

**THE HIGH COURT**

[2021] IEHC 827  
[2021 No. 163 EXT.]

**BETWEEN**

**MINISTER FOR JUSTICE**

**APPLICANT**

**AND**

**JOHN PAUL BARRETT**

**RESPONDENT**

**JUDGMENT of Mr. Justice Paul Burns delivered on the 13th day of December, 2021**

1. By this application, the applicant seeks an order for the surrender of the respondent to the French Republic ("France") pursuant to European arrest warrant dated 28th October, 2014 ("the EAW"). The EAW was issued by Vincent Charmoillaux, Deputy Public Prosecutor, as the issuing judicial authority.
2. The EAW seeks the surrender of the respondent in order to enforce a sentence of 2 years' imprisonment imposed on the respondent on 30th January, 2014, of which 1 year, 4 months and 1 day remains to be served.
3. The respondent was arrested on 5th June, 2021 on foot of a Schengen Information System II alert and brought before the High Court on the same day. The EAW was produced to the High Court on 15th June, 2021.
4. I am satisfied that the person before the Court, the respondent, is the person in respect of whom the EAW was issued. No issue was raised in that regard.
5. I am satisfied that none of the matters referred to in ss. 21A, 22, 23 and 24 of the European Arrest Warrant Act, 2003, as amended ("the Act of 2003"), arise for consideration in this application and surrender of the respondent is not precluded for any of the reasons set forth in any of those sections.
6. I am satisfied that the minimum gravity requirements of the Act of 2003 have been met. The sentence in respect of which surrender is sought is in excess of 4 months' imprisonment.
7. At part D of the EAW, it is indicated that the respondent did not appear in person at the trial resulting in the decision which is sought to be enforced. The issuing judicial authority has indicated that it is relying upon the equivalent of point 3.1.(b) of the Table set out at s. 45 of the Act of 2003, which transposes Article 4A of the European Council Framework Decision dated 13th June, 2002 on the European Arrest Warrant and the Surrender Procedures Between Member States, as amended ("the Framework Decision"), into Irish law. The EAW states as follows:-

*"3.1 b) The person was not summoned in person but by other means actually received official information of the scheduled date and place of the trial which resulted in the decision, in such a manner that it was unequivocally established that*

*he or she was aware of the scheduled trial, and was informed that a decision may be handed down if he or she does not appear for the trial."*

8. The issuing judicial authority goes on to rely upon point 3.4. of the Table as follows:-

*"3.4 The person was not personally served with the decision, but he will be personally served with this decision without delay after the surrender, and when served with the decision, the person will be expressly informed of his right to a retrial or appeal, in which he has the right to participate and which allows the merits of the case, including fresh evidence, to be re-examined, and which may lead to the original decision being reversed, and he will be informed of the time frame within which he has to request a retrial or appeal which will be ten days."*

9. At part D.4. of the EAW, it is stated:-

*"Mr. BARRETT was informed when he was released under judicial supervision on 17 November 2010 that he was required to declare an address on French territory to which all summonses and notifications in the context of these proceedings would be sent. He was informed that, pursuant to Articles 116 and 148-3 of the French Code of Criminal Procedure, any notification made to this address was deemed to be made to him. Mr BARRETT declared the address of his lawyer. He was summoned to this address on 17 January 2014."*

10. At part E of the EAW, it is indicated that the warrant relates to three offences and the description of the circumstances under which the offences were committed is set out thereat. On 5th March, 2010, the respondent was arrested in Veys driving a truck carrying 5 tonnes of smuggled cigarettes. He had loaded this cargo in Paris and was heading for Cherbourg to embark for Ireland. He was not in possession of the customs documents required by law. He was employed by a company [F.B.] based in Clonmel, Ireland and managed by [S.F.] and [D.F.], did not cooperate with the investigation and gave several false and contradictory versions. The 3 offences are described as:-

- Smuggling prohibited or highly taxed goods in an organised gang;
- Attempted undeclared export of prohibited or highly taxed goods in an organised gang; and
- Criminal association for the preparation of an offence punishable by 10 years' imprisonment.

