THE HIGH COURT

[2022] IEHC 506

[2021 No. 229 EXT.]

BETWEEN

MINISTER FOR JUSTICE AND EQUALITY

APPLICANT

AND

GZIM BARDHOKU

RESPONDENT

JUDGMENT of Ms. Justice Caroline Biggs delivered on the 16th day of June, 2022

1. By this application, the applicant seeks an order for the surrender of the respondent to Austria pursuant to a European Arrest Warrant dated 10th of July 2020 ("the EAW"). The EAW was issued by Senior Prosecutor Mag. Elois Ebner of the Prosecution Office in Ried im Innkreis, as the issuing judicial authority.

2. The EAW seeks the surrender of the respondent in order to prosecute him in respect of alleged robbery and false imprisonment offences.

3. The respondent was arrested on 5th day of August 2021, on foot of a Schengen Information System II alert, and brought before the High Court on that date. The EAW was produced to the High Court on the 17th of August 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. 22, 23 and 24 of the European Arrest Warrant Act, 2003, as amended ("the Act of 2003"), arise for consideration in this application and the surrender of the respondent is not prohibited for any of the reasons set forth in any of those sections.

6. Minimum gravity has been established as each of the offences in respect of which surrender of the respondent is sought carries a maximum penalty in excess of twelve months' imprisonment.

7. Section.38(1)(b) of the Act of 2003 provides that it is not necessary for the applicant to establish correspondence between the offences to which the EAW relates and offences under the law of the State where the offences referred to in the EAW are offences to which Article 2.2 of the Framework Decision applies and carry a maximum penalty in the issuing state of at least three years' imprisonment. In this instance, the issuing judicial authority has certified that the offences referred to in the EAW are offences to which Article 2.2 of the Framework Decision applies, that same are punishable by a maximum penalty of at least three years' imprisonment and has indicated the appropriate box for "organised or armed robbery". There is no manifest error or ambiguity in respect of the aforesaid certification such as would justify this court in looking beyond same.

8. As surrender is sought to prosecute the respondent, no issue arises under s. 45 of the Act of 2003.

9. The respondent objected to surrender on the following grounds:

- That the European Arrest Warrant dated the 10th July 2020 that seeks the surrender of the respondent was issued by a Senior Prosecutor, without endorsement by a court, and as such the said European Arrest Warrant was not issued by a valid issuing judicial authority for the purposes of Article 6(1) of Council Framework Decision 2002/584/JHA. On the basis of the decision of the

Court of Justice of the European Union in *NJ* Case C-489/19 PPU**,** the said European Arrest Warrant accordingly could not be lawfully transmitted or relied upon and had no legal effect.

- That in light of the provisions of Article 9(3) of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States (i.e. "the alert shall be equivalent to a European Arrest Warrant pending the receipt of the original") and Article 31(1) of Regulation (EU) 2018/1862 of 28 November 2018 on the establishment, operation and use of the Schengen Information System (SIS) in the field of police cooperation and judicial cooperation in criminal matters (i.e. "An alert entered in SIS in accordance with Article 26 and the additional data referred to in Article 27 shall together constitute and have the same effect as a European Arrest Warrant"), no valid SIS II Alert could be based on an invalid European Arrest Warrant. The proceedings herein accordingly have no valid legal basis.
- That in contravention of Article 26(1) of Regulation (EU) 2018/1862 of 28 November 2018 on the establishment, operation and use of the Schengen Information System (SIS) in the field of police cooperation and judicial cooperation in criminal matters, an Alert in respect of the respondent was entered into the SIS II system and maintained thereon otherwise than "on the basis of a European Arrest Warrant", and the respondent's arrest on foot of this Alert was unlawful. The proceedings herein accordingly have no valid legal basis. On the basis of the decision of the Court of Justice of the European Union in *NJ*, the Austrian Prosecutor's European Arrest Warrant had no legal effect as it was not endorsed by a court. The Alert on foot of which the respondent was arrested

herein was not an Alert as defined by s.2 of the European Arrest Warrant Act 2003.

- That in contravention of Article 27(1) of Regulation (EU) 2018/1862 of 28th November 2018 on the establishment, operation and use of the Schengen Information System (SIS) in the field of police cooperation and judicial cooperation in criminal matters, an Alert in respect of the respondent was entered into the SIS II system and maintained thereon without "a copy of the original of the European Arrest Warrant" having been entered into the SIS II system. On the basis of the decision of the Court of Justice of the European Union in NJ Case C-489/19, the Austrian Prosecutor's European Arrest Warrant had no legal effect as it was not endorsed by a court. The Alert on foot of which the respondent was arrested herein was not an Alert as defined by s.2 of the European Arrest Warrant Act 2003.
- That the Austrian Court's purported authorisation of the Prosecutor's European Arrest Warrant, more than one year after same issued, on the day on which the respondent was arrested in the State on foot of an SIS II Alert, constituted an abuse of process.
- That the Austrian domestic arrest warrant of the 15th February 2019 appears to have been expired at the time of the respondent's arrest on the 5thAugust 2021, thus rendering his arrest unlawful.
- That the surrender of the respondent would be contrary to Section 21A(l) of the European Arrest Warrant Act 2003, as amended, as no decision to charge the respondent with, or try him for, the offences referred to in the European Arrest Warrant has been made.
- That the surrender of the respondent would constitute a breach of and/or a disproportionate interference with his right to respect for his family and private life under Article 40.3.1° and Article 41 of the Constitution, Article 8 of the European

Convention on Human Rights and Article 7 of the Charter of Fundamental Rights of the European Union, and his surrender is therefore prohibited by s.37(1) of the European Arrest Warrant Act 2003. The prosecuting authority which issued the European Arrest Warrant had the opportunity to question the respondent in relation to the 2013 offences referred to in the European Arrest Warrant while the respondent was detained while in transit at Vienna Schwechat Airport on the 8th May 2018 but did not do so. The said prosecuting authority retains the opportunity to question the respondent in this jurisdiction under Part 5 of the Criminal Justice (Mutual Assistance) Act 2008, as amended. Furthermore, if surrendered to the Issuing State, the Respondent would be subject to onward surrender to Belgium on foot of a Belgian European Arrest Warrant dated the 10th December 2019, in respect of which the High Court refused surrender on the 6th September 2021.

- That the request for the surrender constitutes an abuse of process and/or is oppressive and unnecessary in circumstances where the respondent was previously detained by the authorities of the Issuing State on the 8th May 2018 while in transit at Vienna Schwechat Airport, but was not questioned in relation to the 2013 offences referred to in the European Arrest Warrant. On that occasion on the 8th May 2018, the respondent was required to provide his address in Ireland and sign a document in German which he did not understand. This document contained the same file reference number (4 St 243/131) as is contained in the European Arrest Warrant and is addressed to the same prosecuting authority (Prosecution Office of Ried im lnnkreis) as issued the European Arrest Warrant. Notwithstanding the said opportunity to question the respondent in relation to the issues set out in the European Arrest Warrant, the said prosecuting authority waited more than 2 years before issuing the European Arrest

Warrant on the 10th July 2020, and failed to utilise the procedures available under Part 5 of the Criminal Justice (Mutual Assistance) Act 2008.

- That the surrender of the respondent is prohibited by section 44 of the European Arrest Warrant Act 2003, as amended. There is no allegation that the respondent was in the Issuing State at the time the offences are alleged to have been committed, and the basis upon which the Issuing State purports to exercise extraterritorial jurisdiction in respect of the said offences has not been set out. Counsel for the respondent confirmed that this matter is not being relied upon.
- That the European Arrest Warrant does not comply with Section 11 of the European Arrest Warrant Act 2003, as amended, as the nature and classification under the law of the issuing state of the offence concerned has not been provided. The article numbers of three different provisions of the Austrian Criminal Code are referred to, without any indication as the contents of these or under which of these the respondent is said to have been convicted. Counsel for the respondent confirmed that this point is not being relied upon.
- That the European Arrest Warrant does not comply with Section 11 of the European Arrest Warrant Act 2003, as amended, as the alleged degree of involvement of the respondent in the commission of the offence is not adequately specified. The description of the offending behaviour is wholly unclear as regards the level of participation alleged against the respondent, and the absent information is relevant to, *inter alia*, the question of extraterritoriality. Counsel for the respondent confirmed that this point is not being relied upon.
- That the European Arrest Warrant does not comply with Section 11 of the European Arrest Warrant Act 2003, as amended, in circumstances where the penalties to which the respondent would be liable if convicted of each or any of

the offences referred to in the European Arrest Warrant have not been specified. It is indicated that the respondent would be subject to "1 to 15 years of imprisonment", but it is unclear to which offence this potential sentence relates. Counsel for the respondent confirmed that this point is not being relied upon.

