



**AN CHÚIRT UACHTARACH  
THE SUPREME COURT**

**[2026] IESC 39**

**Supreme Court Record No.: S:AP:IE:2025:000162**

**High Court Record No.: H:EXT:2025:0000137**

**O'Malley J.  
Hogan J.  
Donnelly J.  
Hyland J.  
O'Moore J.**

**Between/**

**THE MINISTER FOR JUSTICE, HOME AFFAIRS AND MIGRATION**

*Respondent*

**AND**

**CHRISTIAN SUNDAY ASAIKI**

*Appellant*

**JUDGMENT of Ms. Justice Donnelly delivered on the 24<sup>th</sup> day of July 2026**

1. This Court, not for the first time, is asked to consider whether the High Court was entitled to surrender a person to another Member State of the European Union to serve a sentence imposed upon him after a trial at which he was not present (a trial *in absentia*). At issue is whether the High Court may order surrender following such a trial *in absentia* in the absence of an express statement from the issuing judicial authority that the requested person had knowledge *of the consequences of failure to appear*. The resolution of that question turns on whether the Court can be satisfied that the appellant was aware of the consequences of failing to appear at his trial and thus can be held to have implicitly but unequivocally waived his right to be present.

2. A common understanding of the phrase ‘the consequences of failure to appear’ is important in that analysis. It is necessary to look at the development in the legislative provisions (both EU and domestic) and in the case law (of the Court of Justice of the European Union (“the Court of Justice”), the European Court of Human Rights (“the ECtHR”) and the courts in this jurisdiction) in that regard. Neither party has asked for a reference to the Court of Justice, and I am of the view that no reference is necessary in circumstances where the resolution of this appeal turns on the application of clear law to the facts.

### **Background**

3. The surrender of the appellant is sought on foot of a European arrest warrant dated 21 April 2020 (“the Warrant”) issued by the Office of the Public Prosecutor at the Court of Belluno, Italy (“the issuing judicial authority”). The appellant had been convicted and sentenced *in absentia* on 11 April 2018 (rendered final on 7 May 2018). He is sought for the purpose of serving the balance of an eight-year sentence (being seven years and six months) for ‘illicit trafficking in narcotic drugs and psychotropic substances’ imposed upon him following a trial *in absentia* in 2018. Prior to conviction, the appellant spent six months in pre-trial detention in Italy. He was released on 1 March 2015. A letter from the issuing judicial authority provided by the requesting state sets out that the appellant “[f]ollowing his release ... appointed a defence counsel of his choosing on 3 March 2015 and elected domicile in Italy ... where the judicial acts were to be served”.
4. The parties are agreed that at the time of his release from prison in Italy the appellant was aware that proceedings were in being against him. It appears that the appellant could not have known the precise date and place of his trial because such details were not available at the time of his release as there had been no judicial decision that he would be put on trial. Absence of precise knowledge of the date and place of trial is not, the parties agree,

a bar to surrender in light of the decision of the Court of Appeal in *Minister for Justice v Szamota (No 2)* [2023] IECA 143 (“*Szamota*”) which was based upon the developing case law of the Court of Justice. To that extent, the parties agree that the principles set out by this Court in *Minister for Justice v Zarnescu* [2020] IESC 59 (“*Zarnescu*”) require updating in light of those subsequent decisions of the Court of Justice. I address those decisions below.

5. A copy of the mandate appointing defence counsel was provided by the requesting state. The mandate is signed by the appellant and bears the date 2 March 2015. It records that it was filed with the relevant court office on 3 March 2015. The appellant highlights that the “document makes no reference to the possibility of a trial proceeding *in absentia*” and that the final line states that “[t]he defence lawyer refuses to accept notification of acts directed to the defendant”. On the other side, the respondent draws attention to the fact that the document “included an effectively blanket instruction to conduct the case on his behalf with ‘all legal powers ... as well as every right ... at every stage and level of the criminal proceedings’”.
6. The mandate grants defence counsel power to seek immediate trial, request or object to an abbreviated trial, request plea bargaining, request certain sentences and includes references to suspended sentences and community service. It also provides counsel with the power to file an appeal and to represent the appellant before the Supreme Court of Cassation. Of some note is that the appellant did not file any affidavit in the High Court setting out his knowledge or understanding of the position regarding trial and his understanding of the nature of the document he had signed.
7. Following his release, at an unspecified date or dates during the criminal process, court papers (“the judicial acts”) were delivered to the address provided by the appellant but were not collected. The judicial acts were then served on his duly appointed defence

counsel in accordance with Article 161, paragraph 4 of the Italian Code of Criminal Procedure. The information sent by the issuing judicial authority also indicates that all the judicial acts served on the requested person were translated into English.

8. On 3 February 2016, it was ordered by a preliminary investigations judge in Belluno that the preliminary hearing proceed in the appellant's absence. The Italian judge found that the appellant was represented by a defence lawyer of his choice, had declared or elected domicile, was fully aware of the proceedings, had been formally notified of the scheduled hearing and had expressly declared to waive attending the hearing. The judge also noted "the regularity of the service of the notice scheduling the preliminary hearing". It is also of some note that on the same day the judge refused to proceed in the absence of another co-defendant because the relevant terms of the Italian Code of Criminal Procedure were not met. The judge ordered that the other defendant be served with the notice scheduling the hearing, together with the report of the hearing and the request for committal to trial by hand by the judicial police.
9. With respect to the hearing before the court of trial (the Court of Belluno) on 11 January 2017, that court found that the appellant was legally represented by a defence lawyer of choice, had declared or elected domicile and was fully aware of the proceedings. It did not record that he was formally notified of the scheduled hearing or that he had expressly waived attendance, but having regard to Article 420-*bis* of the Italian Code of Criminal Procedure, it ordered the hearing of the case in the absence of the appellant.
10. The Warrant at issue indicates that the appellant will have a right to request a retrial or appeal on the merits after his surrender. In answer to a query raised by the High Court pursuant to s. 20 of the European Arrest Warrant Act, 2003 ("the 2003 Act"), the issuing judicial authority explained that under Article 629-*bis* of the Italian Code of Criminal Procedure, the annulment of a judgment requires the appellant to demonstrate that the

declaration that he was absent was made in violation of Article 420-*bis* of the Code and that the failure to appeal against the judgment was not his fault. In further correspondence, the issuing judicial authority, in essence, confirmed that a retrial or appeal is not automatic and, in order to be permitted, the proceedings must fall within the circumstances expressly provided by law.

### **Fair Trial, the Right to be Present and Refusal to Surrender**

11. The right to a fair trial under Article 6 of the European Convention of Human Rights (“the Convention”) and Articles 47 and 48 of the Charter of Fundamental Rights of the European Union (“the Charter”) includes, implicitly, a right to be present at the trial. The right to be present at trial may be waived either expressly or implicitly, provided that certain conditions are met.
12. Council Framework Decision 2002/584/JHA on the European arrest warrant and the surrender procedures between Member States (“the 2002 Framework Decision”) and the 2003 Act specifically make provision for the situation where a requested person was not present at their trial. As there was a variety of approaches to trials *in absentia* across Member States, the 2002 Framework Decision was an attempt to provide Member States with a means whereby they could be assured that fair trial rights were respected in so far as the right to be present was concerned. Council Framework Decision 2009/299/JHA, which concerned the enhancement of procedural rights and mutual recognition, (“the 2009 Framework Decision”) amended the provisions of the 2002 Framework Decision (and other Framework Decisions concerning mutual recognition of criminal decisions) by inserting Article 4a which provides a list of situations where non-recognition of decisions given in the absence of the person is prohibited. The recitals to the 2009 Framework Decision make express links with the fair trial right provided for in Article 6 of the Convention.

13. In Case C-399/11 *Melloni* ECLI:EU:C:2013:107, the Court of Justice described the amended provisions of the 2002 Framework Decision as harmonising the conditions of execution of European arrest warrants across Member States. The Court of Justice said that the insertion of Article 4a by the 2009 Framework Decision “is intended to remedy the difficulties associated with the mutual recognition of decisions rendered in the absence of the person concerned at his trial arising from the *differences as among the Member States in the protection of fundamental rights*” (para [62], emphasis added).
14. The 2002 Framework Decision makes no other explicit reference to fair trial rights. It states however that it does not have the effect of modifying the obligation to respect fundamental rights and principles enshrined in Article 6 of the Treaty on European Union. The 2003 Act makes explicit provision for respect for fundamental rights. Section 37(1)(a)(i) of the 2003 Act provides that a person “shall not be surrendered under this Act if— (a) his or her surrender would be incompatible with the State’s obligations under— (i) the Convention”. Prior to its repeal by s. 31 of the European Arrest Warrant (Amendment) Act, 2024, s. 37(1)(b) had similarly provided for the refusal to surrender in circumstances where surrender would constitute a contravention of constitutional rights.
15. Even in the absence of an express ground of refusal, it has been recognised by the Court of Justice that it is possible for an executing judicial authority to refuse surrender where there is a real risk of a breach of fundamental rights (including a real risk of an unfair trial). Before surrender can be refused because of such a risk, the principle of mutual trust requires a detailed two-step test to be engaged with by the executing judicial authority which, broadly, requires that there be systemic and generalised deficiencies of justice in the issuing state evident by engagement with the issuing judicial authority and, that a detailed and specific consideration of the facts as they relate to the risk to the requested person be carried out (Joined Cases C-404/15 PPU and C-659/15 PPU *Aranyosi and*

*Căldăraru* ECLI:EU:C:2016:198; Case C-216/18 PPU *Minister for Justice and Equality (Deficiencies in the system of justice)* ECLI:EU:C:2018:586 (“LM”); Joined Cases C-562/21 PPU and C-563/21 PPU *Openbaar Ministerie (Tribunal established by law in the issuing Member State)* ECLI:EU:C:2022:100).

