AN CHÚIRT UACHTARACH

THE SUPREME COURT

S:AP:IE:2020:000021

Clarke C.J.
MacMenamin J.
Charleton J.
O'Malley J.
Baker J.

In The Matter of The European Arrest Warrant Act 2003 (As Amended) And
In The Matter of Marius Bogdan Zarnescu (DOB: 16th March 1979)

Between/

The Minister for Justice and Equality

Applicant/Appellant

- And -

Marius Bogdan Zarnescu

Respondent

Judgment of Ms Justice Marie Baker delivered the 28th day of September, 2020

1. The right to a fair trial has a prominent place in a democratic society, and the supporting right to be present at a criminal trial or appeal is deeply entrenched in domestic law and in international instruments.

2. The extradition of a person tried and sentenced *in absentia* can therefore give rise to a concern whether the fundamental rights of defence of the requested person were adequately protected. The European Court of Justice and national case law have evolved a number of principles to meet the understandable reluctance of a requested state to return a person when doubts exist as to the knowledge of the person of the scheduled date for trial or sentence, and an acceptable balance between respect for the legal order of another Member State and mutual cooperation on the one hand and the rights of the requested person is not always easy to achieve.

The Framework Decisions

3. Council Framework Decision 2002/584/JHA on the European Arrest Warrant and the Surrender Procedures Between Member States, O.J. L/190, 18.7.2002 provides for the prohibition of surrender where there was a trial *in absentia* save in certain conditions.

4. The Framework Decision, as appears from recital 7, was issued to replace the system of multilateral extradition built upon the European Convention on Extradition of 13 December 1957. Recital 10 and article 1.2 point to its basis in mutual recognition and on a high level of confidence between Member States.

5. The Framework Decision was amended by Council Framework Decision 2009/299/JHA O.J. L/81, 27.3.2009 ("the 2009 Framework Decision"). Recital 4 of the 2009 Framework Decision recognises the importance of having clear and common grounds for non-recognition of decisions obtained *in absentia* and for that purpose provides:

> "This Framework Decision is aimed at refining the definition of such common grounds allowing the executing authority to execute the decision despite the

absence of the person at the trial, while fully respecting the person's right of defence."

6. The Framework Decisions leave to the national laws of Member States the forms and methods, including procedural requirements, required to achieve the results specified in this Framework Decision.

7. The 2009 Framework Decision, in the light of the perceived lack of consistency in decisions to return when the requested person did not appear in person at the hearing, inserted article 4a:

> "The executing judicial authority may also refuse to execute the European arrest warrant issued for the purpose of executing a custodial sentence or a detention order if the person did not appear in person at the trial resulting in the decision, unless the European arrest warrant states that the person, in accordance with further procedural requirements defined in the national law of the issuing Member State:
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> (a) in due time:
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> (i) either was summoned in person and thereby informed of the scheduled date and place of the trial which resulted in the decision, or by other means *actually* received official information of the scheduled date and place of that trial in such a manner that it was *unequivocally established* that he or she was aware of the scheduled trial,
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> and
>
> (ii) was informed that a decision may be handed down if he or she does not appear for the trial". *(emphasis added)*

8. The article contains a draft EAW, which is repeated in full in the Irish implementing legislation.

9. The balance of the inserted article is not relevant to this judgment.

10. The European Arrest Warrant Act 2003 ("the 2003 Act") implements the Framework Decisions, as amended by the European Arrest Warrant (Application to Third Countries and Amendment) and Extradition (Amendment) Act 2012. The amended s. 45 mirrors precisely the language of the 2009 Framework Decision. It is agreed that the slightly different formulation in the main body of s. 45 which uses the phrase "shall not be surrendered" is not materially different from the language in the 2009 Framework Decision that an executing judicial authority "may also refuse to execute" the warrant.

11. The Framework Decisions afford an interpretive basis for the interpretation of national law in accordance with the principles stated by the Court of Justice in *Pupino (Case C-105/03)*, EU:C:2005:386, such that the purpose of the Framework Decisions is attained and a conforming interpretation achieved. This is apparent from the decisions of this Court in *Minister for Justice and Equality v. Tokarsk* [2012] IESC 61, and *Minister for Justice v. Bailey* [2012] IESC 16, [2012] 4 IR 1.

12. This judgment concerns the correct approach to return of a person who has been convicted *in absentia* when service has not been effected by one of the means expressly envisaged in the saver provisions in the Table to s. 45 of the Act.

13. It is the appeal of the Minister for Justice and Equality directly from the High Court under Article 34.5.4° of the Constitution against the order of Binchy J. of 22 January 2020 refusing to order the surrender of the respondent to Romania pursuant to a European arrest warrant dated 23 January 2018 ("the EAW") for the reasons set out

in his written judgment of 13 January 2020, *Minister for Justice and Equality v. Zarnescu* [2020] IEHC 6.

14. The appellant is the executing authority for the purposes of the EAW legislation, and Romania is the requesting Member State.

National discretion

15. The Member States enjoy discretion in the implementation of the Framework Decisions in how national legislation balances the principles of judicial cooperation with respect for rights of defence or to a fair trial. Recital 15 of the 2009 Framework Decision provides that the grounds for refusal in article 4a(1) are optional, but that the rights to a fair trial must be respected:

> "The grounds for non-recognition are optional. However, the discretion of Member States for transposing these grounds into national law is particularly governed by the right to a fair trial, while taking into account the overall objective of this Framework Decision to enhance the procedural rights of persons and to facilitate judicial cooperation in criminal matters."

