Unapproved
No redaction required

THE COURT OF APPEAL

Record No 2020/263

Neutral Citation Number: [2023] IECA 143

Birmingham P

Collins J

Edwards J

IN THE MATTER OF THE EUROPEAN ARREST WARRANT ACT 2003

(AS AMENDED)

BETWEEN

THE MINISTER FOR JUSTICE AND EQUALITY

Applicant/Respondent

AND

DORIAN SZAMOTA

Respondent/Appellant

JUDGMENT of Mr Justice Maurice Collins delivered on 9 June 2023

(Reasons for the Order made by the Court on 24 May 2023)

BACKGROUND

1. The relevant factual background is set out in detail in my earlier judgment in this appeal, given on 21 July 2021 ([2021] IECA 209). Briefly, Poland seeks the surrender of Mr Szamota, a Polish national, for an offence of carrying out a denial of service attack on a commercial business accompanied by threats to continue the attack unless a monetary payment was made to him (referred to in this judgment as the "*First Offence*"). Mr Szamota was sentenced to one year's imprisonment for that offence, with execution of that sentence being conditionally suspended for a probation period of 5 years.

2. Subsequently, Mr Szamota was convicted *in absentia* of an offence of breaking into a caravan and theft of a number of items from it ("*the Second Offence*"). He was sentenced to a term of imprisonment of 14 months for that offence. Mr Szamota says that he was unaware of the proceedings for the Second Offence and consequently did not have an opportunity to attend the hearings or instruct legal counsel to represent him in his defence.

3. The Second Offence was committed within the probation period in respect of the First Offence and, as a result, on 16 May 2017 the District Court for Wroclow-Śródmieście made an order pursuant to the Polish Code for the enforcement of that sentence. It is for the purpose of serving that sentence (the sentence of 14 months imprisonment imposed for the First Offence) that Mr Szamota's surrender is sought.

4. Mr Szamota argued that the trial for the Second Offence and/or the subsequent proceedings leading to the enforcement of the suspended sentence for the First Offence constituted or were a part of the "*trial resulting in the decision*" for the purposes of Article 4a of Council Framework Decision 2002/584/JHA ("*the Framework Decision*") and contended that none of the conditions set out in Article 4a(1) were satisfied, so that his surrender should be refused. The Minister argued that such an objection to surrender was effectively foreclosed by the decision of the CJEU in *Samet Ardic* Case C-571 PPU, EU:C:2017:1026.

5. The Minister's position prevailed before the High Court (Binchy J) but the High Court nonetheless granted leave to appeal to this Court. For the reasons set out in my earlier judgment, the Court had doubts as to the correct resolution of the issue and accordingly referred a number of questions to the CJEU pursuant to Article 267 TFEU. The Court also decided to refer substantially similar questions in *Minister for Justice and Equality v Siklosi* [2021] IECA 210 and both references were dealt with together by the CJEU. The Court also gives a further judgment in *Siklosi* today.

6. The references were heard by the CJEU (Fourth Chamber) on 13 July 2022. The Opinion of Advocate General Ćapeta was delivered on 27 October 2022 and the CJEU gave its judgment on 23 March 2023 (Joined Cases C-514/21 and C-515/21, *sub nom LU* (Case 514/21) & *PH* (Case C-515/21) EU:C:2023:235). The CJEU answered this Court's questions as follows:

"1. Article 4a(1) of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, as amended by Council Framework Decision 2009/299/JHA of 26 February 2009, read in the light of Articles 47 and 48 of the Charter of Fundamental Rights of the European Union, must be interpreted as meaning that where the suspension of a custodial sentence is revoked, on account of a new criminal conviction, and a European arrest warrant, for the purpose of serving that sentence, is issued, that criminal conviction, handed down in absentia, constitutes a 'decision' within the meaning of that provision. That is not the case for the decision revoking the suspension of that sentence.

2. Article 4a(1) of Framework Decision 2002/584, as amended by Framework Decision 2009/299, must be interpreted as authorising the executing judicial authority to refuse to surrender the requested person to the issuing Member State where it is apparent that the proceedings resulting in a second criminal conviction of that person, which was decisive for the issue of the European arrest warrant, took place in absentia, unless the European arrest warrant contains, in respect of those proceedings, one of the statements referred to in subparagraphs (a) to (d) of that provision.

3. Framework Decision 2002/584, as amended by Framework Decision 2009/299, read in the light of Article 47 and Article 48(2) of the Charter of Fundamental Rights of the European Union, must be interpreted as precluding the executing judicial authority from refusing to surrender the requested person to the issuing Member State, on the ground that the proceedings resulting in the

revocation of the suspension of the custodial sentence for the execution of which the European arrest warrant was issued took place in absentia, or from making the surrender of that person subject to a guarantee that he or she will be entitled, in that Member State, to a retrial or to an appeal allowing for the re-examination of such a revocation decision or of the second criminal conviction which was handed down against that person in absentia and which proves decisive for the issue of that warrant." (my emphasis in all cases)

7. As already noted, the High Court had taken the view that it followed from *Ardic* that Mr Szamota's subsequent criminal conviction for the Second Offence, which triggered the activation of the suspended sentence imposed on him following his conviction for the First Offence, did not constitute or form part of the "*the trial resulting in the decision*" for the purposes of Article 4a: [2020] IEHC 606. It is now apparent from the CJEU's decision in *LU* & *PH* that that view was in error.

