, therefore clearly distinguishable from accusation warrants which require dual levels of protection.

25. The Applicant has referred in her submissions to ***Case C-627/17 PPU ZB*** which seems to me to be directly relevant to this question and to support the Ministers submissions on the point. In that case the Public Prosecutors Office in Brussels issued an EAW for the arrest of ZB seeking the enforcement of a sentence previously imposed by the court in Brussels. As in Italy, the Public Prosecutor in Belgium operates independently and participates in the administration of justice, and furthermore Belgian law does not provide for a separate action to review a decision to issue an EAW.

26. The Court distinguished the facts here, which involve an EAW issued for the purpose of executing a sentence, from those in issue in the earlier decisions of ***OG & PI (Public Prosecutors Office in Lubeck and Zwickau) C-508/18 & C-82/19*** and ***PF (Prosecutor General of Lithuania) C-509/18*** which concerned the question of whether there was effective judicial protection or supervision in cases where the person was sought for prosecution. At paragraphs 35 and 36 of its Judgment in ZB, referring to EAWs issued for the purposes of enforcing a sentence, the CJEU stated:

> *'35. In such a situation, the judicial review referred to in paragraph 75 of the judgment …*[in OG and PI]…, *which meets the need to ensure the effective judicial protection of the person requested on the basis of a European arrest warrant issued for the purposes of executing a sentence, is carried out by the enforceable judgment. 36. The existence of earlier judicial proceedings ruling on the guilt of the requested person allows the executing judicial authority to presume that the decision to issue a European arrest warrant for the purposes of executing a sentence is the result of a national procedure in which the person in respect of who an enforceable judgment has been delivered has had the benefit of all safeguards appropriate to the adoption of that type of decision, including those derived from the fundamental rights and fundamental legal principles referred to in Article 1(3) of Framework Decision 2002/584'*

27. Here the earlier judicial proceedings which underlie the domestic warrant issued in relation to each of these five EAWs has followed from a judicial process in each of the five courts in question, which has resulted in convictions and sentences being imposed. This court can therefore, in line with reasoning of the CJEU as set out above, presume that the decision to issue these EAWs for the purpose of executing each of those five sentences is the result a procedure in Italy where the respondent has had the benefit of all appropriate safeguards prior to the passing of the sentences which it is now sought to enforce.

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

S45 OF THE ACT AND ARTICLE 4(6) OF THE FRAMEWORK DECISION

The Applicable Law re Trial in Absentia and Surrender

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

(a) The return of a person tried in absentia is permitted;
(b) Article 4(6) of the Framework Decision permits the refusal to return where the requested state has a legitimate reason to refuse the EAW;
(c) A person tried in absentia will not be returned if that person's rights of defence were breached;
(d) Section 45 of the Act, which is designed to give effect to Article 4(6) in Irish law, expressly identifies circumstances in which a person tried in absentia may be returned, primarily where there is evidence of service or where the person was legally represented or where it is shown that a right of retrial in the requesting state is available as of right;
(e) The examples outlined in section 45 as forming the basis of the analysis are not exhaustive, and the requested authority may look to the circumstances giving rise to the non-attendance of the accused person at the hearing;
(f) The requested state has a margin of discretion in how it approaches the facts, and whether to refuse return;
(g) In so doing the requested authority must be satisfied that it has been established unequivocally that the accused person was aware of the date and place of trial and of the consequences of not attending;
(h) Actual proof of service is not always required, and an assessment may be made from extrinsic evidence that the requested person was aware but nonetheless chose not to attend;
(i) Proof of service on a family member is not sufficient extrinsic evidence of that knowledge;
(j) The assessment is made on the individual facts but there must be actual knowledge by the requested person;

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

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

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

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

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

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

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

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

30. At paragraph 63 Baker J said:

"*In the light of the decision of the Court of Justice in Dworzecki and the language of the Frameworks Decisions, the requested court may examine the behaviour of a requested person with a view to ascertaining whether it has been unequivocally established that he or she was aware of a trial date and the consequence of non-attendance, with a view to ascertaining if an informed choice was made not to*

attend. This in practical terms means ascertaining whether the person has knowingly waived his or her rights to be present at trial."