16. Recital 16 indicates that the discretion to refuse return is not unlimited and that if the conditions in article 4a are met, return should not be refused:

> "The provisions of this Framework Decision amending other Framework Decisions set conditions under which the recognition and execution of a decision rendered following a trial at which the person concerned did not appear in person should not be refused. These are alternative conditions; when one of the conditions is satisfied, the issuing authority, by completing the corresponding section of the European arrest warrant or of the relevant certificate under the other Framework Decisions, gives the assurance that the requirements have been or will be met, which should be sufficient for the

purpose of the execution of the decision on the basis of the principle of mutual recognition."

17. The Irish legislation was amended to reflect these provisions and s. 45 of the 2003 Act, inserted by s. 23 of the 2012 Act, provides for the non-execution of an EAW in the case of trial *in absentia*, unless certain conditions are met:

> "A person shall not be surrendered under this Act if he or she did not appear in person at the proceedings resulting in the sentence or detention order in respect of which the European arrest warrant was issued, unless the European arrest warrant indicates the matters required by points 2, 3 and 4 of point (d) of the form of warrant in the Annex to the Framework Decision as amended by Council Framework Decision 2009/299/JHA, as set out in the table to this section."

18. The Table to s. 45 sets out in four numbered paragraphs the circumstances where a person tried *in absentia* can nonetheless be surrendered with a view to identifying whether the person was aware of the scheduled date and place of the hearing which resulted in the decision:

> "3.1a. the person was summoned in person on . . . (day/month/year) and thereby informed of the scheduled date and place of the trial which resulted in the decision and was informed that a decision may be handed down if he or she does not appear for the trial;
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> OR
>
> 3.1b. 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 for the trial;

OR

3.2. being aware of the scheduled trial, the person had given a mandate to a legal counsellor, who was either appointed by the person concerned or by the State, to defend him or her at the trial, and was indeed defended by that counsellor at the trial;

OR

3.3. the person was served with the decision on . . . (day/month/year) and was expressly informed about the right to a retrial or appeal, in which he or she has the right to participate and which allows the merits of the case, including fresh evidence, to be re-examined, and which may lead to the original decision being reversed, and

the person expressly stated that he or she does not contest this decision,

OR

the person did not request a retrial or appeal within the applicable time frame;

OR

3.4. the person was not personally served with the decision, but

— the person will be personally served with this decision without delay after the surrender, and

— when served with the decision, the person will be expressly informed of his or her right to a retrial or appeal, in which he or she has the right to participate and which allows the merits of the case, including fresh evidence, to be re-examined, and which may lead to the original decision being reversed, and

— the person will be informed of the time frame within which he or she has to request a retrial or appeal, which will be . . . days .”

19. The core issue in the appeal is the principle applicable to surrender when the circumstances do not come within those set out in this Table to s. 45, and in particular 3.1b.

Background

20. The chronology was agreed by the parties during case management. Binchy J. also noticed that the facts which gave rise to the application were, for the most part, not in dispute and summarised them at para. 35 of his judgment.

21. On 4 December 2012 the respondent was convicted of an assault offence arising out of an incident on 6 June 2011 in a restaurant in Oneşti, Romania. A one-year prison sentence was imposed by a court of first instance on 4 December 2012 but suspended for a period of three years. The sentence was affirmed by an appellate court on 14 February 2013. This will be referred to as “the first conviction”.

22. On 19 April 2017 the respondent was convicted, on a guilty plea entered on affidavit, of driving without a licence and sentenced to 8 months’ imprisonment, and the first instance Oneşti Court of Law revoked the suspension of the one-year prison sentence imposed in respect of the first conviction. This will be referred to as “the second conviction”.

23. The respondent did not appear in person at the hearing at first instance leading to the second conviction but was represented by a lawyer “mandated” (the language used in the legislation) by him. His lawyer filed an appeal to the Bacău Court of Appeal.

24. Before the scheduled hearing date of the appeal the respondent wrote in person to the Bacău Court seeking an adjournment in order to retain a new lawyer, saying

that he was in Ireland and could not travel on account of work commitments. The letter provided an address in Bray, County Wicklow, identified as his place of residence and gave as his domicile an address in the village of Curița, Cașin Commune, Onești, Romania. The hearing was then adjourned to 7 November 2017.

25. On 25 September 2017, a summons notifying the adjourned date was delivered to the domicile address in Romania and was received by the respondent's father. There was no direct evidence that the correspondence had been forwarded to the respondent by his father or that he was otherwise made aware of its contents.

26. A hearing took place before the Bacău Court of Appeal on 7 November 2017, at which, according to the issuing judicial authority, "the debates were closed". The appeal proceeded in the absence of the respondent and he was without legal representation. The decision at first instance was upheld in a judgment delivered on 22 November 2017.

27. The EAW issued on 23 January 2018 by a judge of Onești Court of Law ("the issuing judicial authority") and was endorsed for execution by the High Court on 20 June 2019.

28. The EAW (part (b).1) states on its face that the decision sought to be enforced is the "criminal sentence" of 19 April 2017 of the Onești Court of Law, which became final and enforceable following the decision of the Bacău Court of Appeal of 22 November 2017.

29. Further information was sought by the appellant by letter of 22 May 2019. The issuing judicial authority responded by letter dated 28 May 2019.

30. The respondent was arrested on foot of the EAW on 17 July 2019.

31. Five points of objection were delivered on 26 July 2019 and an affidavit of support was sworn by the respondent on 9 October 2019.