THE REMAINING ISSUES IN THIS APPEAL

8. In light of the judgment of the CJEU, the Court gave the parties an opportunity to make observations on the appropriate resolution of the appeal. Both parties lodged helpful written observations. Having considered those observations, the Court took the view that a further hearing would be of assistance and that hearing took place on 24 May 2023 when counsel for both parties made further oral submissions.

9. In his written observations, Mr Szamota argued that, as regards the Second Offence, neither the European Arrest Warrant here ("*the Warrant*") nor the further information provided at the request of the High Court demonstrated compliance with any of the conditions in Article 4a(1)(a) – (d) of the Framework Decision. He drew attention to para 71 of my earlier judgment in which I stated that, for the purposes of the appeal, the Court was entitled to reach a provisional view that the trial and conviction *in absentia* for the Second Offence was not in compliance with Article 6 ECHR and where I also expressed the view that the Court was entitled to proceed on the basis of a provisional view that, if the trial of Mr Szamota for the Second Offence and/or the subsequent hearing which led to the Enforcement Decision was properly to be regarded as "*the trial resulting in the decision*" (or a part of such trial) the requirements of Article 4a/section 45 would not be satisfied.[1]

[1] It is clear from the CJEU judgment in *LU & PH* that the hearing leading to the making of the Enforcement Decision does not constitute or form part of the "*trial resulting in the decision"* : §53 & §83, as well as the final

10. On the material before us (so it was said) it was not possible for the Court to satisfy itself that his surrender would not breach his rights of defence. Any request for further information would not have the potential to yield any information capable of altering the provisional findings made by the Court. The Court should therefore simply allow the appeal and set aside the order for surrender made by Binchy J in the High Court. In his oral submissions on Mr Szamota's behalf, Mr Munro SC emphasised that EAW proceedings were intended to be dealt with expeditiously. Any further request for information would inevitably involve further delay, in circumstances where a number of requests have already been made and the Polish authorities have had ample opportunity to provide all relevant information in support of their request. Mr Munro also laid stress on the fact that Mr Szamota's surrender had never been sought in respect of the Second Offence which, he suggested, amounted to a tacit acknowledgement that the Polish authorities were not in a position to satisfy Article 4a in relation to it.

11. The Minister took a rather different view of how the Court should proceed. Her starting point was the fundamental principle – re-iterated once again in *LU & PH* - that the EAW regime has as its basis the high level of trust which must exist between the Member States and that it follows from the Framework Decision, and in particular Article 1(2), that execution of an European arrest warrant constitutes the rule, whereas refusal to execute is intended to be an exception which must be interpreted strictly (*LU*

sentence of its answer to question 1. The Court is therefore concerned only with the proceedings leading to Mr Szamota's conviction for the Second Offence.

& PH, §§46-47, citing Case C-158/21 *Puig Gordi*). The Minister noted that the CJEU has made it clear that even where the requirements of Article 4a are not met, it does not necessarily follow that surrender must be refused. Citing *LU & PH*, §78, the Minister submitted 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 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 avoid any contact with his or her lawyers.*" The Minister submitted that there were indicia in the information provided by the Polish authorities here indicating a "*tacit waiver*" by Mr Szamota of his entitlement to attend his trial for the Second Offence (referring here to the CJEU's decision in Case C-569/20 *IR*). Finally, the Minister drew attention to the statement of the CJEU in *LU & PH,* §81, that, in order to ensure effective cooperation in criminal matters, the executing judicial authority "*must make full use of the instruments provided for in Article 15*" of the Framework Decision.

12. On this basis, the Minister invited the Court to issue a detailed information request pursuant to section 20 of the European Arrest Warrant Act 2003 (as amended) ("*the 2003 Act*"),[2] directed primarily to the question of Mr Szamota's knowledge of and/or

[2] Section 20(1) – which gives effect to Article 15(2) of the Framework Decision - now provides that *"[i]n proceedings to which this Act applies the High Court shall, if of the opinion that the documentation or information provided to it is not sufficient to enable it to perform its functions under this Act, require the issuing judicial*

participation in the proceedings leading to his conviction *in absentia* for the Second Offence but also seeking clarification of the nature of the "*extraordinary legal remedy (reversal, motion to re-open the proceedings)*" which, according to the Bydgoszcz District Court, it would be open to Mr Szamota to pursue if surrendered, with a view to ascertaining whether it might satisfy the requirements of Article 4a(1)(d).[3]

authority or the issuing state, as may be appropriate, to provide it with such additional documentation or information as it may specify, within such period as it may specify."

[3] See footnote 4 of my earlier judgment.

DISCUSSION

13. In light of the position taken by the Minister, and having regard to the terms of section 20 of the 2003 Act (which provides that the High Court may issue a request for additional documentation or information) and to Article 15(2) of the Framework Decision (which refers to requests by the "*executing judicial authority*" which, by virtue of section 9 of the 2003 Act, is the High Court) the Court asked the parties to address the question of whether it was empowered to issue a section 20 request. In that context, the Court drew the attention of the parties to the decision of the Supreme Court in *Minister for Justice v Palonka* [2020] IESC 40 in which Charleton J (Clarke CJ and Baker J concurring) appeared to indicate that the High Court alone had jurisdiction to request further information pursuant to section 20.

