



THE HIGH COURT

Record No. 2025 292 EXT

[2026] IEHC 405

BETWEEN

MINISTER FOR JUSTICE, HOME AFFAIRS AND MIGRATION

APPLICANT

AND

AMIENWALAN DAVID IKEKHUA

RESPONDENT

JUDGMENT delivered by Mr. Justice Sean Gillane on 24 June 2026

Introduction

1. This is an application for the surrender of the respondent to Italy (“the issuing state”), pursuant to section 16 of the European Arrest Warrant Act 2003, as amended (“the 2003 Act”), on foot of a European Arrest Warrant issued by the Deputy General Prosecutor, Cristina Polenzani, on the 13th of March 2025 (“the warrant”).
2. The warrant was issued by a judicial authority in the issuing state (“IJA”).
3. The respondent was arrested on the 12th of November 2025 on foot of an SIS alert and brought before this Court. The warrant was produced to the Court on the 24th of November 2025.

4. No issue has been raised by the respondent in relation to his identity, and I am satisfied that the respondent is the person identified in the warrant.
5. As will be seen later in this judgment, a matter of some significance is disclosed at Part A of the warrant where it is stated that the respondent, who is a Nigerian national, was deported from Italy on the 1st of August 2014.
6. Part B of the warrant states that the respondent's surrender is sought for the purpose of executing a custodial sentence previously imposed upon him on the 5th of April 2024, which is said to be an "*Aggregation Order N. 42/2024 SIEP issued by the Office of the Prosecutor General in Ancona*" ("the Aggregation Order").
7. The respondent swore an affidavit on the 27th of January 2026 for the purpose of a bail application, which was unsuccessful. At paragraphs 4-5 of the affidavit, he stated:

"In terms of my involvement with the criminal justice system in Italy, I cannot recall the precise dates but based on my best recollection I say that I was arrested in Italy in or around the year 2010. I had the benefit of an Italian lawyer and attended court in relation to criminal offences there.

I say that I spent approximately 2 years in custody in connection with those criminal offences and was then released on house arrest, which ended in or around 2014. I say that as far as I was then aware, any sentences and criminal proceedings against me in Italy were over and done with."

8. The respondent went on to say at paragraph 7:

“I say that I do not know whether I was in 2014, or still am, subject to a ‘deportation order’ in Italy as I do not understand such legal instruments and cannot establish contact with my former Italian lawyer from Cloverhill Prison to find out what orders were made against me in Italy (including also the length or [sic] my sentence, how it was calculated, and how much if any remains to be served). Given the passage of time and lack of contact with my former Italian counsel, I am effectively now dependant on the Italian authorities for the judgments and orders which will show for what I was convicted and what sentence I received.”

9. The respondent does not consent to his surrender and a notice of objection was filed on the 3rd of February 2026 pursuant to Order 98, Rule 5 of the Rules of the Superior Courts 1986, as amended.
10. While the respondent argues that the warrant suffers from a fatal lack of clarity, the central thrust of the submissions made on his behalf relates to what are said to be the legal consequences of his deportation by the issuing state on the request for his surrender to serve a sentence that was imposed in his absence.
11. It is submitted that his surrender is prohibited by section 45 of the 2003 Act.

Background

12. Part B of the warrant indicates that the Aggregation Order relates to the following two “enforceable judgments”:

“Sub 1: Judgment 23.01.2015 Court of Appeal of Perugia, Final 09.05.2015, reforming the judgment delivered by the Court of Perugia on 19.05.2014

Sub 2: Judgment 11.07.2023 Court of Appeal of Ancona, Final 10.12.23 far Ikekhua David, partially amending judgment by the Court of Macerata on 09.10.2018.” (Emphasis added.)

13. Part C of the warrant states that the respondent was sentenced to a term of imprisonment of 8 years and 4 months, along with ancillary penalties that included a fine of €6,000, suspension of his driving licence for a period of three years and deportation from the issuing state. Part C also indicates that a period of 8 years, 3 months and 25 days remains to be served along with the ancillary penalties.
14. Part D of the warrant indicates that the respondent was not present at the trial resulting in the decision. It can be observed from the warrant that both paragraph 3.1b and paragraph 4 of Part D have been invoked by the issuing authority.
15. At paragraph 3.1b, the IJA confirmed that the respondent:

“... 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.”