32. Further additional information from the issuing judicial authority was requested by the appellant on 17 October 2019, and furnished on 24 October 2019. The issuing judicial authority referred to a provision in the Romanian Criminal Procedure Code which states that when a person has appointed a lawyer, he or she shall not be deemed to have been tried *in absentia* if counsel appeared at any time during the criminal proceedings, and that, in the present case, the respondent had been represented before the court of first instance. The issuing judicial authority also stated that since the respondent had not filed a request to have the matter reopened in accordance with the applicable procedure, it could not assess whether or not he would be successful in any request to do so following his surrender. (para 3.4 of the Table to s. 45)

33. The appellant applied to the High Court seeking an order for the surrender of the respondent pursuant to s. 16(1) of the 2003 Act. The respondent pursued two of the points of objection at the hearing:

> 1) that he had not been properly served with a summons to court, and was not present in court, nor represented, on the occasions when the appeal court adjudicated upon the matter. Further, that he is not guaranteed a retrial to remedy this alleged deficiency;
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> 2) that he was denied fair procedures in the process leading to the activation of the sentence for the first conviction, and therefore his surrender would be prohibited on fundamental rights grounds by s. 37(1) of 2003 Act.

The High Court decision

34. On the facts, Binchy J. was critical of the respondent:

> "The respondent has, for all intents and purposes, orchestrated the state of affairs that has come to pass. He was on notice of the date on which the appeal was originally scheduled to be heard, and he requested an adjournment, which

request was granted. He then took no further steps either to engage a lawyer or to acquaint himself with the new hearing date. The court, on the other hand, notified him of the new hearing date by way of a letter addressed to the respondent at his Romanian domicile, which he himself provided to the court in the letter seeking an adjournment." (para. 39)

35. He considered that the case was to be decided on the interpretation of s. 45 of the 2003 Act, and that required that it be unequivocally shown that the respondent was aware of the rescheduled date of hearing. He was not satisfied that this proof had been met, and therefore surrender had to be refused:

"[I]n my view the most that can be said is that it is likely that the respondent was aware of the re-scheduled hearing date of 7th November, 2017, because it is likely that his father would either have forwarded his post to the respondent, or would have opened it and advised the respondent of its contents. I consider it likely that one of these events would have occurred not least because the respondent himself nominated his Romanian domicile in his letter to the Bacau Court. However, being satisfied that something is likely to have occurred falls some way short of being "unequivocally" satisfied as to its occurrence, and the latter is required by s. 45 of the [2003 Act]. In effect, what the Court is being invited to do is to deem as good service on the respondent, the service of court documents at his domicile, in circumstances where these documents were received by the respondent's father. There is a difference between deeming service good and being unequivocally satisfied that service on a party has occurred." (para. 42)

36. Binchy J. stated that the plain language of s. 45 was "unambiguous" that proof of knowledge of the scheduled dated had to be "unequivocal", but whilst this led to an

"undesirable outcome", there was no ambiguity such as to permit of a purposive interpretation. He said he would not have hesitated to grant the surrender order had he determined the matter solely on the basis of the Framework Decision.

37. He went on in para. 46 to make a call for legislative intervention:

> "I have arrived at my decision by reason of the unambiguous language of s. 45 of the [2003 Act]. I have to say however that I do so with considerable misgivings having regard to the conduct of the respondent. He is, in effect, benefitting from the fact that the Bacau Court of Appeal accommodated him in his request for an adjournment of the proceedings, as well as his own subsequent inaction. Had the Bacau Court of Appeal refused his application for an adjournment, and dealt with the matter when the case was first listed on 12th September, 2017, then there is every likelihood that this application would have succeeded, because the respondent was aware in advance that the matter was listed for hearing on that date. Some modification to s. 45 of the [2003 Act] is, in my view, necessary in order to avoid such undesirable outcomes."

The issues in the appeal

39. Binchy J. refused a certificate to appeal and the leave was granted by this Court, [2020] IESCDET 58, on the following grounds:

> 1. Did the High Court correctly interpret the provisions of s. 45 of the 2003 Act in determining that surrender of the respondent had to be refused?
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> 2. Should s. 45 of the 2003 Act be interpreted in a purposive manner?
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> 3. Where a requested person has been tried *in absentia*, but the circumstances do not come within one of the specific exceptions set out in the Table to s. 45,

can the High Court order surrender once it is satisfied that the requested person's surrender does not mean a breach of rights of defence?

40. The net issue in the appeal is whether and in what circumstances a person who does not appear in person at the hearing leading to the decision to be enforced can be surrendered, notwithstanding that the facts do not fall within the exceptions identified in the Table to s. 45.

41. Although it was not so argued in the High Court, the parties are now agreed that s. 45 falls to be interpreted in light of the case law of the Court of Justice of the European Union with a view to achieving a conforming interpretation and that, to that extent, Binchy J. erred in his interpretation of s. 45 of the 2003 Act. The respondent does not contend for a literal interpretation but argues that the trial judge did, in fact, interpret the provisions of s. 45 in accordance with the established jurisprudence.

The arguments of the appellant

42. The appellant argues that as the High Court had found on the facts that the respondent had deliberately absented himself from the rescheduled hearing, surrender would not breach his defence rights, and that there was no basis on which this finding could be reversed.

43. The appellant argues that there can be varying circumstances other than those enumerated in article 4a(1)(a) to (d) and the Table to s. 45 which could justify a conclusion on the facts that surrender would not breach the rights of defence of the requested person, and that such circumstances could include cases where he or she had sufficient knowledge of the charges and proceedings and either unequivocally waived a right to attend the trial or displayed a lack of diligence in taking proper measures to receive official notifications about the date and place of trial.