14. As I noted at para 79 of my previous judgment, the Supreme Court in *Palonka* decided that the High Court should seek certain further information from the Polish authorities, including information directed to the *Ardic* issue. While the Supreme Court retained *seisin* of the appeal, the High Court was directed to make such additional findings of fact as might reasonably be necessary to enable an assessment of the legal issues, including the possibility of a reference to the CJEU "*on the imposition of a sentence, or activation of a sentence, in absentia.*" After a lengthy process of further request and response, the High Court (Paul Burns J) gave judgment setting out his findings of fact based on the additional information provided: [2021] IEHC 840. The Supreme Court then gave a further judgment (again *per* Charleton J) determining the appeal: [2022]

IESC 6. By then, the *Ardic* point had fallen away on the facts (paras 14 & 15) but the Court refused surrender on grounds of delay.

15. It was suggested in argument by Ms Williams BL (for the Minister) that the Supreme Court had issued a further section 20 request in *Palonka* when the appeal came back to it from the High Court. However, there appears to be nothing in its second judgment to that effect. It was also suggested that the Supreme Court had issued a section 20 request in the course of the proceedings leading to its decision in *Minister for Justice, Equality and Law Reform v Bailey* [2012] IESC 16, [2012] 4 IR 1. While it is evident from the judgments in *Bailey* that the Minister sought and obtained leave to introduce new evidence for the purposes of the appeal, there appears to be nothing in any of the judgments indicating that a section 20 request was made by the Supreme Court in that appeal.

16. It is unclear, therefore, whether as a matter of fact a court other than the High Court has ever actually made a section 20 request. That, of course, is not determinative of whether an appellate court is entitled to do so. However, in my opinion it is unnecessary for the Court to express a definitive view on that issue in this appeal. Assuming - in favour of the Minister - that this Court may issue such a request, in my view it would not be appropriate for it to do so here. In contrast to the position in *Palonka*, there are no remaining *legal* issues for resolution in this appeal. The only *legal* issues in this appeal have been resolved by the judgment of the CJEU. It follows from that judgment that the Polish authorities have the burden of establishing *either* that one of the conditions of Article 4a(1) of the Framework Decision is satisfied in relation to Mr Szamota's trial

and conviction for the Second Offence *or* that otherwise there are circumstances that demonstrate that the surrender of Mr Szamota would not entail a breach of his "*rights of the defence*" in the sense indicated in the CJEU jurisprudence (which is in turn informed by the Article 6 jurisprudence of the European Court of Human Rights). These are, in substance, questions of *fact* and the High Court, rather than this Court, is the appropriate forum to resolve any dispute about them (though, as will appear, these issues may raise legal issues but such issues do not properly arise in this appeal and ought not to be determined by this Court at first instance). It follows, in my view, that the High Court is the appropriate court to make any section 20 request(s) that may be necessary to enable it to resolve such dispute.

17. It was ultimately accepted by the parties that it was open to the Court to allow the appeal, set aside the order for surrender made by the High Court and remit the proceedings to the High Court to consider whether any of the conditions of Article 4a(1) is satisfied in respect of the Second Offence or, if not, whether it can be demonstrated that the surrender of Mr Szamota would not entail a breach of his "*rights of the defence*" so that it may nonetheless be appropriate to surrender him in accordance with the Warrant.[4] At the conclusion of the hearing on 24 May 2023, the Court indicated its view

[4] It was initially suggested by the parties – incorrectly – that the Court had three options as to the disposition of the appeal, namely, to allow the appeal and discharge the order for surrender, to make a section 20 request itself or to take the approach adopted in *Palonka* of remitting the proceedings back to the High Court for the purposes of making a section 20 request while retaining *seisin* of the appeal.

that it was appropriate to make an order in those terms. The remainder of this judgment sets out the reasons for the making of that order.

18. Because of his view that the proceedings leading to Mr Szamota's conviction for the Second Offence did not constitute (or form part of) the "*trial resulting in the decision*" for the purposes of Article 4a, Binchy J was not required to adjudicate on whether any of the conditions in Article 4a(1) was satisfied. Furthermore, as Ms Williams BL noted, at the time of the High Court hearing, it was generally understood that section 45 of the 2003 Act (which gives effect to Article 4a of the Framework Directive) required strict compliance and precluded any wider assessment of the circumstances to ascertain whether, even where none of the Article 4a conditions was met, surrender would nevertheless not involve any breach of the rights of the defence: *Minister for Justice & Equality v Zarnescu* [2020] IEHC 6. Subsequent to the High Court hearing in these proceedings (but prior to judgment being given) the Supreme Court made it clear that this was too restrictive an approach, holding that section 45 of the 2003 Act is to be interpreted purposively and that the Table set out in the section is not to be regarded as exhaustive: *Minister for Justice and Equality v Zarnescu* [2020] IESC 59.