16. The 2002 Framework Decision and the 2003 Act, however, provide specifically for fair trial concerns arising from trials *in absentia*. As a result, the two-step test does not apply (there is no need to look for systemic and generalised deficiencies). Instead, the executing judicial authority assesses the individual circumstances of the trial of the requested person from the information set out in the European arrest warrant, supplemented, where required, by the information provided by the issuing judicial authority. I will now turn to the relevant legislative provisions.

### **Legislative Overview**

#### Council Framework Decision 2002/584/JHA as amended and the European Arrest Warrant Act, 2003

17. As originally drafted, Article 5(1) of the 2002 Framework Decision provided that an executing Member State could require certain guarantees in respect of trials *in absentia*. It provided that a person should not be surrendered if they were not present at their trial and were not notified of the time when, and place at which, they would be tried unless the issuing judicial authority gave an adequate assurance that they would have a retrial or be given the opportunity for a retrial, for which they would be told the date and place and be permitted to attend.
18. The 2002 Framework Decision was amended by the 2009 Framework Decision because of difficulties arising from different legal meanings of trial *in absentia* across the Member States of the Union. Recital 3 of the 2009 Framework Decision records that the adequacy of the assurance is to be decided by executing authorities and “it is therefore difficult to

know exactly when execution may be refused”. Indeed, in Broderson, Glerum and Klip, *The European Arrest Warrant and In Absentia Judgments* (Maastricht Law Series 12, EIP 2020) 68, it is stated that in the negotiations leading to the 2009 Framework Decision, the definition relating to a decision rendered *in absentia* “continued to cause problems (...), notably since the term ‘in absentia’ has different legal meanings in the law of the Member States”. The amendment led to the insertion into the 2002 Framework Decision of the new Article 4a.

19. Article 4a permits (but does not require) an executing judicial authority to refuse to surrender where there was a trial at which the person did not appear in person (the 2009 Framework Decision does not use trial in absentia but as this is the phrase used by the Court of Justice I will follow that approach) 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”, has been given certain information or will have certain rights. That information and those rights were then incorporated into the form, at point (d) of the European arrest warrant which is annexed to the 2002 Framework Decision. This new form permits an issuing judicial authority to indicate which, if any, of the procedural requirements have been met by ticking the relevant box. There is some difference between the manner in which the conditions have been laid out in Article 4a(1) and how those conditions are reflected in the new point (d) of the form of the European arrest warrant but this has no relevance to the issues in this appeal.
20. Section 45 of the 2003 Act, which initially gave effect to Article 5(1) of the 2002 Framework Decision, has been amended at various times since its enactment. The most significant for these proceedings is the amendment made to s. 45(1) by s. 23 of the European Arrest Warrant (Application to Third Countries and Amendment) and

Extradition (Amendment) Act, 2012 as part of the transposition of the provisions of the amended 2002 Framework Decision. The amendment to the 2003 Act was as follows:

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

21. The use of “*shall*” raised concerns as to whether there was a restriction on surrender even in circumstances where the 2002 Framework Decision would permit it. On one view, the section required the High Court to refuse every application for surrender which did not comply with the precise scenario set out in the Table/point (d). On the contrary, as the Court of Justice had determined, because this was an optional ground for refusal to surrender, that it seemed that EU law considered that it was permissible to surrender where the executing judicial authority could be satisfied that the defence rights of the requested person had been fully respected, despite the trial *in absentia* (Case C-108/16 PPU *Dworzecki* ECLI:EU:C:2016:346). Through a series of cases in this jurisdiction, it was accepted that the word “shall” ought not to be interpreted as requiring the High Court to refuse surrender where it was satisfied that defence rights had been met (*Minister for Justice v Skwierczynski* [2018] IECA 204 and *Zarnescu*).
22. In any event, the Oireachtas, by s. 29 of the European Arrest Warrant (Amendment) Act, 2024, provided for an amendment to s. 45 by changing the first part of the section to the High Court may refuse to order the surrender of a person under this Act; in effect replacing the word “shall” with the word “may”. The Bill which first proposed this change was initiated in 2022 following the initiation of infringement proceedings against Ireland by

the European Commission in 2020 in respect of various concerns about transposition of the 2002 Framework Decision. The overall infringement proceedings are still active. Legislative change may have been the chosen option because, despite the case law on its interpretation, it is possible that there was a common view that Ireland's transposition of Article 4a imposed a mandatory ground for refusal rather than an optional one (Broderson, Glerum and Klip, 'The European arrest warrant and *in absentia* judgments: The cause of much trouble' (2022) 13(1) NJECL 7, 20).

23. Section 45 of the 2003 Act was also amended to deal with warrants issued under the Trade and Cooperation Agreement, but these amendments do not affect the substance of the section.
24. There can be no doubt that the amended version of s. 45 of the 2003 Act incorporates Article 4a of the 2002 Framework Decision into Irish law by creating an optional ground for non-surrender and by including the Table (which is in the Annex to the 2002 Framework Decision) into s. 45(2) itself. The Table reflects point (d) in the form of the European arrest warrant. The Table set out in s. 45(2) provides for four situations where trial *in absentia* will not prevent surrender. These are if:

“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”.

- 25.** Separately, part 3.4 of the Table also permits the issuing judicial authority to give a guarantee that on surrender the person will be informed of their right to a full retrial/appeal.

Part 3.4 reads as follows:

“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.”

26. Where the issuing judicial authority ticks a box applying points 3.1b, 3.2 or 3.3, it must provide information about how the relevant condition has been met. The absence of a reference to 3.1a reflects that such a situation is the optimum one where, once served on an identifiable date with a summons including a warning as to the consequence of not appearing, there is maximum clarity that a person’s fair trial rights will have been respected. Similarly, 3.4 reflects a straightforward assurance that the requested person will be informed of their right to a full retrial/appeal and of the time frame for claiming that right. The other situations are not so capable of such simple definitive proof and thus require information to demonstrate how the right has been respected. If the executing judicial authority takes the view that it does not have sufficient information to validly decide on surrender, it must request any necessary additional information in accordance with Article 15(2) of the 2002 Framework Decision. The executing judicial authority is entitled to adjudicate, having received such further information from the issuing judicial authority as is required, on whether the totality of the information so provided demonstrates compliance with the condition indicated (Case C-271/17 PPU *Zdziaszek* ECLI:EU:C:2017:629 at paras [103]-[104]).
27. As stated above, lack of compliance with any one of the conditions does not require a judicial authority to refuse surrender. Article 4a is permissive in that it allows for surrender to be refused if a condition is not met. From the decision in *Dworzecki* onwards, the Court of Justice has been clear that the executing judicial authority may examine all the circumstances and the information provided for the purpose of assessing whether the rights of defence of the requested person have been respected (see for example *Zdziaszek* at para [108] and Joined Cases C-514/21 and C-515/21 *Minister for Justice and Equality*

(*Lifting of the Suspension*) ECLI:EU:C:2023:235 (“*LU and PH*”) at paras [76]-[77]). The Court of Justice stated in *LU and PH* that making it impossible for executing judicial authorities to take account of the circumstances of the case would have the effect of “transforming the refusal to surrender from an exception into a general rule” (para [77]).

Directive (EU) 2016/343

28. Directive (EU) 2016/343 of the European Parliament and of the Council (“the 2016 Directive”) concerns, *inter alia*, the right of accused persons to be present at their trial. As Recital 50 of the 2016 Directive records, in accordance with Protocol No 21 to the Treaty on the Functioning of the EU, Ireland has not opted in to the 2016 Directive. Thus, this Directive is not binding on the State. It is however binding on all other Member States (except Denmark). In those circumstances, it is a legitimate concern that Ireland’s sovereignty is not compromised by an indirect incorporation of the 2016 Directive into the 2002 Framework Decision by decisions of the Court of Justice. Indeed, Article 2 of Protocol 21 expressly states that no decision of the Court of Justice interpreting a Title V measure to which we have not opted in to shall be “binding upon or applicable” in Ireland. This Court has recently pronounced on this issue in *NS v Minister for Justice* [2025] IESC 48 (judgment of Collins J.). I agree therefore with the judgment delivered by Hogan J. in respect of the caution that must be exercised regarding case law dealing with a Directive which is not binding on this State.

29. An analysis of the decisions of the Court of Justice on the 2016 Directive, however is, in my view, relevant to any interpretation of Article 4a of the 2002 Framework Decision. This is not merely because the judgments have sometimes concerned both the 2016 Directive and Article 4a, but primarily because the Court of Justice has interpreted the right to be present at trial as a fair trial right. As this fair trial right has its origin in Article 6 of the Convention (and is now reflected in Articles 47 and 48 of the Charter), the

principles established by the ECtHR have relevance to *the interpretation of both* the 2002 Framework Decision and the 2016 Directive. The case law of the Court of Justice, referred to below, makes certain cross-references between those sources of EU law and the corresponding obligations under the Convention. What emerges from the case law is what I consider to be a heightened awareness of the importance of the right to be present as an integral part of the right to a fair trial. As will be demonstrated, an executing judicial authority is *required* to surrender where a condition in point (d) is met and *may* surrender where, despite a condition not being met, it has been established that defence rights have been respected in respect of the trial *in absentia*. The importance for the High Court as an executing judicial authority is that, in circumstances where one of the conditions in point (d) is not met, it would appear to be highly unlikely, if not impossible, that the High Court *could be* satisfied that defence rights were respected in the issuing State in those situations where the Court of Justice has decided that obligations under the 2016 Directive *were not met*.