The arguments of the respondent

44. The respondent accepts that the approach identified by Donnelly J. in *Minister for Justice v. Skwierczynski* [2016] IEHC 802 is correct, and does not advocate a literal approach to s. 45 of the 2003 Act and article 4a of the Framework Decision. It is argued, on the merits, that the rights of defence of the respondent were breached by reason of the fact that the appeal proceeded in his absence and where there was no unequivocal waiver of his rights. It is argued that failure to follow up on the response to the request for an adjournment could not be an unequivocal waiver of rights.

The findings of fact

45. Whilst the High Court judge had noted that the respondent had not followed through by instructing a lawyer after the appeal was adjourned at his request, on the facts, he found that there was doubt as to whether the respondent's father had forwarded this post to him and that there was, as stated in para. 43, "no way of knowing whether or not he did so, and if he did, whether or not the letter was received". Equally, the trial judge held that there was no way of knowing if his father had informed the respondent of the contents of the letter and that a decision could be made at the hearing despite his absence. The Court of Justice in *Dworzecki (Case C-108/16 PPU)*, EU:C:2016:346 held that service of an adult member of the household was not, in itself, sufficient to establish unequivocally that a person had received the relevant communication and the decision of Binchy J. is consistent with that approach.

46. The finding of the trial judge was that there had been no unequivocal waiver of the right to be present at trial. The respondent says that this finding is available on the evidence, and was, in truth, inevitable. The appellant argues that there may be some scope for review of the evidence as the hearing in the High Court was conducted on

affidavit. In the light of the decision of the Supreme Court in *Attorney General v. Davis* [2018] IESC 27, [2018] 2 IR 357, the appellant should have, but has not, identified the relevant facts and the reasoning on which the request to revisit is based.

47. I will return later to the findings of fact made by the trial judge but for the present I comment that Binchy J. is correct that the approach to be found in the Framework Decision, the Irish legislation and the jurisprudence as informed *inter alia* by the European Court of Human Rights, is that the concern of the requested authority is to ascertain whether there was a sufficient degree of actual knowledge to enable a court to form a view as to whether an *in absentia* hearing could safely be judged as not amounting to a breach of defence rights. Whilst the conduct of an accused person is an element in that analysis, the right to be present plays such a fundamental part in the right to a fair trial, that any departure from that principle by the hearing and determination of a criminal matter in the absence of an accused person must be scrutinised.

Case law of the European Court of Justice

48. The boxes contained in the amending Framework Decision and reproduced in the Table to s. 45, each requires proof of actual knowledge of the relevant person: 3.1(a) requires proof of actual service of documentation informing the accused of the scheduled date; 3.1(b) requires proof of actual receipt by that person by means other than a summons in person; 3.2 requires actual awareness by a person who opts to be represented; 3.3 requires evidence of actual service and an express of an intention not to appeal, following express knowledge the person did not request a retrial and finally, 3.4 makes provision for the circumstances where a person was not personally served but where an appeal or other form of review can occur immediately after surrender, and the person will be expressly served with notice of those options.

49. The parties however are agreed that the proper interpretation of s. 45 of the Act must have regard to the judgments of the Court of Justice, described by them as a "purposive" approach. The list of circumstances express in the Table are therefore not exhaustive. This emerges from an analysis of the jurisprudence of the Court of Justice.

50. It is useful to start with the decision in *Dworzecki*, a case concerned with service of a summons on an adult belonging to the household of the person whose surrender was sought, and who had undertaken to pass the summons on to that person. The Court recognised a general right on the requested court to examine the circumstances leading to the non-attendance because:

> "50. Furthermore, as the scenarios described in Article 4a(1)(a)(i) of [the Framework Decision] were conceived as exceptions to an optional ground for nonrecognition, the executing judicial authority may in any event, even after having found that they did not cover the situation at issue, take into account other circumstances that enable it to be assured that the surrender of the person concerned does not mean a breach of his rights of defence.
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> 51. In the context of such an assessment of the optional ground for non-recognition, the executing judicial authority may thus have regard to the conduct of the person concerned. It is at this stage of the surrender procedure that particular attention might be paid to any manifest lack of diligence on the part of the person concerned, notably where it transpires that he sought to avoid service of the information addressed to him."

51. The judgment was concerned with the interpretation of the wording of 3(1)b, which requires the requesting authority to show that notwithstanding that a person had not been personally served with notice of the scheduled date and place of trial or

appeal it was "unequivocally established" that he or she was aware of the date and time and that a decision could be handed down *in absentia* as discussed in the operative part of the judgment, at para. 55:

> "1. Article 4a(1)(a)(i) of [the Framework Decision] must be interpreted as meaning that the expressions "summoned in person" and "by other means actually received official information of the scheduled date and place of that trial in such a manner that it was unequivocally established that he or she was aware of the scheduled trial" in that provision constitute autonomous concepts of EU Law and must be interpreted uniformly throughout the European Union.
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> 2. Article 4a(1)(a)(i) of [the Framework Decision] must be interpreted as meaning that a summons, such as that at issue in the main proceedings, which was not served directly on the person concerned but was handed over, at the latter's address, to an adult belonging to that household who undertook to pass it on to him, when it cannot be ascertained from the European Arrest Warrant whether and, if so, when that adult actually passed that summons on to the person concerned, does not in itself satisfy the conditions set out in that provision."

52. The Court of Justice in *Zdziaszek (Case C-271/17 PPU)*, EU:C:2017:629 held that article 4a(1) of the Framework Decision permits the executing authority to refuse surrender where the information provided either on the standard form or following request for further information does not establish the existence of one of the situations referred to in the express provisions of the article. The Court of Justice went on to state the general proposition that:

> "However, the Framework Decision does not prevent that authority from taking account of all the circumstances characterising the case before it in

order to ensure that the rights of the defence of the person concerned are respected during the relevant proceeding or proceedings."