19. The Supreme Court's decision in *Zarnescu* followed the CJEU's judgment in Case C-108/16 PPU *Dworzecki*, which was referred to extensively by Baker J in her judgment in *Zarnescu* (with which Clarke CJ, MacMenamin, Charleton and O' Malley JJ agreed). In *Dworzecki* the court observed that the executing judicial authority could, in any event, "*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*"

(§50). A similar approach was taken in Case C-416/20 PPU *TR* (which post-dated *Zarnescu*) in which the CJEU stated (at §51) that "*as Article 4a provides for a case of optional non-execution of that warrant, [the court in the executing State] may, in any event, 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 rights of defence, and surrender that person to the issuing Member State*". Such "*other circumstances"* include the conduct of the person concerned, such as the fact that the person *"has sought to avoid service of the information addressed to him .. or even that he has sought to avoid any contact with the lawyers appointed by the [courts of the requesting State]*" (*TR*, §51).

20. In its judgment in *LU & PH* the CJEU re-iterated that the executing judicial authority has a greater degree of discretion than the language of Article 4a might appear to suggest. The passage warrants extended quotation as it sets out the context in which Article 4a operates:

> *"71 With the benefit of that clarification, it must be recalled, first, that Article 4a(1)(a) to (d) lists, in a precise and uniform manner, the conditions under which the recognition and enforcement of a decision rendered following a trial in which the person concerned did not appear in person may not be refused (judgment of 22 December 2017, Ardic, C-571/17 PPU, EU:C:2017:1026, paragraph 71 and the case-law cited).*

72 It follows that Article 4a(1) of Framework Decision 2002/584 does not allow the executing judicial authority to refuse to surrender the person concerned if the European arrest warrant contains, as regards the judicial decision which imposed the custodial sentence for the execution of which that warrant was issued, one of the statements referred to in points (a) to (d) of that provision.

73 In each of the circumstances referred to in Article 4a(1)(a) to (d) of Framework Decision 2002/584, the execution of the European arrest warrant does not infringe the rights of the defence of the person concerned or the right to an effective judicial remedy and to a fair trial, as enshrined in Article 47 and Article 48(2) of the Charter (judgment of 26 February 2013, Melloni, C-399/11, EU:C:2013:107, paragraphs 44 and 53).

74 For the same reasons, the executing judicial authority may not refuse, under Article 4a(1) of Framework Decision 2002/584, to surrender the requested person to the issuing Member State where the European arrest warrant contains, in respect of the criminal conviction handed down in absentia and referred to in paragraph 70 above, one of the statements mentioned in points (a) to (d) of that provision.

75 Conversely, where the European arrest warrant does not contain any of the statements mentioned in Article 4a(1)(a) to (d) of Framework Decision 2002/584, the executing judicial authority must be able to refuse to surrender

the requested person, irrespective of whether the essence of his or her rights of the defence have been infringed, since no requirement of that kind follows either from the wording of Article 4a or from its objective, as recalled in paragraph 50 above.

76 It also follows from the very wording of Article 4a, in particular from the statement that the executing judicial authority 'may ... refuse' to execute the arrest warrant, that that authority must have some discretion as to whether or not it is appropriate to refuse to execute the warrant in such a case. Therefore, it cannot be inferred from Article 4a(1) of Framework Decision 2002/584 that, in a case such as that described in the preceding paragraph, the executing judicial authority is required to refuse to execute the European arrest warrant, without that authority having the opportunity to take into account the circumstances specific to each case (see, by analogy, judgment of 29 April 2021, X (European arrest warrant – Ne bis in idem), C-665/20 PPU, EU:C:2021:339, paragraphs 43 and 44).

77 Such an interpretation is supported by the general scheme of that framework decision. As has been recalled in paragraph 47 above, the execution of a European arrest warrant constitutes the rule laid down by that framework decision, the grounds for refusal to recognise and enforce being exceptions. Making it impossible for the executing judicial authority to take into account any circumstances specific to the individual case which might lead it to consider that the conditions for refusing surrender have not been satisfied would have

the effect of substituting the mere option, provided for in Article 4a of that framework decision, with a genuine obligation, thus transforming the refusal to surrender from an exception into a general rule (see, by analogy, judgment of 29 April 2021, X (European arrest warrant – Ne bis in idem), C-665/20 PPU, EU:C:2021:339, paragraph 47).

78 As the Advocate General observed, in essence, in point 115 of her Opinion, the executing judicial authority may, with that in mind, 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. This may include, 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 (judgment of 17 December 2020, Generalstaatsanwaltschaft Hamburg, C-416/20 PPU, EU:C:2020:1042, paragraphs 51 and 52 and the case-law cited).”

21. The Minister also relies in this context on another recent decision of the CJEU (Fourth Chamber), *IR*, C-569/20, EU:C:2022:401 (judgment of 19 May 2022). *IR* concerned Articles 8 and 9 of Directive (EU) 2016/343 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings.[5] That Directive – which does not apply to Ireland – is one of a number of

[5] Directive of the European Parliament and of the Council of 9 March 2016.

measures on procedural rights in criminal proceedings adopted by the EU pursuant to Article 82 TFEU.[6] Article 8 is concerned with the right of persons to be present at their trial and, in Article 8(2), sets out the circumstances in which a trial may proceed in the absence of the defendant.[7] Article 8(4) also provides that, in circumstances outside the scope of Article 8(2) where an accused cannot be located despite reasonable efforts, they may be tried in their absence, subject to an entitlement to a retrial or other legal remedy as provided for by Article 9. Article 9 then requires Member States to provide a right to a new trial (or, in the alternative, a right to another legal remedy which permits a fresh examination of the merits of the case and which may result in the conviction being reversed) where a person has been convicted *in absentia* and where none of the conditions set out in Article 8(2) applies.