- 30.** Article 8(1) of the 2016 Directive guarantees the right of accused persons to be present at their trial. Article 8(2) permits trials *in absentia* if either of the following two conditions are met:

“(a) the suspect or accused person has been informed, in due time, of the trial and of the consequences of non-appearance; 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.”

- 31.** Those conditions, while worded slightly differently, appear in broad terms at least, to reflect the conditions set out in 3.1a, 3.1b and 3.2 of point (d) of the form of the European arrest warrant annexed to the 2002 Framework Decision as amended. Article 8(3) goes

on to provide that “[a] decision which has been taken in accordance with paragraph 2 may be enforced against the person concerned”. Where the conditions of paragraph (2) are not met, Article 9 provides that the accused person shall “have the right to a new trial, or to another legal remedy, which allows a fresh determination of the merits of the case, including examination of new evidence, and which may lead to the original decision being reversed.”

### **The High Court Proceedings**

32. From the papers before this Court, it appears that the High Court sought further information from the issuing judicial authority regarding the ticking of the box 3.4 in point (d) of the Warrant concerned, which provides a guarantee that on surrender the person will be informed of their right to a full retrial or appeal. It is now conceded that there is no such full guarantee. It is unsatisfactory that a contrary indication was initially given by the issuing judicial authority. The principle of mutual trust depends on a high degree of confidence in the information that is sent by an issuing judicial authority. It is not entirely clear why the High Court sought further information on this aspect (and others) of the Warrant (as to whether it was a contingent right) prior to the points of objection being lodged, but it has to be recognised that our courts (and legal practitioners) have gained a lot of knowledge about the legal systems of other Member States (and they ours) through the operation of the surrender procedures. There may well have been an understanding from many previous requests from Italian judicial authorities, that Italian law (at the time at least) did not provide for such an automatic retrial or appeal and thus clarification was correctly sought and was freely and properly given by the issuing judicial authority.
33. The points of objection filed were limited. In those points, the appellant stated that he awaited proof of his automatic entitlement to a retrial and that the Warrant *appears to evidence* that he had been sentenced without being informed of his trial date which was

said to be an abuse of process. A hearing took place on 24 September 2025 after which the High Court sought *further* information about the right to an *automatic* retrial. The information provided said that in order to request the revocation of the judgment, the appellant would have to demonstrate that they were declared absent in violation of the Italian Code and that through no fault of their own they were unable to appeal the sentence within the legal time limit (or that other exceptional reasons gave grounds to the Court of Appeal to rescind the judgment). Following the receipt of information from the issuing judicial authority, further submissions were made. No affidavit at any stage was filed by the appellant; however, as will become apparent, adducing evidence is not required by a requested person but is permitted.

34. On 14 November 2025, the High Court (Hunt J.) delivered an *ex tempore* decision. Having set out the relevant background and facts, the High Court considered the legal framework. The trial judge noted that upon surrender the appellant would be informed of his right to a retrial or appeal and that this right is not automatic. This finding is not under appeal.
35. The trial judge proceeded to analyse s. 45 of the 2003 Act stating that it transposed Articles 8 and 9 of the 2016 Directive into Irish law. This is incorrect because, as noted, Ireland has not opted in to the 2016 Directive. The High Court engaged, however, with the essential issue which was whether the defence rights of the appellant were respected in proceeding to trial *in absentia*. The High Court found that the evidence demonstrated that the appellant was aware of the proceedings. The trial judge also found that having been detained for six months, he was released only after appointing counsel and declaring a domicile, and further, that the appellant remained represented throughout. In so far as it is suggested that the appellant was released from pre-trial custody *after* appointing a lawyer, that seems to be incorrect; see the correspondence referred to above at para [3].

The trial judge was satisfied that the facts summarised therein satisfied the requirements of Article 8 of the 2016 Directive. There was, therefore, no reason to consider Article 9.

36. The High Court found that the appellant had knowingly absconded and absented himself from the proceedings. Hunt J. observed that in the decision of Case C-569/20 *Spetsializirana prokuratura (Trial of an absconded accused person)* ECLI:EU:C:2022:401 (“*IR*”), the Court of Justice held that a person who deliberately avoids a trial cannot later demand a retrial and that Recital 35 of the 2016 Directive confirms that trials *in absentia* without a retrial are permissible where an accused unequivocally waived the right to be present at the trial. In his view, the appellant’s conduct met such a standard. The Court held that in the circumstances the appellant’s rights were fully protected.
37. The Court found that the appellant knowingly absented himself from trial and that he could not now rely on the absence of an automatic retrial to prevent surrender. To refuse surrender would, in the view of the trial judge, undermine mutual trust between Member States and would disrupt the proper administration of justice. Hunt J. stated that the European arrest warrant regime is built on mutual trust and that the present case did not warrant an exception. He concluded that the necessary formal requirements were met, that there was no other bar to surrender and that the surrender would not breach the appellant’s fair trial rights. The Court thus ordered the surrender of the appellant.

### **Case Law**

38. There was general agreement between the parties as to the relevant case law. Many of the relevant principles are set out in the decision of this Court in *Zarnescu*.

Zarnescu

39. In *Zarnescu*, this Court (Baker J.) drew together the principles which emerged from a close examination of the relevant case law on trial *in absentia* in this jurisdiction and from the Court of Justice and the ECtHR. It is not intended to duplicate that analysis here.
40. The parties were also in agreement that some revision of those principles, concerning knowledge of the date and place of the trial, is required. As will be explained, in light of the specific facts and circumstances of this case and the developing case law, it is appropriate to look again at how the principles are expressly set out in *Zarnescu*.
41. In *Zarnescu*, the requested person had not appeared at the appeal hearing in Romania when the decision to convict and sentence him was affirmed. The issuing judicial authority had ticked boxes 3.1b and 3.2, but also 3.4 (the guarantee of a retrial). Mr Zarnescu had been represented by a lawyer mandated by him at the original hearing. At the appellate stage he sought an adjournment of the appeal to obtain a new lawyer and told the authorities of his work in Ireland and his address there. Notice of the adjourned date was sent to his address in Romania rather than Ireland. Based on its analysis of the law, this Court held that his defence rights had not been met, highlighting the lack of diligence on the part of the Romanian authorities.
42. The contest in that case was primarily addressed to knowledge of the trial resulting in the decision (meaning, according to the Court of Justice in Case C-270/17 PPU *Tupikas* ECLI:EU:C:2017:628, the instance at the end of which the decision was handed down). As a result, the principles had less to say about the extent of the knowledge required of the *consequences* of a failure to turn up at trial (without a guarantee of a retrial) before such a trial may be said to have satisfied defence rights.
43. Similarly, the judgment did not dwell on how defence rights can otherwise be satisfied, i.e. by mandating a lawyer to appear on your behalf in your absence. Thus, the principles

set out at para [90] of the judgment in *Zarnescu* can be enhanced by further refinement beyond the refinement agreed by the parties herein. The agreement between the parties was an acceptance of the decision of the Court of Appeal (Collins J. delivering judgment) in *Szamota* where he raised doubts that the references in (g) and (m) of the list of principles in *Zarnescu* to “date and place” of the trial accurately portray the (more limited) extent of the knowledge required. *Szamota* will be addressed further below.

44. I will discuss further below why, in light of other case law, it is appropriate to give even greater refinement to the *Zarnescu* principles than that proposed by the parties. It is important to note that *Zarnescu* remains an important and useful decision but to the extent that it sets down principles it must now be regarded as having been overtaken by legal developments including by this judgment.

#### The European Court of Human Rights

45. The keystone of the right to be present for one’s trial is the fair trial guarantee in Article 6 of the Convention. The developments in EU legislative provisions concerning fair trial rights, and the interpretation given by the Court of Justice to those provisions, respects that provenance. The leading decision on Article 6 is *Sejdovic v Italy* App No 56581/00 (ECtHR, 1 March 2006) (“*Sejdovic*”). The ECtHR held that an individual’s right to a fair trial would be breached in circumstances where, following a conviction *in absentia*, that individual was unable to be re-tried. Importantly, that statement of principle does not apply where the individual in question could be shown to have waived (explicitly or implicitly) the right to appear or had intended to escape trial.
46. *Sejdovic* built on an earlier decision of the ECtHR in *Jones v the United Kingdom* App No 30900/02 (ECtHR, 9 September 2003) (“*Jones*”). Citing *Jones*, the ECtHR in *Sejdovic* stated that before an individual could be said to have implicitly waived their right to be present at their trial under Article 6 of the Convention “it must be shown that [an accused]

could reasonably have foreseen what the consequences of his conduct would be”. Waiver must be established in an unequivocal manner. As to how the Court might approach evidence of waiving the right, the ECtHR observed at para [88]:

“a person charged with a criminal offence must not be left with the burden of proving that he was not seeking to evade justice or that his absence was due to *force majeure* ... At the same time, it is open to the national authorities to assess whether the accused showed good cause for his absence or whether there was anything in the case file to warrant finding that he had been absent for reasons beyond his control”.

#### The Court of Justice of the European Union

47. The importance of *Sejdovic* is apparent from *Dworzecki* where the Court of Justice used almost identical language to that in *Sejdovic* (at para [86]) to describe the waiver of the right to be present at trial within the context of Article 4a of the 2002 Framework Decision. The Court of Justice stated at para [42]:

“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 the gravity of the criminal offence with which the accused is charged and does not run counter to any important public interest.”