10. The respondent swore an affidavit dated 28th September 2021 wherein he averred to the following:

- The respondent says that he was arrested by arrangement with An Garda Síochána at the Criminal Courts of Justice, Parkgate Street, Dublin 8 on the 5th of August 2021, on foot of an SIS II Alert issued by the Austrian authorities, and was admitted to bail. On the 17th of August 2021, the Austrian European Arrest Warrant (EAW) which was the basis for the SIS II Alert was produced to the High Court and he was given a copy. He was remanded on continuing bail to the 20th August 2021, on which date a hearing date of the 14th of October 2021 was assigned to his case.
- He says he believes that said EAW was issued by a Senior Prosecutor in the Prosecution Office of Ried im Innkreis Austria on the 10th July 2020. He says he believes, and is so advised that there is no indication either on the EAW itself or on any accompanying document that the issuing of the EAW was endorsed by a Court. The EAW refers to offices of robbery and deprivation of liberty which are said to have occurred on the 11th June 2013 in Ried im Innkreis, Austria. He says he believes, and is so advised that the alleged degree of participation by the respondent is not specified and it is simply stated that he cooperated with a number of named persons. He notes that it is not alleged that he was present in Ried im Innkreis or even in Austria at the time, and he confirms that he was not and that he did not play any role in the alleged robbery and deprivation of liberty.

- He says that he is a national of Kosovo, where he was born on the 17th July 1984. He was affected by the war in Kosovo and left there in 2001, coming to Ireland, here he was granted refugee status. As a refugee without a national passport, he was issued with a 1951 Refugee Convention Travel Document by the Irish authorities. He uses his Travel Document for travel and does not have a passport.
- He says that he has lived in Ireland since 2001, at a number of different addresses.
- He says that he now lives in County Wexford with his wife and their children, one is 15 years old, and another is 12 years old.
- He says that he is self-employed and with his wife, owns two businesses, namely, Veronna Pizzeria, Kilmuckridge, County Wexford and Mario's Pizzeria, 5 Main Street, Coolgreany, County Wexford. He manages the supplies for the two businesses and does the accounts and the paperwork.
- He says he believes and is so advised that the EAW issued by the Austrian authorities does not appear to be based on any evidence and that it appears in fact that his surrender is sought for the purpose of questioning him about a crime alleged to have been committed more than 8 years ago, on the 1st June 2013. He has been in Austria on a number of occasions since, and has had interactions with the Austrian authorities. In or around August 2013, he was travelling by car from Albania to Germany and crossed over part of Austria for this purpose. At the border when leaving Austria, he was stopped and fined around €140 for failing to pay a road toll (he had not realised that he had to pay this toll). He showed his Irish Travel Document on this occasion as proof of identity. He recalls showing his Irish Travel Document to Austrian Police at a road stop when transiting through Austria by car on another occasion and being allowed proceed – he thinks this was in 2015.

- He says that, more recently, on the 8th May 2018, he was detained by the Austrian authorities when transiting through Vienna Schwechat Airport, but was not questioned in relation to the 2013 offences referred to in the EAW. On that occasion, on the 11th May 2018, he was required to provide his address in Ireland (which he did) and sign a document in German which he did not understand. No English translation was provided to him and he was very unhappy to have to sign this, but it seemed that he was not going to be released unless he signed it. He was given a copy of the document, and he has now obtained a translation of it. He refers to a copy of the said document, dated the 8th May 2018, together with an English translation thereof, upon which, pinned together and marked with the letters "GBt", he has signed his name prior to the swearing thereof.
- He says that he believes and is so advised that said document contains the same file reference number (4 St 243/13t) as is contained in the EAW and is addressed to the same prosecuting authority (Prosecution Office of Ried im Innkreis) as issued the EAW.
- Although the Austrian authorities had the opportunity to question him in relation to the issues set out in the EAW, the Prosecution Office of Reid im Innkreis waited more than 2 years before issuing the EAW on the 10th July 2020. He says he believes and is so advised that it is wholly inappropriate and constitutes a disproportionate and unnecessary interference with his family and private life to issue a European Arrest Warrant for the purposes of questioning him, which this could have been done previously in Austria.
- He further states that he believes and is so advised that there is a procedure available under Part 5 of the Criminal Justice (Mutual Assistance) Act 2006 whereby he could

answer questions under oath in Ireland for use in any investigation in Austria, but that the Austrian authorities have chosen not to utilise this procedure.

- He says he believes and is so advised that, on the 6th September 2021, Hunt J. refused to order his surrender on foot of a European Arrest Warrant issued by the Belgian authorities on the 10th December 2019. His surrender had been sought to serve a 4-year sentence of imprisonment (with 1,320 days left to serve) in respect of an offence said to have been committed in Belgium in September/October 2015. Similar to the present case, a man named Bashkim Osaj was a named co-accused in the Belgian case, and his conviction in Belgium had been based on a statement made by Bashkim Osaj at a pre-trial investigation, even though he had not given evidence at his trial or at his appeal. It was not alleged that he had been in Belgium at the time of the offences, which were aggravated robbery type offences. When Hunt J. requested additional information from the Belgian authorities, they replied saying simply that they would not provide it. Hunt J. subsequently refused to order his surrender to Belgium and he says he believes and is so advised that his reasons are set out in his written judgment of 6th September 2021. He says he believes and is so advised that, if surrendered to Austria, he would be at risk of further surrender to Belgium, to serve a sentence of imprisonment in respect of which the Irish High Court has refused surrender. He says that this is a further matter of particular concern to him.
- The respondent exhibited the document he signed at the Vienna Airport, where he gave his address under the following heading:

  "The subsequent notice of place of residence has been brought to my attention. Insofar as I am unable to provide an address for service, I am being asked to notify the criminal justice authority in writing of an address of service or to report to this authority within 2 weeks.

Important information for the place of residence as an accused:

If you are unable to provide an address for service or you are unable to designate an identifiable address for service within 2 weeks of this notice or to report to the criminal justice authority, it is considered that you are waiving your right to a hearing, which means that you may be prosecuted or, where appropriate, a warrant may be issued for your arrest.

Criminal Justice authority: Ried im Innkreis Prosecutors' Office

File number: 4 St 243/13t

Grounds: Section 143 of the Code of Criminal Procedure

Tendering authority: LKA OO

Case number: B5/79969/2013/3560 OZ 3."

Thus, the respondent was denied entry into the country as he did not have a valid visa but was required to provide the authorities with details in relation to his address.

11. The issuing judicial authority also furnished this Court with a Ruling of the Provincial court of Ried im Innkries. The document is signed by a judge Mag Hosner dated 5th of August 2021 Court of Ried im Innkreis which stated:

"The European Arrest Warrant of the Public Prosecutor's Office of Red im Innkreis under 4 St 243/13t dated 10/07/2020 with regard to Gzim Bardhoku, born on 17/07/1984 in Kosovo, Irish citizen, is authorised by the court according to art. 29 par. 1 EU-JZG [law on the judicial cooperation in criminal matters with the Member States of the European Union].

Reason:

On 14/02/2019 the public prosecutor's office of Ried im Innkreis applied for court authorisation of the order of arrest (and others) regarding Gzim Bardhoku, born on 17/07/1984 in Kosovo, Irish citizen, because of the offence of aggravated robbery

according to arts. 142 par. 1, 143 par. 1 StGB (Penal Code) and the offence of deprivation of liberty according to art. 99 par. 1 StGB (Penal Code) which was authorised by the court on 15/02/2019 (ON [order number] 80]. The order of arrest was extended based on the ruling of the provincial court of Ried im Innkreis dated 05/08/2021 until 01/08/2022.

On 10/07/2020 the public prosecutor's office of Ried im Innkreis issued a European Arrest Warrant with regard to Gzim Bardhoku, because of the offence of aggravated robbery according to arts. 142 par. 1, 143 StGB [Penal Code] and the offence of deprivation of liberty according to art. 99 par. 1 StGB [Penal Code] (ON [order number] 105, 106).

In order to avoid repetition, reference is made to the order of arrest dated 15/02/2019 as well as to the ruling dated 05/08/2021 with which this order of arrest was extended, which is why the European Arrest Warrant dated 10/07/2020 was to be authorised according to art. 29 par. 1 EU-JZG [law on the judicial cooperation in criminal matters with the Member States of the European Union]."

There was a ruling from the same court on the same date which extended the time limits for the domestic arrest warrant.

12. In light of the respondent's points of objection and affidavit, this Court sent a number of Section 20 requests and received the following additional information from the issuing judicial authority:

I. By way of additional information dated 22nd October 2021, the issuing judicial authority furnished a response in the following terms:

"1. A witness testified that Gzim Bardhoku had admitted to him the involvement in the Home Invasion to the detriment of Mr. and Mrs. Wagner.

2. Prior to a decision on the possible indictment of the requested person, the

investigation proceedings shall be concluded insofar, as his formal hearing as a suspect is yet to be performed.

3. The European Arrest Warrant is based on the domestic arrest order authorized by court. The European Arrest Warrant had been formally authorized by the Regional (Provincial) Court of Ried im Innkreis on 5th August 2021."

II. A further request for additional information dated was sent on 16th February 2022 that asked *inter alia* the following:

"The High Court respectfully requests the following information:

(i) *At the time of the issue of the European Arrest Warrant, was there a decision made to charge and try the requested person?*

(ii) *At the time the European Arrest Warrant was issued, was it the intention of the competent prosecution authority, subject to any additional information that may come to light and any other procedure that may be necessary, to put the requested person on trial for the offences the subject matter the EAW?*

(iii) *Is it now the intention of the competent prosecuting authority, subject to any additional information that may come to light any formal steps to be taken, to put the requested person on trial for the offences the subject matter of the EAW?*

(iv) *In the opinion of the competent prosecuting authority, does there currently exist sufficient evidence on which the requested person can be tried for the offences the subject matter of the EAW?*

(v) *What formal steps must be taken after the surrender (if it is ordered) before the requested person can be indicted before*

the Court in respect of the offences the subject matter of the EAW?"