22. IR had been accused of tax offences in Bulgaria. He was served with an indictment and gave an address for further contact. However, when the judicial stage of the proceedings commenced he was not found at that address. The court appointed a lawyer to represent him but he was unable to contact him either. The indictment was subsequently declared

[6] Poland is bound by the Directive which, as regards the provisions conferring a right to a new trial, has direct effect: *IR*, §28. However, Mr Szamota's conviction for the Second Offence predates the adoption of the Directive in 2016 and its deadline for transposition of 1 April 2018 (Article 14(1)).

[7] Article 8(2) provides that "*Member States may provide that a trial which can result in a decision on the guilt or innocence of a suspect or accused person can be held in his or her absence, provided that: (a) the suspect or accused person has been informed, in due time, of the trial and of the consequences of nonappearance; or (b) the suspect or accused person, having been informed of the trial, is represented by a mandated lawyer, who was appointed either by the suspect or accused person or by the State.*"

void and the proceedings closed. Subsequently, a fresh indictment issued and the proceedings were re-opened. Efforts were made to locate IR without success. The court considered that IR had absconded and that the case could be heard in his absence. It was, however, unsure whether the situation came within Article 8(2) or 8(4) of the Directive. It referred a number of questions directed to the interpretation of Articles 8 and 9.[8]

23. The CJEU noted (at §29) that where the conditions set out in Article 8(2) are met, a trial conducted *in absentia* may result in an enforceable decision, without the Member State being obliged to provide for a new trial. Article 8(2) is based on the premise that the person concerned, having been duly informed, "*has voluntarily and unequivocally foregone exercise of the right to be present at the trial*" (§34). That was borne out by recital 35[9] which made it clear that the possibility of conducting a trial in absentia without there being any requirement to permit a new trial at the request of the person concerned is "*limited to situations in which that person has, of his or her free will, unequivocally refrained from being present at his or her trial*" (§35). In light of the aim of the Directive to enhance the right to a fair trial in criminal proceedings and thus

[8] The referring court's questions also referred to Article 4a of the Framework Decision, on the basis that it was possible that IR might be located in the territory of another Member State from which his surrender would be sought. However, the CJEU declined to address Article 4a on the basis that the main proceedings did not concern, either primarily or indirectly, the validity or execution of a European arrest warrant: §21-§23

[9] *"The right of suspects and accused persons to be present at the trial is not absolute. Under certain conditions, suspects and accused persons should be able, expressly or tacitly, but unequivocally, to waive that right."*

increase mutual trust, the provisions of Articles 8 and 9 "*must be interpreted in such a way as to ensure that the rights of the defence are respected, while preventing a person who, although informed of a trial, has foregone, either expressly or tacitly, but unequivocally, being present at it from being able, after a conviction in absentia, to claim a new trial and thereby improperly hinder the effectiveness of the prosecution and the sound administration of justice*" (§37).

24. Where an accused person has absconded, a right to a new trial cannot be excluded on that basis alone (§47). However, the court went on:

> *"48 It is only where it is apparent from precise and objective indicia that the person concerned, while having been officially informed that he or she is accused of having committed a criminal offence, and therefore aware that he or she is going to be brought to trial, takes deliberate steps to avoid receiving officially the information regarding the date and place of the trial that that person may, subject however to the particular needs of the vulnerable persons referred to in recitals 42 and 43 of Directive 2016/343, be deemed to have been informed of the trial and to have voluntarily and unequivocally foregone exercise of the right to be present at it. The situation of such a person who received sufficient information to know that he or she was going to be brought to trial and, by deliberate acts and with the intention of evading justice, prevented the authorities from informing him or her officially of that trial in due time by means of the document referred to in paragraph 41 of the present judgment is thus covered by Article 8(2) of that directive.*

49 Such precise and objective indicia may, for example, be found to exist where that person has deliberately communicated an incorrect address to the national authorities having competence in criminal matters or is no longer at the address that he or she has communicated.

50 The interpretation of Article 8(2) of Directive 2016/343 that is provided above is borne out by recital 38 of the directive, according to which, in considering whether the way in which the information is provided is sufficient to ensure the person's awareness of the trial, particular attention should be paid to the diligence exercised by public authorities in order to inform the person concerned and to the diligence exercised by the person concerned in order to receive that information.

51 That interpretation upholds, moreover, the right to a fair trial, referred to in recital 47 of Directive 2016/343 and as laid down in the second and third paragraphs of Article 47, and Article 48 of the Charter, which, as stated in the Explanations relating to the Charter of Fundamental Rights (OJ 2007 C 303, p. 17), correspond to Article 6 ECHR (see, to that effect, judgment of 13 February 2020, Spetsializirana prokuratura (Hearing in the absence of the accused person), C-688/18, EU:C:2020:94, paragraphs 34 and 35).