53. The appellant argues that *Dworzecki* does not contemplate refusing surrender when a person deliberately absents himself or herself from the hearing leading to the detention order, and that the executing authority can have regard to whether there had been a breach of the rights of defence of the person whose surrender is sought, and the conduct of the person concerned must be a factor, including any manifest lack of diligence.

Minister for Justice and Equality v. Skwierczynski

54. The interpretation of s. 45 of the 2003 Act was recently considered at length in the judgment of Donnelly J. in the High Court in *Minister for Justice and Equality v. Skwierczynski* [2016] IEHC 802, upheld by the Court of Appeal, [2018] IECA 204 (written judgment of Hedigan J. with whom Mahon and Edwards JJ. agreed).

55. The request was to surrender a person tried *in absentia* to serve the balance of a six-month sentence. On the facts, Donnelly J. was not satisfied that there had been strict compliance with the conditions set out in the Table to s. 45, but in reliance on the decision of the Court of Justice in *Dworzecki*, she held that the executing judicial authority may take into account other circumstances. While the ECJ was concerned with the provisions of article 4a(1)(a)(i), the reasoning had wider application. The subsequent decision of the Court of Justice in *Zdziaszek* supports this view.

56. 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 2009 Framework Decision, and in the light of the decision of the Court of Justice in *Dworzecki*, that a literal interpretation of s. 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 because the concepts are autonomous European Union concepts:

> "102. […] the plain intention of the Oireachtas in enacting s. 16 and s. 45, and taking into account the entirety of the Act, was to give effect to the Framework Decision. This optional ground for refusal to surrender a requested person was transposed almost entirely in accordance with the wording of the relevant article in the Framework Decision. The Act of 2003 also requires this Court to refuse to surrender if his ECHR rights or constitutional rights will be violated on surrender. 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 defence.
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> 103. Therefore, the Court is satisfied that it must give a construction which reflects the plain intention of the Oireachtas. That intention is plain from the sections and the Act as a whole. This is a section which is reflects the concepts set out in the Framework Decision. Those concepts are autonomous concepts of E.U. law to be interpreted uniformly throughout the European Union. 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 the Table to s. 45 provided that the High Court can be assured that his surrender does not mean a breach of rights of defence."

57. The Court of Appeal agreed with that analysis in a short para. 56 of the judgement of Hedigan J. I too consider her approach to be correct.

58. Surrender was permissible precisely because the respondent was aware of the hearing that upheld the conviction and sentence, and it was clear that he had made a

decision not to participate which was fully informed and that on the facts there was an unequivocal waiver.

59. Binchy J. distinguished *Minister for Justice and Equality v. Skwierczynski* on the facts:

> "it seems to me that the facts of that case were altogether different insofar as in that case the court found that a defect in the service of the summons in connection with the trial of first instance was cured by the subsequent appeal filed by the respondent in that case. While it is not entirely clear from that decision, it seems implicit that that appeal was prosecuted and then dismissed." (para. 45)

60. The respondent does not disagree with the principles but says the test remains whether the rights of defence of the respondent were respected in the process in the requesting state, and that on the facts the decision of Binchy J. was correct.

An examination of the circumstances is permissible and required

61. Recital 1 of the 2009 Framework Decision provides that the right of an accused person to appear in person at 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".

62. That recital finds expression in article 4a of the Framework Decision, quoted at para. 17 supra. The waiver must be unequivocal, but it can be implied from conduct. This flows from the decision of the Court of Justice in *Melloni (Case C-399/11)*, EU:C:2013:107, where, at para. 49, it said that:

> "The accused may waive that right of his own free will, either expressly or tacitly, provided that the waiver is established in an unequivocal manner, is attended by minimum safeguards commensurate to its importance and does

> not run counter to any important public interest. In particular, violation of the right to a fair trial has not been established, even where the accused did not appear in person, if he was informed of the date and place of the trial or was defended by a legal counsellor to whom he had given a mandate to do so".

63. 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.

64. The primary debate between the sides then comes down to the correct approach to the circumstances when none of the specific opt out provisions can be met. Again, there is broad agreement between the parties that when the court comes to engage this more general jurisdiction to order surrender notwithstanding that the identified exemptions cannot be shown, it must have regard to the overriding principle that a person may not be so rendered if his or her rights of defence have been breached.

65. This means that 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 defence 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.

66. The respondent does not doubt that some departure from the exceptions expressly identified in article 4a of the Framework Decision and s. 45 of the 2003 Act is permissible but says that there is not an "open ended process" in the making of a decision to surrender, which, it is argued, may be done only in the context of well-established principles, including those from the European Court of Human Rights.

Jurisprudence of ECtHR

67. Both parties agree that the jurisprudence of the European Court of Human Rights at Strasbourg offers assistance in the analysis of how rights of defence are to be protected where judgment, sentence and conviction are imposed *in absentia*.

68. The basic principles are found in the judgment of the Court in *Sejdovic v. Italy* (Application No. 56581/00), delivered on 1 March, 2006. The applicant complained that he had been convicted *in absentia* without having had the opportunity of presenting his defence before the Italian courts in breach of Article 6 of the European Convention on Human Rights and Fundamental Freedoms. The starting point is that a person charged with a criminal offence is entitled to take part in the hearing, a proposition fundamental to Article 6 of the Convention. Express provision is made in subparas 6.3 (c), (d) and (e) for minimum indicia of the concrete elements of the rights of defence, *viz.* that a person charged with a criminal offence may defend himself in person, may examine or cross-examine witnesses, and as the Court said, it is difficult to see how a person could exercise those rights without being present. The Court did not go so far as to say that a person must be present at a first instance hearing, provided an opportunity exists to appeal both on the merits and on the law,

but stated the general principle that unless it is established that he or she has waived the right to appear and defend there is a denial of justice. The Court pointed out that Article 6(3)(c) did not specify the manner by which a person could exercise the right to defend himself in person or through legal assistance. It also was careful to note the wide discretion as regards the choices made in different legal systems, provided those are effective to achieve the protections of the rights of defence.