11. The respondent swore an affidavit dated 22nd July, 2021, in which he avers that he only first became aware of an outstanding prison sentence when he was contacted about executing the EAW herein. He denies the substantive offences and argues that due to the passage of time he will be hampered in his ability to fully defend same. He avers that he gave an address to the French authorities of *"Strylay, Killenaule Road, Fethard, Co. Tipperary"* as opposed to the address cited on the EAW of *"Strylay, Killarney Road"*. The respondent avers that he recalls being arrested in France in 2010, the truck was searched

and he was informed that untaxed cigarettes were found. He was released after approximately 2 days. He was then sent back to France to collect the truck and was arrested. He remembers being brought to court and then to prison. He also remembers signing some papers but is not sure what those were. After 8 months, he states that he was not charged and was brought before a magistrate who said he would prepare papers for his release and then a few days later he was released from prison and returned home in November 2010. He accepts that he gave his lawyer's name and office as the contact details for the purpose of the French proceedings and that he was notified at his parents' address of the ongoing process in France. He avers that he received 2 pieces of correspondence from his French lawyer. He exhibits the correspondence which appears to indicate that he had been fined €1.25 million and a court hearing was set for 30th January, 2014. The letter advised him to contact a lawyer to defend him. The letter was dated 25th October, 2013. The respondent avers that he could not afford to pay even a fraction of that amount. He avers that [S.F.] and [D.F.] were returned to France, went to trial and were acquitted. (He provided no proof of this). He avers that in April 2016, he suffered a severe head injury and exhibits various medical reports. He avers that he has forgetfulness and his sister keeps notes of his various appointments. He avers that while he has some recall of the background events, due to the passage of time and the effects of his injury he would not be able to recall precise details of the pickup which led to all of the trouble. He avers that he is single and lives with his elderly parents. He continues to work as a long-haul truck driver.

12. By additional information dated 29th September, 2021, the issuing judicial authority indicates that the offence covered by the box marked "*participation in a criminal organization*" was that of criminal conspiracy to prepare an offence punishable by 10 years' imprisonment. It indicates that the judgment dated 30th January, 2014, in translated form, would be transmitted later. It confirms that a sentence of 2 years' imprisonment was imposed and that 1 year, 4 months and one day of same remains to be served. It repeats the contents of part D.4. of the EAW as already quoted herein. It repeats the contents of part D.3.4. of the EAW to the effect that the respondent will have a right of appeal. It confirms that the respondent may request a medical assessment in order to evaluate his or her criminal responsibility, his or her accessibility to a criminal sanction and the compatibility or otherwise of his or her state of health with incarceration. It indicates that the court of appeal will be able to rule on the criminal responsibility of the respondent, the accessibility of the respondent to criminal sanction and the compatibility or not of the state of health of the respondent with incarceration.
13. At hearing, the respondent objects to surrender on the following grounds:-
  - (i) Surrender is precluded by reason of s.38 of the Act of 2003;
  - (ii) Surrender is precluded by reason of a lack of clarity in relation to the judgment to be enforced;
  - (iii) Surrender is precluded by reason of s.22 of the Act of 2003;

- (iv) The judgment did not result from judicial proceedings; and
- (v) Surrender is precluded by reason of s.37 of the Act of 2003.

**Section 38 of the Act of 2003**

14. Section 38(1)(a) of the Act of 2003 precludes surrender in respect of an offence unless the acts stated to constitute that offence would also constitute an offence in this State. Section 38(1)(b) provides that it is not necessary to establish such correspondence between an offence to which the EAW relates and an offence under the law of this State where the offence referred to in the EAW is an offence to which Article 2.2 of the Framework Decision applies and carries a maximum penalty in the issuing state of at least 3 years' imprisonment. In this instance, the issuing judicial authority has invoked the procedure provided for at s. 38(1)(b) of the Act of 2003 and has indicated the appropriate box at part E of the EAW for "*Participation in a criminal organisation*". It goes on to indicate that it is not relying upon such invocation as regards:-

*"The transport, possession and export (or attempted export) of highly taxed goods such as cigarettes, without these goods having been declared and taxes having been paid, constitutes the customs offence of smuggling. Where this smuggling has been committed in an organised gang, the penalties are ten years' imprisonment."*

15. It is clear from the additional information dated 29th September, 2021 that the tick-box procedure provided for at s. 38(1)(b) of the Act of 2003 is only being relied upon as regards the offence of criminal association for the preparation of an offence punishable by 10 years' imprisonment. There is no manifest error or ambiguity in relation to this certification such as would justify this Court going beyond same.