16. As a result of invoking paragraph 3.1b, the IJA provided further information at paragraph 4 in the following terms:

“Sub 1: At the hearing of 23/01/2015 before the Court of Appeal of Perugia, IKEKHUA David was represented and defended by lawyer Mauro Dottori, delegated to replace defence lawyer of choice Barbara Romoli of the Bar of Perugia

Sub 2: At the hearing of 11/07/2023 before the Court of Appeal of Perugia IKEKHUA David was represented and defended by lawyer Cristina Bolognini of the Bar of Ancona – Defence lawyer of choice; (It seems to be accepted that this reference to the Court of Appeal of Perugia is a mistranslation and should instead read the Court of Appeal of Ancona.)

‘Under the Italian legal system, the defence lawyer of choice represents defendants in every stage of the proceeding, and the notifications served upon defence lawyers are valid as if served upon defendants. The trials against IKEKHUA David were celebrated in compliance with the law provision in force in Italy.’” (Emphasis in the original.)

17. Part E of the warrant refers to three offences which are particularised in considerable detail as offences involving the possession and distribution of controlled drugs contrary to Italian law on dates between 2003 and 2007.
18. In relation to the ‘tick box’ offences as provided for under Article 2.2 of the European Council Framework Decision dated the 13th of June 2002 on the European Arrest

Warrant and the Surrender Procedures Between Member States (“the 2002 Framework Decision”), the offences ticked are “*participation in a criminal organisation*” and “*illicit trafficking in narcotic drugs and psychotropic substances.*”

19. Correspondence does not appear to be an issue in this case, but in any event, the factual particulars clearly correspond with offences in the State i.e., the offence of possession of controlled drugs for unlawful sale or supply as set out in section 15 of the Misuse of Drugs Act 1977 and the offence of participating, in or contributing to, organised crime as set out in section 72 of the Criminal Justice Act 2006.
20. It also seems clear that the requirements of minimum gravity have clearly been met, having regard to the duration of the sentence imposed and the duration of the balance of that sentence remaining to be served.

Further Information

21. A request for further information pursuant to section 20 of the 2003 Act was made on the 1st of December 2025.
22. The IJA was asked, *inter alia*, to provide a fully completed Part D of the warrant in relation to the Aggregation Order and the judgments referred to; confirmation on how, if not present at trial, the respondent was informed of the date and place set for hearing; whether the respondent was served with the decision of the 5th of April 2024 and whether he will be entitled to an appeal or re-hearing if surrendered.

23. A response dated the 10th of December 2025 was received translated into English on the 9th of January 2026 (“the first response”).
24. A further request for information was made on the 3rd of February 2026 in circumstances where it appeared that either a number of queries raised in the original request went unanswered or there was a page missing from the first response. The IJA was also asked to provide translated copies of the Aggregation Order and the four judgments referred to at Part B of the warrant.
25. A response dated the 5th of February 2026 was received translated into English on the 11th of March 2026 (“the second response”). The IJA indicated that the information requested had already been communicated in the first response and stated that “*the following is communicated again in relation to the placed questions.*” Translated copies of the Aggregation Order and the aforementioned judgments were provided.
26. It is perhaps unnecessary and unhelpful to an understanding of the issues in this case to quote at length from the responses of the IJA. Counsel for the respondent helpfully produced a table, derived from those responses, setting out the position in relation to the trials and appeals involving the respondent without demur from counsel for the applicant. On that basis, the agreed factual history appears to be as follows.
27. The respondent was arrested on the 1st of March 2014 and produced before a judge on the 3rd of March 2014, where he was examined, placed under an obligation to report to the judicial police and ordered to be tried by direct trial procedure. Following adjournments to the 9th of April 2014 and the 14th of May 2014, the respondent was

represented by a defence lawyer of his choice, Barbara Romoli, at his hearing on the 19th of May 2014.

28. On the 19th of May 2014, the respondent was convicted before the Court of Perugia and sentenced to 1 year and 6 months' imprisonment, a €6,000 fine and costs, with confiscation and destruction of the seized drugs ordered. The respondent was not present and was recorded as "*free, absent.*"
29. The second response does not give a "*separate personal summons method*" for the hearing on the 19th of May 2014 but states that the respondent was represented and defended by his appointed lawyer at the hearing.
30. On the 1st of August 2014, the respondent was deported by the issuing state. There is no evidence to suggest that he ever returned.
31. It is common case that the respondent was not present at the first instance hearing on the 19th of May 2014 and could not have been personally present at the other hearings as he was outside the jurisdiction of the issuing state.
32. A defence lawyer filed an appeal on the respondent's behalf on the 16th of September 2014.
33. On the 23rd of January 2015, the Court of Appeal of Perugia confirmed the judgment of the 19th of May 2014 and ordered the respondent to pay the appeal costs. The decision

became final on the 9th of May 2015. The respondent was not present and was recorded as “*free with obligations, absent.*”