48. The Court of Justice stated that “[t]he right to a fair trial enjoyed by a person summoned to appear before a criminal court thus requires that he has been informed in such a way as to allow him to organise his defence effectively” (para [43]). The Court went on to clarify in that paragraph that the list in Article 4a(1)(a)(i) (which combines parts 3.1a and 3.1b of point (d) on service/information of the trial) was not an exhaustive list of the circumstances in which surrender could be ordered following a trial *in absentia*. Crucially, a court may “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” (para [50]). It was held

that “the executing judicial authority may thus have regard to the conduct of the person concerned. It is at this stage of the surrender procedure that particular attention might be paid to any manifest lack of diligence on the part of the person concerned, notably where it transpires that he sought to avoid service of the information addressed to him”. In *Dworzecki* however, the Court of Justice rejected the contention that the service of a summons on an adult belonging to the same household as the requested person was sufficient of itself to satisfy defence rights, even where the adult undertook to pass on the summons.

49. In Case C-416/20 PPU *Generalstaatsanwaltschaft Hamburg* ECLI:EU:C:2020:1042 (“*TR*”), a decision which postdates *Zarnescu*, it was held that the executing judicial authority was entitled to refuse surrender unless at least one of the conditions set out in Article 4a(1) is met (para [38]). This paragraph was also cited in the recent judgment of Case C-798/23 *Abbottly* ECLI:EU:C:2025:763 at para [38]. Where one of the conditions is met, there is a requirement to surrender (*TR* at para [41], citing *Tupikas*). The conditions in the Framework Decision provide an exhaustive list of the grounds for non-execution of the warrant (para [47]), thus if the information in the warrant (together with any further information) complies with a condition in Article 4a, the warrant must be executed despite the trial *in absentia* (see also *Zdziaszek* at paras [98]-[109]).
50. *TR* is also an important decision addressing whether the legality of the surrender depends on the fulfilment by the requesting state of the conditions laid down in the 2016 Directive. Citing *LM*, the Court of Justice reiterated that a refusal to execute a European arrest warrant is intended to be an exception which must be interpreted strictly. The Court repeated that the new Article 4a “effects a harmonisation of the conditions of execution” of a European arrest warrant in trial *in absentia* situations “which reflects the consensus reached by all the Member States regarding the scope to be given under EU law to the

procedural rights enjoyed by persons convicted *in absentia*” (citing *Melloni*). The Court of Justice said that the EU legislature therefore adopted the approach that the exhaustive list of circumstances in Article 4a must be regarded as not infringing the rights of the defence and thus the executing judicial authority is obliged to surrender once one of those conditions is met (paras [40]-[41]).

51. The Court of Justice in *TR* stated that any possible non-conformity with the 2016 Directive by the issuing Member State did not constitute a ground for refusal. Arguably, a separate ground for refusal, i.e. a breach of the right to a fair trial could arise if the non-conformity is based upon a systemic and generalised deficiency in the national system of justice (a failure of national law) and which operated in a precise and specific way to the detriment of the requested person. Therefore, while there is a potential for conflict between Article 6 of the Convention and the 2002 Framework Decision generally, no such conflict arises in this appeal. In any event, the Court of Justice, within its later decisions on the 2016 Directive, appears to align with the jurisprudence of the ECtHR on Article 6 and it is likely that any possible gap between the interpretation of fair trial rights will narrow given that Article 4a and Article 8 of the 2016 Directive have the Convention right as their origin.
52. In *TR*, the Court of Justice reiterated the protections in respect of the matters set out in Article 4a and emphasised that the facts had to be addressed in detail by the referring court. The Court repeated that the executing judicial authority may still surrender the requested person if defence rights have been met, by referring to a situation where a person may have sought to avoid service of the information addressed to them or to avoid contact with their lawyers. At paras [51] and [52], the Court of Justice confirmed a broad application of what was outlined in *Dworzecki*, in holding that there was an option to surrender when, taking into account all of the circumstances, defence rights have been respected in the absence of the specific conditions in Article 4a1(a) and (b) being satisfied.

53. Finally, the Court noted that the fact that the 2016 Directive could not be relied upon to prevent the execution of a European arrest warrant does not affect the absolute obligation on the issuing Member State to comply within its legal system with the provisions of EU law; even where the deadline for transposition has passed, the surrendered person may rely on its terms (para [55]).
54. In light of the decision in *TR*, the obligation that rests on the High Court to surrender a requested person where the conditions in the Table set out in s. 45(2) are met ought to be reflected in any revised *Zarnescu* principles. Indeed, it was recognised by Baker J. in *Zarnescu* that in accordance with Recital 6 to the 2009 Framework Decision, the discretion to refuse return is not unlimited and that if the conditions in Article 4a are met, return should not be refused (para [16]).
55. In a decision postdating *Zarnescu*, the Court of Justice was asked to consider the situation where a decision to lift the suspension of a custodial sentence followed a trial *in absentia* of the requested person. In *LU and PH*, in response to a request for a preliminary reference from the Court of Appeal, it was stated that where the suspended sentence was revoked on account of a new criminal conviction imposed *in absentia*, then the conditions set out in Article 4a(1) must be met in respect of that second conviction. The Court of Justice emphasised the factual nature of the enquiry of “the circumstances specific to each case” as to whether surrender could be refused under Article 4a of the 2002 Framework Decision and repeated what was said in *TR* regarding avoidance of service of proceedings and contact with lawyers (paras [76]-[78]).
56. A number of cases dealing directly with the 2016 Directive were relied upon by the parties. I approach these cases mindful of the position that this Directive is not binding on Ireland.
57. In *IR*, a Bulgarian trial court referred the question of whether it could hold a trial *in absentia* in circumstances where an indictment had been served on IR (the accused)

following which he indicated an address at which he could be contacted. He could not be summoned despite attempts made to do so or to otherwise contact him. He was represented by a court appointed lawyer. The referring court said that there was uncertainty as to procedural safeguards which the accused person enjoyed where, after being notified of the first indictment and before the commencement of the judicial stage of the criminal proceedings, that person had absconded. The court requested a preliminary ruling on the interpretation of Article 8(2)(b) of the 2016 Directive and of Article 4a of the 2002 Framework Decision (on the basis that it was possible that he might be found on the territory of another Member State). The Court of Justice held the reference inadmissible in so far as it relates to the 2002 Framework Decision. did not expressly address Article 4a. The Court held that a person could be deemed to have foregone their right to be present at trial where there were “precise and objective indicia” that they were deliberately avoiding receipt of information as to the date and place of the trial. This could occur where they deliberately communicated an incorrect address to the national authorities. Making express reference to *Sejdovic*, the Court of Justice said that nothing in Article 6 of the Convention prevented a waiver freely made, either expressly or tacitly, of the guarantees of a right to a fair trial. The waiver has to be established in an unequivocal manner and must be attended by minimum safeguards. Such a waiver is found where it is established that the person has been informed of the existence of the criminal proceedings, 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. For the mandate to satisfy the condition under Article 8(2)(b), the person concerned must themselves have entrusted a lawyer (including a court appointed one) with the task of representation.

58. In response to this Court’s request for further case law on what is meant by “consequences”, the parties referred to two further relevant cases, Case C-644/23 *Stangalov* ECLI:EU:C:2025:16 and Case C-135/25 PPU *Kachev* ECLI:EU:C:2025:366.
59. *Stangalov* arose from a second reference from Bulgaria in the domestic proceedings against IR. The referred question in *Stangalov* asked whether the 2016 Directive precluded national law which did not entitle a person convicted *in absentia* to a new trial where they absconded after receiving a preliminary indictment drawn up in the pre-trial investigative stage thereby preventing the authorities from notifying them of the indictment and date and place of the trial, and where they were defended by a court appointed lawyer with whom they have no contact. This question raises both similarities and differences with the present case. This appeal is similar in that, as in *Stangalov*, the appellant absconded at the preliminary investigation stage and therefore before the trial date was set. Unlike in *Stangalov*, this appellant was represented by a lawyer to whom he gave a mandate.
60. The Court of Justice was satisfied that if the final indictment corresponds to the preliminary indictment and is sent and actually delivered to the address given by IR, that could constitute precise and objective indicia to support the finding that IR, having been informed of the charges against him and therefore having sufficient information that he was going to be brought to trial, prevented the authorities from informing him officially of the trial by leaving the address he communicated to them with the intention of evading justice. Importantly, the fact that it was not certain at the pre-trial investigation stage that the preliminary indictment would be followed by a final one *did not prevent* that finding. A second question raised the issue of the role of the court where national law appeared to contradict the minimum rules set out in the 2016 Directive. The Court of Justice held that

if that was the case, the national courts were bound to disapply national law without having to request or await the prior setting aside of that national provision.

61. In the case of *Kachev*, the Court of Justice provided an even more detailed analysis of Article 8 of the 2016 Directive. In that case, MST (the accused) and his court appointed lawyer were served with a preliminary indictment which required MST to periodically sign a police register in his place of residence. He was told not to leave that place and to surrender himself in the event of being summoned. The Court said that a person could only be deprived of a right to a new trial if the conditions laid down in Article 8(2) were satisfied. Points (a) and (b) of Article 8(2) were observed to be applicable alternatively and that they each set out two cumulative conditions, the first of which requires that the person concerned is informed of the trial. A court must have regard to the diligence of both public authorities and of the person convicted *in absentia*:

“Consequently, any precise and objective indicia that that person, 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 are relevant for the purpose of assessing that same condition” (para [35]).

