

**THE HIGH COURT**

**[Record No. 2015/145 EXT]**

**[Record No. 2015/159 EXT]**

**[Record No. 2015/160 EXT]**

**[Record No. 2017/50 EXT]**

**BETWEEN**

**MINISTER FOR JUSTICE & EQUALITY**

**APPLICANT**

**AND**

**WOJCIECH ORLOWSKI**

**RESPONDENT**

**JUDGMENT of Mr. Justice Binchy delivered on the 4th day of February, 2021**

1. This judgment is concerned with four European arrest warrants (the "EAWs") issued by the Republic of Poland seeking the surrender of the respondent in order to prosecute him for offences and also in order to enforce existing sentences of imprisonment arising out of convictions of offences already handed down in Poland. Objections to surrender have been raised in connection with specific offences, and also generally in relation to all EAWs. I will first address the objections raised as regards specific offences, by reference to the EAW in which they arise.

**The First EAW [2015/159 EXT]**

2. The first EAW is dated 4th December, 2012, and was issued by a judge of the Court of Appeal of the Circuit Court in Lublin. It was endorsed by this Court on 13th August, 2015 and the respondent was arrested pursuant to same on 5th November, 2015.
3. At para. E of the first EAW, it is stated that it relates to a total of six offences. Following a request for information made by the central authority here to the central authority in Poland, it was clarified that the surrender of the respondent is not sought in connection with the first of the six offences, and so the surrender of the respondent is requested for the purposes of his prosecution for the offences described at paras. E. II-VI of the first EAW. Having regard to the objections raised to his surrender in connection with these offences, it is expedient to set these offences out in full as follows:-

*"II. In the period known from the IV quarter of 2002 year until May 2003 year of dates closely unknown in Zamość, lubelskie province, Radom, mazowieckie province and in Warsaw acting in intention taken in advance for the purpose of obtaining financial benefit jointly and in agreement with identified person, in short intervals of time and against regulations of statutory provisions he participated in dealing the considerable quantity of psychotropic substance in the form of not less than 85 grams of amphetamine and a considerable quantity of intoxicant in the form of not less than 5750 grams of marihuana in such a way that he acquired – from the identified person in total not less than 3250 grams of marihuana in at least five transactions including the batches of the drug of weight 500 grams, 1000 grams and in one case 750 grams, - as well as from unidentified persons 2500 grams of marihuana in portions of 500 grams and in one case of weight 300 grams and also 85 grams of amphetamine and then he sold off to the identified person 2300 grams*

*of marihuana in five batches including in four cases weight of 500 grams of the drug and one time of 300 grams as well as 85 grams of amphetamine in portions of weight from 5 to 10 grams and in one case 60 grams, moreover the remaining quantity of marihuana to unidentified persons;*

- III. on date 6th October 2004 year in Zamość, lubelskie province against the regulations of statutory provisions he participated in dealing the psychotropic substance in the form of 30 tablets of ecstasy, in such a way that he delivered the drug with the intermediary of identified person Adam Jarkiewicz;*
- IV. on date 6th October 2004 year in Zamość, lubelskie province against regulations of statutory provisions he possessed a precursor in the form of 50 millilitres of BMK (benzyl methyl ketone) which he next delivered to Adam Jarkiewicz with the intermediary of other identified person, for the purpose of prohibited production of psychotropic substance;*
- V. in the period from 31st March 2005 year until 16th May 2005 year in Zamość and in other localities of lubelskie province, acting in organized criminal group in executing the intention taken in advance, in short intervals of time and against the regulations of statutory provisions he participated in dealing the considerable quantities of psychotropic substances in quantity 1200 grams of amphetamine and 4200 tablets of ecstasy, in such a way that he purchased the drugs from unidentified persons and next he sold them off to Jakub Wiśniewski and Marcin Bednaruk on date 31st March 2005 year 2000 pieces of ecstasy tablets and 200 grams of amphetamine, on date 4th April 2005 year 1500 pieces of ecstasy tablets and 500 grams of amphetamine and on date 16th May 2005 700 pieces of ecstasy tablets and 500 grams of amphetamine, for the purpose of their further distribution;*
- VI. on date 19th October 2005 year in Warsaw using violence in such a way that during the undertaken attempt of opening from the outside left front door of a vehicle driven by him make Opel Omega registration numbers LLY 5056 by the police officer assistant chief constable Jacek Setniewski of the Division III Central Bureau of Investigation Main Police Headquarters who was standing in the street, he suddenly moved the vehicle above mentioned from the place and continued driving straight – he forced the police officer above mentioned to discontinue his legal official activity;”*

- 4. A notice of objection in relation to the first EAW was filed on behalf of the respondent on 25th January, 2016. The following objections were raised:-
  - (1) The offences in connection with which the respondent is sought do not correspond to offences in this jurisdiction;
  - (2) There is a lack of clarity as to whether the offence described at para. E. II constitutes one or more offences;

- (3) The surrender of the respondent would be contrary to his rights under Article 8 of the European Convention on Human Rights (the "Convention") and Articles 7 and 24 of the Charter of Fundamental Rights of the European Union (the "Charter"), and as a consequence, his surrender is prohibited by s. 37 of the European Arrest Warrant Act 2003 (the "Act of 2003");
  - (4) The surrender of the respondent in connection with the offences described at paras. E. I-VI should be refused because the prosecution of the respondent in connection with these offences became statute barred under the laws of the requesting state in or about July, 2015.
5. Other points of objection were also raised but were either not pursued at the hearing of the application or alternatively had become irrelevant by the time of the hearing, in view of the fact that they were concerned with offence E. I, and the surrender of the respondent is no longer sought in connection with that offence.
6. Arising out of the points of objection of the respondent, a request for additional information was made of the central authority of the issuing state, by letter of 17th February, 2016. Replies to this request for information were delivered by letter dated 29th February, 2016, arising out of which a further request for information issued on 16th March, 2016, replies to which were delivered by letter dated 23rd March, 2016. The following information was provided:-
  - (1) It was confirmed that the surrender of the respondent is no longer required in relation to the offence set out at para. E. I. It was explained that this was because he was acquitted of the offence concerned by a judgment of the Regional Court in Lublin of 5th May, 2009.
  - (2) It was confirmed that the surrender of the respondent was required for the purpose of prosecuting the respondent in relation to the remaining offences set out at paras. E. II-VI of the first EAW. It was also clarified that, as regards offence E. II, the respondent is to be prosecuted for one offence only, and that this is a different offence to that in respect of which he has already been convicted and sentenced, and for which he is wanted separately pursuant to the second EAW, dated 18th December, 2012.
7. The issuing judicial authority also provided further information in relation to the history of proceedings against the respondent in Poland. It stated that on 5th May, 2009, the respondent was acquitted of the charge in connection with offence E. I, but was sentenced for the remaining offences. He then appealed that decision (save that part relating to his acquittal) and was successful in that appeal, but the court directed that there should be a retrial in relation to offences E. II-E. VI.
8. Arising out of the further information, a supplemental notice of objection was delivered on behalf of the respondent on 1st April, 2016, whereby it was pleaded that the surrender of the respondent should be refused pursuant to s. 41 of the Act of 2003, on the grounds

that the offences numbers E. II-E. V of the first EAW constitute offences, in whole or in part, in respect of which final judgment has been given in the requesting state.

9. The respondent swore an affidavit dated the 17th December, 2018 whereby he averred that he had obtained the advices of a lawyer in Poland who had provided an opinion dated 20th May, 2016 to the effect that the prosecution of the offence described at para. E. VI of the first EAW was statute barred. He exhibited a letter to that effect, apparently from the lawyer concerned, although the letter was not on headed paper. At the hearing of this application, the Court was informed that the lawyer concerned had been asked by the respondent's Irish solicitors to provide an affidavit to this effect, and that while he had not refused to do so, he had not provided such an affidavit, as requested. The respondent also swore an affidavit of 26th May, 2016, whereby he averred that prosecution for the offence described at para. E. VI of the EAW is statute barred, purporting to exhibit to that affidavit the legislation in Poland providing for the relevant time limits for prosecution of such an offence. In the same affidavit, he also avers that the offence referred to at para. E. VI of the first EAW is alleged to have occurred on 6th October, 2004, but the provision of law which it is alleged the respondent contravened on that date is stated to be Article 61 of the law dated 29th July, 2005. Accordingly, the respondent avers, the conduct in which he is alleged to have engaged was not an offence on the date on which he is alleged to have done so. In the same affidavit, he also alleges that he paid a fine which is the subject of another offence for which his surrender is sought pursuant to an EAW dated 18th December, 2012, and I will address this issue below.
10. Finally, as regards the background to the first EAW, a third notice of objection was filed on behalf of the respondent in this matter on 5th February, 2020, grounded upon a further affidavit of the respondent of 4th January, 2020. In the supplemental notice of objection, it is pleaded that the rights of an accused person under Articles 4, 6(2) and 7(1) of EU Directive 2012/13 of 22nd May, 2012 (the "Directive") on the right to information in criminal proceedings apply to the respondent as a person arrested on foot of an EAW. It is pleaded that the issuing state (the Republic of Poland) has failed to provide the respondent with the information required by the Directive, including a letter of rights containing information as to the possibility of challenging the lawfulness of his arrest, documents essential for doing so, or the reasons for his arrest and detention. It is pleaded that the failure on the part of the issuing state to provide this information fails to allow the respondent a real opportunity to request the withdrawal of the national arrest warrant on which the first EAW is based, and that this is contrary to the principle of equivalence in that the respondent is treated less favourably than a comparable person arrested in the same state in which the offences are alleged to have been committed. In his affidavit grounding this objection, the respondent avers that he was not provided with any of the information or documentation to which he claims he is entitled under the Directive. This same objection in the grounding affidavit was filed in respect of all of the EAWs.

## **Correspondence**

11. At the hearing of this application, it was not disputed that the actions of the respondent as alleged in paras. E. II, E. III and E. V of the first EAW would, if committed in this jurisdiction, constitute offences contrary to s. 15 of the Misuse of Drugs Act, 1977, i.e. the actions would constitute the offence of possession of controlled drugs with intention to supply another.
12. However, it was disputed that the actions as described at paras. E. IV and E. VI of the first EAW would, if committed in this jurisdiction, constitute an offence. On behalf of the applicant, it was argued that the alleged actions of the respondent as described in para. E. IV of the first EAW would constitute an offence contrary s. 21(2) of the Misuse of Drugs Act, 1977, which makes it an offence for a person to contravene any regulations made under that Act. Counsel for the applicant then referred to the European Communities (Control of Drug Precursors) Regulations, 2009 (the "Regulations of 2009"), Regulation 8 of which provides, at para. 4 thereof:-

*"A person having possession of category 1 substances which ought to be accompanied by a copy of a declaration, or copies of declarations, in accordance with Article 4(3) of Regulation 273/2004 shall be guilty of an offence if such person is unable to produce such document or documents at the request of the competent authority."*

The reference to category 1 substances and Regulation 273/2004, is a reference to Annex 1 to EU Regulation 273/2004 on drug precursors. The first scheduled subject in Annex 1 is Phenylacetone. On behalf of the applicant, it was argued that Phenylacetone is the same or the equivalent of BMK (benzyl methyl ketone) referred to in para. E. IV of the first EAW. However, on behalf of the respondent it was argued that no evidence was presented to the Court that this is so. It was further argued on behalf of the respondent that the circumstances described in para. E. IV of the first EAW could not constitute an offence under Regulation 8(4) of the Regulations of 2009 because there is nothing to indicate that the respondent did not have in his possession the documents required by that regulation; and the offence is only committed when a person is unable to produce such documentation.