34. Mauro Dottori was identified as the lawyer that represented the respondent in respect of the appeal hearing, delegated in place of Ms. Romoli, his defence lawyer of choice. The warrant states that the respondent did not appear in person and paragraph 3.1b was invoked in the terms set out above.
35. As noted above, Part D of the warrant indicates that under Italian law, a defence lawyer of choice represents the defendant at every stage of the proceedings and notifications to the defence lawyer are treated as valid notifications to the defendant.
36. On the 9th of October 2018, the respondent was listed before the Court of Macerata for first instance trial and judgment. It appears as though the court requalified the charges as lesser offences and pronounced a nonsuit because the offences were time barred. The court declared any provisional measures ineffective and ordered confiscation and destruction of the seized drugs. The respondent was not present and was recorded as “*absent, to be considered present.*”
37. The second response states that the respondent was represented by a lawyer appointed by him, Pietro De Gaetani of the Bar Association of Ancona. This response does not give a “*separate personal summons method*” for the respondent in relation to the hearing on the 9th of October 2018.

38. On the 11th of July 2023, the Court of Appeal of Ancona partially reformed the Macerata judgment. The respondent was found guilty and sentenced to 6 years and 10 months' imprisonment with costs, public-office disqualification, legal disqualification during sentence, a three-year travel ban/licence withdrawal and expulsion after sentence. The respondent was not present and recorded as "*free, absent.*"
39. It was recorded that the respondent was represented by a lawyer appointed by him, Cristina Bolognini of the Bar of Ancona who had sought confirmation of the first instance judgment or, alternatively, a minimum punishment. Again, the warrant indicates that the IJA invoked paragraph 3.1b.
40. On the 5th of April 2024, the Aggregation Order was issued by the Office of the Prosecutor General in Ancona. This order produced the overall sentence of 8 years and 4 months' imprisonment and a €6,000 fine with a period of 8 years, 3 months and 25 days remaining to be served along with the fine.
41. The IJA said that on this occasion "*no trial was celebrated since it was a measure to cumulate concurrent sentences*" and, therefore, the respondent was not required to appear.
42. Notwithstanding the fact that the IJA regard this as an executive phase measure instead of a trial, they stated in the second response that:

"The measure S.I.E.P no. 42/2024 was duly notified by means of the telematic notification and communication system (S.N.T.) to his Defence Solicitor,

Nicolina Elisabetta, in conformity with the provisions of the Italian legal system.”

43. The second response states generally that during the course of both criminal proceedings under assessment, the respondent was assisted in his defence by lawyers and those lawyers never raised any notification irregularities.

44. In relation to the question of appeal or retrial if surrendered, the IJA stated in the first response:

“... please be advised that all the judgments on which the arrest warrant in respect of Mr. IKEJHUA [sic] is based have become final, and that under the Italian legal system a defendant is entitled to request that final judgments be vacated and/or reviewed, where the conditions exhaustively prescribed by the relevant legal arrangements are met.” (Emphasis added.)

45. In the second response, the IJA stated that:

“The convictions the surrender of the person to be extradited is sought for became irrevocable and, as such, final. Therefore, the convict will not have the right to a new trial, except in the cases STRICTLY provided by law.”

Discussion

46. Counsel for the respondent submitted that, however one approaches this history, the respondent’s surrender is prohibited by section 45 of the 2003 Act.

47. It was submitted that as a basic starting point, it is clear that the respondent was not present for either “*trial resulting in the decision*” and that both trials took place *after* the respondent had been deported *by* the issuing state.
48. Counsel submitted that it was significant that the IJA had invoked paragraph 3.1b in respect of both enforceable decisions, and the consequences of this are unavoidable. It was argued that in doing this, the IJA was saying, in terms, that this condition has been met and that it has been “*unequivocally established*” that the respondent was aware of the scheduled trial and informed of the consequences in the event of non-appearance.
49. Counsel submitted that there was simply no evidence *at all* of any attempt to contact the respondent in relation to the proceedings and that this was “*immediately fatal*” to the request for surrender. It was argued that it was fundamental that the respondent be told of the scheduled trial and given an opportunity to participate, and counsel submitted that he had, in fact, been excluded from the entire process.
50. It was submitted that no question of waiver could arise in these circumstances and it could not be inferred that a lawyer was mandated by the respondent simply because they had represented the respondent on a prior occasion. It was submitted that this was an untenable position and vividly illustrated in this case where, in relation to the decision dated the 11th of July 2023, it is suggested by the applicant that the condition in paragraph 3.1b was met by contacting lawyers who had appeared for the respondent nine years previously.