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

"*It is also relevant in this context that in LU & PH itself the CJEU was clear that the executing judicial authority may take into account other circumstances that enable it to satisfy itself that the surrender of the person concerned does not entail a breach of his or her rights of the defence and thus surrender that person to the issuing Member State, including (inter alia) ' the conduct of the person concerned, in particular the fact that he or she sought to avoid service of the information addressed to him or her or to avoid any contact with his or her lawyers'). That language, which picks up on statements made in TR, suggests that, for the purposes of Article 4a of the Framework Decision, the right to be present at one's trial may, in certain circumstances, be effectively waived even where the person concerned was not aware of the date and place of his or her trial (because they had taken steps which prevented notice of their trial being served upon them).*

It may therefore be the case that the concept of waiver in this context must be understood more broadly than the Supreme Court's decision in Minister for Justice and Equality v Zarnescu [2020] IESC 59 *would appear to suggest. As Baker J made clear (at para 65), return may still be ordered even where the case does not fit within any of the exceptions to non-surrender set out in section 45 ' but only if the court is satisfied having made an appropriate inquiry that the rights of defence of the requested person have been met.' However, the court went on to read the ECtHR jurisprudence as requiring, as a condition of an effective waiver, that it be established unequivocally that the accused person ' was aware of the date and place of trial and of the consequences of not attending' (see para 90(g) as well as 90(m)). With respect, that may put the matter too far. The Strasbourg jurisprudence certainly appears to identify knowledge of the criminal proceedings as a pre-requisite to an effective waiver but it does not appear to make knowledge of the date and place of trial a necessary condition for waiver in all circumstances: see the authorities referred to in IR, §53, as well as*

ECtHR 13 September 2018, MTB v Turkey (Application no. 47081/06), §47 and following and the authorities referred to there. Zarnescu was, of course, decided before the CJEU's decisions in TR, IR and LU & PH, all of which appear to espouse a relatively broad approach to the issue of waiver, subject always to respect for the rights of defence."

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

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

33. The Court accepted that the jurisprudence of the European Court of Human Rights had been correctly interpreted by the UK Supreme Court and stated in paragraph 72:

"*… 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*."

34. 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.*"

First and Third EAWs

35. The Respondent rightly makes no Section 45 complaint in relation to the First and Third Warrants as the Respondent was in attendance in each of those cases in Italy at the *'trial resulting in the decision'*.

36. Dealing with the First Warrant, the enforceable judgment was handed down by the Court of Goirizia on the 29 September 2017, which imposed a sentence of one year's imprisonment for offences committed ten days earlier. At part (d) of this Warrant, the IJA indicated that he appeared in person at the trial resulting in the decision. Part (e) of the Warrant also refers that, at the opening of the trial, the Respondent (through his lawyer) submitted a motion under Italian Criminal Procedure which resulted in the imposition of a reduced sentence.

37. The Respondent asserted that the used of the word 'sic' on pp 7 to 9 of this EAW has resulted in some lack of clarity or incompleteness in relation to the offences for which he was convicted. Bearing in mind the purposes of Part (e) of the Warrant in this regard, namely, to set out sufficient particulars such that this executing authority can consider the question of correspondence, there is no merit in this complaint. There can be no doubt from this Warrant for what offences his surrender is sought and no difficulty in establishing correspondence.

38. In relation to the Third Warrant, the enforceable domestic judgment was handed down by the Court of Pordenone on 18 May 2020, imposing a custodial sentence of one year in respect of three offences committed on the 11 September and the 7 October 2017. An appeal was declared inadmissible by the Supreme Court of Cassation on the 27 January 2017. Clearly no issue arises in relation to compliance with the requirements of s.45 in relation to this Warrant.