52 As is clear from the case-law of the European Court of Human Rights, neither the letter nor the spirit of Article 6 ECHR prevents a person from waiving of his or her own free will, either expressly or tacitly, the entitlement to the guarantees of a fair trial. 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 with its importance. Furthermore, it must not run counter to any important public interest (ECtHR, 1 March 2006, Sejdovic v. Italy, CE:ECHR:2006:0301JUD005658100, § 86, and ECtHR, 13 March 2018, Vilches Coronado and Others v. Spain, CE:ECHR:2018:0313JUD005551714, § 36).

53 It is clear, in particular, from that case-law that such a waiver may be found where it is established that the accused person has been informed of the existence of the criminal proceedings against him or her, is aware of the nature and the cause of the accusation, and does not intend to take part in the trial or wishes to escape prosecution (see, inter alia, ECtHR, 1 March 2006, Sejdovic v. Italy, CE:ECHR:2006:0301JUD005658100, § 99, and ECtHR, 23 May 2006, Kounov v. Bulgaria, CE:ECHR:2006:0523JUD002437902, § 48). Such an intention may, inter alia, be found where the summons to appear could not be served on account of a change of address which the accused failed to communicate to the competent authorities. In such a case, the person concerned cannot invoke a right to a new trial (see, to that effect, ECtHR, 26 January 2017, Lena Atanasova v. Bulgaria, CE:ECHR:2017:0126JUD005200907, § 52)."

25. The court expressed the view that the lawyer appointed to represent IR was not "*mandated*" in circumstances where IR had not entrusted the lawyer with the task of representing him (§56). Noting that the request for a preliminary ruling did not state the nature and cause of the accusation in the new indictment, the court stated that, if the

referring court found that it corresponded to the initial indictment and that it was delivered to the address given by IR to the investigating authorities after service of the initial indictment, "*such circumstances could constitute precise and objective indicia enabling it to be held that IR – having, in accordance with Directive 2012/13/EU .. on the right to information in criminal proceedings …, been informed of the nature and cause of the accusation against him and, therefore, of the fact that he was going to be brought to trial – prevented the authorities from informing him officially of that trial by leaving, with the intention of evading justice, the address that he had communicated to them*" (§58). That assessment was, however, for the referring court to carry out.

26. The Fourth Chamber proceeded to give the following answer to the questions referred to it:

> "*Articles 8 and 9 of Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings must be interpreted as meaning that an accused person whom the competent national authorities, despite their reasonable efforts, do not succeed in locating and to whom they accordingly have not managed to give the information regarding his or her trial may be tried and, as the case may be, convicted in absentia, but must in that case, in principle, be able, after notification of the conviction, to rely directly on the right, conferred by that directive, to secure the reopening of the proceedings or access to an equivalent legal remedy resulting in a fresh examination, in his or her presence, of the merits of the case. <u>That person may, however, be denied that right if it is</u>*

apparent from precise and objective indicia that he or she received sufficient information to know that he or she was going to be brought to trial and, by deliberate acts and with the intention of evading justice, prevented the authorities from informing him or her officially of that trial." (my emphasis).

27. While *IR* was not concerned with Article 4a of the Framework Decision, the Minister submitted that it is equally relevant to the interpretation and application of that provision. As was noted in the Minister's written observations, in her Opinion in *LU & PH* Advocate General Ćapeta referred to the Directive as "*an indication of the EU legislature's common understanding on when all national courts must recognise judicial decisions rendered in absentia*"[10] and as harmonising at EU level the acceptable limitations of the right to be present at the trial.[11] The relevance of *IR* in this context was not challenged by Mr Szamota. In the absence of any argument on the point, it is not necessary or appropriate to express a definitive view. However, it would be surprising if a trial and conviction *in absentia* that is enforceable (without a requirement for a retrial) under Articles 8 and 9 of the Directive might nonetheless be regarded as not satisfying the conditions in Article 4a of the Framework Decision such that surrender ought to be refused in the absence of an entitlement to a retrial on return. As the Fourth Chamber observed in *IR*, the purpose of the Directive is to enhance the right to a fair trial in criminal proceedings and thus increase mutual trust between

[10] Opinion, para 6 and footnote 9.

[11] Opinion, para 133 and footnote 72.

Member States. Mutual trust is the bedrock on which the Framework Decision rests. Both Article 4a of the Framework Decision and Articles 8 and 9 of the Directive have their roots in Article 6 ECHR (and in Articles 47 and 48 of the Charter of Fundamental Rights).[12] In the circumstances, if a person has effectively waived their right to be present at their trial for the purposes of Article 8 and 9 of the Directive, it is difficult to see how it might plausibly be contended that their subsequent surrender on foot of a European arrest warrant (in the absence of a right to a retrial) would entail a breach of his or her rights of the defence such as to require the refusal of surrender. In other words, it seems logical that the conduct capable of amounting to an effective waiver of the right to be present for the purposes of Article 8 and 9 of the Directive should, in principle, be capable of amounting to an effective waiver for the purposes of Article 4a of the Framework Decision.