51. It was also submitted that this complaint applies *a fortiori* in relation to a court-appointed lawyer.
52. It was argued that the reliance by the IJA on domestic law provisions in relation to deemed notice, as cited in paragraph 4 of Part D of the warrant, is neither here nor there in relation to the legal principles that apply to a trial *in absentia* and that the test is whether the rights of the respondent have been protected pursuant to the 2002 Framework Decision.
53. Counsel also submitted that it was important to recognise that in circumstances where the sentence sought to be enforced was “*aggregated*”, an established infirmity in one of the proceedings was fatal to the entire request.
54. Counsel for the applicant did not disagree that the focus should be on the question of whether the fair trial rights of the respondent had been protected but submitted that the additional information provided gave a more than adequate assurance in that regard.
55. Counsel said that the starting point was that the trials and appeals were presumed to be fair and emphasised that it appeared as though the lawyers of the respondent’s choice had appeared for him at every hearing bar one, depending on the view that might be taken on the phrase “*delegated*” lawyer.’ He pointed out that the respondent had been successful in the hearing on the 9th of October 2018 (although the decision was successfully appealed at a later date) and in relation to the hearing on the 19th of May 2014, an appeal had been initiated on his behalf.

56. Counsel said that when one looks at the first instance trials, there was significant engagement and no indication from the respondent that he did not want his lawyers to continue to represent him. It was submitted that there was nothing to support the proposition that his lawyers were operating without his mandate or involvement. It was submitted that counsel for the respondent was inviting the Court to speculate and “*to look around corners.*”
57. Counsel submitted that the Court could, and should, assume that there was a “*retainer*” when it came to the representation of the respondent and that the Court should look at what was done by his lawyers during the trials.
58. Counsel was critical of the fact that none of the information provided by the IJA had been contradicted by the respondent on affidavit and that there was no engagement with what was said to have taken place at the various hearings by the lawyers appearing on his behalf. However, the respondent has sworn that he thought the criminal proceedings were over and done with after his release from custody and that he knows nothing of any criminal proceedings post-2014.
59. The law in relation to the issues that arise where there has been a trial *in abstentia* has been the subject of repeated analysis by the Court of Justice of the European Union (“CJEU”), the European Court of Human Rights (“ECtHR”) and the Superior Courts in this jurisdiction, and many of the principles are now well established.
60. The 2002 Framework Decision provides for the prohibition of surrender where there was a trial *in abstentia* save in certain circumstances.

61. This was amended by the European Council Framework Decision 2009/299/JHA dated the 26th February 2009 (“the 2009 Framework Decision”). Recital 4 of the 2009 Framework Decision provides that:

“... 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.”

62. On the issue of waiving the right to be present in person at trial, Recital 1 provides that:

“... under certain conditions the accused person may, of his or her own free will, expressly or tacitly but unequivocally, waive that right.”

63. Article 4a of the 2002 Framework Decision, as inserted by Article 2 of the 2009 Framework Decision, provides that:

“1. 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:

(a) in due time:

(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;

and

(ii) was informed that a decision may be handed down if he or she does not appear for the trial.”

64. In principle, it seems clear from the 2009 Framework Decision that if the conditions in Article 4a are met, surrender should not be refused.

65. Section 45 of the 2003 Act, as inserted by section 23 of the European Arrest Warrant (Amendment) Act 2012, implements these principles domestically and provides that:

“(1) The High Court may refuse to order the surrender of a person 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 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.

(2) Where a person has not received any information from the authorities in the State about the existence of criminal proceedings against him or her, he or she may request a copy of the judgment in relation to which the European arrest warrant ... in respect of the person has been issued and upon such a request

being made the High Court shall without delay arrange for the issuing state to be informed of the request.

TABLE

(d) Indicate if the person appeared in person at the trial resulting in the decision:

- 1. ☐ Yes, the person appeared in person at the trial resulting in the decision.*
- 2. ☐ No, the person did not appear in person at the trial resulting in the decision.*
- 3. If you have ticked the box under point 2, please confirm the existence of one of the following:*
 - ☐ 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;*

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.

4. If you have ticked the box under points 3.1b, 3.2 or 3.3 above, please provide information about how the relevant condition has been met.”

66. The saver provisions in the table come directly from the 2009 Framework Decision.

67. Section 45 of the 2003 Act was the subject of close analysis by the Supreme Court in *Minister for Justice and Equality v. Zarnescu* [2020] IESC 59, the opening paragraph of which reads:

“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.”