Second Warrant

39. The Respondent submits, in relation to the Second EAW, that surrender ought to be refused on the basis of a failure to comply with the requirements of s.45 of the 2003 Act.

40. The enforceable judgment underlying the Second EAW was handed down by the Court in Trento on the 23 July 2019 and a sentence of two years and three months imprisonment was imposed for two offences of theft committed on the 14 December 2017.

41. The Respondent did not appear at the hearings and was not therefore in attendance at *'the trial resulting in the decision',* Here the IJA again relies on designated Box 3.1(b) from the Schedule to Section 45 of the 2003 Act. The evidence in the case, from the EAW and additional information received in response to various s.20 requests, establishes the following:-

    (a) Under Italian Law the Respondent was required to declare a domicile for notification purposes and, he himself declared the address for service at Via Giuilio Cesare, 39 in Rende

    (b) He provided this address when he was being questioned by the Police in relation to these matters on the 22 December 2017,

    (c) As the Respondent was unable to himself provide the name of a lawyer during this questioning, a lawyer was appointed as his Public Defender – Ms Erika Orazietti with a local law firm in Trento, Italy and with an address at Via S M Maddelana;

    (d) At the time of his questioning, he was advised inter alia (i) that he was obliged to communicate all changes in his declared domicile and that failure to do so would result in notification being made to his lawyer's law firm and (ii) if notification at his elected domicile was not possible, notification would be declared to his lawyer's law firm;

    (e) At that questioning he was further advised that he had a right to be present at and participate in the criminal proceedings to be registered and that in the case of his absence, the prosecution could continue where he was represented by a public defender;

    (f) The Minutes for Identification Purposes, dated the 22 December 2017, contain the various elections, warnings and obligations of which he was made aware during this questioning. Such document was translated into Romanian and read to him and he confirmed his acknowledgment of the same by signing and furthermore was provided with a copy thereof;

    (g) He did not notify the authorities of his change of address;

(h) A notification of court summons was served upon him at the address he had given, and he was informed therein that provided there was no legitimate impediment the case could be heard in his absence;

(i) Four unsuccessful attempts were made to serve the Respondent and thereafter, as he had been informed previously could happen, the summons was served on his defence counsel in accordance with s.161(4) of the Italian Criminal Procedure Code;

(j) He did not attend at the hearing and the case proceeded in his absence after the court established service had been effected on his lawyer and there was no lawful impediment to the case proceeding;

(k) The Respondent was represented by Ms Orizetti at the various hearings up to and including the enforceable judgment, delivered on the 23 July 2019.

42. Applying the principles set out in *Zaranescu, Szamota & Szlachcikowski* to the circumstances relating to this EAW, I am satisfied that the rights of defence were not breached in relation to the trial which led to the conviction and sentence of Mr Cantea. From the EAW and the additional information supplied in response to s.20 requests, whilst in this case the Respondent was tried *in absentia* and whilst actual proof of service of the relevant summonses and other court documents cannot be shown, it has been established that:-

(i) There was a manifest lack of diligence on the part of Mr Cantea in receiving notifications of the date and place of the hearings. This is evidenced by his failure to inform the authorities of his change of address after being informed by them in of his obligation so to do and signing an official document (which had been translated into his own language) acknowledging this obligation and indeed so doing having had the assistance of a lawyer during the relevant interrogation;

(ii) There was an informed choice by Mr Cantea to avoid service of official and court documents and I have no doubt that he made an informed decision not to be present at his trial;

(iii) Mr Cantea was made aware of the possible consequences of not attending at any future hearing or trial, namely that the hearing could proceed in his absence;

(iv) Taking into account all of the evidence, including the conduct of the Respondent, this court must conclude that he waived the right to attend at the trial which led to the convictions and sentence at issue in this EAW and did so with knowledge of the possibility that the trial could proceed in his absence.