III. A response was received the 18th February 2022 in the following terms:

"1. A witness has expressly stated that Gzim Bardhoku had informed him of the crime andthat he had committed it together with Bashkim Osaj,

2. Breaking and entering with regard to the family home of the Wagners, by breaking open the cellar door and robbery with co-perpetrators Nejazi Nejazi (formerly: Dzemaili) and Bashkim Osaj on 11th June 2013 around 0:00 a.m. in Försterstraße. They entered the victims' sleeping room on the first floor and two perpetrators immediately assaulted Dr. Klaus Wagner and one perpetrator pounced on Mag. Gudrun Wagner. One of the perpetrators held a gun to Klaus Wagner's temple, the other perpetrator put a knife to his throat. After having gained control over their victims, the perpetrators demanded cash. The victims were instructed to open their two safes sothat the perpetrators could pick up cash, jewellery, other valuable assets and 4 gold bars (1kg each), while one of the perpetrators (Gzim Bardhoku) had a telephone conversation during the robbery with Bekim Krasniqi (who had been with his girlfriend during the time of the robbery) since they were at first merely able to find one of the safes. Krasniqi, who had informed the three perpetrators about the wealth of the Wagner family prior to

the robbery, also told the perpetrators about the whereabouts of the second safe. Subsequently, the perpetrators locked the victims in an adjacent washroom and locked the door in a manner that it took the victims hours before they were able to escape the washroom. The perpetrators were disguised in balaclavas and were exclusively using torches.

Bashkin Osaj, Gzim Bardhoku, as well as the separately prosecuted Bekim Krasniqi and Nejazi Nejazi had the intention to unlawfully enrich themselves or third persons by threatening the spouses Wagner with immediate danger to life and limb with the purpose of extorting jewellery, other valuable assets and cash.

The separately prosecuted Bekim Krasniqi and Nejazi Nejazi have already been convicted by final judgment in connection with the mentioned offences committed.

3. The maximum penalty is a fifteen-year prison term. The extent of the concrete penalty lies within the discretion of the competent court.

4. The European Arrest Order had been authorised by court (see email dated 20th August 2021 with translated authorisation of the European Arrest Order issued by the Regional Court Ried im lnnkreis, as well as email dated 22nd October 2021).

5. The Austrian Code of Criminal Procedure expressly requires that the accused shall be heard and be given the possibility to make statements with regard to the offences he is accused of having committed prior to a formal indictment. Thus, an indictment is

only permissible after having heard the accused with regard to the accusations.

<u>Concerning questions (i) – (v):</u>

(i) The investigation procedure has been initiated. An indictment has not yet been brought in yet (see answer to question 5.)

(ii) Yes. After hearing the accused, his criminal liability will be assessed and an indictment will be brought in (the indictment may be appealed and decided upon by the Higher Regional Court Linz)

(iii) and (iv) yes [sic]

(iv) After surrender of the accused, his examination will be conducted by officers of the State Criminal Police Upper Austria together with competent legal protection magistrate. On this basis, it may be proceeded from the fact that there will be an indictment in subsequence to this."

IV. A further request for additional information was sent on the 2nd March 2022 and again *inter alia* asked the following:

"1. It appears that the Austrian domestic arrest warrant in this case issued on 15th February 2019, the SIS alert was entered on 22ndFebruary 2019, the European Arrest Warrant was issued by Senior Prosecutor Mag Alois Ebner on 10th July 2020, and the European Arrest Warrant was authorised by the Provincial Court of Ried im Innkreis on 5th August 2021.

Please confirm whether this chronology is accurate, and if so, please indicate (a) what warrant or order provided the foundation for the SIS alert on 22nd February 2019; and

(b) whether there had been any previous Austrian European Arrest Warrant in respect of Mr. Bardhoku, prior to the European Arrest Warrant issued by Senior Prosecutor Mag Alois Ebner on 10th July 2020.

2. As requested in my letter of the 19th October 2021, if it is possible, please provide the exact time at which the Provincial Court of Ried im Innkreis made its ruling authorising the European Arrest Warrant pursuant to Article 29 paragraph l EU-JZG on 5th August 2021.

3. Mr Bardhoku states that he was detained by Austrian authorities on 8th May 2018 while in transit at Vienna Schwechat Airport, but was not questioned at this time in relation to the 2013 offences referred to in the European Arrest Warrant. He states that he was asked to sign a document (a copy of which is enclosed, together with translation which Mr. Bardhoku subsequently commissioned), which contains the same file reference number (4 St 243g/13t) as is contained in the European Arrest Warrant and which is addressed to the Prosecution Office of Ried im Innkreis. He complains that the Prosecution Office of Ried im Innkreis did not use this opportunity to question him in relation to the issues set out in the European Arrest Warrant, and did not issue a European Arrest Warrant until more than 2 years later. Please indicate whether Mr. Bardhoku's statements in relation to this are disputed, and please indicate whether there was any reason why he was not questioned or arrested in relation to the 2013 offences referred to in the European Arrest Warrant at this time."

V. A response dated the 24th March 2022 was received in the following terms:

"1. The chronology is accurate. All EAW's are based on domestic arrest warrant authorized by the court.

2. It is not possible to provide the exact time at which the Provincial Court of Ried im Innkreis made its ruling authorising the EAW. The ruling was made in the early

morning and was put in the electronic act system at about 09.45.

3. Mr. Bardhoku was not known as perpetrator since august 2016. A witness stated, that Mr. Bardhoku himself told, that he had made the robbery. In 2016 it was known, that Mr. Bardhoku (and Osaj) had been arrested by Belgian authorities, so we tried to get information and question him but unfortunately the Belgian authorities had released them both.

In 2017 Mr. Bardhoku was searched for residence determination, that's why he was contacted by the police at Vienna Airport on 8 May 2018 (he was not arrested, but the entrywas refused because he had no visa). The police informed us on 11. May 2018, so it was not possible to organize a questioning.

We will not turn over Mr. Bardhoku to the Belgian Authorities or a third part country, since this is only possible if the Irish Authorities will give their approval. It is also possible to give the guarantee, that Mr. Bardhoku will be turned over back to Ireland, if he should be condemned."

VI. A follow-on response dated 23rd March 2022 was received in the following terms:

"Ad 3. and affidavit: Gzim Bardhoku was not known as an accused person before the statement of a witness in August 2016; which is why criminal investigations against him had not been possible in the years prior to that. Furthermore, it became knownthat Gzim Bardhoku and Bashkim Osaj were in detention in Belgium which is why a questioning was applied for through a mutual legal assistance request. However, the questioning turned out to be impossible since both were released by the Belgian authorities before our request could be processed.

On 08th September 2017, a national alert was entered for the purpose of communicating the whereabouts of Gzim Bardhoku. On 15th September 2019, the national arrest warrant was authorized by court and a European Arrest Warrant was

issued. On 21st February 2019, the first alert within the SIS was entered. On 10th July 2020, a new European Arrest Warrant was issued (since the Warrant prior to that had ceased to be valid), once again based on a national arrest warrant authorized by court.

On 05th August 2021, it was applied for an extension of the time limitation of the national arrest warrant, as well as for the formal authorization of the European Arrest Warrant (see email dated 20th August 2021 with translated court authorization of the European Arrest Warrant given by the Provincial / Regional Court Ried im Innkreis; as well as email dated 22nd October 2021).

Concerning the validity of Austrian European Arrest Warrants issued by a prosecution authority, it is once more referred to the decision of the Court of Justice of the European Union (CJEU) in the case C-489/19 NJ. The separately prosecuted Bekim Krasniqi and Nejazi Nejazi have in the meantime been found guilty by final decision for the offence committed.

Regarding the affidavit:

Ad 8.: Mr. Bardhoku had not been known as a person accused before August 2016, which is why criminal investigations had not been possible before. At that time, only Bekim Krasniqi, Nejazi Nejazi and Bashkim Osaj were known as perpetrators. Ad 9. and 10.: Mr. Bardhoku had been checked on the airport Vienna Schwechat on 08th May 2018 on the basis of an alert for the purpose of communicating his whereabouts. An arrest was not made! The Public Prosecutor´s Office Ried im Innkreis had not been informed on that before 11th May 2018, which is why a questioning was not possible. Furthermore, the proceedings against the separately prosecuted co-accused persons had not yet been concluded at that time.

Ad 11.: A surrender to the Belgian authorities by Austria is only possible if the state executing the European Arrest Warrant (in this case Ireland) grants its approval. Pursuant to Section 29 para. 3 and Section 31 para. 1 EU-JZG, the Irish authorities may be granted the approval to resurrender the person accused in the event of a conviction for the purposes of executing a possible penalty of a prison term, as well as the approval that the accused is not surrendered to a non-member state."