68. At paragraph 12 of her judgment, Baker J. said:

“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.” (Emphasis added.)

69. In *Zarnescu*, the request for surrender was made by Romania.
70. The respondent had been convicted of an assault offence and received a suspended sentence. He subsequently pleaded guilty to a road traffic offence, which resulted in a sentence of imprisonment and the revocation of the suspended sentence. The respondent did not appear in person at the hearing resulting in the second conviction but was represented by a lawyer “*mandated*” by him.
71. The respondent’s lawyer filed an appeal. Before the hearing date for the appeal, the respondent wrote to the Court of Appeal in Bacău seeking an adjournment in order to retain a new lawyer, by which time he was in Ireland and an Irish address was provided. A summons notifying the adjourned date was delivered to his Romanian address and received by his father. There was no direct evidence to suggest that this summons was forwarded to the respondent.
72. In *Zarnescu*, the issuing judicial authority stated that under the Romanian Criminal Procedure Code, when a person has appointed a lawyer, he or she shall not be deemed to have been tried *in absentia* if his or her lawyer appeared at any time during the criminal proceedings.
73. In the High Court, while Binchy J. was critical of the respondent and his failure to acquaint himself with the new hearing date, in circumstances where he had requested an adjournment, he concluded that, nonetheless, surrender had to be refused because the language in section 45 required that proof of knowledge of the rescheduled hearing date had to be “*unequivocal*.”

74. Even though Binchy J. was satisfied that it was “*likely*” that the respondent’s father had forwarded his post or told him of the date, this was not enough and it was clear, in his view, that there was a difference between deeming service good and being unequivocally satisfied that service on a party had occurred.
75. It was apparent that Binchy J. had refused surrender with reluctance and felt as though it was an “*undesirable*” but unavoidable outcome necessitated by the clear and unambiguous language of section 45 which did not permit a purposive interpretation.
76. Leave to appeal was granted by the Supreme Court and the net issue was identified at paragraph 40 as:
- “... 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.”*
77. The agreed position between the parties before the Supreme Court was that a literal interpretation of section 45 of the 2003 Act was not required and the section fell to be interpreted in light of the case law of the CJEU with a view to achieving a conforming interpretation. See *Dworzecki* (Case C-108/16 PPU, ECLI:EU:C:2016:346), *Zdziaszek* (Case C-271/17 PPU, ECLI:EU:C:2017:629) and *Melloni v. Fiscal* (Case C-399/11, ECLI:EU:C:2013:107).

78. An analysis of the jurisprudence of the CJEU demonstrates that the list of circumstances expressed in the table referred to above are not exhaustive.

79. In *Zdziaszek*, the CJEU referred to Article 4a of the 2002 Framework Decision and stated at paragraph 110:

“However, that 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.”

80. In this context, Baker J. in *Zarnescu* also referred to the judgment of Donnelly J. in *Minister for Justice and Equality v. Skwierczynski* [2016] IEHC 802, where she stated at paragraphs 102-103 that:

“... 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...

... 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.”

81. Donnelly J.’s approach was approved of by Hedigan J. in *Minister for Justice and Equality v. Skwierczynski* [2018] IECA 204.

82. Further, on the issues of trial *in absentia* and waiver of the right to be present in person at trial, the CJEU said at paragraph 49 of *Melloni* 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.”

83. In relation to Article 6 of the European Convention of Human Rights, Baker J. reviewed a number of decisions of the ECtHR and stated that the basic principles are to be found in *Sejdovic v. Italy* (Application No. 56581/00, 1 March 2006). At paragraph 70 of her judgment, she stated that:

*“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 [of *Sejdovic*]), although national authorities may assess whether there exists good cause for a person’s absence at a hearing.”* (Emphasis added.)

84. The applicant in *Sejdovic* had been tried *in absentia* without receiving information about the date of his trial but a lawyer had been appointed to represent him. However,

this did not allow the ECtHR to conclude that he had either sought to evade trial or unequivocally waived his right to appear at trial. Therefore, there had been a breach of his Article 6 rights.

85. In *M.T.B. v. Turkey* (Application No. 47081/06, 12 June 2018), the ECtHR stated, at paragraph 49, that in relation to the question of trial *in absentia*:

“... 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.”