13. I consider that the arguments advanced on behalf of the respondent in this regard are correct. There is not enough information provided for the Court to be satisfied that possession of the substance described at para. E. IV of the first EAW would constitute an offence in this jurisdiction. Accordingly, the surrender of the respondent in connection with this particular offence is prohibited by s. 38 of the Act of 2003.
14. As to the offence described at para. E. VI of the first EAW, it is submitted on behalf of the applicant that the actions of the respondent as described in this paragraph would constitute an offence under s. 19(3) of the Public Order Act, 1994 (as amended) (the "Act of 1994"), if committed in this jurisdiction. It is submitted that it is clear from this paragraph that it is alleged that the respondent used violence in such a manner as to cause a police officer to discontinue his official duties. On behalf of the respondent, it is submitted that s. 19(3) of the Act of 1994 requires that the person concerned be aware

that the person whom it is alleged he is obstructing is a police officer, and that is not clear from the actions as described at para. E. VI of the first EAW. Moreover, it is submitted that the actions of the respondent as described in this paragraph are capable of an innocent interpretation.

15. Section 19(3) of the Act of 1994 provides:-

*"Any person who resists or wilfully obstructs or impedes —...*

*(c) a peace officer acting in the execution of a peace officer's duty, knowing that he or she is or being reckless as to whether he or she is, a peace officer so acting".*

16. "Peace officer" is defined under s. 19(6) of the Act of 1994 as *"a member of the Garda Síochána, a prison officer, a member of the fire brigade, ambulance personnel or a member of the Defence Forces."*

17. It is clear from s. 19(3) of the Act of 1994 that it is not necessary to know that the person who is being obstructed is a peace officer; it is sufficient to be reckless as to this fact.

18. It is certainly somewhat difficult to follow para. E. VI of the first EAW, the explanation for which lies in the translation of the document from Polish to English. However, a careful examination of the text of the paragraph makes it clear that what is alleged is that the respondent suddenly and in a violent manner drove his car away at the very moment when a police officer was attempting to open the left-hand front door of the vehicle, and that the police officer was at the time engaged in his official duties. It is a reasonable inference to draw that it is alleged that the respondent knew that the person who was attempting to open his door was a police officer so engaged in his duty, or alternatively was reckless as to that fact. Accordingly, I am satisfied that the facts alleged in para. E. VI of the first EAW would, if committed in this jurisdiction, constitute an offence under s. 19(3) of the Act of 1994.

#### **Section 41 Objection**

19. It is further pleaded and argued on behalf of the respondent that his surrender is prohibited for the purposes of prosecution of the offences described at paras. E. (2) II, III and V of the first EAW, on the grounds that he has already been convicted and sentenced in connection with these very offences. It is submitted that this is clear from the additional information furnished by the issuing judicial authority itself. Counsel for the respondent refers to a letter of the Regional Court (Sad Rejonowy), Lublin-Zachód of 24th February, 2016, in which letter it is stated that the previous conviction of the respondent in connection with these offences was quashed because there was a doubt as to whether or not the acts constituted one activity of the respondent or a continuous activity for the purposes of Article 12 of the Criminal Code and, therefore, whether or not those very acts had or had not already been the subject of other court proceedings under file reference 61/09, which resulted in the conviction of the respondent. The surrender of the respondent is also sought arising out of that conviction, under a separate EAW, being the second of the EAWs addressed in these proceedings. The same letter goes on to state:-

*"In case of establishment however, that the acts E. II, III and V as well as the act included by the judgment of the District Court (Sad Okregowy) in Zamość, files ref. II K 61/09 have constituted one activity/continuous net/- the proceedings will be discontinued pursuant to article 17 paragraph 1 subparagraph 7 the Code of Criminal Procedure/res judicata/"*

20. On behalf of the applicant, however, it is submitted that the information provided by the issuing judicial authority makes it clear that the offences concerned were committed on different dates. Those referred to in the first EAW are alleged to have been committed in the period between the last quarter of 2002 and May, 2003, whereas the offences, the subject of the conviction, under file reference II K 61/09 were committed at a later point in time, between September, 2005 and 21st October, 2005. Moreover, a retrial has been ordered in relation to the offences, the subject of paras. E. (2) III, IV and V of the first EAW and, therefore, this is manifestly not a case of double jeopardy. Finally, the applicant submits that the issuing judicial authority has provided the assurance that in the event that there is any overlap between the offences, the prosecution of the offences, the subject of the first EAW (at paras. E. (2) III, IV and V), will be discontinued.
21. Section 41 of the Act of 2003 requires the Court to refuse surrender where it is required for the purpose of proceeding against the requested person in the issuing state for an offence consisting of an act or omission that constitutes in whole or in part an offence in respect of which final judgment has been given in the state or a Member State. In this case, it is argued that a final judgment has already been given against the respondent under file reference II K 61/09, and that that final judgment also relates to the offences described at para. E. (2) II, III and V of the first EAW.
22. In its letter of 24th February, 2016, the Regional Court (Sad Rejonowy) Lublin-Zachód in Lublin, stated that *"one of the reasons for quashing the judgment in the scope of acts in paragraphs VII, VIII and X of the indictment act/E. II, III and V/was a doubt whether these acts constituted one activity of the accused/one continuous act in understanding of the article 12 of the Criminal Code/and therefore with regard to the above, whether they have not already been the subject of other court proceedings – in the case pending before the District Court (Sad Okregowy) in Zamość files reference II K 61/09"*.
23. It is clear that this is a legal issue to be resolved under the law of the Republic of Poland. If, in the course of the retrial, the respondent establishes that, as a matter of law, his acts constitute one activity or a continuous act for the purposes of the Criminal Code, then he will be successful in his defence of these proceedings; if he is not successful with this argument, then it will not avail him, whatever about his chances of succeeding in defending those proceedings on other grounds.
24. That this is a legal matter to be determined by the courts in Poland is clear from the fact that the acts for which his surrender is sought for the purposes of paras. E. (2) II, III and V of the first EAW are all alleged to have occurred during a specified period that predates the acts that gave rise to the conviction under case file reference II K 61/09. The last of the acts comprising the former is stated at para. E. (2) V of the first EAW to have

occurred in the period from 31st March, 2005 and 16th May, 2005, whereas the acts giving rise to the conviction under file reference II K 61/09 are alleged to have occurred in the period between September, 2005 to 21st October, 2005.

25. All of that said, this is a somewhat unusual circumstance not contemplated by the Act of 2003. Section 41 of the Act of 2003 constitutes an outright prohibition on the surrender of persons for the prosecution of offences in respect of which a final judgment has already been given in the requesting state. In proceedings already taken in the requesting state, the respondent has raised this issue as a defence, and has been successful to the extent that this has resulted in a conviction being set aside, with an order directing a retrial in respect of these offences. It is clear that the issue remains a live one in the proceedings contemplated in Poland, and the issuing judicial authority has stated that if it is found that the activities described in paras. E. (2) II, III and V and the activities the subject of file reference II K 61/09 constitute one activity or a continuous act, then the prosecution in respect of the former will be discontinued. As far as s. 41 of the Act of 2003 is concerned, therefore, it is not established that the offences are the same and that the surrender of the respondent is prohibited by that section. On the other hand, the Court has the assurance from the issuing judicial authority that if it is so established, then proceedings will be discontinued. In these circumstances, the surrender of the respondent for these offences is not, in my view, prohibited by s. 41 of the Act of 2003.

#### **Retrospective Criminalisation**

26. Although not pleaded in the points of objection, an issue was raised at the hearing of this application that the surrender of the respondent in connection with offences E. (2) II, III, IV and V is prohibited by s. 37 of the Act of 2003, because, where those offences are concerned, it would violate the respondent's rights under Article 7 of the Convention and Article 15.5.1° of the Constitution. This argument was advanced on the basis that all of the offences concerned are stated to be contrary to the law dated 29th July, 2005 on the counteracting of drug addiction, and this law post-dates each of the offences. Accordingly, it is submitted, this gives rise to the retrospective criminalisation of behaviour, contrary to Article 7 of the Convention and Article 15.5.1° of the Constitution. Arising out of this submission, I directed that further information should be sought from the issuing judicial authority to clarify the basis upon which a law that post-dated the offences in question, could form the basis for those offences.
27. The explanation provided by the issuing judicial authority is that the law dated 29th July, 2005, which did not come into effect until 4th October, 2005, replaced the previous law counteracting drug addiction. Pursuant to art. 4.1 of the penal code, if at the time of adjudication the law in force is other than that in force at the time of the commission of the offence, the new law shall be applied. However, the old law is to apply if it is more lenient to the accused. This explanation satisfactorily disposes of this objection. It is clear that the offences concerned were offences under a different legislative provision at the time that the offences are alleged to have been committed by the respondent.

#### **The Second EAW [2015/160 EXT]**

28. The second EAW is dated 18th December, 2012. It was endorsed by this Court on 13th August, 2015 and the respondent was arrested pursuant to same on the 5th November, 2015.
29. The second EAW is a "*conviction*" warrant and relates to the conviction of the respondent of five offences. He was initially convicted of these offences on two separate occasions, the first being on 14th June, 2011 when he was convicted of the first four of the offences to which the first EAW relates, under file reference K 61/09, and the second being on 23rd February, 2009, under file reference K 443/06, when he was convicted of the fifth offence. He was present in court on 14th June, 2011, but was not present on 23rd February, 2009. In any case, he subsequently made an application to have the convictions and penalties applicable amalgamated, and this gave rise to a further decision under a third file reference, K 13/12 which is described in the second EAW as being an enforceable cumulative order passed by Sad Okregowy District Court in Zamość on 19th April, 2012. At para. B of the second EAW, it is stated that the warrant is based upon the cumulative order of 19th April, 2012.
30. The second EAW was issued by the President of the Second Penal Division of the District Court of Zdzislaw Lukasiewicz, as issuing judicial authority. It was issued pursuant to the cumulative order of 19th April, 2012, referred to above.
31. It was not pleaded nor argued that the surrender of the respondent for the offences referred to in the second EAW is prohibited for any of the reasons referred to in ss. 21A, 22, 23 or 24 of the Act of 2003, and I am satisfied that the surrender of the respondent for the offences described in the second EAW is not prohibited by any of those sections of the Act of 2003.
32. At para. C of the second EAW, particulars of the penalties applicable to the offences referred to in the second EAW are provided. The penalties range from a maximum of three years in connection with the fifth offence to a maximum of twelve years for the third and fourth offences. Pursuant to the judgment of the Sad Okregowy of 19th April, 2012, the respondent received a custodial sentence of five years' imprisonment. Accordingly, the requirements as to minimum gravity for the purposes of the application are established.
33. Particulars of the offences under Polish law are provided in each case. A description of the circumstances in which each offence is alleged to have been committed is also provided. Accordingly, I am satisfied that the second EAW contains all of the information required pursuant to s. 11 of the Act of 2003.
34. The first offence described at para. E. 1 of the second EAW is alleged to have occurred on 24th July, 2004. It concerns a false or fraudulent claim under a motor insurance policy. It is stated that the respondent was involved in this activity in concert with others. The box for fraud has been ticked in respect of this offence, at s. E. 1 of the second EAW.