VII. A further request was sent on 8th April 2022 in the following terms:

"Q1. Please confirm that at the time of the input of the SIS alert on 22 February 2019 there was a European arrest warrant in existence in respect of the requested person. Q2. If the answer to Q1 is that there was a valid European arrest warrant in existence, please confirm whether or not that European arrest warrant was endorsed by the court and, if so, the date it was authorised by the court."

VIII. In a preliminary response dated 25th April 2022, the issuing judicial authority stated:

"In advance let me tell you, that there was an EAW from 22.2.2019. This EAW was not formally endorsed by court, because the previous austrian law did not state, that EAW's have to be endorsed by court (they were and are always based on national arrest warrants endorsed by court), so the approbation was forgotten. Anyway the new EAW was endorsed by court (see Emails or responses from 22.10.2021 and 23.03.2022)."

IX. In a follow-on response dated 25th April 2022, the issuing judicial authority stated:

"Ad 1.: On 22nd February 2019, a European Arrest Warrant was pending against Gzim Bardhoku. In formal terms, it had not been authorized by court since this was not required by law according to the previous legal situation in Austrian at that time. Therefore, a formal authorization by court was not applied for. Due to

the reason that the national arrest order had been limited in time, the European Arrest Warrant was issued anew on 10th July 2020, and, in subsequence to the court authorized extension of the time limitation of the national arrest order on 05th August 2021, it was also authorized by court on the very same day (i.e. 05th August 2021). All European Arrest Warrants are based on underlying national arrest warrants authorized by court.

Ad 2.: On 05th August 2021, it was applied for the extension of the time limitation of the national arrest warrant and the formal authorization of the European Arrest Warrant (see email of 20th August 2021 incl. translated authorization of the European Arrest Warrant given by the Regional Court of Ried im Innkreis; as well as email of 22nd October 2021).

Concerning the validity of Austrian European Arrest Warrants issued by a prosecution authority, it is again referred to the decision of the Court of Justice of the European Union (CJEU) in the case C-489/19 NJ."

X. The respondent furnished further additional information in the form of a report provided by Dr. Stefan Schumann, dated 30th of May 2022 wherein he stated:

"Therefore, in order for a public prosecutor to issue an EAW, and to input it into the SIS, it is not sufficient that there is a domestic Arrest Warrant authorised by the court.

Rather, as explicitly stated by § 29(1), first sentence, EU-JZG the ordering of an EAW by the public prosecutor requires explicit prior authorisation by the court, upon the application by the public prosecutor.

Thus, in my opinion in your client's case it is not correct to state that Austrian law did not require a European Arrest Warrant to be authorised by a court at the time the SIS Alert was inputted [sic] on the 22nd February 2019.

[…]

Yet, give the clear intention of the rephrasal [sic] of § 29(1), first sentence, EU-JZG, entering into force on 1st January 2012, which was referred also in the leading commentaries already in 2012/2013 (see the references in Fn. 2), to my opinion there seemed to be no margin of interpretation: Since that time, it should have been clear that the order of an EAW (and SIS alert) by the public prosecutor required and requires prior explicit authorisation by the court."

11. Is surrender prohibited by Section 37 on the basis of Abuse of Process of the SIS II Alert system

In order to fully understand the respondent's submission, it is necessary to set out a chronology of events derived from the EAW, the additional information received, and the affidavit, as follows:

- **13/06/2013:** An aggravated burglary is committed in Ried im Innkreis, Austria. This is the offence referred to in the EAW which is the subject matter of the within proceedings. Bekim Krasniqi and Nejazi Najazi are subsequently convicted in respect of same.
- **August 2016:** The respondent becomes *"known as an accused person"* following the statement of a witness in August 2016 - "... *criminal investigations against him had not been possible in the years prior to that"* and *"At that time, only Bekim Krasniqi, Nejazi Nejazi and Bashkim Osaj were known as perpetrators"* (see paragraphs 3 and 8 of the additional information response of the 23rd March 2022). The Austrian authorities then send a mutual assistance request to the Belgian authorities for then *"questioning"* of the respondent in Belgium, where he had been detained on remand - this mutual assistance request was not fulfilled as the respondent had been released by the Belgian authorities.

- **08/05/2018:** The respondent is detained by Austrian authorities while transiting through Vienna Schwechat Airport "on the basis of an alert for the purpose of communicating his whereabouts", but is not questioned in respect of the 2013 aggravated burglary, although he is required to sign a form which carries the same file reference number (4 St 242/13t) as is contained in the current EAW. As is set out in the additional information response of the 23rd March 2022: "*An arrest was not made! The Public Prosecutor's Office Ried im Innkreis had not been informed on that before 11th May 2018, which is why a questioning was not possible. Furthermore, the proceedings against the separately prosecuted co-accused persons had not yet been concluded at that time".*
- **15/02/2019:** A domestic/national arrest warrant is issued in respect of the Respondent by an Austrian court with unknown expiry date. A European Arrest Warrant is issued by the Public Prosecutor on the same date. This was not authorised by a court.
- **22/02/2019:** An Alert is entered onto SIS II system in respect of the respondent.
- **09/10/2019:** The Court of Justice rules in C-489/19 PPU *NJ* that an EAW issued by a Public Prosecutor in Austria has no legal effect and cannot be transmitted unless and until it is endorsed by a court.
- **10/07/2020**: The current EAW is issued by a Senior Prosecutor in Reid im Innkreis in respect of the respondent without any involvement from the Court.
- **03/08/2021**: The respondent (at that time on bail in separate Belgian EAW proceedings 2020/319 EXT) is requested to attend at Court 21 in the Criminal Courts of Justice on 05/08/2020 for the purposes of being arrested in respect of a new European Arrest Warrant matter.

- **05/08/2021**: At some time prior to 9.45am, a judge of the Provincial Court of Ried im Innkreis in Austria makes a ruling to "authorise" the *"European Arrest Warrant of the Public Prosecutor's Office...dated 10/07/2020"*. The respondent is arrested in Ireland at 11.48am pursuant to s.14 of the European Arrest Warrant Act 2003 on foot of the SIS II Alert, which had been entered on the SIS II system on 22nd February 2019, and on which it was indicated *"EAW Available? YES"*. The respondent is brought before Burns J. pursuant to s.14(3) of the 2003 Act and is granted bail.
- **16/08/2021**: The Ruling of the Austrian Court of 05/08/2021, authorising the Prosecutor's European Arrest Warrant, is translated into English.
- **17/08/2021**: The original "European Arrest Warrant" issued by the Senior Prosecutor on 10/07/2020, together with an English translation thereof, is produced to the High Court (Barr J.) pursuant to s. 14(4) of the 2003 Act. The procedure under s. 14, rather than under s. 13 of the 2003 Act is followed – the EAW was not endorsed by the Irish Court.
- **20/08/2021**: The matter comes before the High Court for its notional s. 16 hearing date, and its substantive hearing dated of the 14/10/21 is assigned. Later, on the same date, i.e. Friday, 20th August 2020, the Irish Central Authority receives by email a copy and a translation of the Ruling of the Austrian Court of 05/08/2021 authorising the Prosecutor's European Arrest Warrant. A copy and translation of a separate 05/08/2021 Ruling extending the validity of the Austrian 15/02/2-19 domestic arrest is also attached.

12. From this chronology, the important information in this Court's view is the following:

a. At the time of the initial entry on the SIS system, on the 5th February 2009, the Austrian EAW that was the basis for the alert was not endorsed by an Austrian Court.

b. A judge of the Provincial Court of Ried im Innkreis in Austria had made a ruling to authorise the EAW before 9:45am on the 5th August 2021. The respondent was not arrested in Ireland until 11:48am on the same date. Consequently, by the time of the arrest of the respondent, the Austrian EAW had been endorsed by an Austrian Court.

13. The Court of Justice of the European Union has in a number of decisions dealt with the question of the level of independence a body must have in order to constitute a valid judicial authority for the purposes of Article 6(1) of Council Framework Decision 2002/584/JHA. The primary CJEU caselaw on this issue has been summarised by Edwards J. in *Minister for Justice and Equality v Fassih* [2021] IECA 159 at para. 9; -

> *"[9]… As outlined in paragraph 3 of the judgment of the High Court, [2020] IEHC 369, the Court of Justice of the European Union ('CJEU') handed down judgment on the 27th of May, 2019, in the conjoined cases of O.G. (C-508/18) and P.I. (C-82/19 PPU). The O.G. and P.I. cases were specifically concerned with whether the Public Prosecutor's office of Lübeck, and the Public Prosecutor's office of Zwickau, respectively, in Germany could validly act as issuing judicial authorities, in a situation where they were potentially subject to directions or instructions in a specific case from the executive of the issuing state. In its judgment the CJEU determined that the autonomous concept of 'issuing judicial authority' within the meaning of Article 6(1) of the Framework Decision, must be interpreted as not including Public Prosecutors' Offices of a Member State which are exposed to the risk of being subject, directly or indirectly, to directions or instructions in a specific case from the*

executive, such as a Minister for Justice, in connection with the adoption of a decision to issue a European arrest warrant."