86. At paragraph 90 of her judgment in *Zarnescu*, Baker J. summarised the applicable principles:

“(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."*

87. Although the Supreme Court ultimately determined that the approach of Binchy J. was incorrect, it upheld the decision not to surrender the respondent on the basis that it could not be said unequivocally that he was aware of the adjourned date and, equally, it could not be said that he had waived his right to be present at the rescheduled hearing.
88. It seems to me, therefore, that the correct approach is to scrutinise the evidence to determine whether the requested person has knowingly waived his or her right to be present at trial while also analysing whether the rights of defence have been sufficiently protected. Overall circumstances and the conduct of the requested person should also

be considered, but in light of the principle that the right to be present at trial is recognised as a fundamental part of the right to a fair trial.

89. Counsel for the respondent sought to rely on the decision of McGrath J. in *Minister for Justice v. Malecki* [2024] IEHC 512, where surrender was refused. In *Malecki*, the respondent was tried and acquitted, and the acquittal was the subject of a successful appeal.
90. Thereafter he was tried *in absentia*, in circumstances where he was in custody in Ireland, and he claimed that he had not mandated any lawyer to appear for him in these proceedings. The issuing judicial authority in that case also relied on paragraph 3.1b of Part D of the warrant.
91. Counsel for the respondent in this case submitted that the position in *Malecki* was broadly analogous with deportation i.e., a respondent who could not attend his trial due to circumstances outside his control or *force majeure*.
92. Counsel for the applicant submitted that *Malecki* was distinguishable on the basis of a different and complicated factual background, to include the fact that the respondent's Polish lawyers disputed much of what the issuing judicial authority had said by way of information provided to the court which the respondent had placed on affidavit, unlike the position in this case. The respondent's Polish lawyers said that they had continued to act for him, having acted for him previously, on the basis of an ethical obligation rather than on the basis of any mandate or instructions received from him.

93. It is, I think, correct to say that *Malecki* had some unusual evidential features and it is, therefore, possible to distinguish it on the facts. However, McGrath J, in applying the principles set out in *Zarnescu*, did point out that it was readily understandable that following the acquittal, the respondent thought that the matter was at an end and, therefore, he could not be faulted for failing to remain in contact with his lawyers. He also stated at paragraph 55 that:

“This is also of course a case where the Respondent could not physically attend his trial as he was in custody in Ireland at the time of the relevant hearings. As pointed out by Burns J in Mocek (No 2) particular care must be exercised where it is said that a person in custody waived his or her rights and in particular his or her right to be present at a hearing. Not only was the respondent unaware of the trial or appeal dates and not only had he not given a mandate to a lawyer to act for him, he was in custody here and this was a fact known to the ‘Polish State’. I say the ‘Polish State’ as during these times, a separate EAW was served on Mr Malecki in prison, and this proceeded to conclusion before the High Court whilst he was in custody. In this regard I note the comments in Seliwak in relation to the duties and obligations on the authorities where a person is in custody as set out above.” (Emphasis added.)

94. While not directly analogous, I am of the view that it is relevant to my consideration of this case as the respondent similarly could not physically attend the proceedings, a fact known to the issuing state as they had deported him.
95. A case which did not feature in the written submissions of either party but which may have some relevance is *Minister for Justice and Equality v. Fiszer* [2015] IEHC 664.

Fischer involved a request for surrender from Poland where the issuing judicial authority had ticked ‘no’ at Part D of the warrant in relation to the question of whether the respondent had appeared at the trial resulting in the decision. However, the issuing judicial authority also indicated that the respondent had given a mandate to a “*legal counsellor*” to defend him and was defended by that legal counsellor at trial.

96. At paragraph 32 of her judgment, Donnelly J. made the following comments, which were relied upon by McGrath J. in *Malecki*:

“This Court must place, and does place, mutual trust and confidence in the statements in the EAW and accompanying documentation provided by the issuing judicial authority. These documents indicate that this respondent had given a mandate to the lawyer. Furthermore, the Court is entitled to take into account that a lawyer will, in the normal course, only act on instructions. The bare reference by the respondent to not keeping in touch with the lawyer leading to his implication that the lawyer had no longer any instructions to act, does not amount to a direct statement that the instructions were actually withdrawn.”

97. However, it is clear from her judgment that the true position in *Fischer* was not fully, or accurately, reflected in the fact that the ‘no’ box was ticked by the issuing judicial authority.

98. In fact, it was clear from the additional information provided by the issuing judicial authority in that case that the trial of the respondent was an ongoing one and that the respondent had been present, with his legal representative, at its commencement when the indictment was read over to him.