35. The second offence also concerns a fraud in which it is stated the respondent was involved with others, and by which they deceived a third party into supplying goods for a considerably lesser sum than they had led him to believe that they would pay for the same. The box for fraud has also been ticked in connection with this offence, at s. E. 1 of the second EAW.
36. The third offence concerns an assault. It is stated that the respondent and others "*beat up and robbed Ludwik Buczny*", and detailed particulars of the assault are then provided. The applicant claims that this corresponds to an assault under either s. 2 or s. 3 of the Non-Fatal Offences Against the Person Act, 1997 and/or robbery under s. 14 of the Criminal Justice (Theft and Fraud Offences) Act, 2001. At the hearing of the application, it was not disputed that the acts of the respondent as described in this part of the second EAW do correspond to offences in this jurisdiction, and I am satisfied that the acts of the respondent as so described in this part of the second EAW would indeed constitute the offences contended for by the applicant, if committed in this jurisdiction.
37. The fourth offence, which is alleged to have been committed between September, 2005 and 21st October, 2005, concerns the supply of drugs for financial gain. The applicant contends that the offences as described would constitute an offence under s. 15 of the Misuse of Drugs Act, 1977 – possession of a controlled drug for the purpose of selling. The respondent did not dispute that this is so and I am satisfied that the fourth offence also corresponds to an offence in this jurisdiction.
38. The fifth and final offence to which the second EAW relates concerns profiteering from prostitution. It is stated that the respondent and others profited from the prostitution of a named woman by taking 70 PLN from every 120 PLN earned by the woman from prostitution. The applicant claims that the activities of the respondent as described in the second EAW (as regards the fifth offence) would, if committed in this jurisdiction, constitute the offence of living on the earnings of prostitution contrary to s. 10 of the Criminal Law (Sexual Offences) Act, 1993. This is disputed by the respondent. The respondent relies upon the decision of this Court (Murphy J.) in the case of *Minister for Justice and Equality v. Jerzy Kiernowicz* [2014] IEHC 270. It is expedient to deal with this objection to surrender at this juncture. Section 10 of the Criminal Law (Sexual Offences) Act, 1993 provides:-
- "A person who knowingly lives in whole or in part on the earnings of the prostitution of another person and aids and abets that prostitution shall be guilty of an offence."*
39. It is submitted on behalf of the respondent that it is not enough simply to demonstrate that the person has received income from the prostitution of another – the Court must also be satisfied that the accused person aids and abets that prostitution. In *Kiernowicz*, the court was so satisfied, because the respondent in that case was stated to be the owner of an escort agency, and the court found that:-

*"The additional information that the Respondent was allegedly the owner of an escort agency and that investigations of that escort agency indicated that escorts were engaged in prostitution is sufficient to establish the additional element of aiding and abetting prostitution which is required for correspondence with an offence in this State."*

40. It is submitted on behalf of the respondent that, while the Court may draw reasonable inferences from the facts provided, it is not open to the Court to draw inferences as to the conduct of the respondent arising out of the prostitution offences of another person. It is further submitted that the offence of aiding and abetting prostitution is not supported on the basis of the evidence provided in the second EAW.
41. The following information is provided at para. E. 5 of the second EAW, in relation to the fifth offence:-
- "5. From May to July, 2004 in Zamość, Province of Lubelskie, jointly and in concert with other perpetrators whose identities have been established, he profited from prostitution practiced by Teresa Malec in the following way: from every PLN 120 which customers paid the woman for having sex with them the perpetrators took PLN 70. As a result, the perpetrators obtained the amount of PLN 18,000 from Teresa Malec during the above mentioned term and they turned committing the crime into their source of income (concerns case number II K 443/06)."*
42. On the facts as so set out, it is, in my view, an entirely reasonable inference to draw that the respondent and others were indeed aiding and abetting the named woman in prostitution. It is clear that the payments which they were receiving from the woman concerned were directly related to her activities. This is clear from the statement that *"they turned committing the crime into their source of income"*. Moreover, it is clear that the payments they received were directly related to her activities in prostitution, and not, for example, by way of payment of rent. I am satisfied that the information provided in the second EAW in relation to the fifth offence is sufficient to establish correspondence with an offence under s. 10(1) of the Criminal Law (Sexual Offences) Act, 1993.
43. It was also argued on behalf of the respondent that his surrender for the offences described in the second EAW is prohibited by s. 16(1)(c) and s. 45 of the Act of 2003, because the decision upon which the second EAW is based was handed down *in absentia*. There is no dispute between the parties that this is the case. However, the applicant argues that in considering this issue, the Court should have regard to the conduct of the respondent, and should also consider whether or not his rights of defence have been respected in the proceedings that resulted in the decision of the Sad Okregowy of 19th April, 2012, upon which the second EAW is based.
44. The background to this decision is, for the most part at least, not in dispute. In a letter providing additional information dated the 3rd August, 2015, the issuing judicial authority stated that, on 16th March, 2012, the respondent sent a letter to the Sad Okregowy District Court in Zamość asking the court to make an aggregate judgment, to include the

judgments handed down in case file reference numbers II K 61/09 and II K 443/06. He provided a mailing address, and the summons for the hearing that followed was sent to that address. The respondent's wife received the summons on 30th March, 2012. The summons also stated that the attendance of the respondent at the hearing was not obligatory. The letter confirms the respondent did not attend. It also states that the respondent was not staying at the address at the time, but he had not provided any other address for service of the summons. None of these facts are in dispute.

45. On 11th December, 2018, the respondent swore an affidavit averring that he was not notified of the date of the amalgamation hearing. He further averred that he did not receive a summons or notification of the hearing from his wife or any other person. He says that he was not aware of the scheduled date of the trial. While the respondent had previously sworn affidavits in opposition to this application, he had not previously stated that he was unaware of the date of the amalgamation hearing. By way of explanation for his failure to do so, it was submitted on his behalf that this affidavit was sworn in the light of the decision of the Court of Justice of the European Union ("CJEU") in the case of *Zdziaszek* (C 271/17 PPU). It will be recalled that, in that case, the CJEU determined that surrender of a requested person may be refused where neither the European arrest warrant nor additional information provided by an issuing judicial authority provides the information required by Article 4a of Council Framework Decision 2002/584/JHA of 13th June 2002 on the European arrest warrant and surrender procedures between Member States, as amended by Council Framework Decision 2009/299/JHA of 26th February 2009 (together hereafter referred to as the "Framework Decision"). That article, which is reflected in the table to s. 45 of the Act of 2003, sets out the information that must be provided by an issuing judicial authority, by tick box, to indicate if a person was present at the trial resulting in the decision, or, if not that the person was summonsed or otherwise made aware of the proceedings.
46. It is clear, beyond dispute, that personal service of the summons to the amalgamation hearing in April, 2012, was not effected. It is also accepted that the respondent did not appear at the trial resulting in the decision upon which the second EAW is based. Moreover, none of the alternative options provided for at para. D of the second EAW have been indicated as being applicable, either in the second EAW itself, or in any of the additional information. Against that background, it is hardly surprising that it is submitted on behalf of the respondent that the requirements of s. 45 of the Act of 2003 have not been satisfied and that the surrender of the respondent for the purposes of the second EAW is prohibited.
47. Nonetheless, the applicant argues that this should not operate to prohibit the surrender of the respondent in circumstances where it was he himself who requested the aggregation hearing, and in doing so, he provided his address for service of documents. In the circumstances, it is submitted, that the Court should infer or presume that the respondent was aware of the hearing date for the amalgamation application, and in any case, it is clear that his rights of defence have not been breached. While acknowledging that in general terms it is necessary to prove either personal service upon a requested person or

alternatively that one of the other circumstances described in s. 45 of the Act of 2003 apply, the applicant relies on the decision of the CJEU in *Dworzecki* (C-108/16 PPU) as authority for the proposition that the Court has flexibility in its treatment of this issue, and may take into account a lack of diligence on the part of a requested person.

48. Subsequent to the opening of this application, the Supreme Court handed down its decision in the case of *Minister for Justice and Equality v. Zarnescu* [2020] IESC 59, in which case the Supreme Court was required to consider whether s. 45 must be interpreted literally so that any failure to comply strictly with its provisions will give rise to a refusal to surrender a requested person in connection with any offences affected by that failure, or it is it permissible to adopt a more flexible interpretation of the section, one that is in conformity with the Framework Decision, even though such an interpretation could be, arguably, *contra legem* the domestic law.
49. At para. 90 of the judgment of the Supreme Court, Baker J. summarises the principles applicable to the interpretation and application of s. 45 of the Act of 2003. It is useful to set these out in full:

*"From this analysis the following emerges:*

- (a) The return of a person tried in absentia is permitted;*
- (b) Article 4(6) of the 2002 Framework Decision permits the refusal to return where the requested state has a legitimate reason to refuse the EAW;*
- (c) A person tried in absentia will not be returned if that person's rights of defence were breached;*
- (d) Section 45 of the Act expressly identifies circumstances in which a person tried in absentia may be returned, primarily where there is evidence of service or where the person was legally represented or where it is shown that a right of retrial in the requesting state is available as of right;*
- (e) The examples outlined in section 45 as forming the basis of the analysis are not exhaustive, and the requested authority may look to the circumstances giving rise to the non-attendance of the accused person at the hearing;*
- (f) The requested state has a margin of discretion in how it approaches the facts, and whether to refuse return;*
- (g) In so doing the requested authority must be satisfied that it has been established unequivocally that the accused person was aware of the date and place of trial and of the consequences of not attending;*
- (h) Actual proof of service is not always required, and an assessment may be made from extrinsic evidence that the requested person was aware but nonetheless chose not to attend;*

- (i) *Proof of service on a family member is not sufficient extrinsic evidence of that knowledge;*
- (j) *The assessment is made on the individual facts but there must be actual knowledge by the requested person;*
- (k) *Whether actual knowledge existed is a matter of fact and can be shown from extrinsic evidence;*
- (l) *The purpose of the exercise is to ascertain whether the requested person who did not attend at trial has waived his or her right of defence;*
- (m) *A waiver may be express or implicit from the circumstances, but an implication that a requested person has waived his or her rights to be present at trial is not to be lightly made and will not be made if it has not been unequivocally established that the person was aware of the date and place of trial;*
- (n) *The degree of diligence exercised by a requested person in receiving notification of the date and place of trial may be a factor in the assessment of his or her knowledge of the date of trial;*
- (o) *In a suitable case a manifest absence of diligence may lead a requested authority to the view that the accused person made an informed decision not to be present at trial, or where it can be shown that there was an informed choice made by the person to avoid service;*
- (p) *The mere absence of enquiry as to the date or place of hearing in itself may not be sufficient, as it must be unequivocally shown that the requested person made an informed decision and, so informed, either expressly or by conduct waived a right to be present;*
- (q) *It may in a suitable case be appropriate to weigh the degree of responsibility of the requesting state to notify an accused person of the date of trial against the accused's responsibility for the receipt of his or her mail;*
- (r) *The enquiry has as its aim the assessment of whether rights of defence have been breached. It is not therefore a wide ranging or free-standing enquiry into the behaviour or lack of diligence of the requested person, and the purpose is to ascertain if rights of defence were adequately protected."*

50. In *Zarnescu* the requested person had been convicted on a guilty plea of one offence, and was convicted in respect of another offence in *absentia*, but at which he was represented by a court appointed lawyer. He filed an appeal, but before the hearing date he wrote to the court, seeking an adjournment so that he could retain a new lawyer. He told the court that he was in Ireland and he could not travel to Romania on account of work commitments. The letter provided a complete address in Ireland, identified as his place of residence, and provided another address, in Romania, stated to be his domicile. A

summons notifying the adjourned date was delivered to the domicile address in Romania, and was stated, by the issuing judicial authority, to have been received by the respondent's father. There was no evidence that the correspondence was forwarded to the respondent by his father.