That may be satisfied where the person deliberately gives an incorrect address or is no longer at the address they communicated to the authorities. Courts can take into account that the communication was sent to the address, but this holds true only if the authorities have made reasonable efforts to locate that person and to summon them in person, or by other means provide them with official information as to the date and place of the trial. Reference was made to Article 34(1)(b) and (c) of Regulation (EU) 2018/1862 which allows Member States, for the purposes of communicating the place of residence or domicile of persons, to enter SIS (Schengen Information System) alerts on persons

summoned or sought to be summoned before the judicial authorities. Where there is information that a person has travelled to another Member State, the competent authorities are required to enter an SIS alert in order to be regarded as having made ‘reasonable efforts’.

62. While the first step in the conditions under Article 8(2) of the 2016 Directive is that the person must have been informed of the trial, the second step in each respective condition requires that the suspect or accused person:

“(a) ... has been informed, in due time ... of the consequences of non-appearance; *or*  
(b) ... is represented by a mandated lawyer, who was appointed either by the suspect or accused person or by the State” (emphasis added).

63. As for information about the consequences, the Court of Justice noted that while such information may be communicated when the person is summoned, it cannot be ruled out that it may have already been sent to them during the prior criminal proceedings. This may be so where the person has been made aware of the fact that they would be tried in their absence if they were to abscond, for example, by no longer being contactable at the address or by infringing detention measures. If that information is not actually communicated, then the second step is not satisfied. It cannot be deemed that the person received the information even if the person absconded at the pre-trial stage knowing that they would probably be brought to trial. Such knowledge alone does not enable that person to understand the consequences of failing to appear at that trial.

64. On the separate issue of representation by a mandated lawyer, that requires that the person must themselves have *entrusted* a lawyer (and that may be a court-appointed lawyer) with the task of representing them at the trial *in absentia*. The mere fact of defence by a court-appointed lawyer throughout the judicial proceedings is not enough to satisfy the second step of Article 8(2)(b). The Court distinguished the case from *Stangalov* because unlike

in that case, MST had been represented by a lawyer appointed before he absconded. In those circumstances the Court stated “[i]t cannot therefore be ruled out that that lawyer was in contact with M. S. T. at that time”. The Court of Justice said however that contact between the person convicted *in absentia* and a court appointed lawyer which occurred solely over the course of the pre-trial stage cannot be regarded as being sufficient to show that that person was represented during their trial *in absentia* ‘by a mandated lawyer’ within the meaning of Article 8(2)(b) of the 2016 Directive. The issue, on the basis of the information available to the referring court, was whether “M. S. T. unequivocally entrusted the court-appointed lawyer with the task of representing him, in his absence, before the trial court”.

65. *Kachev* is therefore a significant clarification of the law in respect of the 2016 Directive and of the duties imposed on authorities before a trial *in absentia* can be permitted in the absence of a guaranteed right to a retrial of the person convicted and sentenced. This is not *per se* binding on Ireland and can only have any relevance to the High Court as an executing judicial authority in so far as it may assist in the adjudication on whether defence rights have been respected *in the issuing state*. There is a particular duty imposed upon the competent authorities to make reasonable efforts to locate and also to inform a person of the consequences of failing to appear at their trial. Relying on the fact that a person was represented by a mandated lawyer requires that the person must have unequivocally entrusted to their court-appointed lawyer a mandate to represent them before the trial court in their absence.

66. Since the hearing in the present case, the Court has become aware of further cases in which the Court of Justice addressed the issue of trial *in absentia*. These cases arose either from Council Framework Decision 2008/909/JHA concerning rules under which a Member State with a view to facilitating social rehabilitation is to recognise a judgment and enforce

the custodial sentence handed down by a court of another Member State, or from the 2016 Directive itself. These cases cross-reference many of the cases referred to above. As these were not relied upon by the parties, it must be taken that they were of the view that they did not add to the principles already established in the case law.

#### Further Case Law on Consequences

67. For completeness, I will address some of the other cases the parties relied upon. The appellant relied upon the decision of the UK Supreme Court in *Bertino v Public Prosecutor* [2024] 4 All ER 177, [2024] UKSC 9 (“*Bertino*”) as authority for the position that for an accused to reasonably foresee the consequences of their conduct, this will usually require them to have been warned in one way or another. In *Bertino*, Lord Stephens and Lord Burnett held that the evidence did not show that the requested person had unequivocally waived his right to be present at his trial. At para [54], the Court held that:

“It is apparent from these cases that the standard imposed by the Strasbourg Court is that for a waiver to be unequivocal and effective, knowing and intelligent, ordinarily the accused must be shown to have appreciated the consequences of his or her behaviour. That will usually require the defendant to be warned in one way or another.”

68. At an earlier point in the judgment, Lord Stephens and Lord Burnett also stated that *Sejdovic* left open “the possibility of a finding of unequivocal waiver if the facts are strong enough without, for example, the accused having been explicitly being [sic] told that the trial could proceed in absence”. The UK Supreme Court went on to opine at para [58] that “behaviour of an extreme enough form might support a finding of unequivocal waiver even if an accused cannot be shown to have had actual knowledge that the trial would proceed in absence”.

69. The appellant emphasised that the Court in *Bertino* disagreed with the lower court’s assessment that a “general manifest lack of diligence” was sufficient to establish that the accused had deliberately absented themselves from the trial. He stated that the Court interpreted the European case law as setting a relatively high bar for establishing waiver in the absence of actual knowledge on the part of the accused that the trial could proceed in their absence.
70. The respondent observed that the Court in *Bertino* noted that the ECtHR had carefully avoided drawing hard lines before stating “[c]ases are fact specific”. The respondent went on to say that the facts in *Bertino* differed from the present case. In *Bertino*, the requested person had not spent time in pre-trial custody and had never been formally arrested or charged. Lord Stephens and Lord Burnett found that he was not put on factual or legal notice of the charges against him. The respondent submitted that unlike in *Bertino*, the appellant in the present case was well aware that a prosecution was in being against him.
71. The appellant also relied upon *Minister for Justice v Szlachcikowski* (Stack J.) delivered on 24 May 2023, where the High Court refused surrender on the basis that the evidence did not go so far as to demonstrate that the requested person was informed that a decision would be made in his absence if he did not appear. The decision was upheld by Edwards J. in the Court of Appeal ([2024] IECA 119) who stated that:
- “for a waiver to be unequivocal and effective, knowing and intelligent, ordinarily the accused must be shown to have appreciated the consequences of his or her behaviour. That will usually require the defendant to be warned in one way or another. I readily accept that it will not be necessary in every case for evidence to be adduced that the requested person was expressly advised of the potential consequences of not turning up for his trial. Awareness of consequences could be established in other ways.”

72. The appellant also referred to the decision of Hyland J. in *Minister for Justice v McCarthy* [2026] IECA 22. We have been informed that the Minister intends to make an application for leave to appeal to this Court and it is not proposed to address the facts of that case. Furthermore, I will not address any legal issues surrounding ‘reasonable foreseeability’ as this is not required on the facts of this case.
73. The parties referred to decisions of the ECtHR, *Sibgatullin v Russia* App No 1413/05 (ECtHR, 24 September 2012) (“*Sibgatullin*”) and *Idalov v Russia* App No 5826/03 (ECtHR, 22 May 2012) (“*Idalov*”). The former decision dealt with the question of whether by leaving one country and travelling to a second country, there was an express or implied waiver of the right to confront witnesses in a trial in the second country for an offence allegedly committed in the first country. That was quite an extreme situation and thus, the relevance of *Sibgatullin* is limited. It did not directly address the right to be present but rather the express right to challenge witnesses. A right to be present at one’s trial incorporates the right to confront witnesses and the waiver of the right to be present will incorporate a waiver of the right to confront those witnesses.
74. The *Idalov* case was described in *Bertino* as an ‘exclusion’ case. The applicant in that case was present at his trial but was excluded by the trial judge because of his behaviour. What was in breach of Article 6 was the failure to warn him that if he persisted in the impugned behaviour, he ran the risk of being excluded from his trial. While this is again a different situation to the present case, it nonetheless lays emphasis on the importance of having knowledge of the waiver of the right to be present.

*Minister for Justice v Szamota*

75. Subsequent to the answers given by the Court of Justice in *LU and PH*, the Court of Appeal in *Szamota* gave a substantive judgment in which it returned the case to the High Court for the purpose of considering the issue as to the “knowledge of and/or participation in the

proceedings that resulted in his conviction” for the offence which triggered the suspended sentence, and to seek further information from the issuing judicial authority as required. Of importance to the present case is that the Court of Appeal noted that the relevance of *IR* was not challenged by the appellant in that case. Collins J. stated, correctly in my view, that “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”. This is the correct position because the Court of Justice has interpreted Articles 8 and 9 of the 2016 Directive in accordance with the Convention right to a fair trial and thus, if the Convention right is met, the High Court can be satisfied that, as a matter of the implementation of EU law i.e. the 2002 Framework Decision, defence rights have been met. This approach does not violate Ireland’s sovereignty.