16. From the foregoing, it is necessary that correspondence be established as regards the other 2 offences referred to in the EAW. In that regard, Counsel for the applicant proposes s. 119 of the Finance Act, 2001 as the corresponding offence under the law of this State as regard such offences. Section 119 of the Finance Act, 2001 provides as follows:-

*"119.-(1) It is an offence under this subsection for any person to take possession, custody or charge of, or to remove, transport, deposit or conceal, or to otherwise deal with, excisable products in respect of which any duty of excise is for the time being payable, with intent to defraud, either directly or indirectly, the State of such duty.*

*(2) It is an offence under this subsection for any person to be concerned in the evasion or attempted evasion of a duty of excise on excisable products with intent to defraud either directly or indirectly the State of such duty."*

17. Tobacco products are deemed to be excisable products by virtue of s. 97 of the Finance Act, 2001 and are thereby chargeable to the duty of excise imposed by s. 2 of the Finance (Excise Duty on Tobacco Products) Act, 1977.

18. Counsel for the applicant also relied upon s. 186 of the Customs Consolidation Act, 1876, as amended, as follows:-

*"Every person who ... shall be in any way knowingly concerned in any fraudulent evasion or attempt at evasion of any duties of Customs ... [shall be liable to a fine and/or imprisonment in accordance with this section]."*

19. I am satisfied that correspondence can be established between the two offences referred to in the EAW not covered by s. 38(1)(b) of the Act of 2003 and an offence under the law of this State, viz. an offence contrary to s. 119(1) and/or s. 119(2) of the Finance Act, 2001 and also an offence contrary to s. 186 of the Customs Consolidation Act, 1876, as amended.
20. I note that in the matter of *Minister for Justice and Equality v. D.F.* [2016] IEHC 82, the surrender was ordered of a co-accused of the respondent herein involving the same offences in France and the Court was satisfied that correspondence had been established as set out above herein.

**Lack of Sufficient Detail, Section 22 of the Act of 2003 and Non-Judicial Proceedings**

21. Counsel on behalf of the respondent submits that on the basis of the respondent's affidavit, it is not clear that he had been subjected to any judicial process or that there was an enforceable judgment against him. It was further submitted that in such circumstances his surrender is precluded by reason of s. 22 of the Act of 2003.
22. I do not see any grounds upon which s. 22 of the Act of 2003 is engaged in respect of this matter.
23. The EAW clearly states that the order to be enforced is an order of the Criminal Court of Lille (9th Chamber) dated 30th January, 2014. It is clear that this is a judicial order.
24. I am not satisfied that there is any lack of detail concerning the relevant matters such as would prejudice the respondent in terms of dealing with the application for his surrender or dealing with matters upon his surrender.

**Section 37 of the Act of 2003**

25. Counsel for the respondent submits that given the lapse of time since the events alleged to constitute the offences in question, the guarantee of a retrial to the respondent would not adequately respect his defence rights as he would be unable to effectively defend the matter due to the passage of time and the injuries suffered by him in the intervening period. He submitted that the respondent's right to a fair trial and his right to a private and family life as recognised under the European Convention on Human Rights would be breached if surrendered.
26. As regards the respondent's right to a private and family life and/or the delay in this matter, the Supreme Court, in the case of *Minister for Justice and Equality v. Vestartas* [2020] IESC 12, set out how such matters are to be approached. In *Vestartas*, the

Supreme Court considered Article 8 ECHR in the context of European arrest warrant proceedings. MacMenamin J., delivering the judgment of the Court, stated at para. 23:-

"23. *Article 8(1) ECHR guarantees the right to respect for an individual's private and family life, home and correspondence. But that guarantee is subject to the proviso that public authorities shall not interfere with the exercise of that right, except such as in accordance with law, and is necessary in a democratic society in the interests of national security, public safety, the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others (Article 8(2)). The terms of Article 8(2) are, therefore, sufficiently broad to encompass orders for extradition, or in this case, surrender. But as will be seen, these Article 8 considerations arise within a statutory framework which it is now necessary to consider.*"

As regards delay or lapse of time, MacMenamin J. stated at para. 89:-

"89. *Though a matter of legitimate concern, in this case the delay is to be viewed against the respondent's private and family circumstances. Unless truly exceptional or egregious, delay will not alter the public interest, although there may come a point where the delay is so lengthy and unexplained as to constitute an abuse of process, or to raise other constitutional or ECHR issues. The High Court judgment holds that there had been a significant dilution of the public interest which would ordinarily apply (para. 37). It posed what was characterised there as a modified and weakened public interest in surrender, evidenced by the elapses of time and other factors. Against this, it posed the private and family factors in the case (para. 38). But for the reasons set out above, there was a misapprehension as to the nature of the assessment. This is not a balancing exercise where public and private interests are placed equally on the scales. It is nonetheless necessary to have regard to the circumstances.*"