99. The respondent appeared at an adjourned date and provided the court with some information, to include an admission in respect of one of the charges. There appeared to have been seven further hearing dates at which the respondent appeared in person with his legal representative. The respondent then left Poland and came to Ireland prior to the matter being listed on a further two occasions at which his legal representative was present but he was absent.
100. Donnelly J. found that the respondent was clearly aware that his trial was ongoing and had been present when it was adjourned from time to time. She found that when he left the jurisdiction of the issuing state, he may not have been specifically aware of the next date but he was aware that there was going to be a further trial date and was, therefore, aware of his “*scheduled trial*.” In those circumstances, she held that there was no section 45 bar to surrender.
101. *Minister for Justice v. Sipka* [2021] IEHC 587 was another case in which section 45 of the 2003 Act was considered. In *Sipka*, the respondent was also tried *in absentia*. He swore an affidavit in which he averred that he had not been aware of any intended proceedings against him, that he was not served with a summons to appear in court or otherwise notified of any trial, and that he did not authorise or otherwise mandate any lawyer to represent him in respect of the offence.
102. The issuing judicial authority, by way of additional information, completed Part D of the warrant and invoked paragraph 3.2. The issuing judicial authority said that defence counsel was assigned by the court, had participated in all of the main hearings, was

present when the judgment was rendered at first instance and had lodged an appeal. The judgments at first instance and on appeal were also served on defence counsel.

103. At paragraph 20 of his judgment, Burns J. said:

“Having evaluated all of the documentation before the Court, I am satisfied that the respondent did not appear at the trial at first instance or the appeal. I am satisfied he was not personally summoned to appear at either hearing and I am also satisfied that he was not aware by any other means of the hearing dates scheduled, either at first instance or on appeal. I am satisfied that the respondent was represented by a lawyer appointed by the court in his absence and that, at no stage, did the respondent mandate such a lawyer to act on his behalf. I am satisfied that the respondent has no automatic right to an appeal or retrial in which he would have the right to participate and which would allow the merits of the case including fresh evidence to be re-examined and which could lead to the original decision being reversed. I am satisfied that the respondent was not served with a copy of the conviction either at first instance or on appeal.”

104. As a result of the foregoing, Burns J. refused to make an order for surrender and stated at paragraph 22:

“I am satisfied that as the requirements of s. 45 of the Act of 2003 have not been met, either in form or in substance, and as there was no unequivocal waiver of defence rights on the part of the respondent, the surrender of the respondent is precluded.”

105. In relation to the Aggregation Order, the applicant submits that this did not constitute a “*trial resulting in the decision*” and could not trigger any considerations as to the operation of section 45 of the 2003 Act. There was no requirement under Italian law for the respondent to be present and the IJA has said that no trial took place. While not expressly conceded, the respondent did not seriously contest this position and for the reasons expressed below in relation to the enforceable judgments underlying the application, nothing turns on it.

Decision

106. I am of the view that the “*core fact*” in this case, to borrow a phrase from the judgment of Baker J. in *Zarnescu*, is the deportation of the respondent on the 1st of August 2014 by the issuing state. The enforceable judgments referred to in the warrant clearly postdate that event.

107. It is also a matter of significance that the IJA has, in respect of both judgments which ultimately resulted in the Aggregation Order, explicitly invoked paragraph 3.1b of Part D of the warrant as the basis upon which the surrender of the respondent is not inconsistent with the 2009 Framework Decision.

108. The applicant’s written submissions frankly state that it must be borne in mind that this Court has been:

“... expressly advised by the issuing judicial authorities within paragraph 3.1b of Part (d) of the Warrant that the Respondent 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

was aware of the scheduled trial, and was informed that a decision may be handed down if he does not appear for the trial.” (Emphasis in the original.)

109. At hearing, much of the argument advanced by counsel for the applicant was advanced, perhaps understandably, as if paragraph 3.2 had been invoked by the IJA and it was urged that a broad approach could, and should, be taken by the Court to the requirements expressly envisaged by section 45 of the 2003 Act on the basis of the additional information provided by the IJA. This, it is said, is consistent with the approach of the Supreme Court in *Zarnescu* following Baker J.’s analysis of the relevant authorities from the CJEU.
110. It is correct to say that where a requested person’s situation does not come four-square within one of the exceptions set out in the table to section 45 of the 2003 Act, I must have regard to all of the circumstances leading to the respondent’s non-appearance at trial in my assessment of whether the respondent’s rights of defence have been protected.
111. However, I think it important to say that it seems clear to me that there is simply no evidence of any attempt to provide the respondent with information in respect of the date and place of the trial which “*resulted in the decision*” nor does there appear to me to be any evidential basis to conclude that it was “*unequivocally established*” that the respondent was aware of the scheduled trial or informed that a decision might be handed down if he did not appear.