43. I therefore reject this objection in respect of the Second Warrant.

The Fourth EAW

44. The Respondent submits, in relation to the Fourth EAW, that surrender ought to be refused on the basis of a failure to comply with the requirements of s.45 of the 2003 Act.

45. The Respondent did not appear at the hearings and was not therefore in attendance at *'the trial resulting in the decision'*.

46. Here the IJA again relies again on designated Box 3.1(b) from the Schedule to Section 45 of the 2003 Act. The evidence in the case establishes the following:-

(i) The Respondent was arrested whilst in the act of committing a theft on the 12th of October 2016;

(ii) When questioned by the police on that date, he gave as his domicile for notification purposes the law office of his court appointed Counsel, Alessandro Tonon with a professional address at Bolzano, Corso Italia 30. He confirmed this as his elected domicile upon release from police custody the following day;

(iii) During questioning he was told of his obligation to furnish the authorities with details of any change of domicile and this he failed to do;

(iv) Again, he signed a document acknowledging receipt of those directions and warnings;

(v) He was further informed that were he absent at the criminal trial, the trial could run its course;

(vi) The notification of court summons was served at the elected domicile of Mr Tonon on the 7 January 2019;

(vii) The Respondent was present at the first instance hearing of the 27 November 2019;

(viii) He was represented throughout the trial by Mr Tonon;

(ix) At the hearing of the Court of Appeal of Trento, Mr Tonon was not present and was substituted by his colleague Mattia Gris, a colleague of Mr Tonon and also practising in Bolzano.

47. Applying the principles set out in *Zaranescu, Szamota & Szlachcikowski* to the circumstances relating to this EAW, I am satisfied that the rights of defence were not breached in relation to the trial which led to the conviction and sentence of Mr Cantea. From the EAW and the additional information supplied in response to s.20 requests it is clear that, whilst in this case the Respondent was tried *in absentia* and whilst actual proof of service of the relevant summonses and other court documents cannot be shown, it has been established that:-

(i) There was a manifest lack of diligence on the part of Mr Cantea in receiving notifications of the date and place of the later hearings. This is evidenced by his failure to inform the authorities of his change of address after being informed by them in of his obligation so to do and signing an official document acknowledging this obligation and indeed so doing having had the assistance of a lawyer during the relevant interrogation;

(ii) Having been present at the first date this matter was in Court, when he was represented by his lawyer, he thereafter clearly made an informed decision not to be present at any further hearings of his trial;

(iii) Mr Cantea had been made aware of the possible consequences of not attending at any future hearing, namely that the hearing could proceed in his absence;

(iv) Taking into account all of the evidence, including the conduct of the Respondent, this court must conclude that he waived the right to attend at the trial which led to the conviction and sentence at issue in this EAW and did so with knowledge of the possibility that the trial could proceed in his absence.

The Fifth EAW

48. The enforceable judgment in respect of this EAW was handed down by the Court of Udine on the 21 April 2021, when a sentence of one year's imprisonment was imposed for a single offence of theft committed on the 16 September 2016.

49. The Respondent did not attend in person at the hearings which resulted in the imposition of this sentence. He did not therefore attend at the *'the trial resulting in the decision'* and the requesting state seeks therefore to rely upon and has designated box 3.1b, namely:

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

50. In this case, not only was the Respondent not present at any of the hearings which resulted in the imposition of this sentence, but from the additional information received on the 14 March 2024, it is now clear that he was never arrested, questioned nor participated in any way in the preliminary investigation by the Italian authorities for this offence.

51. The Respondent was identified as a suspect from CCTV footage by police and the supermarket owner. Despite various inquiries and searches by the police, he could not be traced. By decree dated the 26 July 2018 the Judge in charge of the Preliminary Investigation, as he was entitled to do under Italian law, (i) declared him nowhere to be found; (ii) assigned him a court appointed lawyer and (iii) ordered notification to be effected by delivery to the defence lawyer. The Court appointed lawyer, Ms Contessi, thereafter, received all documentation in relation to the case from the authorities and was present at the hearing which resulted in the enforceable judgement in the Court in Udine on the 21 April 2021.