28. 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, <u>in particular the fact that he or she sought to avoid service of the information addressed to him or her or to avoid</u>*

[12] As regards Article 4a, see recitals 1 and 8 of Council Framework Decision 2009/299/JHA (which inserted Article 4a into the Framework Decision) as well as Case C-399/11 *Melloni* in which the CJEU held that Article 4a is compatible with Articles 47 and 48(2) of the Charter. As regards Articles 8 and 9 of the Directive, see recitals 33 and 47.

any contact with his or her lawyers" (my emphasis). That language, which picks up on statements made in *TR*, suggests that, for the purposes of Article 4a of the Framework Decision, the right to be present at one's trial may, in certain circumstances, be effectively waived even where the person concerned was *not* aware of the date and place of his or her trial (because they had taken steps which prevented notice of their trial being served upon them).

29. 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.

30. A broad approach to waiver is also evident in the caselaw from England and Wales: see, for example, *Dziel v District Court in Bydgoszcz, Poland* [2019] EWHC 351 (Admin), *Bertino v Public Prosecutor's Office, Italy* [2022] EWHC 665 (Admin) and *Stafi v Judecatoria Roman, Romania* [2023] EWHC 429 (Admin). It should be noted, however, that the relevant statutory provision in England and Wales (section 20 of the Extradition Act 2003) differs significantly in it terms from section 45 of the 2003 Act (though each seeks to give effect to Article 4a of the Framework Decision). It should also be noted that the Supreme Court has agreed to hear an appeal in *Bertino* (the particular issue in *Bertino* appears to be whether there can be a tacit waiver of the right to attend one's trial only if the requested person was told that if (s)he did not attend, the trial could proceed in their absence).

31. As I have indicated, there was no dispute or debate before us as to the proper scope of the doctrine of waiver in this context. Insofar as there may be any dispute between the parties, that will be a matter for the High Court to adjudicate on as necessary, in light of any additional information that may be ascertained from the IJA pursuant to section 20 of the 2003 Act.

32. One further potential issue should be flagged here, though again it was not the subject of any debate. As Baker J observed in *Zarnescu*, Article 4a provides an *optional* ground for refusal of surrender ("*The executing judicial authority <u>may</u> also refuse to execute*

the European arrest warrant ...." (my emphasis)). However, section 45 of the 2003 Act appears to be mandatory in its terms (*"A person shall not be surrendered under this Act if ...*" (again, my emphasis)). Other Member States have transposed Article 4a as a ground for mandatory refusal. Questions have been raised as to whether transposing Article 4a in this way is a correct transposition. [13] However, *Zarnescu* makes it clear that the provisions of section 45 are not, in fact, exhaustive and that, in certain circumstances, a court *may* order surrender even where none of the conditions set out in section 45 are satisfied. But the existence of such a discretion raises the question of how it is to be exercised. Clearly, if it appears to the court in a given case that surrender would entail a breach of the rights of the defence and of Article 6 ECHR, surrender should be refused. But even where it appears that surrender would *not* involve such a breach, *LU & PH* suggests that surrender is *not* mandatory and may nonetheless be refused: §75 & §76. It is not clear, however, what are the considerations that might indicate that surrender should be refused in such circumstances. As I have said, this issue was not debated before us and in the circumstances it would not be appropriate to express any concluded view on it, save to observe that, as the CJEU has emphasised again and again, the fundamental rule under the Framework Decision is that EAW

[13] See the discussion in Brodersen et al, *Improving Mutual Recognition of European Arrest Warrants for the Purpose of Executing Judgments Rendered Following a Trial at which the Person Concerned Did Not Appear in Person* (*InAbsentiEAW* Research Report 1, 2019), chapter 3.3 (page 47 and following). See also Brodersen et al "The European arrest warrant and in absentia judgments: The cause of much trouble" 13 *New Journal of European Criminal Law* 7-27 (2022) at pages 20-23.

warrants should be executed and that exceptions to that fundamental rule are to be narrowly construed. It would appear to follow that, where the court is satisfied in a given case that surrender would not entail a breach of the rights of the defence, then, in the absence of any countervailing factors, an order for surrender ought normally to be made.

33. Turning to the evidence here, in his affidavit of 6 November 2019 Mr Szamota states unequivocally that he was unaware of his prosecution for the Second Offence and therefore was not in a position to attend his trial or instruct counsel to represent him (para 5). However, according to the issuing judicial authority (IJA) Mr Szamota was present at "*a hearing as part of the preliminary proceedings*" for that offence, was "*instructed about his obligation to provide the court with his correspondence address, otherwise the court sessions are to take place in the absence of the accused*" and was also informed that "*not providing the court with any correspondence address or place of residence may prevent the accused from submitting a complaint or appeal due to expiry of deadlines*" (IJA letter of 20 January 2020). A summons notifying him of his trial on 8 February 2017 was apparently sent to the address notified by Mr Szamota (IJA letter of 3 February 2020) but it was not collected (IJA letter of 27 December 2019).

34. In response to this information Mr Szamota swore a further affidavit reiterating that he had not been aware of his prosecution for the Second Offence and specifically denying that he was a party to, notified or aware of the proceedings for that offence or any preliminary hearings or that he was advised of the obligation to provide a

correspondence address or the consequences of failing to do so or of changing his address. According to Mr Szamota, he was arrested in relation to the Second Offence and held in police custody for a couple of hours, during which he was not asked for his address and was not charged with any offence and, he says, he was not aware that a prosecution was subsequently brought in respect of that offence (Affidavit of 24 February 2020).