51. In the High Court, I had dismissed the application because I took the view, that on a plain interpretation of s. 45 of the Act of 2003, surrender was prohibited by s. 45 because none of the circumstances set forth in s. 45 – being the exceptions to prohibition of surrender following a trial in *absentia* – were satisfied. Ultimately Baker J. agreed with that conclusion on the facts and refused surrender, but what is abundantly clear from the principles identified by Baker J. is that in considering whether or not surrender is prohibited by s. 45, the court retains a discretion whether to order surrender, even though its exact requirements may not have been met, if the circumstances justify such a decision, and if there is no question of a breach of the rights of defence of the requested person. Moreover, a court is not obliged to accept that a person was not aware of a court date, simply because he says so. This is apparent from para. 90 (k) of the judgment of Baker J.
52. It is submitted on behalf on the respondent that, on the facts of this case, the respondent was not present for the hearing (being the trial resulting in the decision) and nor was he represented at that hearing and nor does he have the option of a re-trial. Nor is there any evidence that he was aware of the hearing date. The respondent relies upon the passage cited by Baker J. in her judgment from the decision of the European Court of Human Rights in *Sejdovic v. Italy* (Application no. 56581/00) that:

*"In light of the decision in Sejdovic an informed decision not to attend cannot validly be made if the person who does not attend cannot be shown to have known of the date of the hearing"*. (para. 103 of Zarnescu)
53. It is further submitted on behalf of the respondent that insofar as the Minister relies on lack of diligence, this is a conclusion reached on this basis amounts to no more than an inference, which does not meet the high threshold to demonstrate that the respondent validly waived his right to be present at the hearing.
54. Moreover, it is submitted on behalf of the respondent that service based on a legal fiction whereby it is deemed to be good, is not sufficient to establish actual knowledge (para. 107 of *Zarnescu*).
55. What distinguishes the facts in *Zarnescu* from the facts in this case, is that in *Zarnescu*, the requested person provided his Irish address as his residential address, and informed the authorities that he was in Ireland. In this case, the respondent provided the authorities with his Polish address for the purposes of service, and soon afterwards (within a matter of weeks) left Poland for Ireland. He did not inform the authorities of his move. It is unclear whether or not he was still in Poland when the summons was served, and he does not say whether or not his wife, who received the summons, informed him that it had been served. It is, however, reasonable to infer that the respondent remained

in contact with his wife because on his own account of events, she joined him in Ireland in May, within two months of his departure to Ireland.

56. Looking at those facts through the prism of the principles identified by Baker J. at paras. 90(a) – (r) of her judgment, the following conclusions appear to me to be fair in this case. Either the respondent in fact knew of the date, and made an informed decision not to be present at the trial (which I consider likely) or he failed to exercise any diligence about the matter such as, by informing the authorities that he was moving to Ireland and providing contact details. If one is to weigh the degree of responsibility of the requesting state to notify him of the court date, as against his responsibility for the receipt of his mail (para. 90(q) of Baker J.'s decision), one can see that the authorities fulfilled their responsibility while the respondent did nothing to ensure that he received his mail.
57. As Baker J. observed in para. 90(r) the aim of enquiring into these matters is to assess whether or not the respondent's rights of defence in respect of offences concerned have been breached. I consider that when all the background circumstances are taken into account it could not be said that they have been breached in this instance, and that surrender for the offences the subject of the second EAW is not prohibited.
58. I have carefully considered the submissions of the respondent, and while there is merit in these submissions, it seems to me that if the kind of enquiry into service of the proceedings envisaged by Baker J. at para. 90 of her judgment in *Zarnescu* is to have any meaning, it must, in a case such as this, entitle the Court to draw the conclusion that there has been no breach of the respondent's rights of defence, and that he either knew of the date of the proceedings or failed to exercise any diligence at all about it, and surrender is not prohibited by s. 45 of the Act of 2003. To hold otherwise, would, for practical purposes, amount to a literal interpretation of s. 45 which has clearly been rejected by the Supreme Court in *Zarnescu*.
59. For all of these reasons, the objections to surrender in connection with the offences to which the second EAW relates, must be rejected.

**The Third EAW [2015/145 EXT]**

60. The third EAW is dated 4th April, 2015. It is a "*prosecution warrant*" and was endorsed by this Court on 28th July, 2015. The respondent was arrested on 5th November, 2015, but the hearing of this application was delayed by reason of the case of *Celmer*. The third EAW relates to four offences. No ticked boxes are relied upon in relation to any of the offences, and, accordingly, it is necessary for the Court to be satisfied that each offence as described in the third EAW corresponds to an offence in this jurisdiction.
61. Before addressing the issue of correspondence, I will first address those issues of a non-controversial nature about which the Court must be satisfied in each case. Firstly, there was no dispute as to the identity of the respondent or that the person before the Court is the person to whom the third EAW relates. Accordingly, I was satisfied as to the identity of the respondent.

62. Secondly, the third EAW was issued by the District Court in Zamość as issuing judicial authority. It was issued pursuant to an arrest warrant issued by the Regional Court in Zamość of 11th February, 2014.
63. It was not pleaded or argued that the surrender of the respondent is prohibited by any of ss. 21A, 22, 23 or 24 of the Act of 2003, and I am satisfied that the surrender of the respondent for the offences described in the third EAW is not prohibited by any of these sections.
64. In para. C of the EAW, it is stated that the first offence carries a sentence of up to ten years' imprisonment, and the remaining offences carry a sentence of imprisonment (in each case) of up to five years' imprisonment. Accordingly, the requirement as to minimum gravity is met.
65. Particulars of the offences under Polish law are provided in each case. A description of the circumstances in which each offence is alleged to have been committed is also provided. I am satisfied that the third EAW contains all of the information required pursuant to s. 11 of the Act of 2003.
66. I turn next to address the issue of correspondence in relation to each of the offences. At para. E. II of the EAW it is stated that the respondent, in May, 2008, in Zamość, Province of Lublin, *"in order to gain financial benefit, while threatening Marcin Seregiet, he tried to commit a robbery extortion in the following way, he wanted to get from the harmed the sum of PLN 300 a week by threatening him with murder, in turn for enabling him running a criminal activity such as giving other people psychotropic substances and intoxicants..."* It was submitted that these actions, if committed in this jurisdiction, would constitute an offence under s. 5 of the Non-Fatal Offences Against the Person Act, 1997 (the "Act of 1997") which provides:-
- "5 – (1) A person who, without lawful excuse, makes to another a threat, by any means intending the other to believe it will be carried out, to kill or cause serious harm to that other or a third person shall be guilty of an offence."*
67. On behalf of the respondent, it was accepted that the actions of the respondent as alleged at para. E. II of the third EAW would, if committed in this jurisdiction, constitute an offence and, accordingly, surrender of the respondent in connection with this offence was not opposed on this ground. Correspondence in connection with this offence is established to the satisfaction of the Court.
68. The second, third and fourth offence as described in the third EAW are all described in the same or similar terms and it was accepted by the respondent that, for the purposes of correspondence, they may be grouped together. In each case it is alleged that the respondent, acting in concert with named and unnamed individuals, threatened, in each, a named individual *"in order to extort the return of debt"*. In each case, it is stated that he *"threatened with beating"* the individual concerned and demanded the return of a specified sum of money.

69. On behalf of the applicant, it is submitted that the actions of the respondent as described in the third EAW, in relation to the second, third and fourth offences therein, would constitute an offence under s. 2 of the Act of 1997, s. 5 of the Act of 1997 and s. 17(1) of the Act of 1994 (the offence of unlawful demand with menaces).
70. Counsel for the respondent submitted that the acts as alleged could not constitute offences under ss. 2, 3, 4 or 5 of the Act of 1997 because, in the case of threats of assault, it is necessary to cause another "*to believe on reasonable grounds that he or she is likely immediately to be subjected*" to force or impact. This is a requirement of s. 2(1)(b) of the Act of 1997. The threats as described in the second, third and fourth offences are, it is submitted, clearly not threats to apply force or cause an impact on the body of another immediately. So far as an offence under s. 5 of the Act of 1997 is concerned, this involves a threat to cause "*serious harm*", which is defined in the Act of 1997 as meaning "*injury which creates a substantial risk of death or which cause serious disfigurement or substantial loss or impairment of the mobility of the body as a whole or of the function of any particular bodily member or organ*". It is submitted that the actions of the respondent as described at paras. E. II-IV of the third EAW do not amount to threat to cause serious harm to another, as so defined. As against this, it is submitted on behalf of the applicant that the Court is entitled to infer that the threat is in each case a threat to cause serious harm (as defined), involving, as it does in each case, a threat on the part of the respondent to beat a named person, acting in concert and with the assistance of others, i.e. it is clearly the case that there would be several assailants involved in each case.
71. As far as s. 17 of the Act of 1994 is concerned, it provides as follows:-
- "17 – (1) It shall be an offence for any person who, with a view to gain for himself or another or with intent to cause loss to another, makes any unwarranted demand with menaces.*
- (2) For the purposes of this section–*
- (a) a demand with menaces shall be unwarranted unless the person making it does so in the belief–*
- (i) that he has reasonable grounds for making the demand, and*
- (ii) that the use of the menaces is a proper means of reinforcing the demand."*
72. I have little doubt in arriving at the conclusion that the actions of the respondent as set forth in paras. E. II-IV of the third EAW would, if committed in this jurisdiction, constitute an offence under s. 17 of the Act of 1994. While it was submitted on behalf of the respondent that there was nothing in the EAW to suggest that he did not have reasonable grounds to make the demand, i.e. that in each case the debt was owed by the person from whom it was demanded, this could never be a justification for demanding repayment of the debt by force. Or, put on the words of s. 17(2)(a)(ii), it could never be the case that to demand repayment of a loan by force is a proper means of reinforcing the

demand. Accordingly, I am satisfied that correspondence is established in relation to each of the offences E. II-IV of the third EAW.

**The Fourth EAW [2017/50 EXT]**

73. The fourth EAW is dated 19th January, 2017. It was issued by a judge of the Regional Court in Lublin, as issuing judicial authority. It was endorsed by this Court on 6th March, 2017. The respondent was arrested pursuant to the fourth EAW and brought before this Court on 8th May, 2017.
74. The fourth EAW is a "*prosecution warrant*". At para. E of the fourth EAW, four offences are described, each one of which describes the involvement of the respondent in a criminal organisation and engaging in activities comprising or connected with human trafficking. Accordingly, the requesting state has ticked the box for trafficking in human beings in respect of all offences, and no issues as to correspondence, therefore, arise.
75. The fourth EAW is stated to be issued pursuant to an enforceable judgment on preliminary custody, being a decision of the District Court of Lublin-West of 6th March, 2014. At para. C of the fourth EAW, particulars of the penalties applicable in respect of each offence are provided, and these range from a maximum of five years to a maximum of fifteen years. Accordingly, minimum gravity is established in relation to each offence.
76. It was not pleaded or argued that the surrender of the respondent for the purposes of the fourth EAW is prohibited by any of ss. 22, 23 or 24 of the Act of 2003, and I am satisfied that the surrender of the respondent for the offences described in the fourth EAW is not prohibited by any of the aforementioned sections of the Act of 2003.
77. Particulars of the offences under Polish law are provided in relation to each offence. While an issue has been raised by way of objection in relation to one of the legislative provisions relied upon, for the purposes of s. 11 of the Act of 2003, I am satisfied that the fourth EAW provides adequate particulars of the provisions of the law of the requesting state that are relied upon for the purposes of the request. I am also satisfied that at para. E of the fourth EAW, there is an adequate description of the facts alleged to constitute the offences, and the involvement of the respondent in those activities, for the purposes of s. 11 of the Act of 2003.
78. The Court was informed that an earlier EAW had been presented for endorsement in connection with the same offences. However, the Court was also informed that this earlier EAW was not endorsed and that the fourth EAW is in fact an amended warrant. In this regard, the Court was provided with a request for additional information dated 7th February, 2017 whereby the central authority in this State sought clarification as to those offences that are intended to be covered by the ticked boxes, because the issuing judicial authority had completed s. E. 2 of the EAW, apparently describing the same offences as those referred to in s. E. 1. This resulted in a clarification dated 21st February, 2017 in which it was stated that s. E. 1 of the EAW was intended to cover all four offences.