52. In response to further queries raised with the IJA, it is now clear that if surrendered to Italy the Respondent does not have an automatic right to a re-trial or an appeal that meets the requirements of Section 45 and the Framework Decision.

53. In this case, I cannot conclude that the rights of defence were upheld in the process which led to the conviction and sentence for which surrender is sought on this Fifth EAW. There was a trial in absentia, none of the relevant boxes in Section 45 are met and furthermore there is no evidence from which this court could find, expressly or by inference, that the Respondent was aware of the proceedings and chose not to attend the same or, by his actions, waived any right to attend such proceedings. I must therefore refuse surrender in respect of this Fifth EAW.

SECTION 38 POINT

54. A further issue arose in the course of the various hearings following the receipt of additional information in reply to s.20 Requests sent by this Court to the IJA.

55. This issue relates to Warrant No 3 and the question of whether (a) the sentence that has been imposed for the offences for which surrender is sought therein has in fact been served and (b) if that is the case whether surrender can be made in relation to this warrant given the wording of section 38.

56. By letter of request dated the 24 July 2024, the IJA were asked for clarification in this regard and specifically whether in light of the information previously received:-

> *'(a) the Respondent has in fact served all of the one year sentence imposed by the Court of Pordenone in respect of European Arrest Warrant No 3 and if so, whether his surrender is still being sought in respect of this European Arrest Warrant; or (b) the Respondent is required under Italian Law to serve any part of the one year term of imprisonment imposed by the Court of Pordenone in respect of European Arrest Warrant No 3 and if so, the actual time remaining to be served by the Respondent in respect of this European Arrest Warrant'*

57. In its reply of the 9 August 2024, the Office of the Public Prosecutor attached to the Court of Udine stated:

'The period of preventative custody served by Cantea Marian with regard to the judgement rendered by the Court of Pordenone on 18 May 2020, irrevocable on 27 January 2021 (European Arrest Warrant n. 3) is a term of preliminary custody in prison f 1 year from 29 October 2019 to 28 October 2020 (not 20 October 2020 as erroneously indicated in the previous note
Whereas in the case of enforcement concerning an aggregation of sentences, the domestic system provides that the periods of preventative custody served shall be added and deducted from the total of the penalty to be calculated, even if they refer to the penalties imposed with the individual judgments aggregated in the aggregation order, the surrender of Cantea Marian is requested also based on the European Arrest Warrant n.3'

58. From the above reply, it is clear that Mr Cantea has served the total period of imprisonment imposed in relation to Warrant No 3. It would also appear to be the case, consistent with all the information received from the IJA as to how this system of aggregate sentences operates and with what is said in this reply, that this one year will be deducted from the total time to be served once he is surrendered.

59. Although there is an aggregate sentence, there are five separate warrants and each of the Warrants must comply with the requirements of the 2003 Act. Section 38(1) provides:-

' A person shall not be surrendered to an issuing state under this Act in respect of an offence unless
(a) it is the case that –
....
(ii) a term of imprisonment or detention of not less than 4 months has been imposed on the person in respect of the offence in the issuing state, and the person is required under the law of the issuing state to serve all or part of that term of imprisonment'

60. Given that the Respondent will not be required to serve any or the sentence of imprisonment imposed in respect of the offences in Warrant No 3, his surrender is prohibited pursuant to s38(1)(a)(ii) of the 2003 Act.

CONCLUSION

61. Given my findings as set out above I am therefore:

(a) Refusing to make an order for the surrender of the Respondent in relation to Warrant 3 and 5; and

(b) Making an order for his surrender in relation to Warrants 1, 2 and 4