112. The right to participate in a criminal trial has been identified as fundamental to the concept of a fair trial in domestic law and international instruments, albeit an accused person can waive that right, expressly or by implication, in any number of ways, as clearly demonstrated by the authorities referred to above.
113. However, conceptually, before a question of waiver of a right can arise, there must be some evidence from which it can at least be inferred that a respondent was aware of the date and place of the proceedings where that right crystallises or had, through his conduct, demonstrated an informed choice to avoid service.
114. Further, in the materials before me there does not appear to be any evidence of a “*manifest absence of diligence*” on the part of the respondent from which it could be concluded that he made an informed decision not to be present.
115. I am also of the view that the authorities establish that an awareness of the consequences of non-attendance is an important aspect of the analysis.
116. It seems to me that given the fundamental nature of the right in question, waiver, where it is contended for, should be established unequivocally, to include situations where it is suggested that knowledge of the scheduled trial date can be inferred or implied from extrinsic evidence and circumstances.
117. Notwithstanding the requirement for mutual trust and confidence, I cannot accept the argument advanced by the applicant that, in applying the presumption of a fair trial leading to the relevant convictions together with an acceptance of the position of the

IJA in invoking paragraph 3.1b, this Court can be satisfied that the respondent's rights of defence were "*fully upheld in respect of such underlying hearings.*"

118. The fact that it is stated on the face of the warrant that under the Italian legal system the defence lawyer of choice is regarded as representing a defendant in every stage of the proceedings and notifications served upon defence lawyers are valid as if served upon defendants cannot be a complete answer to the question of whether the rights of defence were upheld, nor can that statement make the exercise that the Court must carry out in accordance with *Zarnescu* redundant.
119. There is no doubt that the respondent was, prior to the hearing and conviction on the 19th of May 2014, at least aware of the proceedings and had been produced before a judge on the 3rd of March 2014 and represented by a lawyer mandated by him during the course of those proceedings. If the matter rested there, the applicant's overarching argument that the respondent had knowledge of and engaged in the process through his legal representatives might have greater force.
120. However, it is common case that the enforceable judgment which is the basis of the request for surrender is the decision of the Court of Appeal of Perugia on the 23rd of January 2015. While it seems clear that the appeal was filed by lawyers on behalf of the respondent, he was not present at the hearing nor was there any evidence of an attempt to inform him of the scheduled hearing date.
121. Further, the judgment of the 23rd of January 2015 records that the respondent was represented by a lawyer "*delegated*" to represent him. Counsel for the applicant did, in

the course of argument, suggest that there might be some question over what the term “*delegated*” might mean in this context. Rightly, this was not seriously pressed as an argument, and it is worth recording that the warrant states that the respondent was defended by a lawyer “*delegated to replace defence lawyer of choice.*” It seems to me that the inescapable conclusion is that this was a court-appointed lawyer and there is no basis to infer the existence of a general “*retainer*” as I was invited to do.

122. I note that the judgment of the Court of Appeal of Ancona on the 11th of July 2023, which is the second enforceable judgment that resulted in the Aggregation Order, is recorded some nine years after the deportation of the respondent. Again, there is no evidence of any attempt to inform the respondent of the scheduled hearing date. While the judgment records that he was represented by a lawyer of his choice, the IJA again relied on the provision in Italian law to the effect that notification to a lawyer equates with notification to an accused.

123. It seems to me that this could not be more different from the position in *Fiszer*, where Donnelly J. commented on the presumption that lawyers in the normal course operate on instructions. As can be seen in that case, the respondent appeared in person with his lawyer a number of times in an ongoing hearing before effectively absconding.

124. I am of the view that it requires too much of this Court to assume an ongoing mandate, or “*retainer*”, and an informed waiver of the respondent’s rights on the basis of the available information nine years after his deportation by the issuing state.

125. In this context, I am also of the view that the fact that the issuing state deported the respondent weighs heavily in the balance in an assessment of the degree of responsibility of the issuing state to notify the respondent of the scheduled hearing dates.
126. I further note for completeness that the question of an appeal or retrial is dealt with in the further information provided by the IJA in terms (referred to above) that could not give any confidence that either option would be available to the respondent if surrendered.
127. For all of the above reasons, I am satisfied that it cannot be said unequivocally that the respondent was aware of the scheduled hearing dates, and I am not satisfied that circumstances exist from which it could reasonably be inferred that he has waived his rights of defence.
128. In these circumstances and having regard to section 45 of the 2003 Act, I am of the view that the surrender of the respondent should be refused.