76. The decision of the Court of Justice in *TR* had indicated that *non-conformity* of the national law of the issuing Member State with the 2016 Directive *did not permit refusal* to surrender, whereas the conditions in Article 4a reflect, albeit slightly differently worded, the conditions set out in the 2016 Directive. Where the conditions of the 2016 Directive are met and the fair trial rights under the Convention have thereby been respected, it is appropriate for the High Court to conclude that the rights of defence to be present at trial have been met. In that situation, the High Court may surrender in accordance with s. 45 of the 2003 Act.
77. Furthermore, Collins J. pointed out that in *LU and PH*, the Court of Justice picked up on language in *TR* that suggests for the purposes of Article 4a, the right to be present at trial may be effectively waived even when the person concerned was not aware of the date and place of his trial (because they had taken steps which prevented notice of their trial being

served upon them). That is, in effect, what the case law of the Court of Justice states: awareness of the criminal proceedings may, if other conditions are met (knowledge of consequences/mandate to a lawyer), be sufficient to demonstrate a waiver of the right to be present. That is precisely what is found in the subsequent cases of *Stangalov* and *Kachev* which deal with Articles 8 and 9 of the 2016 Directive. As Collins J. noted, however, there is no indication as to what considerations might indicate that surrender should be refused even when defence rights have been met. Given the repeated statements by the Court of Justice that refusal to surrender is intended to be an exception, it must be anticipated that it would only be in an exceptional case that the executing judicial authority could or would exercise that option.

### **Consequences**

78. As to the meaning of consequences, there was no real dispute between the parties in this appeal and the case law does not reveal any disputed interpretation. Article 4a of the 2002 Framework Decision as amended refers to the requested person being informed “that a decision may be handed down if he or she does not appear for the trial”. There is nothing in the 2002 Framework Decision or the case law that suggests that this must be given anything other than its ordinary and natural meaning. This means there must be an awareness that the trial will proceed and at the end of it a decision will be given on the guilt or innocence of the accused person and (where relevant a sentence will be handed down). In general, this is the extent of the knowledge that is required but there may be specific cases where a trial in the absence of the accused may violate fair trial provisions such as where a person was *excluded* without being *warned* of the consequences. This judgment does not propose to lay down the conditions under which a person may be surrendered if they have been excluded from their trial.

### **The onus of establishing waiver**

79. There is no onus on the requested person to prove that they were not seeking to evade justice or that their absence was due to *force majeure* (*Sedjovic* at para [88]). There is an initial burden on the issuing judicial authority to provide the necessary information and the executing judicial authority then makes its decision on whether the conditions in Article 4a(1) have been met based upon the information provided in the warrant, supplemented by additional information where the initial information is deemed insufficient (see for example *Zdziaszek* at paras [99]-[104]). Where the executing judicial authority is satisfied that one of those conditions is met, surrender must be ordered. The executing judicial authority may surrender if, having taken into account all the circumstances, it is satisfied defence rights have been respected (see for example *Zdziaszek* at paras [108]-[110]).
80. Where the requested person does provide evidence, this may be assessed as to relevance and credibility and further information may be obtained from the issuing judicial authority if required. The High Court, as the executing judicial authority, is entitled to make its decision having taken into account all of the evidence.

### **Zarnescu Principles Revised**

81. I am satisfied from the foregoing that the *Zarnescu* principles ought to be revised. In light of the clear statement of principle by the Court of Justice in *TR*, it is appropriate and uncontroversial to add a further statement of principle, namely that when one of the conditions set out in the Table in s. 45 is met, there is a requirement on the High Court to surrender. The subsequent case of *LU and PH* has also given further clarity to the approach to be taken under Article 4a. *Zarnescu* did not deal directly with the situation where knowledge of “consequences” or the giving of a mandate was at issue and it is appropriate to refer to those situations. Moreover, as subsequent cases from the Court of

Justice have dealt with fair trial rights in light of the 2016 Directive, it is also appropriate to have some regard to those cases in so far as they reflect matters concerning fair trial rights under the Convention.

82. It must also be stressed that as the case law of the Court of Justice develops on Article 4a, the principles set out in this judgment must be kept under review.
83. In so revising, I think it is important to bear in mind that the High Court, as the executing judicial authority, has two separate pathways to surrender: either where a condition in the Table is met (when surrender is mandatory) *or* where the defence rights of the requested person have otherwise been met (where surrender is optional).
84. In respect of conditions 3.1b, 3.2 and 3.3 which may have been ticked on the form, the High Court is entitled to address whether the information provided by the issuing judicial authority actually meets the conditions indicated (*Zdziaszek* at paras [103]-[104]). In respect of defence rights, the High Court must also assess all relevant information provided. The High Court must address any evidence provided by or on behalf of the requested person bearing in mind that there is no obligation to provide such evidence. Finally, where the trial *in absentia* was a result of the exclusion of the person due to misbehaviour, the importance of respecting defence rights would, in the absence of any decision of the Court of Justice to the contrary, require close consideration of the decisions of the ECtHR on the necessity to inform a person of the risks of their continued behaviour prior to excluding them from their trial. The principles may therefore be adapted and applied to that situation to the extent required for ensuring defence rights were met.
85. The revised principles are as follows:
  - a) The right of an accused person to appear in person at their trial is included in the right to a fair trial as provided for in Article 6 of the Convention and Articles 47 and 48 of

the Charter. (*Sejdovic* at paras [81]-[85]; *Melloni* at paras [47]-[54], [62]; *TR* at para [42]; *LU and PH* at para [73]; see also *Abbottly* at para [32])

b) Under the Convention and the Charter, the right to be present at one's trial may be waived. That waiver may be express or may be implied from all the circumstances. (*Sejdovic* at para [86]; *Melloni* at paras [49]-[54]; *Dworzecki* at para [42])

c) Where a person has been convicted after a trial held in their absence ('a trial *in absentia*'), the 2002 Framework Decision as amended requires an executing judicial authority to surrender a requested person under a European arrest warrant in certain circumstances and permits surrender in other circumstances. (*Dworzecki* at paras [50]-[51]; *TR* at paras [40]-[41] (citing *Melloni* at para [44] and *Tupikas* at para [55]) and at [51]-[53])

d) Section 45 of the 2003 Act transposes Article 4a and point (d) of the form of the European arrest warrant annexed to the 2002 Framework Decision as amended; the Table to s. 45(2) of the 2003 Act reflects point (d) (*Zarnescu* at paras [17]-[18]). References in these principles to Article 4a apply to those transposing provisions.

e) The surrender of a person tried *in absentia* is *required* where a condition set out in Article 4a(1) of the 2002 Framework Decision is met (*TR* at paras [38] and [41] (citing *Tupikas* at para [55]); *Abbottly* at para [31]). This is because fulfilling any one of those conditions guarantees that defence rights are met (*TR* at para [40] (citing *Melloni* at para [44]); *Abbottly* at para [32]).

f) The surrender of a person tried *in absentia* is *permitted* where defence rights have been met even if the conditions in Article 4a(1) have not been satisfied (*Dworzecki* at paras [50]-[51] referring to Article 4a(1)(a)(i); *TR* at paras [51]-[52] referring to Article 4a(1)(a) and (b); *LU and PH* referring to Article 4a(1)(a)-(d) at paras [75]-[76]). In circumstances where defence rights have been respected, surrender should only be

refused in exceptional cases (See generally *TR* at para [34] (citing *LM* at para [41]); *LU and PH* at para [77]; *Abbottly* at para [30]).

g) A person tried *in absentia* may not be surrendered where defence rights have been breached. (*Zarnescu* at para [90] principle (c); *TR* at paras [39]-[40] and [51]; *LU and PH* at paras [60]-[61] (citing *Sedjovic* at para [82]) and [73]; *Abbottly* at para [32])

h) Where the issuing judicial authority has indicated by way of ticking the box that part 3.1a of point (d) of the form has been complied with, no further information from the issuing judicial authority is required according to the terms of part 4 of point (d). That is sufficient compliance with s. 45 for the High Court, as the executing judicial authority, to order surrender. It is only in very particular circumstances that any further enquiry would be warranted. This could be in the situation where the issuing judicial authority has disclosed other information in the warrant that contradicts that statement or where the requested person puts evidence before the Court that part 3.1a was not complied with. If the High Court is initially satisfied as to the credibility of that evidence from the requested person and that it raises an issue as to whether defence rights have been met, then the High Court must revert to the issuing judicial authority for further information as to a) how that condition has been met and/or b) how it otherwise may be demonstrated that defence rights have been respected. (*Dworzecki* at paras [50]-[53]; *Zdziaszek* at paras [97]-[110]; *LU and PH* at paras [81]-[82])

i) Where the issuing judicial authority has indicated by way of ticking part 3.4 that the person will have the opportunity after surrender to be informed of the right to a retrial, no further information from the issuing judicial authority is required according to the terms of part 4 of point (d). That is sufficient compliance with s. 45 for the High Court, as the executing judicial authority, to order surrender. It is only in very particular circumstances that any further enquiry would be warranted. This could be in the

situation where the issuing judicial authority has disclosed other information in the warrant that contradicts that statement or where the requested person puts evidence before the Court that part 3.4 would not be complied with. If the High Court is initially satisfied as to the credibility of that evidence from the requested person and that it raises an issue as to whether defence rights would be met, then the High Court must revert to the issuing judicial authority for further information as to how that condition is met and/or how the issuing judicial authority may otherwise demonstrate that defence rights have been respected. Exceptionally, where the High Court has knowledge gained from operating the surrender system under the 2002 Framework Decision that the legal system of the issuing state may not in fact provide a guarantee of an automatic retrial, the High Court must ask for further information from the issuing judicial authority as to a) how the condition in 3.4 is met and/or b) how it otherwise may be demonstrated that the defence rights of the requested person were met. (*Dworzecki* at paras [50]-[53]; *Zdziaszek* at paras [97]-[110]; *LU and PH* at paras [81]-[82])