14. The respondent drew the Court's attention to extracts from *NJ* (Case C-489/19 PPU) the Court of Justice considered the position of an Austrian Public Prosecutor in this context, following a reference under Article 267 TFEU from a German court. Of particular significance in the context of the present case is the fact that the EAW before the Court of Justice in ***NJ,*** although issued by a Public Prosecutor, had clearly been endorsed by a court prior to its transmission. This is evident from para. 15 of the decision of the Court of Justice; -

"[15] For the purpose of prosecuting those acts, the Public Prosecutor's Office, Vienna, issued a European arrest warrant against NJ on 16 May 2019, which was endorsed, in accordance with the first sentence of Paragraph 29(1) of the EU-GJZ, on 20 May 2019, by the Landesgericht Wien (Regional Court, Vienna)."

The court further determined at para. 43;-

"[43] In the present case, first of all, it appears from the information in the file submitted to the Court that the decision to issue a national arrest warrant and that to issue [sic] *a European arrest warrant must, under Article 171(1) of the StPO and the first sentence of Article 29(1) of the EU-GJZ, respectively, be endorsed by a court before their transmission. Thus, in the absence of endorsement of the decisions of the public prosecutor's office, arrest warrants do not produce legal effects and cannot be transmitted, which was confirmed by the Austrian Government at the hearing."*

15. The respondent submits that it is clear from the decision of the Court of Justice in *NJ* that, but for the involvement of the court in endorsing the EAW, the EAW would be invalid due to the structural lack of independence on the part of the Austrian Public

Prosecutor. It is submitted that, given the absence of court involvement in the EAW process in the present case prior to the transmission of the EAW and its entry onto the SIS II system, the surrender of the respondent is prohibited.

16. The respondent submits that the Prosecutor in this case issued the EAW in its current form on the 10th July 2020, that it had no legal effect, and yet purported to form the basis for the continuation of the SIS II Alert. The respondent submits that the Court in Ried im Innkreis, either by coincidence or perhaps following receipt of information from the Irish authorities, carried out its objective and independent review, 12 months and 26 days later. This was approximately 2 hours before the respondent was arrested on foot of the SIS II Alert, which occurred at 11:48am on 5th August 2021. According to the information provided by the Austrian Government to the Court of Justice in *NJ*, this review included a review of the proportionality of the issuing of the EAW, and involved the finalisation of the form of the EAW, in order that the EAW could thereafter have legal effect and be transmitted. The respondent asserts that there are fundamental conceptual and practical difficulties arising from the entry of an Alert onto the SIS II system without an EAW as its foundation (and the EAW in question must of course have legal effect). He submits that the case of *State (Trimbole) v The Governor of Mountjoy Prison* [1985] IR 550 might be looked to by way of comparison.

17. At the very minimum, the respondent submits that the current proceedings should be struck out as an abuse of process. The respondent submits that there was no valid SIS Alert, and there has been no arrest on foot of an endorsed EAW – therefore, neither the s.13 nor the s.14 procedure, as contained under the 2003 Act would thus apply. However, the respondent further submits that the situation is more serious than that. In this respect, he notes that the Austrian authorities, despite having withdrawn the second EAW in respect of the co-accused Bashkim Osaj in January 2021, precisely because of this very legal

issue (as confirmed in *Minister for Justice and Equality v Bashkim Osaj* [2021] IEHC 846), continued to maintain an unlawful SIS Alert on the system. It is submitted that the respondent could have been unlawfully arrested, and probably detained, anywhere in the EU during this time and that the Austrian authorities sought to "mend their hand" on the morning of the respondent's pre-organised arrest. Of significance, is the fact that the Austrian authorities permitted this arrest to take place, even though they knew that the SIS Alert was founded on an unauthorised EAW. It is submitted that at best, the Austrian authorities were reckless as to whether an unlawful arrest would take place and that this was an abuse of this Court's process and of the SIS II system. It is submitted that the respondent should not be surrendered to Austria as a consequence.

18. The relevant statutory and legislative provisions in relation to the process involved in this case are set out as follows:

1. The Preamble to EU Regulation 2018/1862 states; -

   "(7) Alerts in SIS contain only the information necessary to identify a person or an object and for the action to be taken. Member States should therefore exchange supplementary information related to alerts where required.

   […]

   (28) SIS should contain alerts on persons wanted for arrest for surrender purposes and wanted for arrest for extradition purposes. In addition to alerts, it is appropriate to provide for the exchange of supplementary information through the SIRENE Bureaux which is necessary for the surrender and extradition procedures. In particular, data referred to in Article 8 of Council Framework Decision 2002/584/JHA ([13]) should be processed in SIS. Due to operational reasons, it is appropriate for the issuing Member State to make an existing alert for arrest

temporarily unavailable upon the authorisation of the judicial authorities when a person who is the subject of a European Arrest Warrant is intensively and actively searched and end-users not involved in the concrete search operation may jeopardise the successful outcome. The temporary unavailability of such alerts should in principle not exceed 48 hours.

(29) It should be possible to add to SIS a translation of the additional data entered for the purpose of surrender under the European Arrest Warrant and for the purpose of extradition."

Article 1 states; -

"The purpose of SIS shall be to ensure a high level of security within the area of freedom, security and justice of the Union including the maintenance of public security and public policy and the safeguarding of security in the territories of the Member States, and to ensure the application of the provisions of Chapter 4 and Chapter 5 of Title V of Part Three TFEU relating to the movement of persons on their territories, using information communicated through this system."

Article 2 (1) states; -

"This Regulation establishes the conditions and procedures for the entry and processing of alerts in SIS on persons and objects and for the exchange of supplementary information and additional data for the purpose of police and judicial cooperation in criminal matters."

Article 2 (2) states; -

"This Regulation also lays down provisions on the technical architecture of SIS, on the responsibilities of the Member States and of the European Union Agency for the Operational Management of Large-Scale IT Systems in the Area of Freedom, Security

and Justice (eu-LISA), on data processing, on the rights of the persons concerned and on liability."

Article 3 (1) states; -

"'alert' means a set of data entered into SIS allowing the competent authorities to identify a person or an object with a view to taking specific action."

Article 3 (2) states; -

"Supplementary information' means information not forming part of the alert data stored in SIS, but connected to alerts in SIS, which is to be exchanged through the SIRENE Bureaux:

(a) in order to allow Member States to consult or inform each other when entering an alert;
(b) following a hit in order to allow the appropriate action to be taken;
(c) when the required action cannot be taken;
(d) when dealing with the quality of SIS data;
(e) when dealing with the compatibility and priority of alerts;
(f) when dealing with rights of access"

Article 3 (3) states; -

"'additional data' means the data stored in SIS and connected with alerts in SIS which are to be immediately available to the competent authorities where a person in respect of whom data has been entered in SIS is located as a result of conducting a search in SIS"

Article 4 (1) states; -

"SIS shall be composed of:

(a) a central system (Central SIS) composed of:

(i) *a technical support function ('CS-SIS') containing a database (the 'SIS database'), and including a backup CS-SIS;*

(ii) *a uniform national interface ('NI-SIS');*

(b) a national system (N.SIS) in each of the Member States, consisting of the national data systems which communicate with Central SIS, including at least one national or shared backup N.SIS; and

(c) a communication infrastructure between CS-SIS, backup CS-SIS and NI-SIS ('the Communication Infrastructure') that provides an encrypted virtual network dedicated to SIS data and the exchange of data between SIRENE Bureaux, as referred to in Article 7(2).

An N.SIS as referred to in point (b) may contain a data file (a 'national copy') containing a complete or partial copy of the SIS database. Two or more Member States may establish in one of their N.SIS a shared copy which may be used jointly by those Member States. Such shared copy shall be considered as the national copy of each of those Member States.

A shared backup N.SIS as referred to in point (b) may be used jointly by two or more Member States. In such cases, the shared backup N.SIS shall be considered as the backup N.SIS of each of those Member States. The N.SIS and its backup may be used simultaneously to ensure uninterrupted availability to end-users.

Member States intending to establish a shared copy or shared backup N.SIS to be used jointly shall agree their respective responsibilities in writing. They shall notify their arrangement to the Commission.

The Communication Infrastructure shall support and contribute to ensuring the

uninterrupted availability of SIS. It shall include redundant and separated paths for the connections between CS-SIS and the backup CS-SIS and shall also include redundant and separated paths for the connections between each SIS national network access point and CS-SIS and backup CS-SIS."

Article 4 (2) states; -

"Member States shall enter, update, delete and search SIS data through their own N.SIS. The Member States using a partial or a complete national copy or a partial or complete shared copy shall make that copy available for the purpose of carrying out automated searches in the territory of each of those Member States. The partial national or shared copy shall contain at least the data listed in points (a) to (v) of Article 20 (3). It shall not be possible to search the data files of other Member States' N.SIS except in the case of shared copies."

Article 8 (1) states; -

"Supplementary information shall be exchanged in accordance with the provisions of the SIRENE Manual and using the Communication Infrastructure. Member States shall provide the necessary technical and human resources to ensure the continuous availability and timely and effective exchange of supplementary information. In the event that the Communication Infrastructure is unavailable, Member States shall use other adequately secured technical means to exchange supplementary information. A list of adequately secured technical means shall be laid down in the SIRENE Manual."