79. A notice of objection was filed on behalf of the respondent, which, while undated, was apparently filed on 16th June, 2017.
80. By this notice of objection, it is pleaded that the fourth EAW does not constitute an EAW for the purposes of the Act of 2003 because it was issued on 19th January, 2017, and was, thereafter, corrected on an unknown date, and sent to the central authority here under cover of a letter dated 2nd February, 2017. Accordingly, it is pleaded that there is a lack of clarity as to whether the fourth EAW constitutes a new warrant or is a purported correction of an existing warrant.
81. It is further pleaded that the surrender of the respondent is prohibited by s. 21A of the Act of 2003 as it is unclear whether or not a decision has been made by the requesting state to charge and try the respondent.
82. It is further pleaded that the surrender of the respondent is prohibited because the prosecution of the offences is statute barred under the laws of the requesting state.
83. Finally, as in all other cases, it is also pleaded that the surrender of the respondent is prohibited by s. 37 of the Act of 2003 as it would constitute a disproportionate interference with his family rights under Article 8 of the Convention and Articles 7 and 24 of the Charter.
84. At the hearing of this application, it was argued that there is some uncertainty as to the status or contents of the EAW, by reason of the correspondence concerning the amendment to the same. It was further submitted that, whereas normally there is an affidavit of arrest, which might assist to clarify the EAW relied upon at the time of arrest, there was no such affidavit in this case. However, counsel for the applicant explained that the execution of the arrest of the respondent for the purposes of the fourth EAW was undertaken by arrangement, and, accordingly, it had not been considered necessary to prepare an affidavit of arrest. Counsel for the applicant also submitted that no issues arose out of the amendment to the fourth EAW such as would operate to prohibit the surrender of the respondent. In this regard, the Court was referred to the decisions of Donnelly J. in the cases of *Minister for Justice and Equality v. Swacha* [2016] IEHC 796 (20th December, 2016) and *Minister for Justice and Equality v. Zielinski* [2017] IEHC 419 (8th May, 2017). In *Swacha*, Donnelly J. stated at para. 51:-

"51. *A document which purports to be a validly issued European arrest warrant must be accepted as such. The Supreme Court (Murray C.J.) in the case of Minister for Justice, Equality and Law Reform v. O Fallúin [2010] IESC 37 dealt with the requirement that an EAW be 'duly issued' as contained in s. 10 of the Act of 2003 as originally enacted. It was stated:*

*'Where it is established that a judicial authority within the meaning of the Act of 2003 has in fact issued the European Arrest Warrant in question it seems to me that it should be considered to have been 'duly issued' within the meaning of that section. Neither the Act nor the Framework Decision in my*

*view can be interpreted as permitting, let alone requiring, the courts of the executing state to embark on what would be in effect a judicial review of the validity of an order of the court or judicial authority of the requesting state according to the law of that State. I do not consider that there is anything within the Framework Decision and in particular the Act of 2003 which envisages that our courts would conduct a judicial inquiry in order to determine whether as a matter of German law, French law, United Kingdom law, Latvian law, or as the case may be, a European arrest warrant produced and authenticated as having been issued by the relevant judicial authority is valid. Issues concerning the validity of an order of a court within the meaning of its own national law invariably fall to be tried and determined by the courts of that country...'*

52. *This Court must accept at face value the validity of these EAWs from Poland. To do otherwise, except perhaps in the most egregious cases as indicated in the O Fallúin case, would be to set at nought the principles of mutual trust and mutual confidence as set out above. The issue of whether these corrected versions of the EAWs are valid is one that is purely a matter for the Polish authorities..."*

85. Later, at para. 57, Donnelly J. further stated:-

*"The Court is satisfied that there is nothing in the 2002 Framework Decision or in the Act of 2003 or s. 11 of the Act of 2003 in particular that requires an issuing judicial authority to issue either, a fresh EAW or to provide additional documentation by other means in order to correct an inaccuracy in the EAW as originally issued. The manner in which an EAW is 'corrected' is properly a matter for the issuing judicial authority. A 'corrected version' of an EAW may be accepted as a European arrest warrant within the meaning of the Act and the 2002 Framework Decision."*

86. In *Zielinski*, Donnelly J. followed and applied her earlier decision in *Swacha*. At para. 73, she stated:-

*"The Court takes the opportunity to observe that the phrase 'fresh warrant' may indeed be an unhelpful shorthand to describe the process which may or may not occur in the issuing state. The High Court is obliged to consider whether the surrender of the respondent is required under the provisions of the Act of 2003. When the High Court is presented with what purports on its face to be an EAW emanating from an issuing judicial authority within the meaning of the Act of 2003, the High Court is bound to act upon that European arrest warrant. It is the receipt by the central authority of a 'European arrest warrant' meaning 'a warrant, order or decision of a judicial authority of a Member State, issued under such laws as give effect to the Framework Decision in that Member State, for the arrest and surrender by the State to that Member State of a person in respect of an offence committed or alleged to have been committed by him or her under the law of that Member State', that triggers the procedures set out in the Act of 2003. If an EAW is*

*sent in an amended or corrected form, it is on that EAW that the authorities in this State must act. In that sense, the EAW is 'a fresh warrant' in this jurisdiction, when compared with earlier versions of the European arrest warrant. Whether the issuing state regards it as a 'fresh warrant' or an 'amended warrant' is not entirely germane to the duty on the High Court as executing judicial authority to take appropriate steps on the EAW that is presented to it."*

87. In this case, the EAW is dated 19th January, 2017, and the applicant subsequently received an amended or corrected version of same by letter of 2nd February, 2017. An enquiry was raised by letter of 7th February, 2017 to which a reply was received on 21st February, 2017. The fourth EAW was then endorsed by this Court on 6th March, 2017. That is the warrant upon which the application for the surrender of the respondent as moved before this Court is based.
88. It is apparent from the decisions of Donnelly J. in *Swacha and Zielinski*, as well as the decision of the Supreme Court in *O Fallúin*, that this Court is not concerned with the process by which the fourth EAW was amended. The validity of that process is entirely a matter for the law of the requesting state. This Court received the fourth EAW from an issuing judicial authority and was satisfied to endorse the same. The fact that it was the subject of a prior amendment is immaterial to the deliberations of this Court. As Donnelly J. observed in para. 73 of *Zielinski*: "*if an EAW is sent in an amended or corrected form, it is on that EAW that the authorities in this State must act*". Accordingly, this argument must be rejected.
89. The other points of objection as pleaded were not argued at hearing, save the objections based on s. 37 of the Act of 2003 and the Directive, which I address below. A further argument was, however, advanced at the hearing of the application and that is that one of the legislative provisions referred to in the EAW as being relevant under Polish law to the application, being an Article of the Polish Penal Code as expressed in the law dated 6th June, 1997, has since been repealed. However, no evidence of this was placed before the Court other than an affidavit of the respondent. If the Court is even to consider such an objection, it goes without saying that it must be based on evidence of an appropriately qualified person, and not merely an averment of the respondent himself. Otherwise, the Court is obliged to proceed on the basis of s. 4A of the Act of 2003, which provides that "*it shall be presumed that an issuing state will comply with the requirements of the Framework Decision, unless the contrary is shown*". Moreover, it occurs to me that even if it is the case that the provision concerned has, indeed, been repealed, it is merely one of four provisions referred to in the fourth EAW, and the appeal of one of four provisions could hardly impact upon the application. The obligation of an issuing judicial authority in this regard is to set out those provisions of domestic law in the requesting state whereby the offence is created, or, more specifically, in the words of s. 11(1)(d) of the Act of 2003: those provisions that specify "*the offence to which the European arrest warrant relates, including the nature and classification under the law of the issuing state of the offence concerned*". If a repealed provision is included in error, it is hard to see how that

could undermine the application, in circumstances where other legislative provisions are also indicated as being applicable. Accordingly, this objection must also be rejected.

### **Objections Applicable to all EAWs**

#### **Section 37 Objection**

90. In each case, it is pleaded and argued that the surrender of the respondent would violate his rights under Article 8 of the Convention. The respondent argues that all of the offences are old and that there has been a significant delay in seeking his surrender. Since his arrival here in 2012, the respondent has settled in this country with his wife and daughter, aged 15 years. He opened a business in car repairs, but had to close this business owing to an injury, not very long before his arrest in connection with the EAWs. However, he hopes to reopen this business eventually. The respondent has not come to any adverse attention of the Gardaí since he arrived here in 2012. It is submitted that his surrender would be disproportionate having regard to the period for which he has been here with his family, and to the age of the offences, which date back as far as 2002.
91. It is further submitted that even if the Court considers that this objection is insufficient to justify refusal of surrender in connection with all offences, if the Court is persuaded to refuse his surrender, for other reasons, in connection with some of the offences described in the EAWs, then it may be appropriate for the Court to consider refusing surrender on this ground in connection with the remaining offences.
92. I have no hesitation at all in dismissing this objection. Nowhere in his affidavits in which he addresses this objection does the respondent raise any matters sufficient to engage an objection grounded upon s. 37 of the Act of 2003, never mind sustain such an objection. It is quite clear that whatever consequences may flow from the surrender of the respondent in connection with the matters for which he is sought by the EAWs, they are no more than the ordinary consequences that flow or might reasonably be expected to flow from the surrender of a person to face charges or to serve a sentence in another country. Authority after authority has determined that the surrender of a requested person will not be prohibited by s. 37 in such circumstances. It is unnecessary to explore these authorities in any detail and, indeed, the Court was not referred to any authorities at all by either side in relation to this objection. However, it is clear that the objection does not, for example, come any way close to meeting the test contemplated by the decision of O'Donnell J. in the case of *Minister for Justice and Equality v. J.A.T. No. 2* [2016] IESC 17 or, more recently, the decision of the Supreme Court (MacMenamin J.) in the case of *Minister for Justice and Equality v. Vestartas* [2020] IESC 12.

#### **Objection Grounded on EU Directive 2012/13 (the "Directive")**

93. In each case, the respondent swore an affidavit averring that he was not provided with any of the information to which he claimed he is entitled to be provided with pursuant to Articles 4, 6 and 7 of the Directive. Counsel for the respondent prepared detailed written submissions arguing that the Directive is applicable to applications for surrender under the Act of 2003. In those submissions, he sought to distinguish the cases of *Minister for Justice v. EP* [2015] IEHC 662 (Donnelly J., 6th October, 2015) and the decision of the Court of Appeal (Kennedy J.) in *Farrell v. Superintendent of Milford Garda Station*,

*Maguire v. Superintendent of Letterkenny Garda Station* [2019] IECA 278, on the grounds that in each of those cases, the court was concerned with applications for access to information pursuant to Article 7 of the Directive only, whereas in this case, the respondent was raising objections grounded on Articles 4 and 6 of the Directive.