j) Where an issuing judicial authority relies upon 3.1b, 3.2 or 3.3, it is obliged under the 2002 Framework Decision to provide further information within the warrant in support of that reliance (part 4 of point (d) of the form). It is only if the information casts doubt that the relevant condition has been met that the High Court may be required to seek further information. If such a situation arises, the High Court must ask for further information from the issuing judicial authority as to a) how the condition is met and/or b) how the defence rights of the requested person were otherwise met. (*Dworzecki* at paras [50]-[53]; *Zdziaszek* at paras [97]-[110]; *LU and PH* at paras [72]-[77] and [81]-[82])

k) Where the information provided by the issuing judicial authority does not satisfy the High Court that the precise condition in 3.1b, 3.2 or 3.3 has been met, the High Court

is entitled to consider whether the information establishes unequivocally that the defence rights have been met. (*Dworzecki* at paras [42], [48] and [50]-[53]; *Zdziaszek* at paras [106]-[110]; *LU and PH* [75]-[78])

l) The first part of the condition in each of 3.1b and 3.2 concerns knowledge that the person was facing trial. Therefore, even if it has not been established that the accused person was aware of the scheduled date and place of the trial or of the scheduled trial, defence rights as to knowledge of the criminal proceedings will be met where the requested person was informed of the fact that they have been accused of a crime and was therefore aware that they were going to be brought to trial (even if no final decision on the trial has been made). (*Dworzecki* at paras [43] (“informed in such a way as to allow him to organise his defence effectively”) and [50]; and in respect of the 2016 Directive: *IR* at paras [42], [48]-[53] (citing *Sejdovic* at paras [86] and [99]); *Stangalov* at paras [38]-[43]; *Kachev* at paras [35]-[37])

m) Part 3.1b also requires that the requested person had been informed of the consequences of not attending, i.e. that a decision may be handed down in their absence. (*TR* at para [49] by implication; and in respect of the 2016 Directive: *IR* at paras [40]-[41]; *Stangalov* at paras [37], [51]; *Kachev* at paras [38]-[40])

n) Part 3.2 requires that the requested person had given a mandate to a lawyer which will occur where that person deliberately left it to that lawyer to mount their defence before the trial court, which presupposes that the person appointed the lawyer specifically to represent them in their absence during the trial) and was represented at the hearing by that lawyer. (*TR* at para [49]; and in respect of the 2016 Directive: *IR* at para [56]; *Kachev* at paras [38]-[41], [68] and [72])

o) When asked to consider that defence rights have been respected because there was knowledge on the part of the person of the trial, the High Court must be satisfied that

there is knowledge on the part of the requested person of the proceedings. Whether knowledge of the proceedings exists is a matter of fact and can be shown from other circumstances to demonstrate that defence rights were met (*Sejdovic* at para [99]; *Dworzecki* at para [50]; *LU and PH* at para [78]). Proof of service on an adult belonging to the same household is not sufficient evidence of knowledge (*Dworzecki* at paras [54]-[55]). Conversely, the fact that a person was in custody for a period of time while there was an ongoing preliminary or pre-trial examination establishes that the person was aware of the proceedings and that they would be brought to trial, even if no decision on that trial has actually been taken (by analogy the 2016 Directive cases: *IR* at para [58]; *Stangalov* at paras [39]-[40]).

p) Knowledge of the consequences of the failure to attend trial must also be established and that may also be established from other circumstances demonstrating that there was a deliberate attempt to evade the trial and the consequences of the trial.

q) The High Court, when assessing whether defence rights have been met, is carrying out an assessment as to whether the factual circumstances demonstrate that the requested person waived his or her right to attend the trial. (*Dworzecki* at paras [42], [49]-[53]; *LU and PH* at para [76])

r) Although that waiver may be express or implicit from the circumstances, an implication that a requested person has waived his or her right 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 trial and of the consequences of non-attendance or that the person had given a mandate to a lawyer to represent them (and the lawyer did so). (*Sejdovic* at paras [86], [87] and [99]; *Dworzecki* at paras [42] and [47]-[48]; and the 2016 Directive cases: *IR* at paras [48]-[56] (citing *Sejdovic* at paras [86] and [99]); *Stangalov* at paras [38]-[43] and [51]-[52]; *Kachev* at paras [35]-[37])

- s) The degree of diligence exercised by a requested person in receiving notification of the scheduled date and place of trial or of the scheduled trial may be a factor in the assessment of his or her knowledge of the trial. The mere absence of enquiry as to the scheduled trial 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 the right to be present. (*Sejdovic* at para [87]; *Dworzecki* at para [51]; *Zarnescu* at para [90] principles (n) and (p); *TR* at para [52]; *LU and PH* at para [78]; and the 2016 Directive cases: *IR* at paras [48]-[49] and [58]-[59]; *Stangalov* at paras [38]-[39]; *Kachev* at paras [35] and [51])
- t) In a suitable case, a manifest absence of diligence such as seeking to avoid service or contact with lawyers may lead the High Court to the view that the accused person made an informed decision not to be present at trial. (*Dworzecki* at paras [50]-[51]; *Zarnescu* at para [90] principle (o); *TR* at para [52])
- u) It may in a suitable case be appropriate to weigh the reasonable efforts of the requesting state to notify an accused person of the trial in the assessment of whether the requested person may be said to have waived their right to be present, such as where the only service was on an adult member of the same household or where the authorities did not make any attempt to contact/serve the requested person at the address to which he indicated that he had moved. (*Dworzecki* at paras [54]-[55]; *Zarnescu* at para [98]; and the 2016 Directive case of *Kachev* at paras [37], [44], [52], [53])
- v) The requested person is not required to adduce evidence as to why they did not attend, instead the High Court must be satisfied from the information supplied by the issuing judicial authority that refusal is not required. If, however, the requested person produces evidence, this will have to be considered by the High Court and may itself, if

relevant and credible, require further information from the issuing judicial authority.

(*Sejdovic* at para [88]; *Zdziaszek* at paras [99]-[104])

### **Application of the Principles to the Appeal**

#### **The Submissions**

86. The appellant considered that the issue which required determination was whether he was aware of the consequences of his absence. In his submission, the information was insufficient to demonstrate knowledge on his part that he could be convicted and sentenced in his absence. At its height, according to the appellant, what is claimed by the issuing judicial authority was that he had “effective knowledge” of the proceedings. He emphasised that it was only after his release from prison that he appointed a defence counsel and elected domicile in Italy. He was not aware of what the judicial acts sent to his nominated address contained. The appellant also highlighted that the document which appointed a defence counsel concluded by stating that “[t]he defence lawyer refuses to accept notification of acts directed to the defendant”.
87. At the hearing, counsel for the appellant highlighted the omission by the issuing judicial authority to tick any of the relevant boxes as implicit support for the contention that there was no evidence that he had been notified of the consequences or gave a mandate to a lawyer. This does not follow. What appears in the present case is that boxes 3.1a, 3.1b and 3.2 could not be ticked because he had not been notified of either the date and place of the trial or given notice of the scheduled hearing because he was not available for service at his address prior to the decision (decree) ordering his trial, which was made on 3 February 2016. That was addressed in *Stangalov*; even where the person absconds at the pre-trial investigation stage, that does not prevent it being established that the requested person had sufficient knowledge that they were going to be brought to trial and prevented service of that information by absconding. The hurdle that must be crossed,

that he had knowledge that he was going to be brought to trial (by information from the issuing judicial authority), has been conceded here. What is at issue is whether it can otherwise be established that the conditions for surrender are met in that the appellant's defence rights have been respected.

88. The appellant contended that the height of what can be said in this case is that he spent time in pre-trial custody. He stated that it is of import that the Italian authorities did not say that he was informed of the consequences of not attending. He said that the Warrant purports to guarantee him a retrial or appeal and that it was only through the provision of additional information that this was established not to be an automatic entitlement. With reference to the principles set out in *Sejdovic* outlined above, the appellant submitted that, as in *Minister for Justice v Szlachcikowski*, there is no evidence to support the contention that he was aware that his trial might proceed in his absence, and consequently that he knowingly and unequivocally waived his right to appear at his trial.
89. Counsel for the appellant submitted, correctly, that the appellant was not obliged to provide evidence in relation to the trial *in absentia* and that it was for the Court to be satisfied on all of the information before it that the appellant would not be surrendered to serve a sentence where he was tried *in absentia* in breach of his right to a fair trial. In my view, adopting that position can only take a requested person so far. A court is entitled to draw reasonable inferences from the information forwarded by the issuing judicial authority. Moreover, a requested person cannot ask a court to draw conclusions for which there is no evidence.
90. In this appeal, counsel appeared to question how much his client could have been expected to understand when signing the mandate to the lawyer. It is difficult to envisage a situation where a legal document, such as a mandate to a lawyer, could be challenged in any set of proceedings without very specific evidence as to the why and how it is being alleged that

a person could not be bound by its contents; that would apply with at least equal strength to documents supplied by an issuing judicial authority in this procedure which is underpinned by the principle of mutual trust. Thus, very specific evidence would be required to go behind the clear provisions of a mandate.

91. Counsel for the respondent placed significant emphasis upon the time spent by the appellant in custody and the mandate in particular in submitting that there was sufficient evidence in the present case to show that the appellant had waived his right to appear at trial. Referring to the terms of the mandate, the respondent submitted that the appellant was not only aware of the possibility that he might be tried in his absence but clearly envisaged that his trial would proceed and instructed the lawyer to act on his behalf during the course of the trial. The respondent submitted that the mandate instructed the defence counsel to act on the appellant's behalf in comprehensive terms. According to the respondent, it appears that the defence counsel acted on the appellant's behalf and as a result, he is not in the position of an unrepresented defendant, such as was the case in *Jones and Zarnescu*. It was highlighted that the Court of Justice has identified a failure to maintain contact with lawyers as an indication that an accused person did not intend to take part in their trial.