Article 8 (3) states; -

"The SIRENE Bureaux shall carry out their tasks in a quick and efficient manner, in

particular by replying to a request for supplementary information as soon as possible but not later than 12 hours after the receipt of the request. In case of alerts for terrorist offences, of alerts on persons wanted for arrest for surrender or extradition purposes, and in cases of alerts on children referred to in point (c) of Article 32(1) the SIRENE Bureaux shall act immediately."

Article 20 (1) states; -

"Without prejudice to Article 8(1) or to the provisions of this Regulation providing for the storage of additional data, SIS shall contain only those categories of data which are supplied by each Member State, as required for the purposes laid down in Articles 26, 32, 34, 36, 38 and 40."

Article 20 (2) states; -

"The categories of data shall be as follows:

(a) information on persons in relation to whom an alert has been entered;

(b) information on objects referred to in Articles 26, 32, 34, 36 and 38."

Article 20 (3) states; -

"Any alert in SIS which includes information on persons shall contain only the following data:

(a) Surname

[…]

(g) Date of Birth

[…]

(k) The reason for the alert

[…]

(n) The action to be taken in the case of a hit."

Article 21 (1) states; -

"Before entering an alert and when extending the period of validity of an alert, Member States shall determine whether the case is adequate, relevant and important enough to warrant an alert in SIS."

Article 22 (1) states; -

"The minimum set of data necessary in order to enter an alert into SIS shall be the data referred to in points (a), (g), (k) and (n) of Article 20(3), except for in the situations referred to in Article 40. The other data referred to in that paragraph shall also be entered into SIS, if available."

Article 26 (1) states; -

"Alerts on persons wanted for arrest for surrender purposes on the basis of a European Arrest Warrant, or alerts on persons wanted for arrest for extradition purposes, shall be entered at the request of the judicial authority of the issuing Member State."

Article 27 (1) states; -

"Where a person is wanted for arrest for surrender purposes on the basis of a European Arrest Warrant, the issuing Member State shall enter into SIS a copy of the original of the European Arrest Warrant."

Article 27(2) states; -

"The issuing Member State may enter a copy of a translation of the European Arrest

Warrant in one or more other official languages of the institutions of the Union."

Article 28 states; -

"The issuing Member State of an alert for arrest for surrender purposes shall communicate the information referred to in Article 8(1) of Framework Decision 2002/584/JHA to the other Member States through the exchange of supplementary information."

Article 29 states; -

1. "The issuing Member State of an alert for extradition purposes shall communicate the following data to all other Member States through the exchange of supplementary information:

(a) the authority which issued the request for arrest;

(b) whether there is an arrest warrant or a document having the same legal effect, or an enforceable judgment;

(c) the nature and legal classification of the offence;

(d) a description of the circumstances in which the offence was committed, including the time, place and the degree of participation in the offence by the person on whom the alert has been entered;

(e) insofar as possible, the consequences of the offence; and

(f) any other information useful or necessary for the execution of the alert.

2. The data listed in paragraph 1 of this Article shall not be communicated where the data referred to in Article 27 or 28 have already been provided and are considered sufficient for the execution of the alert by the executing Member State."

Article 31 (1) states;-

> *"An alert entered in SIS in accordance with Article 26 and the additional data referred to in Article 27 shall together constitute and have the same effect as a European Arrest Warrant issued in accordance with Framework Decision 2002/584/JHA where that Framework Decision applies."*

Article 8 of Framework Decision 2002/584/JHA states;-

> *"1. The European arrest warrant shall contain the following information set out in accordance with the form contained in the Annex:*
>
> *(a) the identity and nationality of the requested person;*
>
> *(b) the name, address, telephone and fax numbers and e-mail address of the issuing judicial authority;*
>
> *(c) evidence of an enforceable judgment, an arrest warrant or any other enforceable judicial decision having the same effect, coming within the scope of Articles 1 and 2;*
>
> *(d) the nature and legal classification of the offence, particularly in respect of Article 2;*
>
> *(e) a description of the circumstances in which the offence was committed, including the time, place and degree of participation in the offence by the requested person;*
>
> *(f) the penalty imposed, if there is a final judgment, or the prescribed scale of penalties for the offence under the law of the issuing Member State;*
>
> *(g) if possible, other consequences of the offence.*

2. The European arrest warrant must be translated into the official language or one of the official languages of the executing Member State. Any Member State may, when this Framework Decision is adopted or at a later date, state in a declaration deposited with the General Secretariat of the Council that it will accept a translation in one or more other official languages of the Institutions of the European Communities."

Article 9 states; -

"1. When the location of the requested person is known, the issuing judicial authority may transmit the European arrest warrant directly to the executing judicial authority.

2. The issuing judicial authority may, in any event, decide to issue an alert for the requested person in the Schengen Information System (SIS).

3. Such an alert shall be effected in accordance with the provisions of Article 95 of the Convention of 19 June 1990 implementing the Schengen Agreement of 14 June 1985 on the gradual abolition of controls at common borders. An alert in the Schengen Information System shall be equivalent to a European arrest warrant accompanied by the information set out in Article 8(1).

For a transitional period, until the SIS is capable of transmitting all the information described in Article 8, the alert shall be equivalent to a European arrest warrant pending the receipt of the original in due and proper form by the executing judicial authority."

19. Where an arrest is made on foot of an SIS Alert, section 14 of the 2003 Act is applicable. Section 14 of the 2003 Act provides:

"14. — (1) A member of the Garda Síochána may arrest any person without a warrant that the member believes, on reasonable grounds, to be a person named in an alert.

(2) A person arrested under this section shall, upon his or her arrest, be informed, in ordinary language, of the reason for the arrest and of his or her right to —

(a) obtain or be provided with professional legal advice and representation, and

(b) where appropriate, obtain or be provided with the services of an interpreter.

(3) A person arrested under this section shall, as soon as may be after his or her arrest —

(a) be furnished with a copy of the alert, and

(b) be brought before the High Court, which court shall, if satisfied that he or she is the person named in the alert —

(i) inform the person of his or her right to —

(I) obtain or be provided with professional legal advice and representation, and

(II) where appropriate, obtain or be provided with the services of an interpreter, and

(ii) remand the person in custody or, at its discretion, on bail for a period not exceeding 14 days (and for that purpose the High Court shall have the same powers in relation to remand as it would have if the person were brought before

it charged with an indictable offence) for production to the High Court of the European arrest warrant on foot of which the alert was entered.

(4) Where, in respect of a person remanded in custody or on bail under subsection (3) , a European arrest warrant is transmitted to the Central Authority in the State pursuant to section 12—

(a) that person shall be brought before the High Court as soon as may be,

(b) the European arrest warrant shall be produced to the High Court,

(c) a copy shall be given to that person, and

(d) the High Court, if satisfied that the provisions of this Act have been complied with and that the person before it is the person in respect of whom the European arrest warrant was issued, shall —

(i) inform the person of his or her right to consent to being surrendered to the issuing state under section 15 , and

(ii) if the person does not exercise his or her right to consent under paragraph (i) —

(I) remand the person in custody or on bail (and for that purpose the High Court shall have the same powers in relation to remand as it would have if the person were brought before it charged with an indictable offence), and

(II) fix a date for the purposes of section 16 within the period of 21 days next following.

(5) Where, in respect of a person remanded in custody or on bail under subsection (3) , the European arrest warrant is not produced on the date fixed by the Court for the purpose under that subsection the person shall be released from custody."

20. Where a requested person is arrested on foot of an SIS Alert, and does not consent to his surrender to the requesting State, a hearing takes place in accordance with section 16(2) of the 2003 Act. The function of the Court in a section 16(2) hearing is clear; *viz,* the Court may order surrender when it is satisfied that:

(i) The European arrest warrant is provided to the Court;

(ii) Where appropriate, the matters required by section 45 of the 2003 Act are provided to the Court;

(iii) The Court is satisfied that the person before it is the person in respect of whom the European arrest warrant was issued;

(iv) The Court is not required, under section 21A, 22, 23 or 24 of the 2003 Act to refuse surrender; and

(v) The surrender of the person is not prohibited by Part 3 of the 2003 Act.

21. **<u>Applicable caselaw</u>**

In *NJ* (Case C-489/19PPU) the CJEU observed as follows; -

"[41] The question therefore arises as to whether, in those circumstances, decisions relating to the issue of a European arrest warrant, adopted in accordance with the Austrian system, can be regarded as satisfying the minimum requirements on which their validity depends as regards the objectivity and independence of the review carried out when those decisions are adopted, as referred to in paragraph 38 of this judgment.

"[42] In that context, it must be pointed out that <u>the concept of 'decision' must be understood as referring to the act in the form which it takes when it is executed.</u> Indeed,

it is at that time and in that form that the decision to issue the European arrest warrant is likely to impinge on the right to freedom of the person requested." (emphasis added).

The approach taken by the CJEU to the concept of decision is entirely in accordance with the principles established by courts in this jurisdiction in relation to the EAW process.