69. The right to be present at a hearing is regarded as an essential cornerstone of the protection of an accused person, but equally the right may be waived either expressly or tacitly. There the Court stated the broad proposition, accepted in subsequent cases, and flowing from this fundamental principle that:

> "However, if it is to be effective for Convention purposes, a waiver of the right to take part in the trial must be established in an unequivocal manner and be attended by minimum safeguards commensurate to its importance (see *Poitrimol*)."

70. That leads to another proposition that where a person has not been notified of a date of hearing, a waiver of a right to appear cannot be inferred. In practice, this means that actual knowledge of the date must be shown, albeit as will be discussed below, actual knowledge can be shown from extrinsic evidence. A person charged with a criminal offence must not be "left with the burden of proving that he was not seeking to evade justice" (para. 88), although national authorities may assess whether there exists good cause for a person's absence at a hearing.

71. Mr. Sejdovic had been tried *in absentia* and had not received any official information about the charges or the date of his trial, but a lawyer was appointed to represent him. The factors present in his case, including that he was absent from his usual place of residence, did not amount to objective factors from which it could be

inferred that he had sufficient knowledge of his prosecution and of the charges against him, and therefore it was unable to conclude that he had sought to evade trial or unequivocally waived his right to appear in court.

72. Insofar as a court might rely on inferred knowledge or an inferred waiver of rights, at para. 99 the Court said that it could not rule out the possibility that certain established facts "might provide an unequivocal indication that the accused is aware of the existence of the criminal proceedings against him and of the nature and the cause of the accusation and does not intend to take part in the trial or wishes to escape prosecution". It gave as an example where an accused has stated publicly or in writing that he does not intend to respond to a summons of which he has become aware. The emphasis however was on the requirement to establish unequivocally that an accused was aware of the date and place of hearing and therefore that a waiver could safely be inferred.

73. The conclusion of the Court was that the applicant had not been shown to have sought to escape trial or to have unequivocally waived his right to appear in court, and a violation of Article 6 of the Convention was therefore found.

74. While the word "unequivocal" and its cognates was used throughout the judgment, the language used by the Court points to its view that the evidence on which a requesting state seeks to rely must go much further than mere inference from a series of facts, and while it does not require to be established as a matter of certainty that there was a certain waiver, the standard of proof is high and the emphasis was on the requirement to establish facts that could lead to an inference, rather than to establish an inference from argument.

75. That judgment was followed by a series of cases, including three which are relevant to the facts of the present appeal. In the first of these, *Booker v. Italy*

(Application No. 12648/06), a judgment delivered on 14 September, 2006, the applicant complained that he was tried *in absentia* without having had the opportunity to present his version of the facts before the Italian courts. He also made an argument regarding the language in which he was summoned, which was written in Italian although he was a native English speaker. The Court applied the principles established in *Sejdovic* but distinguished it on the facts, in that the applicant had been informed of the proceedings and the date of the hearing, and went on to identify several factors which suggested that he had a sufficient knowledge of Italian to understand the meaning of the document, including that he lived in Italy, was married to an Italian national and that the statements that led to his conviction were made by him in Italian, he had instructed a lawyer to represent him in the criminal proceedings and had not informed the authorities of any shortcomings in his understanding of the documents served on him, nor did he request an English translation. The decision therefore was that he had voluntarily decided not to participate, and had failed to contact his legal representative, and the Court was prepared to conclude that he had unequivocally, albeit tacitly, waived his right to appear at the hearing.

76. More recently in *Di Silvio v. Italy* (Application No. 56635/13), a judgment delivered on 20th October, 2015, the applicant had sought an adjournment of the hearing of the trial on the grounds of ill health, and did not appear at the adjourned date, although a lawyer instructed by him presented a plea on his behalf. The Court found that he had been informed of the date of the proceedings at first instance and of his conviction and had appealed that through a lawyer of his choice. It also found that he was aware of the date initially set for the appeal and concluded that he had unequivocally, albeit tacitly, waived his right to appear:-

> "In these circumstances, the Court considers that it was for the applicant to contact the counsel of his choice to find out whether the requested postponement had been granted and, if so, what date had been set for the appeal proceedings…the person concerned could also have contacted the registry of the Court of Appeal for information on the progress of his trial." (para. 34)

77. The Court held that whilst it was not clear whether he had taken any such steps, his counsel was present at the adjourned hearing date.

78. The most recent judgment of the Court in Strasbourg was delivered on 12th June, 2018, in the case of *M.T.B. v. Turkey* (Application No. 47081/06) in which the applicant complained that he had been tried *in absentia* and denied a fresh determination of his case, and claimed a violation of Article 6 of the Convention. The analysis observed that the first question to be answered was whether the applicant could be said to have expressly or through his conduct waived his right to appear and defend himself and that:

> "The starting point of that assessment will inevitably focus on the question of whether the applicant had knowledge of the criminal proceedings against him, without which no valid waiver can take place." (para. 49)

79. There being no evidence that he had either received the summons to appear before the trial court or been served with the final decision convicting him, the conclusion was that it could not be said that he had expressly and knowingly waived his right to appear and defend himself.