35. In his judgment in the High Court, Binchy J noted the conflict between the accounts given by Mr Szamota and the IJA. In his view, that conflict had to be resolved in favour of the Minister, as part of the trust and confidence which the Court was required to accord to the IJA (para 54). Nonetheless, he noted that the evidence fell short of establishing that Mr Szamota had actually received the summonses which the IJA said had been sent to the address provided or that Mr Szamota was aware of the hearing date for the trial of the Second Offence (para 55). In my earlier judgment (at para 67), I expressed the view that it seemed clear that, if the trial of Mr Szamota for the Second Offence was to be regarded as "*the trial resulting in the decision*" (or part of such trial) none of the conditions set out in Article 4a(1) would be satisfied on the basis of the evidence before the court. I also stated that it was difficult to see how, on the information then available, a court could be satisfied that Mr Szamota's surrender would not entail a breach of his rights of defence on the basis of the broader assessment mandated by *Dworzecki* and *TR* (and reflected here in the Supreme Court's decision in *Zarnescu*) (para 68), concluding (at para 70) that:

"*surrender could not properly be ordered on the basis of the information currently before the Court and the Court would have to consider seeking further information from the IJA in such circumstances (including further information about the nature and scope of the "extraordinary legal remedy" that will evidently be available to the Appellant if surrendered). No doubt, the Judge would have sought such further information had he been persuaded to take a different view of the law.*"

36. The Minister did not take issue with that assessment. She did not contend that the material before the Court established compliance with any of the conditions in Article 4a(1) nor did she suggest that, on the basis of such material, the Court could properly conclude that Mr Szamota's surrender would not entail a breach of his rights of defence. In essence, the Minister's position was that the IJA should be afforded a further opportunity to address these matters in light of the judgment of the CJEU on the reference. Ms Williams accepted that the Court is not obliged to adopt that course and that the Court is entitled to take the view that the request for surrender fails on the basis of the material before it and, on that basis, it is entitled simply to allow the appeal and discharge the order for surrender made by Binchy J in the High Court. Arguably that is, *prima facie*, the order that ought to be made. The IJA has no entitlement to proffer further material at this stage of the proceedings and the Court is not required to allow it an opportunity to do so. To that extent, the Minister is clearing asking the Court to exercise a discretion in her favour (or, more correctly, in favour of the IJA). In exercising that discretion, the Court must, of course, have regard to the objectives of the Framework Decision.

37. In the circumstances here it appeared to me that the Court ought to accede to the Minister's request, to the extent of remitting the proceedings to the High Court to consider whether any of the conditions of Article 4a(1) is satisfied in respect of the Second Offence or, if not, whether it can be demonstrated that the surrender of Mr Szamota would not entail a breach of his "*rights of the defence*", having regard to Article 6 ECHR and, for that purpose, making any necessary section 20 requests.

38. As I indicated in my earlier judgment, it is very likely that Binchy J would have sought further information pursuant to section 20 if it had been apparent that Mr Szamota's prosecution for the Second Offence was a "*trial resulting in the decision*" for the purposes of Article 4a. As I have noted, it has also been clarified that strict compliance with the express provisions of Article 4a/Section 45 is not an absolute prerequisite to surrender under the Framework Directive (though, as also noted, issues may arise as to the precise circumstances in which a court may conclude that the right to be present at trial has effectively been waived). In the particular circumstances here – involving, as Ms Williams aptly put it in submission, a "*changed landscape*" - I do not consider that it would be appropriate simply to allow the appeal and discharge the surrender order. On the basis of the material before the Court, it is clear that a real issue arises as to Mr Szamota's knowledge of and/or participation in the proceedings that resulted in his conviction for the Second Offence which warrants further inquiry. The account given by the IJA indicates that a significant waiver issue may arise (though I express no view on how that issue might be resolved, which will be a matter for the High Court). The nature of the "*extraordinary legal remedy (reversal, motion to re-open the*

proceedings)" also remains unclear and, in particular, it remains unclear whether the availability of such a remedy might, in the circumstances here, satisfy the requirements of Article 4a(1)(d). In my view, it is appropriate that these issues should be explored further before a final decision is taken as to whether Mr Szamota should or should not be surrendered.

39. It is also relevant in this context that – in contrast to the position in *Siklosi* – the entirety of the sentence imposed on Mr Szamota in respect of the Second Offence remains operative in full.

40. It will be a matter for the High Court, consistent with the views expressed in this judgment, to determine precisely what additional information should be sought from the IJA. The High Court should be asked to give priority to these proceedings and it will, I am sure, impress on the IJA the importance of providing a timely and comprehensive response. The process should not be open-ended. If the IJA fails to provide the information requested in a timely manner, then the High Court will be entitled to proceed to adjudicate on the surrender request on the basis of the information available to it. The assessment of any additional information provided by the IJA (and any further evidence that may be proffered by or on behalf of Mr Szamota) will also be a matter for the High Court, in light of the submissions of the parties.

CONCLUSION

41. As explained earlier in this judgment, the Court has already given its decision on this appeal and has made an order (i) setting aside the order for surrender made by the High Court and (ii) remitting the proceedings to the High Court for further consideration in accordance with this judgment. This judgment has set out the reasons why I concluded that it was appropriate to make an order in those terms.

Birmingham P and Edwards J have indicated their agreement with this judgment