22. In the headnote to *Minister for Justice, Equality and Law Reform v. Altaravicius* [2006] I.R. 148, the Supreme Court held; -

"*That a mere assertion that there was a defect or that there might be a defect in the manner in which a European arrest warrant was issued was not sufficient to put a court on inquiry as to the matter and did not entitle the respondent to be furnished with the domestic warrant on which the European arrest warrant was based. Such an approach would be entirely inconsistent with the provisions of the Act of 2003 and the objectives and provisions of the Framework Directive. And that extradition arrangements, whatever their form, between this country and other states have been applied by the courts on the presumption that the other states have complied in good faith with their obligations under the relevant treaty or statutory provision. The assertion of non-compliance or the raising of the possibility of non-compliance was not sufficient to dislodge the presumption of compliance. The presumption stood until something to the contrary was shown. The existence of such a presumption of compliance could not be treated as a basis for demanding the production of the underlying domestic warrant."*

In its decision, the Court stated at paras. 18-21; -

"[21] As I mention later in this judgment the Act of 2003 must be interpreted in the light of the terms of the framework decision which it implements and with particular regard to the objectives to be achieved. The system or mechanism of surrender created by the framework decision applies in all member states of the European Union. Recital 5 in the preamble to the framework decision refers to "the introduction

of a new simplified system of surrender of sentenced or suspected persons for the purposes of execution or prosecution of criminal sentences". It has as its object "to remove the complexity and potential for delay inherent" in pre-existing extradition procedures. (Whether, in the light of its structure and the manner in which it has been drafted it will achieve that objective, is another question.) As recital 6 and article 1.2 make clear it is founded on the mutual recognition of judicial decisions and judicial cooperation within the European Union. Recital 10 emphasises "the mechanism of the European arrest warrant is based on a high level of confidence between Member States". Both the preamble and provisions of the framework decision as well as the Act of 2003 acknowledge that in operating this system of surrender fundamental rights, including fairness of procedures, must be respected and provide for certain safeguards in that respect."

In determining that neither s. 11 of the Act of 2003 nor article 8 of the framework decision require that a copy of the underlying domestic arrest warrant be included in or attached to the European arrest warrant, Mr Justice Murray stated at para. 60; -

"*[60] The operative document in an application for surrender pursuant to the Act is the European arrest warrant issued by a judicial authority of the issuing state within the meaning of the framework decision. That is the essential basis on which the High Court is required to act in an application pursuant to s. 16 of the Act of 2003."*

The Court continued at paras. 83-84; -

"[83] Neither the framework decision nor the Act of 2003, as amended, explicitly requires the production of the domestic warrant. Indeed, to the contrary, the system established is for a single warrant, the European arrest warrant. There is a presumption that the requesting state will comply with the framework decision. This presumption lies "unless the contrary is shown": see s. 4A of the Act of 2003, as

amended. While it is open to a respondent to adduce evidence, to raise grounds, to show that the requesting state has not complied with the framework decision, under the framework decision and the Irish statutory scheme there is a presumption that what is set out in the European arrest warrant is accurate and that the requesting state is acting in good faith.

[84] In effect the applicant seeks to turn this presumption on its head and, rather than the court proceeding on the European arrest warrant and the presumption, requires that this document be furnished in addition from the requesting state. The submission on behalf of the respondent, that while the presumption exists he bears the burden of rebutting it and so should be furnished with the documentation from the requesting State, is ingenious, but contrary to both the framework decision and the Act of 2003. The European arrest warrant represents a scheme for rendition, intended to be simple and intended to be on foot of a single warrant, the European arrest warrant, and not a national warrant. Consequently, as a matter of first principles relating to this system, I am satisfied that the respondent is not entitled on a simple request to be furnished with the domestic warrant."

23. This Court has also considered the decision of *S.M.R. v Wheatfield Prison* [2009] IEHC 442 wherein the applicant was the subject of a European arrest warrant issued by the United Kingdom. He was arrested in the State on foot of the warrant and objected to his surrender. The High Court subsequently upheld his objections and refused to order his surrender. The Minister for Justice appealed that decision to the Supreme Court. That court allowed the appeal and ordered the applicant's surrender (see *Minister for Justice v. S.M.R.* [2007] IESC 54, [2008] 2 I.R. 242). After the Supreme Court had given its judgment, it emerged that the domestic warrant issued in the United Kingdom grounding the application for the European arrest warrant had, between the time of the High Court case and the hearing

of the Supreme Court appeal, been withdrawn. The Supreme Court granted a stay on its order for the surrender of the applicant pending a High Court challenge to the lawfulness of his detention pursuant to Article 40.4.2° of the Constitution. The applicant argued that under the law of England a domestic warrant had to exist before a European arrest warrant could issue. He argued that as that warrant had been withdrawn the European arrest warrant was no longer valid and his detention for surrender under that warrant was therefore unlawful. It was Held by the High Court (McKechnie J.), in upholding the legality of the applicant's detention, that, once a European arrest warrant had validly issued, it was a stand alone instrument with independent status separate and distinct from the underlying domestic warrant. The validity of such a warrant could only then be undermined on the grounds envisaged in the framework decision and the European Arrest Warrant Act 2003. As no such grounds existed in this case, and as the European arrest warrant in question had been validly issued, the applicant's detention was not unlawful. McKechnie J. reviewed the existing caselaw, in particular, Altaravicius, and stated at para. 43; -

> *"[43] The core point of the case was whether a person, the subject matter of a European arrest warrant, could demand as of right a copy of the domestic warrant which had issued in the requesting state. The Supreme Court firmly rejected the existence of any such proposition, and found that the respondent had put no material or evidence from which even an inference of inconsistency between both warrants could be established. Minister for Justice v. Fallon [2005] IEHC 321, (Unreported, High Court, Finlay Geoghegan J., 9th September, 2005) was clearly distinguishable in that Mr. Fallon placed before the High Court evidence, which if established as a matter of probability, was sufficient to prove that the European arrest warrant was not issued in accordance with the Framework Decision, and the national law of the requesting state giving effect to that Decision. In Minister for Justice v. Altaravicius*

[2006] IESC 23, [2006] 3 I.R. 148 there was no such evidence. His move in seeking such documentation was purely speculative. He had no grounds, much less grounds of a prima facie nature, to challenge the European arrest warrant. In such circumstances his application was purely a fishing expedition and could not be entertained.

[44] In the course of his judgment Murray C.J., in giving an overview of the relationship between the framework decision and the Act of 2003, pointed out that the objective of the decision was to remove the complexities inherent in existing bi-lateral and multi-lateral extradition agreements, and to replace it with a new, more simplified system of surrender. He also alluded to the basis of the new system, being one based on mutual respect and recognition of judicial decisions between member states. Mutuality was a cornerstone of the process (recital 6 and article 1.2 of the decision).

[45] When dealing with certain legal arguments the judge held:- (a) that the Act of 2003 must be interpreted in light of the framework decision which it implements, having regard, in particular, to the objectives which it seeks to achieve; (b) that there is no distinction of any meaning between article 8(1)(c) of the decision (referring to "evidence" of a judgment or warrant) and s. 11(1A)(e) of the Act of 2003 (where the corresponding provision speaks of "information" and makes no mention of "evidence"), as to what information should be contained in a EAW. that s. 4A (see para. [10]) applied to the requirements of the Directive, subsequent to the making of a s. 16 order for surrender, and (d) that "[60] The operative document in an application for surrender pursuant to the Act is the European arrest warrant issued by a judicial authority of the issuing state within the meaning of the framework

decision. That is the essential basis on which the High Court is required to act in an application pursuant to s. 16 of the Act of 2003" (see p. 165)"

24. In this Court's view, the following extracts from Mc Kechnie J.'s decision are of considerable importance to this case; -

"[63] As Baroness Hale said in R. (Hilali) v. Governor of Whitemoor Prison at p. 310:-

'[32] For better or worse, we have committed ourselves to this system and it is up to us to make it work." We should, in her view, approach it in:- "a spirit of mutual trust and respect and not in a spirit of suspicion and disrespect.' I respectfully agree with these views.

[64] In implementing its values therefore and those of the Act of 2003, it seems to me that if a European arrest warrant is validly issued according to the framework decision, it is intended to be a stand alone instrument capable of securing the arrest and surrender of a person; subject only to that decision and to the national legislation giving effect to it. Because of its international dimension, it must have an independent status subject only to the constraints which I have mentioned. It is an autonomous document within these stated confines and must be treated as such. It is, in the words of Minister for Justice v. Altaravicius [2006] IESC 23, [2006] 3 I.R. 148, the "operative document", the document upon which "the whole process hinged": that single warrant is the "essential basis" of the system. Therefore, whether under the recitals and/or the articles of the decision, or by virtue of s. 4A of the Act of 2003; or even indeed more broadly on the basis of mutuality, it ought to be accepted that the relevant judicial decisions are presumptively correct, and are made within due process and in accordance with the laws of the state in question. That presumption, which involves a rule of non-inquiry, may be called into question, but only within the

legal scaffolding upon which the system stands. This system involves a new dawn and with it, a new approach. Therefore, the former mindset which drove extradition law must yield and give way: respect and confidence replacing distrust and misgiving.

[65] This is not to suggest for a moment, that it has a life of its own, untrammelled by rules or regulations. That is simply not so: it must operate within a legal framework. As Fennelly J. said in Dundon v. Governor of Cloverhill Prison [2005] IESC 83;-

'The European arrest warrant is designed to operate, fundamentally within a judicial process. This essential aspect of the procedure is not merely a recognition that its execution 'must be subject to sufficient controls,' as is stated in the eighth recital, but of the principle of legality. Persons cannot be surrendered compulsorily from one member state to another except in accordance with an open and transparent judicial procedure which guarantees respect for fundamental human rights.'