80. When the Court came to consider whether there might have been a tacit waiver of rights to appear and defend himself, again the analysis was by reference to whether he had sufficient knowledge of the proceedings. The evidence of the Turkish

government was that the trial court had acted diligently in seeking to locate the applicant and that his absence at the trial had arisen as a result of his failure to notify the authorities of his change of address. It is noted that the police had been able to locate and arrest the applicant at his home address in regard to another matter, and the court was satisfied therefore that due diligence had not been shown in efforts to locate him. The Court considered therefore on the facts that the applicant had no knowledge of the proceedings and did not waive his right to appear and defend himself or attempt to evade justice.

81. The fact that a person is represented by a lawyer where it can reasonably be expected that the lawyer was made aware of the date of hearing or an adjourned date may be relevant to the conclusion that a defendant waived his right to be present: *Tedeschi v. Italy* (Application No. 25685/06), delivered 28 September 2010.

Diligence and waiver

82. This analysis brings into focus the question of whether a lack of diligence on the part of an accused person may be sufficient to lead to a conclusion that there had been an unequivocal waiver of a right to be present at trial.

83. The preamble to the Framework Decision of 2009, makes it clear that diligence does play a part in the analysis:-

> "In accordance with the case law of the European Court of Human Rights, when considering whether the way in which the information is provided is sufficient to ensure the person's awareness of the trial, particular attention could, where appropriate, also be paid to the diligence exercised by the person concerned in order to receive information addressed to him or her." (Recital 8)

84. A waiver by a person sought to be returned of his or her right to appear at the relevant hearing may be express or may be tacit, and a tacit waiver is one that can be

ascertained from the behaviour of that person. The Minister argues that a lack of diligence on the part of the accused person may be sufficient to amount to a tacit waiver. Counsel for Mr. Zarnescu argues that while the case law recognises that a tacit waiver may be found, the court is not at large in the way in which it analyses the facts and the court should not too quickly come to a view that there has been a lack of diligence sufficient to amount to or be capable of being characterised as a tacit waiver of a right to appear at a hearing.

85. In *Dworzecki*, the United Kingdom government argued that attention could be paid to the diligence exercise by a person in order to receive information addressed to him or her. The Court of Justice rejected that argument, albeit it accepted that regard may be had to the conduct of the person concerned:

> "In the context of such an assessment of the optional ground for non-recognition, the executing judicial authority may thus have regard to the conduct of the person concerned. It is at this stage of the surrender procedure that particular attention might be paid to any manifest lack of diligence on the part of the person concerned, notably where it transpires that he sought to avoid service of the information addressed to him. " (para. 51)

86. While the conduct or diligence of a person may be relevant, its relevance is to the question of whether there has been knowledge, and the Court fell far short of stating a proposition that the lack of diligence in, for example, following up correspondence is sufficient to permit the imputation of knowledge and a consequential decision that there has been an implicit waiver of the right to appear.

87. In *Gaga v. Romania* (Application No. 1562/02), delivered 25 March 2008, the Court was not prepared to find lack of diligence when the accused could have been informed of the date of trial by his former wife when he had expressly asked that post

not be sent to him at that address, even though there was every reason to expect that he was aware of the likelihood of an appeal by the prosecution.

88. Regard might be had too to the decision of the ECtHR in *Hennings v. Germany* (Application No. 12129/86), delivered 16 December 1992, where the court considered that the applicant could reasonably have been expected to obtain a key to his letterbox in order to have ready access to any mail addressed to him, and that the authorities could not be held responsible for barring his access to court because he failed to take the necessary steps to ensure receipt of his mail. A lack of diligence in those circumstances was held to be sufficient to allow conclusion that *in absentia* proceedings did not breach Article 6.

89. Mere absence of diligence therefore cannot in itself amount to evidence of an informed choice to waive a right to be present at trial, and proof of actual notification to those charged in criminal proceedings must be taken as a starting point.

Summary of principles

90. From this analysis the following emerges:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Analysis of findings of fact by the trial judge

91. Some disagreement exists between the parties regarding what findings of fact were actually made by Binchy J. At para. 35 of his judgment he sets out in numbered paragraphs a summary of the facts that he found to be established, and which for the most part were not in dispute. At para. 39 he expressed the view that Mr. Zarnescu had:

> "for all intents and purposes, orchestrated the state of affairs that has come to pass. He was on notice of the date on which the appeal was originally scheduled to be heard, and he requested an adjournment, which request was granted. He then took no further steps either to engage a lawyer or to acquaint himself with the new hearing date. The court, on the other hand, notified him of the new hearing date by way of a letter addressed to respondent at his Romanian domicile, which he himself provided to the court in the letter seeking an adjournment."

92. In the light of the findings of fact earlier made the conclusion, if such it was, drawn by Binchy J. that the respondent had "orchestrated" matters, seems to me not to be supported by the evidence. Indeed, he had expressly notified the Romanian authorities that he was resident in Ireland and was not free for reasons of work to return to Romania. The Romanian address was given as an address of his domicile, whether for reasons of identification or otherwise, but it was clear from the documentation that his postal address, and the address at which he was to be found, was the address in Ireland. That is the core fact in this case, and it is not one which supports a finding that the conduct of Mr. Zarnescu is such that he can be said to have deliberately evaded justice. It is noteworthy too that the letter sent to him at his father's address, the domicile address, in the body of the document stated his residential address to be in Ireland. The Irish address given was a full address and it could not be said that the information was evasive or incomplete.

93. Insofar therefore as a finding was made that Mr. Zarnescu has orchestrated circumstances so as not to become aware of the adjourned date, I conclude that the evidence did not support that finding.