27. MacMenamin J. further set out at para. 94:-

"94. *The contrast with the exceptional facts in J.A.T. is plain. For an Article 8 defence to succeed, it can only be on clear facts based and cogent evidence. The evidence must be sufficient to rebut the presumption contained in s.4A of the Act (see, para. 41 above). The circumstances must be shown to be well outside the norm; that is, truly exceptional. In the words of s.37(1), they must be such as would render an order for surrender 'incompatible' with the State's obligations under Article 8 of the ECHR. This would necessitate that the incursion into the private and family rights referred to in Article 8(1) was such as to supervene the limitations on the right contained in Article 8(2), and over the significant public interest thresholds set by the 2003 Act itself.*"

28. I do not regard the lapse of time in this matter as such that would justify this Court in refusing surrender as a result thereof.

29. I do not regard the respondent's personal or family circumstances as truly exceptional so as to justify a refusal of surrender.
30. The respondent was sentenced *in absentia*. Article 4A of the Framework Decision provides for the circumstances in which a person may be surrendered to serve a sentence imposed *in absentia*. These are set out in a Table to Article 4A of the Framework Decision. Section 45 of the Act of 2003 transposes Article 4A into Irish law, including the said Table.
31. If the applicant establishes compliance with the requirements of s. 45 of the Act of 2003, then surrender is not precluded.
32. In this instance, the issuing state relies upon the equivalent of point 3.1.(b) of the Table to the effect that the respondent was not summoned in person but by other means actually received official information of the scheduled date and place of the trial and was informed that a decision might be handed down if he did not appear for the trial. It was indicated that the respondent provided the French authorities with the address of his French lawyer for the purposes of notifications in the context of the proceedings. The respondent accepts that this was so and indeed accepts that he received notification of the proposed hearing on 30th January, 2014 from his lawyer. He chose to ignore the proceedings. It was conceded that the respondent had adopted ostrich-like tactics in ignoring correspondence.
33. In such circumstances, it is difficult to envisage how it can be maintained that the respondent's defence rights were not respected or given effect to. The requirements of s. 45 of the Act of 2003 have been met. The respondent made a conscious and deliberate decision to simply ignore the proceedings.
34. In such circumstances, regardless of any entitlement to an appeal, the requirements of Article 4A of the Framework Decision and s. 45 of the Act of 2003 have been met and the respondent's defence rights were respected and given effect to.
35. The respondent contends that due to the lapse of time and injuries suffered by him in the interim period, he will not be in a position to effectively mount an adequate appeal if surrendered. Given that his surrender could be ordered in the absence of the existence of such an appeal, it is difficult to see how any compromised ability on his part to deal with an appeal can be regarded as a ground to refuse surrender.
36. The issuing judicial authority has confirmed that the respondent may request a medical assessment to evaluate his criminal responsibility, his accessibility to a criminal sanction or compatibility of his health with incarceration. Should the respondent choose to appeal the order to be enforced, then the court of appeal in France will deal with those matters.
37. A medical report from the respondent's G.P., Dr. Molly Owens, dated 5th November, 2021, indicates that the respondent remains under medical review and requires an MRI scan and CT scan every 18 months. She opines that any disruption to the respondent's

daily routine and medical follow-up will have significant negative consequences for his health and wellbeing.

38. It should be noted that a case was not made that the French prison system would be incapable of adequately dealing with the respondent's medical needs.
39. Section 4A of the Act of 2003 provides that it shall be presumed that an issuing state will comply with the Framework Decision unless the contrary is shown. The Framework Decision incorporates respect for fundamental rights. I am not satisfied that the presumption provided for in s.4A of the Act of 2003 has been rebutted in this instance.
40. Ultimately, this Court has to determine whether the surrender of the respondent is incompatible with the State's obligations under the ECHR or the protocols thereto or would be in breach of a provision of the Constitution. I am satisfied that the surrender of the respondent would not be incompatible with the State's obligations in that regard and nor would it constitute a breach of any provision of the Constitution.

**Conclusion**

41. I am satisfied that surrender of the respondent is not precluded by reason of Part 3 of the Act of 2003 or any other provision of that Act.
42. I dismiss the respondent's objections to surrender.
43. Having dismissed the respondent's objections to surrender it follows that this Court will make an order pursuant to s. 16 of the Act of 2003 for the surrender of the respondent to France. I note that the respondent is due to undergo a scan in January 2022 and the Court is prepared to consider an application to postpone surrender on that basis.