94. Counsel for the respondent argued that the decision of the Court of Appeal in *Farrell and Maguire* arose within the narrow framework of a judicial review, whereas the point is now raised in the wider context of an application for surrender pursuant to the EAWs. He submitted that it would not have been difficult for the State to comply with the requirements of the Directive or, for that matter, to provide the information required by the same now. In that way, the objectives of the Framework Decision would not in any way be frustrated by compliance with the Directive. It was further submitted that the respondent, having exercised his right to free movement within the European Union, should not be precluded from challenging the national arrest warrant issued in Poland, as he would be entitled to do if he were arrested in that country. He also referred to recital 39 of the 2012 Directive, which suggests that Article 4 of the Directive might apply to European arrest warrants.
95. In reply to this argument, it was submitted on behalf of the applicant that the law is clear from the decision of the Court of Appeal in the case of *Farrell and Maguire*. Counsel for the applicant referred to the decision of Kennedy J., at paras. 74-77 in which she held that only Article 5 of the Directive is applicable to European arrest warrants .
96. In the course of discussion about the objection, I informed counsel for the respondent that, in a decision handed down very shortly prior to the initial hearing of this application, on the 14th February, 2020, in the case of *Minister for Justice & Equality v. Maguire, Minister for Justice & Equality v. Farrell* [2020] IEHC 77, I addressed and rejected this very argument. At para. 47 thereof, I stated:-

*"Both Donnelly J. and, on appeal the Court of Appeal ruled very clearly that the provisions of the Directive which the respondents are seeking to invoke in these proceedings are provisions which only have application when a person is arrested, in the ordinary course of proceedings, to face charges in the same Member State in which that arrest takes place, as distinct from upon arrest pursuant to a European Arrest Warrant. The respondents are not charged with any criminal offence in this jurisdiction... The Court of Appeal has clearly ruled that, in European Arrest Warrant proceedings, the entitlement of arrested persons is restricted to Article 5 of the Directive. Furthermore, Donnelly J. had previously handed down a decision to precisely the same effect in Minister for Justice Equality and Law Reform v. E.P. [2015] IEHC 662. This Court is bound by those decisions."*

97. On informing counsel of this, this objection was not pursued further, but neither was it expressly withdrawn. Beyond any doubt however, this objection must be rejected having regard to the three unambiguous decisions referred to above.

### **Objection Based Upon Rule of Law Concerns in Poland**

98. Counsel for the respondent argued that, insofar as the EAWs are concerned with prosecution of offences, the respondent cannot be assured of a fair trial, to which he is entitled pursuant to Article 6 of the Convention, because he cannot be assured that such a trial will be conducted before a member of the judiciary who is independent of the executive. However, at the initial hearing of these applications, counsel conceded that he would not be able to demonstrate that if surrendered, "*there is a real risk of trial before a court that [is] not independent and therefore a breach of his fair trial rights*" (per O'Donnell J., at para. 87 of his judgment in the Supreme Court, in the case of *Minister for Justice & Equality v. Celmer* [2019] IESC 80). Nonetheless, it was submitted on behalf of the respondent that developments on the political stage in Poland since the decision of the Supreme Court in that case have been "stark", and that it should no longer be necessary for a person whose surrender to Poland is sought to demonstrate such individual prejudice as is required by *Celmer*. Counsel placed before the Court a Financial Times article dated 9th February, 2020 in which the author opines that the rule of law in Poland is under ever greater threat.
99. Subsequent to the initial hearing of this application, counsel for the respondent approached the Court, *ex parte*, to say that a decision had been handed down on 17th February 2020, by the Higher Regional Court of Karlsruhe, Germany, that might influence the decision of the Court in relation to this point of objection. Having heard counsel, I acceded to his request to make further submissions arising out of further developments in the law of the requesting state since the decision of the Supreme Court in *Celmer*, which decision in turn arose out an appeal from a decision of Donnelly J. in this Court in the case of *Celmer (no. 5)* [2018] IEHC 639, following upon the decision of the CJEU in case C-216/18 PPU, the case known as *L.M.*, a decision of the CJEU following a referral by Donnelly J. in the case of the same Mr. Celmer.
100. There then followed a full hearing arising out of these submissions which took place on 27th July, 2020. On that date, counsel for the respondent opened to the Court advices dated 9th July, 2020 and 17th July, 2020 received from a Polish lawyer, namely Katarzyna Dabrowska (who was the same Polish lawyer who provided an expert opinion to the court in *Celmer*) in relation to developments in the law of Poland subsequent to both the decisions of the CJEU in *L.M.* and the Supreme Court in *Celmer*. Specifically, the opinion provided addressed laws passed on 20th December, 2019 and adopted by the Polish legislature on 23rd January, 2020, being an act on the system of common courts, (the "new laws"), which the respondent claims, *inter alia*, restrict the ability of an accused person to challenge the jurisdiction of a court of trial on grounds of its composition, including whether or not the appointment of the judge was in accordance with law or on grounds relating to the independence or impartiality of the judge or tribunal. The respondent relies upon not just the advices received from Ms. Dabrowska, but also on an opinion on the new laws delivered by the Polish Commissioner for Human Rights, as well as reports on the same from the Organisation for Security and Cooperation in Europe (the OSCE) and a report of the Venice Commission of 30th December, 2019, in which it stated, *inter alia*, that the new laws:-

*"Diminish judicial independence and put Polish judges into the impossible situation of having to face disciplinary proceedings for decisions required by the ECHR, the law of the European Union and other international instruments."*

101. The respondent also referred the Court to infringement proceedings launched by the European Commission against Poland on 29th April, 2020, arising out of the new laws. Counsel for the respondent acknowledged that the information concerning legislative developments in Poland since December 2019 is of a general nature and is not sufficient for the purpose of conducting an assessment of the risk to the respondent personally. The court in Karlsruhe had directed a series of questions to the issuing judicial authority in Poland in connection with the legal effect of the new laws, but, before a response had been delivered to those questions, it had declined the application because it was satisfied on the basis of the information before it that there were specific and precise reasons amounting to substantial grounds for believing that the requested person in the case would not receive a fair trial, if surrendered. It was then submitted to me on behalf of the respondent that, having regard to the new laws, I should seek further information from the issuing judicial authority with a view to assessing their impact on the fair trial rights of the respondent, if he is surrendered.
102. Initially, I decided against ordering a request for further information, because it seemed to me that the questions to be asked would be of such a general nature as could only give rise to a general response. Inevitably, this would be mean that, whatever the answers might be, they could hardly provide information that would be specific and precise to the respondent's case.
103. Subsequently however, I changed my mind and directed that certain questions should be put to the relevant issuing judicial authority with responsibility for issuing each warrant. I changed my mind for two reasons; Firstly, there was another development brought to the attention of the Court, that is that a Dutch court had made a referral to the CJEU in relation to the new laws (the "Dutch referral"), and while details of this were at the time unclear, I took the view that it would be appropriate to await the decision of the CJEU on the Dutch referral in case it impacted on these and other proceedings. Accordingly, while awaiting the decision of the CJEU on the Dutch referral, it seemed to me to be appropriate to seek further information as regards the new laws, in case the replies might assist the Court in its determination, following upon the decision of the CJEU in the Dutch referral. Secondly, on reflection, I considered it appropriate to seek further information having regard to the decision of the CJEU in *L.M.*, in which the CJEU stated at paras. 74-76:

*"74. In the course of such an assessment, the executing judicial authority must, in particular, examine to what extent the systemic or generalised deficiencies, as regards the independence of the issuing Member State's courts, to which the material available to it attests are liable to have an impact at the level of that State's courts with jurisdiction over the proceedings to which the requested person will be subject.*

75. *If that examination shows that those deficiencies are liable to affect those courts, the executing judicial authority must also assess, in the light of the specific concerns expressed by the individual concerned and any information provided by him, whether there are substantial grounds for believing that he will run a real risk of breach of his fundamental right to an independent tribunal and, therefore, of the essence of his fundamental right to a fair trial, having regard to his personal situation, as well as to the nature of the offence for which he is being prosecuted and the factual context that form the basis of the European arrest warrant.*
76. *Furthermore, the executing judicial authority must, pursuant to Article 15(2) of Framework Decision 2002/584, request from the issuing judicial authority any supplementary information that it considers necessary for assessing whether there is such a risk."*
104. Accordingly, on 14th October, 2020 I directed that further information be sought from the issuing judicial authorities under s. 20 of the Act of 2003. By letters dated 19th October, 2020 the central authority in this jurisdiction sent six questions to the two issuing judicial authorities responsible for the issue of the EAWs, and a reply to those questions was received by letters dated 3rd and 6th November, 2020. The questions and answers received are as follows:

Question 1: "Do the laws of Poland as summarised in the High Court judgment of *Minister for Justice v. Celmer* [2018] IEHC 153, para. 28 [...] and the reasoned proposal of the European Commission pursuant to Article 7 of the TEU apply to the courts before which Mr. Orłowski will stand trial, including any courts to which he may appeal after the first instance decisions?"

Answer 1 – 3rd November: "The current legal provisions in force in the Republic of Poland are applied in all common courts, as well as in the High Court, also those mentioned in the reference;"

Answer 1 – 6th November: "the circumstances that you indicated in notes (point 1) do not have direct influence on Mr. Wojciech Orłowski's trial situation. However, the indirect link can be found in the fact that these circumstances affect the whole Polish legal system."

Question 2: "Does the law dated 20th December 2019, being an Act on the system of common courts, including the Act on the Supreme Court, and published in the Journal of Laws 2019, No. 190, apply to the courts before which Mr. Orłowski will stand trial, including any courts to which he may appeal after the first instance decision?"

Answer 2 - 3rd November: "Act of 20th December 2019 on change of the Act – Law on the system of common courts, Act on the High Court and some other acts (Journal of Laws of 2020, position 190) is in force, both in the court of first instance and the appeal court;"

Answer 2 - 6th November: "The act of 20th December 2019 on the amendment of the act-Law on common courts system, Law on the Supreme Court and some other acts, published in the Journal of Laws 2020, entry 190 apply to common courts that are courts before which Mr. Wojciech Orłowski will appear, including courts to which he can appeal against the judgment of the court of first instance."

Questions 3 and 4: "Have any judges assigned to the courts before which the respondent will stand trial - including any appellate court judges - been subjected to disciplinary proceedings since the above laws came into force?"

"If so, please provide details of the disciplinary charges and the outcome of such proceedings including any penalties imposed."

Answers 3 and 4 - 3rd November: "According to the information provided by the President of the District Court of Zamość, of 29th October 2020, results in the period from 24th February 2020, that is from the day the above mentioned Act came into force till the day of 29th October 2020, there were not any and have not been run any disciplinary proceedings against the judges of the Second Penal Division of the Regional Court of Zamość, as well as against the judges of the Second Penal Division of the District Court of Zamość;"

Answers 3 and 4 - 6th November: "I kindly inform you that until implementation of the aforementioned provisions there have been no disciplinary proceedings commenced against any judges of the Circuit Court in Lublin."

Question 5: "Is it possible for a judge before whom the respondent may stand trial, including any appellate court judges, to be disciplined on account only of any decisions that he or she may make in the ordinary performance of his or her duties?"

Answer 5 - 3rd November: "There is a possibility of starting a disciplinary proceeding against the judge running the case of Wojciech Orłowski, because of decisions which he would take in the case, if the decisions are taken with gross and obvious violation of the provisions in force;"

Answer 5 - 6th November: "Pursuant to the content of art. 107 paragraph 1 of the act of 27th July 2001 – the Law on the common courts system as amended by art, 1 point 32 of the act of 20th December 2019 on amendment of the act- Law on the common courts system, Law on the Supreme Court and some other acts, a judge takes disciplinary responsibility for misconduct in service (disciplinary) including;

- 1) a gross and apparent violation of the provisions of law;
- 2) actions or negligence that would prevent or significantly disrupt functioning of the judicial organ;

- 3) actions questioning the existence of working relationship of the judge, efficiency of appointment of the judge or constitutional competence of the organ of the Republic of Poland;
- 4) *public activities incompatible with the principles of independence of the courts and judges;*
- 5) breach of the dignity of authority of the office of judge.