94. Later in the judgment in his analysis of the decision in *Dworzecki*, Binchy J. said that "the most that can be said is that it is likely that the respondent was aware of the re-scheduled hearing date", but went on then in para. 43 to say that there was no way of knowing whether the information was received and that he was unable to establish he was actually aware of the date and the consequence of not attending. I am unable to reconcile that analysis with earlier comments by the trial judge that there was a degree of orchestration by Mr. Zarnescu which might lead him to take a view that his conduct amounted to an unequivocal waiver.

95. The approach of this Court to the findings of fact must be that identified in *AG v. Davis* and as it has not been argued that the findings of fact are manifestly wrong or incapable of being supported by the evidence, the Court will not further consider whether to itself make findings of fact.

Summary and conclusion

96. The leading judgment of the Court of Justice regarding service is *Dworzecki* which held that service on a family member is not enough precisely because service by that mode is not sufficient to show actual knowledge of the date of a hearing, whether that be shown or inferred, and only actual knowledge is sufficient to unequivocally establish that a person has chosen not to attend or to waive his right to attend.

97. The judgment of Donnelly J. in *Minister for Justice and Equality v. Skwierczynski* concerned circumstances where there was no direct evidence of actual knowledge, but where extrinsic evidence was sufficient to show such knowledge, and that approach is consistent with the approach found in the judgments of the European Court of Human Rights. It is also consistent with the approach of the Court of Justice in *Dworzecki* that the right of defence may be sufficiently protected "if the person

concerned was actually given official information of the date and place fixed for his trial by 'other means'" other than those expressly set out in the Framework Decision at para. 43. There is nothing inherently unfair in analysing the broad circumstances with a view to ascertaining whether the accused person did have actual knowledge and therefore his non-attendance amounts to an unequivocal waiver of his right to be present. The example given in the judgment of *Di Silvio* is where a person admits by one means or another that he or she knows of the date of trial, but the examples will range from those straightforward examples to more complex cases where a series of factors might be sufficient to enable a court to make a judgment on the state of knowledge of an accused person. This means that if a requesting state cannot establish proof of service by direct means such as postal certificates or the signature of an accused person of receipt of correspondence, there may still exist circumstances where actual knowledge can be found on the facts.

98. That the correspondence sent to Mr. Zarnescu's domicile address in Romania may or may not have come to his attention or have been brought to his attention by his father, must lead to the inevitable conclusion that if there was any lack of diligence it was on the part of the Romanian authorities who for unexplained reasons send notification to the address at which Mr. Zarnescu said he did not reside.

99. In my view it is critical that Mr. Zarnescu was not represented at the hearing, and it was clear from his letter to the court seeking an adjournment that he did intend to instruct lawyers, that he was not in a position to personally attend because he resided in Ireland and work commitments kept him here, and that the adjournment was sought specifically so that he could instruct lawyers to represent him at the adjourned date.

100. It is, at the least, surprising that the relevant authorities did not notify him at his address in Ireland which he had clearly identified as his residential address in correspondence with the Bacău Court of Appeal.

101. A lack of diligence or avoidance is not a substitute for actual knowledge, and whilst the respondent might be criticised for lack of diligence, and while there might even be suspicion that he knew the date of the appeal, it cannot be said unequivocally that he was aware of the adjourned date. Therefore it equally cannot be said that he waived his right to be present.

102. Counsel for the appellant relies on *Di Silvio* as supporting the proposition that Mr. Zarnescu could have contacted the registry of the Court to ascertain whether the adjournment had been granted and the date to which it was postponed. No finding was made by the High Court judge was to whether Mr. Zarnescu could have sought further information from the registry of the court, and that question was not engaged at all by the trial judge. What is clear however is that Mr. Zarnescu sought an adjournment and identified an address at which he resided. For reasons which were ultimately not explained the correspondence notifying him of the adjourned date was sent to the address of his domicile and not the address at which he said he resided, although in the body of the letter the Irish address was mentioned as the place where he was to be found.

103. It seems to me that neither *Booker* nor *Di Silvio* offer facts which are sufficiently similar to the present case to afford support for the approach for which the appellant contends. In both cases the requested person had legal representation at the hearing of the relevant court, and the Court was able to form a view that each of them was aware of the date of hearing and had chosen not to attend. The choice was an informed choice, and in the light of the decision in *Sejdovic* an informed choice not to

attend cannot validly be made if the person who does not attend cannot be shown to have known of the date of hearing.

104. The case law of the European Court of Human Rights was not opened to Binchy J., but nonetheless his approach to the requirement that an accused person be shown to be aware of the proceedings, and where appropriate the date of hearing or the date to which a hearing was adjourned, is consistent with its approach. As he said, there can be no question of a court relying on implications regarding the service of documents or notice when what is to be assessed is the state of knowledge of an accused. He sets this out at the end of para. 42:-

> "There is a difference between deeming service good and being unequivocally satisfied that service on a party has occurred."

105. This approach is consistent with the finding in *M.T.B. v. Turkey* that the fact that the documentation was served in accordance with domestic legal provisions was not in itself sufficient to relieve the state of its obligations under Article 6 (para. 53).

106. He refused therefore to extrapolate from the conduct of the respondent that he had unequivocally waived his right to appear on the adjourned date.

107. I consider that Binchy J. was correct that service based on a legal fiction, such as in domestic rules of practice which permit service to be deemed good, is not sufficient to establish actual knowledge which in turn is the foundation of the analysis of whether non-attendance at a hearing was sufficiently informed to amount to an unequivocal waiver.

108. I would uphold the decision of the trial judge for these reasons, although I consider that his approach to the legal test applicable to the operation of s. 45 as amended, was not correct.