92. The respondent further submitted that from the evidence in the present case and the case law (*Sejdovic* and *Bertino*), trials *in absentia* are a feature of Italian criminal procedure. The respondent thus contended that the considerations present in *Minister for Justice v McCarthy* that a trial *in absentia* was not reasonably foreseeable do not apply in the present case.

### Decision

93. There are a number of striking features in this case. The first is that the appellant spent six months in custody being investigated for drug trafficking offences. The second

concerns the mandate he gave to a lawyer *after* he left custody. This mandate was extensive and granted to the lawyer the right to represent him *at the preliminary investigation stage, at any trial and at any appeal*. Moreover, it was clear that it mandated the lawyer to take a wide variety of decisions, including those concerning plea bargains. The third relevant feature is that the appellant gave an address for service to the authorities. The fourth is that the appellant expressly waived his right to be present at the preliminary hearing. While he did not give an express waiver to appearing at trial, the Court of Belluno gave due consideration (and a separate Order) to the issue of trial *in absentia*. The Court Order of 11 January 2017 records “the regularity of the service of the notice scheduling the preliminary hearing”, that he was represented by a defence lawyer of choice, had declared or elected domicile and was fully aware of the proceedings having been subjected to pre-trial custody in prison. The redacted record of the hearing in the Court of Belluno on the 11 January 2017 also records that the defence lawyer requested cross-examination of the witnesses for the prosecution and “questioning of the defendant, if present”. No record has been provided of the actual hearing of the trial, but the evidence provided indicates that the defence lawyer was actively engaged in the preparatory hearings for that trial.

94. In those circumstances there was never any reality in the appellant contesting a lack of knowledge of the proceedings and he did not do so. There was sufficient awareness of those proceedings, for the High Court to be satisfied that first condition of awareness of trial had been met.
95. All of those factors feed into whether there is evidence of knowledge of the consequences of the failure to appear to justify the finding that there has been an implicit waiver of his right to be present at trial. In this appeal, the issue was squarely whether the accused had

been aware that the trial would proceed in his absence if he did not appear that a decision may be handed down (and where relevant a sentence could be handed down).

96. The mandate is a significant piece of the evidence in this case. As can be seen from the provisions of Article 4a of the 2002 Framework Decision (and indeed Article 8 of the 2016 Directive), representation following the provision of a (sufficient) mandate will permit an inference of waiver to be drawn provided that there is knowledge of the criminal proceedings. The mandate in these proceedings expressly gave all legal powers to the lawyer under various Articles of the Italian Code of Criminal Procedure “*at every stage and level of the criminal proceedings*” (emphasis added). It is apparent from the contents of the mandate (and the fact of representation without the presence of the appellant) that it included the right of the lawyer to take all relevant decisions in the trial save for those expressly reserved for defendants. The defence lawyer was granted power to “appeal orders, judgments, and rulings delivered at any phase of the trial, including appeals, out-of-time appeals, enforcement, and surveillance, including all precautionary measures of any kind, issued by any authority, as well as all decisions of the Preliminary Investigation Judge”. A wide variety of other powers including filing for reviews/appeals or opposing requests for dismissal are also referred to in the mandate. The lawyer could request an immediate trial and/or accept or reject an abbreviated trial, request plea bargaining to be agreed upon with the prosecution within regulatory limits and to submit a request for settlement. There are also provisions regarding agreement of certain conditional suspension of the sentence and/or to accept or partially waive grounds for appeal, “stating the terms of the sentence that may be agreed upon with the Public Prosecutor within the legal limits and in a measure deemed appropriate”.
97. I do not accept that there is significance to the absence from the mandate of any express reference to trial *in absentia*. The clear inference to be drawn from the contents of the

mandate, which was clearly extensive, is that by the mandate the appellant was entrusting his lawyer to represent him in anticipation that this would include representation where he was not present at the trial. We were not, however, asked to address the argument as to whether the giving of the mandate to the lawyer *and* representation by that lawyer in combination with the appellant's knowledge of the criminal proceedings, was sufficient to establish that defence rights were respected. Perhaps indeed, this was because the issuing judicial authority was never asked and thus never sent any documentation from the trial hearing; the focus was on the decision taken on 11 January 2017 to proceed in his absence. Instead, we were asked to address whether the circumstances demonstrated that the requested person was *aware of the consequences* of not turning up and I will concentrate on that. The terms of the mandate, however, weigh heavily in the assessment of whether there was knowledge of the consequences of not turning up for his trial.

98. The fact that the appellant had expressly waived his right to be present at the preliminary hearing, but not the trial, requires special consideration. An inference, favourable to the appellant, may be that this fact is evidence that he did not waive his right to be present at the trial. On balance, taking into account all the circumstances, I am satisfied that any possible inference of that nature can be excluded. In the first place, the preliminary judge was concerned with the situation where the preliminary hearing was then in being and there had been an express waiver of his right to be present. There was no trial scheduled at that time as there had not yet been a decision to commit him for trial. Indeed, it is difficult to see how or why an accused person would be asked by *a court* whether they expressly waived their right to be present at their trial at a time when they had not in fact been committed for trial. The court is therefore not being seen to anticipate an outcome and thereby cast doubt on the impartiality of its decision making. On the other hand, giving a mandate to a lawyer to be represented throughout the criminal proceedings is not

so jarring – the lawyer’s task is to provide advice to a client on the criminal proceedings and possible outcomes and in those circumstances, an accused person can make an informed choice to mandate the lawyer to represent them throughout all aspects of the criminal proceedings that may arise.

**99.** Secondly, the trial court noted in its Order of 11 January 2017, that there was regularity in serving the appellant with the notice of the preliminary hearing, but it does not record that there was an express waiver of the right to attend the trial. The absence of an express waiver is an indication that the trial court did not receive any express waiver of the type that was clearly acceptable to the preliminary judge. That does not exclude the fact that there was an implicit waiver. In that respect, what the Order of 11 January 2017 records is that the court did not receive from the appellant an express indication that he would not be attending the trial. Where a person has chosen to abscond, the absence of an express waiver is unsurprising. The trial court considered that it had sufficient information to decide that a trial *in absentia* was permitted under the Italian Code of Criminal Procedure in the context of the other factors such as awareness of the proceedings and representation. While this Court must make its own decision as to whether there was knowledge of the consequences of not turning up at the trial, these are all factors that can be taken into account.

**100.** Taking all the matters set out at para [93] into account – what could be added but is not necessary is the fact that this appellant left Italy at some stage after March 2015 and made his way to Ireland with knowledge of these serious criminal proceedings – I am satisfied that they establish facts from which the only reasonable inference is that there was awareness on the part of the appellant of the consequences that the trial would proceed in his absence and that a decision (including a sentence) could be handed down. That there was an implicit waiver of his right to be present is established unequivocally by these

factors having regard to the weighty evidence of the broad mandate he gave to his lawyer. He clearly knew that his lawyer was representing him in his absence at the preliminary hearing and expressly waived the right to appear therein. The mandate could not have been any clearer that the representation extended to decision-making on sentence and appeals and that he was giving his lawyer the mandate to represent him in relation to those aspects, i.e. to represent him in his absence. This itself is a clear and precise indicator of his knowledge of the consequences. The statement in the mandate that the lawyer refuses to accept notification of acts directed to the defendant is irrelevant here in the assessment of the appellant's knowledge of the consequences of non-attendance.

**101.** I am satisfied that it has been established in these proceedings that the defence rights of the appellant were met in his trial for the offences for which his surrender is requested and that he unequivocally waived his right to appear at the trial in the knowledge of the criminal proceedings and of the consequences of his failure to appear.

### **Conclusion**

**102.** In this judgment I have refined, in light of further case law of the Court of Justice, the principles set out in *Zarnescu*. They are to be found at para [85] above.

**103.** In so revising, it is important to bear in mind that the High Court, as the executing judicial authority has two separate pathways to surrender: either where a condition in the Table is met (when surrender is mandatory) *or* where the defence rights of the requested person have otherwise been met (where surrender is optional). In respect of conditions 3.1b, 3.2 and 3.3 which may have been ticked on the form, the High Court is entitled to address whether the information provided by the issuing judicial authority actually meets the conditions indicated. In respect of defence rights, the High Court must also assess all relevant information provided. The High Court must address any evidence provided by or on behalf of the requested person bearing in mind that there is no obligation to provide

such evidence. Finally, where the trial *in absentia* was a result of the exclusion of the person due to misbehaviour, the importance of respecting defence rights would, in the absence of any decision of the Court of Justice to the contrary, require close consideration of the decisions of the ECtHR on the necessity to inform a person of the risks of their continued behaviour prior to excluding them from their trial. The principles may therefore be adapted and applied to that situation to the extent required for ensuring defence rights were met.

**104.** In the present appeal, I am satisfied that the defence rights of the appellant were respected.

It was uncontested that he was aware of the criminal proceedings against him. The evidence before the Court, especially that set out at para [93] above, demonstrates that he was aware of the consequences of his failure to attend. That is to say, the appellant was aware that a decision would be handed down (and where relevant a sentence would be handed down) could be handed down in his absence. In all the circumstances, I am satisfied that the evidence demonstrates that he waived his right to be present at his trial.

**105.** I would dismiss this appeal and affirm the Order of the High Court.