By defining the grounds of disciplinary responsibilities of a judge the legislator indicated that the judges are disciplinary liable for misconducts, including a gross and apparent violations of the provisions of law and breach of the dignity of the office of the judge constituting the disciplinary misconduct. In the definition of 'violation of the provisions of law' it is about any violation of law within the scope of regulation of the law on common courts system, internal rule of the court administration, court instructions as well as substantive and procedural law which are the ground of judge's adjudicating activity. The violation of the provisions of law by a judge must take place during his official duties, entrusted tasks and must be within application of the law in legal proceedings."

Question 6: "Is it possible for an accused person who has concerns about the (a) appointment and/or (b) impartiality before whom he/she may stand trial to challenge and/or request that judge to recuse him or herself i.e. to request the judge not to preside over or participate in the trial in any way? If so, will that challenge or request be decided on before the trial proceeds any further?"

Answer 6 - 3rd November: "There is a possibility to file a motion for exclusion of a judge by the accused person. Until such a motion is recognized the case is not in progress."

Answer 6 - 6th November: "In response to question 6 I would like to inform you that a prosecuted person(the accused in criminal investigation) in case he/she undermines the independence of the adjudicating court has a possibility to file a motion to exclude the judge. Pursuant to art 41 § 2 of the Code of Penal Procedure a motion for the disqualification of a judge, filed pursuant to § 1 after the judicial examination has been commenced, shall not be heard, save for cases in which the grounds for disqualification have arisen or did not become known to the party concerned until after the commencement of the examination. Save for the case described in § 2 the decision on disqualification shall be made by the court before which the proceedings are pending; the judge concerned shall not participate in the panel which is to pass the decision on this disqualification.

There is no appeal against this court's rejection of the motion of the accused which was filed in this mode.

In the appeal proceedings the appellant of the judgment of the first instance may however point out that a violation of the provisions of substantive law has occurred

according to art. 438 § 1 of the Code of Penal Procedure (including art. 41 paragraph 1 of the Code of Penal Procedure) if it could affect the content of the decision. The exception from the discussed mode was stipulated in article 26 paragraph 2 of the Act of 8th December 2017 on Supreme Court (Journal of Laws.2019.825). In accordance with that provision Supreme Chamber of Control and Public Affairs of the Supreme Court deals with examining motions or statements concerning disqualification of a judge or name of the court before which the proceedings are commenced, including allegation of the lack of independence of the court or a lack of impartiality of the judge. The court examining the case shall immediately forward the motion to the President of the Supreme Chamber of Control and Public Affairs in order to initiate the proceedings in accordance with the principles set out in separate provisions. Forwarding the motion to the President of the Supreme Chamber of Control and Public Affairs does not stop the course of the ongoing proceedings. Pursuant to article 26 paragraph 3 of the quoted Act, the motion mentioned in paragraph 2 will not be heard if it relates to establishing or assessment of the legality of the appointment of the judge or his legitimacy to perform tasks concerning justice system.”

105. It is not in dispute that in these proceedings, the respondent has not put forward any evidence as to how any of the generalised or systemic deficiencies in the rule of law in Poland, regardless as to when those deficiencies first arose, should cause the Court to be concerned that there are substantial grounds for believing that, having regard to his personal situation, and the nature of the offences with which he is charged, he will run a real risk of a breach of the fundamental right to a fair trial. The respondent has not sworn any affidavit in opposition to this application, to say how it is that he considers his trial will be affected by the new laws or the earlier legislative changes in Poland which have been found to constitute deficiencies in the rule of law.
106. Moreover, notwithstanding that he has obtained comprehensive legal advice from Polish lawyers regarding these matters, those advices give no indication as to the impact of the changes in Polish law (including those changes in the law with which *Celmer* was concerned) on court hearings and decisions at trial level in Poland. This was one of the factors that the Supreme Court (O'Donnell J.) suggested might be considered by courts in future applications (see para. 88 of the judgment of O'Donnell J. in *Celmer*). On the contrary, Ms. Dabrowska specifically states, for example, that there is no information to say that a disciplinary prosecutor has been appointed to any single case against a judge where the respondent might be tried, although it should be noted that in another application travelling with this application, the Court has been informed of disciplinary proceedings against unnamed judges, but no other information was available. Ms. Dabrowska further states that she has no knowledge of any irregularities in the appointment of judges to the common courts, apart from the fact that changes have occurred in the composition of the National Council for the Judiciary, the body which nominates judges for appointment, although she notes reports of three judges who were removed from a delegation to a court. She also states that “*No intentional interference has been proven so far*” in the random process involving the selection of judges to hear

individual cases, and that it appears that fewer cases are being assigned to judges who are loyal to the Government. That said, Ms. Dabrowska states in a report dated 17th July, 2020 that in a six month period during 2017-2018, the Minister for Justice, according to press releases, removed from office 66 presidents, and 63 vice presidents of common courts.

107. The opinion of Advocate General Campos Sánchez-Bordona in the Dutch referral was delivered on 12th November, 2020. While he, in effect, affirmed that the test determined in *L.M.* remained applicable (notwithstanding the introduction of the new laws in the intervening period), he emphasised the need for an executing judicial authority to be even more rigorous in its examination of the circumstances pertaining to the European arrest warrant under consideration, having regard to increased systemic or generalised deficiencies. The respondent submits that in light of this requirement to be “*even more rigorous*” in the examination of circumstances, precise information on the appointment of the judges presiding over the respondent’s trial and any disciplinary measures already taken against them must be provided before a decision to surrender can be made.
108. The applicant on the other hand submits that there is nothing either in the information provided by the respondent himself or in the replies received from the IJA that would constitute substantial grounds for believing that the respondent (specifically) is at risk to an unfair trial, if surrendered. The applicant submits that while the response to the request for further information accords with criticism of developments impacting upon the rule of law in Poland in recent years, nonetheless there is an insufficiency of evidence to establish that this respondent faces a specific risk of an unfair trial, and in the absence of any evidence from the applicant himself in this regard, the Court should not raise any further inquiries.
109. The CJEU then delivered its decision on the Dutch referral on 17th December, 2020, (joined cases C-354/20 PPU and C-412/20 PPU, referred to by the CJEU as cases “*L*” and “*P*” respectively, which nomenclature I adopt from this point onwards). In the concluding paragraph of its decision, it held:-

*“Article 6(1) and Article 1(3) Of Council Framework Decision 2002/584/JHA of 13th June 2002 on the European arrest warrant and surrender procedures between Member States, as amended by Council framework decision 2009/299/JHA of 26th February 2009, must be interpreted as meaning that, where the executing judicial authority, which is called upon to decide whether a person in respect of whom a European arrest warrant has been issued is to be surrendered, has evidence of systemic or generalised deficiencies concerning the independence of the judiciary in the member state that issues that arrest warrant which existed at the time of issue of that warrant or which arose after that issue, that authority cannot deny the status of ‘issuing judicial authority’ to the court which issued that arrest warrant and cannot presume that there are substantial grounds for believing that that person will, if he or she is surrendered to that Member State, run a real risk of breach of his or her fundamental right to a fair trial, guaranteed by the second*

*paragraph of article 47 of the Charter of fundamental rights of the European Union, without carrying out a specific and precise verification which takes account of, inter-alia, his or her personal situation, the nature of the offence in question and the factual context in which the warrant was issued, such as the statements by public authorities which are liable to interfere with how an individual cases handled.”*

110. In effect, this is a re-statement of the test prescribed by the CJEU in *L.M.* It is a test that requires the Court to consider and answer two questions:-

- 1) Is there objective, reliable, specific and properly updated material indicating that there is a real risk of a breach of the fundamental right to a fair trial guaranteed by the second paragraph of Article 47 of the Charter of Fundamental Rights of the European Union on account of systemic or generalised deficiencies so far as concerns the independence of the issuing Member State’s judiciary? There can be little doubt but that the answer to this question is that such material is available and confirms the existence of that real risk. Donnelly J. identified the risk in *Celmer (No.5)* [2018] IEHC 639, and it is clear that far from having improved in the intervening period, the situation has deteriorated further following the introduction of the new laws. That this is so is apparent not just from international commentary concerning the new laws, but also from the opinion of Advocate General Campos Sánchez-Bordona, who in his opinion in the *L and P*, noted that the position in Poland appears to be worsening (see para. 57 of his opinion)
- 2) The second limb of the test requires the executing judicial authority to determine specifically and precisely, the extent to which the general deficiencies identified are liable to have an impact at the level of the courts of the Member State having jurisdiction over the proceedings, to which the requested person will be subject and, whether, having regard to his or her personal situation, the nature of the offence for which he or she is being prosecuted and the factual context in which the arrest warrant was issued, and in the light of any information provided by the Member State pursuant to Article 15(2), there are substantial grounds for believing that that person will run such a risk if surrendered to that Member State.

111. The replies to the request for further information confirm that the new laws do apply to the court before which the respondent will be tried. The nature of the offences for which the surrender of the respondent is sought do not give rise to any specific concern i.e. there is no reason to believe that the respondent will not receive a fair trial simply because of the nature of the offences involved, and nor has this been argued. There is nothing unusual about the factual context in which the arrest warrant was issued. Nor has any information been provided as regards the personal situation of the respondent to give rise to a concern that he will not receive a fair trial.

112. All of the grounds relied upon, in relation to this ground of objection, are general grounds arising out of generalised and systemic deficiencies in the rule of law in Poland. However, it has now been stated twice by the CJEU that such generalised and systemic deficiencies

in the rule of law of the requesting state are not sufficient in and of themselves to justify a refusal an application for surrender.

113. That being the case, since the respondent has not advanced any reasons to cause the Court to have any concerns that he personally will not receive a fair trial, and since there is nothing unusual about the crimes of which he stands accused, or the factual background to the events giving rise to the charges he is facing, the respondent has not reached the very high threshold of satisfying the Court that, if surrendered, there are substantial grounds for believing he will be at a real risk of not receiving a fair trial by an independent and impartial tribunal. Accordingly it follows that this ground of objection must be rejected, in so far as it is concerned with issues related the independence of the judiciary and fair trial rights.

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114. There is, however, another limb to the objection grounded on legislative changes in Poland, and their impact on the rule of law, which, the respondent submits, has not been addressed by the Supreme Court decision in *Celmer* or by the CJEU decisions in *L.M.* and *L and P* and, accordingly, the test posited by those cases have no application to this objection. This relates to the lawfulness of appointment of judges, and the possibility of challenging the composition of a court. It is submitted on behalf of the respondent that one of the matters that has been giving rise to concerns about the rule of law in Poland is the appointment of judges. There are concerns that judges may be appointed or have been appointed contrary to law, and furthermore that some provisions of the new laws prohibit any challenge to validity of a judge’s appointment. Article 42a of the new law provides: “*Within the framework of the activity of the courts or organs of the courts, it is unacceptable to question the powers of courts and tribunals, constitutional state bodies and law enforcement and control bodies*”. It is hardly surprising that such a provision has given rise to concern. Amongst the sources relied upon as expressing this concern is the Polish Commissioner for Human Rights who, referring to Article 42a of the new law the Act stated:-

*“The real purpose of the Act and of the definition in question [definition of judge] is to legalise the legal status of persons who have been appointed as judges, even if their appointment was in gross violation of the law.”*

115. Counsel for the respondent acknowledged that his concerns about the validity of a judge’s appointment would be assuaged if it were possible to challenge his/her appointment. However, it is submitted that that entitlement has, for all practical purposes, been abolished by Article 26 of the New Laws, which is referred to above (at para. 104) in the second reply, dated 6th November, 2020, to question no. 6 of the request for information to the issuing judicial authorities, and to which I refer again to below. It is submitted that all of this gives rise to a risk of a violation to the respondent’s right under Article 6 of the Convention which provides, *inter alia*, that “*everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law*”. Reliance is also placed upon Article 47 of the Charter which provides, *inter alia* that there is a right to “*an independent and impartial tribunal previously established by law*”.

In so far as there is no longer a procedure available to challenge the lawfulness of a judge's appointment, it is submitted that that also constitutes a violation of the respondent's rights to an effective remedy under Article 47 of the Charter.

116. It is submitted on behalf of the respondent that this issue has not been addressed either in *L.M.* or in the more recent decision of the CJEU in *L and P*. Those cases it is submitted, were concerned with the independence of the judiciary and the right to a trial before an independent and impartial tribunal and related issues. It is submitted that the question of whether a court has been established in accordance with law however, is a separate and distinct matter. An accused person is entitled to trial before a properly constituted court, established by law.
117. It is submitted that any proceedings before a court that has not been established by law are in violation of those rights. Since the manner of appointment of judges has been to the fore in the controversy surrounding rule of law issues in Poland in recent years, and since it is clear that an accused person cannot hope to challenge the composition of the court before which he or she stands trial, these matters together must lead the Court to a conclusion that there are substantial grounds to believe that if the respondent is surrendered, his right to a fair trial before a court established by law, as guaranteed by Article 6 of the Convention and Article 47 of the Charter will be violated.
118. I will first address the question as to whether or not it is possible to challenge the composition of a trial court. The applicant submits that it is far from clear from the evidence that an accused person does not have the right to challenge the composition of a court on the grounds of a defect in the appointment of a judge. This was addressed both by the lawyer retained in Poland by the respondent, Ms. Dabrowska, and in replies to the request for information made to the issuing judicial authorities in October 2020, which I have set out above. Having reviewed all of that documentation, I think it likely that the submissions of the respondent in this regard are correct. Articles 26(2) and (3) of the Act on the System of Common Courts of 20th December, 2019 provide:-
  - "(2) *The competence of the Extraordinary Control and Public Affairs Chamber includes consideration of motions or statements concerning the exclusion of a judge or the designation of the court before which the proceedings are to be conducted, including the allegation of lack of independence of the court or lack of impartiality of the judge. The court examining the case shall immediately forward the motion to the President of the Extraordinary Control and Public Affairs Chamber in order to give it further course of action under the rules specified in separate regulations. The submission of the motion to the President of the Extraordinary Control and Public Affairs Chamber does not stop the ongoing proceedings.*
  - (3) *The motion referred to in paragraph 2 shall be left unprocessed if it involves determining and assessing the legality of the appointment of a judge or his authority to perform judicial tasks."*

119. I think it is reasonably clear from this text and the opinion of Ms. Dabrowska that, even if a person can issue a motion to challenge the validity of a judge's appointment, that motion will not be heard. The position may well be different where the motion concerns issues relating to impartiality, but that is a separate matter. However, while that conclusion may strengthen the respondent's objection, it is only one element of it, advanced in support of his central contention that he will not receive a trial before a court established by law, if surrendered.
120. I have great difficulty in accepting the argument that neither of the decisions in *L.M.* nor *L and P* embraced matters concerning the appointment of judges or the right to a trial before a Tribunal established by law. In *L.M.*, the CJEU was considering the objections of the respondent in that case which revolved around legislative changes in Poland since 2015. At para. 21, it identifies some of the changes under consideration (which had given rise to a reasoned proposal on the part of the European Commission pursuant to Article 7(1) of the Treaty on the European Union), and amongst the matters about which concern was expressed were compulsory retirement and future appointments in the Supreme Court and the composition of the National Council for the Judiciary. The issue of appointment and dismissal of judges is referred to on numerous occasions in the reasoned proposal of the Commission, for example, at paras. 57, 68, 141, 144, 155, 157, 161 and 175. In *L.M.*, the CJEU addresses the reasoned proposal at paras. 18 - 20. It is clear, in my opinion, that the decision of the CJEU in *L.M.* was concerned with all of the legislative changes, including those relating to appointment of judges, that had taken place up to the time that Donnelly J. in this Court referred questions to the CJEU for consideration in that case.
121. In *L and P* at para. 14, the CJEU sets out those developments which caused the referring court in that case to seek a ruling from the CJEU. Included in these developments were the adoption of the law of 20th December, 2019 which, it is noted in the decision in *L and P*, has led the European Commission to initiate infringement proceedings on 29th April, 2020, against Poland, concerning the new laws. In the course of an exchange with the Court on this issue, counsel for the respondent stated that there have been "*doubtful appointments*" to the courts in Poland, and that this has been a feature of the information available concerning the courts in Poland from the very outset. This, it seems to me, may reasonably be interpreted as an acceptance that matters concerning the regularity of the appointment of judges were very much "in the mix" when the CJEU delivered its decisions in both *L.M.* and *L and P*. That being so, I find it difficult to comprehend the argument that a person such as the respondent, who wishes to raise objection to his surrender to Poland on this ground, does not have to meet the test that has in effect been pronounced twice by the CJEU in *L.M.* and *L and P*, and applied in this jurisdiction by both the High Court in *Celmer (No. 5)* and, on appeal, in the Supreme Court. For this reason alone, this objection must be rejected, but there are also other reasons to reject the same.
122. The possibility that judges may be appointed otherwise than in accordance with law is a systemic and generalised deficiency in the rule of law, but it is not open to this Court to refuse surrender of a requested person on the basis of a systemic or generalised

deficiency. The Framework Decision provides for a limited number of grounds for the refusal of an application for surrender. Some of these are mandatory and some are optional. But it has been recorded many times, and was repeated again in *L and P* at para. 37, "*execution of the European Arrest Warrant constitutes the rule, refusal to execute is intended to be an exception which must be interpreted strictly*". One of the exceptions permitted by the Framework Decision is where surrender would give rise to a violation of fundamental rights recognised by Article 6 of the Treaty on European Union and as reflected in the Charter (Recital 12 of the Framework Decision). In turn, this is reflected in s. 37 of the Act of 2003 which states that a person shall not be surrendered under the Act if his or her surrender would be incompatible with the State's obligation under the Convention or the protocols to the Convention.

123. While the general and systemic deficiencies that have been identified and addressed in *L.M.* and *L and P* are of profound concern, it does not follow that all appointments made pursuant to the new laws will be contrary to law. Before the Court may refuse surrender on the basis of this objection, it must be satisfied that there are substantial grounds for believing that the requested person will, if surrendered, run a real risk of breach of his or her fundamental right to a fair trial, before a tribunal established in accordance with law. Those substantial grounds in turn can only be established by reference to a specific and precise examination of the personal situation of the respondent.
124. There is no information available to suggest that there are substantial grounds to believe that the respondent will stand trial before a judge who has not been appointed in accordance with law. The furthest that the matter can be put is that this is a possibility. Such specific evidence as is available has been provided by Ms. Dabrowska who, in a report to the respondent's solicitors of 17th July, 2020 and in answer to a question as to whether or not she is aware of any irregularities in the appointment to the common courts [of judges] states: "*The author has no knowledge of any irregularities other than the appointment of judges at the request of the National Council of the Judiciary in a changed form...*". While I am unclear as to exactly what this means, there is nothing in the two reports provided by Ms. Dabrowska to indicate that she has any concerns regarding the regularity of the appointment of judges at the level of court in the district where the respondent will face trial. She does say that she does not know the identity of the judge or judges who will preside over the trials of the respondent, but it seems clear from her reports that she has no information to indicate that she has any specific concerns regarding the regularity of the appointment of judges that can be said to relate specifically to the respondent.
125. The respondent relies upon a decision of the European Court of Human Rights in the case of *Ástráosson v. Iceland* (Application No. 26374/18, 1st December, 2020). In that case, the applicant had been convicted of road traffic offences and appealed against that conviction to the Court of Appeal in Iceland. The appellate court was made of a panel of judges, the appointment of one of whom, it subsequently transpired, was defective. The ECtHR drew a distinction between the independence and impartiality of the tribunal on the

one hand, and the right to a trial by a tribunal established at law on the other. At paras. 280 and 285, the court stated:

*"280. The Court has no reason to doubt that the appointments at issue had, technically, not been 'markleysa' (a nullity) under Icelandic law or that, once appointed, the individual judges would endeavour to observe the fair trial requirements. However, none of those findings address as such the question whether the irregularities in the process leading to the appointment of A.E. had, by and of themselves, interfered with the applicant's right to a 'tribunal established by law' as a distinct Article 6 safeguard, as interpreted by the Court. ...*

*285. Moreover, the question whether the irregularities at issue had any actual implications for A.E.'s independence or impartiality, this being at the centre of the Supreme Court's examination of the applicant's case, did not as such have a direct bearing on the assessment of his separate complaint under the 'tribunal established by law' requirement, as already noted in paragraph 280 above."*

126. On the facts of the case the ECtHR found that there had been a flagrant breach of the applicable rules relating to judicial appointments which were specifically designed to serve the important public interest of safeguarding judicial independence vis-à-vis the executive branch. This failure, the ECtHR concluded, amounted to a violation of the right to trial before a court established by law. It was accepted by the State parties in *Ástráosson* that the appointment of the judge in question had been irregular under domestic law. The applicant in these proceedings submits that there has been no evidence adduced in these proceedings to suggest that any of the judges appointed pursuant to the changes in legislation in Poland dating back as far as 2015 have been appointed other than in accordance with domestic Polish law. I think there is significant merit in that submission. Moreover, in *Ástráosson* the ECtHR held that the fact that a court is both independent and impartial in the discharge of its functions, does not in and of itself mean that the judge or judges sitting on the court were appointed in accordance with law. The opposite is also true, and the fact that legislative changes in Poland have given rise to serious concerns about the independence or impartiality of the courts in Poland generally, does not mean that all courts, or any particular court, have been established contrary to law.
127. Through no fault of his own, the respondent is unable to advance any evidence regarding the legality of the appointment of the judges who will be in charge of the proceedings that he faces, if surrendered. So the furthest that the respondent can put this argument is to say that there is a possibility that, if surrendered, he will be put on trial before a court that has not been established in accordance with law. A mere possibility that this might occur is not sufficient to refuse an application for surrender. If authority were needed for this proposition, it can be found in *Minister for Justice, Equality and Law Reform v. Rettinger* [2010] IESC 45. That case was concerned with the possibility that the respondent might be subjected to treatment contrary to Article 3 of the Convention, if surrendered (as it happens, also to Poland). At para. 27 of her judgment, Denham J. sets out the principles applicable to the consideration of such an objection and at para. (VII)

she expressly states that “*the mere possibility of ill treatment is not sufficient to establish an applicant's (sic) case*”.

128. It follows from all of the above that this ground of objection must also be rejected. Having considered all of the objections of the respondent, I am satisfied that the respondent should be surrendered in respect of all of the matters for which his surrender is sought in connection of all four of the EAWs to which this judgment relates, save only the offence referred to in para. 13 of this judgment, being the offence described in para. E(IV) of the EAW dated 4th December, 2012.