So whilst this process must be given due respect in the manner which I have described, nevertheless all persons subject to its operation must be afforded proper protection and safeguarded. This however must be achieved by and within the legal structure, partially union based and partially national based, upon which it survives.

[66] To answer the question posed at para. 58, I must firstly find an entry point of challenge which is legally available. Dealing with the European dimension it seems to be that the only instrument, to which recourse can be made, is the framework decision. That decision has no express provision giving an answer to the problem raised in this case. However, by reference to its terms, the warrant in question, when issued, complied fully with the article 8 requirements and the offences specified in it, clearly come within the scope of article 2. None of the grounds for either mandatory or optional non-execution apply (articles 3 and 4 respectively): indeed it is not suggested they do. The recitals have not been relied upon as having any particular, as

distinct from general, significance. As no other reliance has been placed on the decision, including the recitals, it appears to me that unless the provisions of the Act of 2003 afford justification for intervention, this court cannot do so.

[67] In the domestic context it should immediately be noted that the Act of 2003 has no provision dealing with the withdrawal of an European arrest warrant, whether Ireland is the requesting or the requested state. Nor has it any provision governing the problem in this case. Therefore recourse can only be had to its more general provisions. As previously stated, s. 10 of the Act of 2003, inter alia, allows intervention to see if the European arrest warrant has been validly issued by the requesting state. Once satisfied as to that requirement, can the phrase be interpreted as permitting this court to inquire into the European arrest warrant's continuing validity at all times thereafter? The relevant phrase is part of an act of the Oireachtas and therefore the standard rules of construction apply (see Howard v. Commissioner of Public Works [1994] 1 I.R. 101). The words to my mind are clear and unambiguous and permit of no meaning save that which is obvious. Once satisfied that the European arrest warrant has been "duly issued" I cannot see how that part of s. 10 has any further application. Whilst I have no doubt but that the court when making a s. 13 order (endorsement to execute) or a surrender order under s. 16, can operate the provisions of s. 10, it is still confined by the recited wording to the same event; namely validity at date of issue. As that inquiry has no relevance to this case I cannot, therefore, find an entry point via this route.

[68] Section 10, however, also requires compliance with the following sections of the Act of 2003 and with the provisions of part 3 before the arrested person can be validly surrendered. Apart from s. 21A, ss. 22, 23 and 24 of the Act of 2003 (see paras. 55 and 56) can have no application: indeed it is not suggested that they have.

Section 21A prohibits surrender if the court is satisfied that a decision has not been made to charge and try the suspect person with the offence(s) specified in the European arrest warrant. Even without recourse to the presumption in subs. (2) of that section, the evidence is strongly to the contrary: at all times since the original decision was made, it has and remains the intention of the issuing state to prosecute the applicant in respect of the offences in question. Therefore the applicant is evidentially excluded from benefiting from s. 21A of the Act of 2003. This conclusion in my view is not disturbed by the circumstances in which the Hendon warrant was withdrawn, it being clear that, howsoever caused, the withdrawal was an erroneous one.

[69] The only provision of part 3 of the Act which has been relied upon is s. 37(1)(b): it forming the basis for asserting that the applicant's surrender would contravene his constitutional rights and therefore his present detention is unlawful. The fact that he has not been in custody during the currency of these habeas corpus proceedings, does not affect this submission. This point can only succeed if firstly I am permitted to look behind the European arrest warrant and examine its validity on the ground complained of, and secondly, if I am, that a finding of its invalidity is made on that basis. As I have previously stated, it is my belief that the European arrest warrant, when validly made, is separate and distinct from the underlying warrant; as a result I cannot go behind it unless permitted to do so by either the framework decision or the Act of 2003. As I am unable to establish a legal basis within either for so doing I must conclude that the applicant has been unable to satisfy me that his detention pursuant to the European arrest warrant is unlawful.

[70] I have arrived at this decision notwithstanding the real difficulty facing the applicant should he decide to mount a challenge to the warrant in England. He would

have to do so in absentia because once physically within that jurisdiction he can be arrested at common law for these offences. If such circumstances occurred, all issues regarding the European arrest warrant would become moot. This case, in this respect, is therefore quite unlike Minister for Justice v. Stapleton [2007] IESC 30, [2008] 1 I.R. 1 I.R. S.M.R. v. Governor of Wheatfield Prison 169 McKechnie J. H.C. 669, where the delay point could be as cogently argued in the English courts as in the Irish courts. Despite this problem, and whilst acknowledging its existence, I do not believe that it can affect the overall decision.

[71] I would also like to add that this judgment cannot be seen as one which renders immune from judicial challenge in this jurisdiction, unacceptable laxity by requesting states. Such practice if it became widespread would affect trust, confidence and recognition. If that occurred remedies would be made available.

[72] By reason of the aforesaid, it is unnecessary to consider whether as a matter of English law the European arrest warrant fell with the withdrawal of the Hendon warrant. If this issue had to be looked at, great difficulty would have been encountered as there was a diametric clash between the affidavit evidence: this may have required a re-assessment of the cross-examination issue. That however does not now arise for the reasons above given.

[73] Therefore this challenge must fail."

25. It is clear from the above judgments that the operative document is the European Arrest Warrant. The only provision of Part 3 of the Act which has been relied upon is s. 37(1)(b) - it forming the basis for asserting that the applicant's surrender would contravene his constitutional rights. He is not in custody, and therefore submits that his initial arrest, and the subsequent proceedings are unlawful, and an abuse of process. Akin to S.M.R., this point can only succeed if the Court is firstly permitted to look *behind* the European arrest warrant and

examine its validity on the ground complained of, and secondly, that if the Court *is* permitted, that a finding of its invalidity is made on that basis. In this regard, and as has been stated, this Court is guided by the views expressed by McKechnie J. in S.M.R. when he states at para. 69;-

> *"[69]… The European arrest warrant, when validly made, is separate and distinct from the underlying warrant; as a result I cannot go behind it unless permitted to do so by either the framework decision or the Act of 2003. As I am unable to establish a legal basis within either for so doing I must conclude that the applicant has been unable to satisfy me that his detention pursuant to the European arrest warrant is unlawful."*

26. Thus, applying the principles derived from the caselaw and the relevant statutory provisions, it seems to this Court that there is no requirement for the Court, where an arrest based on an SIS Alert has taken place, to engage in the process of assessing the validity of the Alert or otherwise to police the SIS Alert system. The criteria under section 16(2) of the 2003 Act do not include the Court in the executing State conducting a review of hearings which took place before the domestic courts. Provided that the EAW is valid and there has been compliance with section 16(2), surrender may be ordered.

27. In this matter:

(i) The respondent was arrested on foot of an Alert at 11.48am on 5th August 2021. At the time of arrest, the European arrest warrant underlying the Alert upon which the Court is being asked to act upon, had been endorsed by the Austrian Court.

(ii) The respondent was advised of his rights under section 14(2);

(iii) The respondent was provided with a copy of the Alert;

(iv) The respondent was brought before the Court on 17th August 2021;

(v) The European arrest warrant was produced in Court on 17th August 2021;

(vi) The Court was satisfied, on 17th August 2021, that the provisions of the 2003 Act had been complied with;

(vii) The respondent was informed of his right under section 15 of the 2003 Act; and,

(viii) A date was set for the section 16 hearing within 21 days.

28. It is clear, therefore, that the applicable statutory procedure when there is an arrest on foot of an Alert has been complied with in this instance. As the Court is being asked to order surrender on foot of an EAW and that EAW is valid and satisfies the criteria set out in section 16, no further enquiry is required. It follows that, even if there was an issue surrounding the entry of the SIS on the Alert system, this does not have a bearing on the Court's decision as to whether it will order surrender pursuant to section 16 provided the EAW before the Court, upon which the Court is being asked to make the order is valid. This approach is in accordance with a number of cases, deriving both from the CJEU and Irish Law, dealing with the EAW process, and they are referred to this in judgment.

29. In this Court's view the manner in which the SIS system operates is consistent with such an approach. The use of the SIS system is a means to bring a person before the court. Having done so, a valid EAW must be produced, and that was done in this case. The SIS system, as can be seen from my brief outline of the relevant articles, is a system that requires only the most basic information to create an alert, although it does allow for, and in fact invites, additional information being provided to the executing judicial authority. In this case, the additional relevant information confirming the existence of a judicially endorsed warrant was available to the Court in the prescribed time under the Act of 2003 and was in existence at the time of the arrest of the respondent.

30. The respondent relied during oral submission on *Niculaie Aurel Bob-Dogi* (Case

C-241/15) and submitted that an analogous situation arose in this case. Therein, the Second Chamber stated; -

> *"In those circumstances, the Curtea de Apel Cluj (Appeal Court, Cluj) decided to stay proceedings and refer the following questions to the Court for a preliminary ruling:*
>
> *'1. For the purposes of the application of Article 8(1)(c) of the Framework Decision, must the expression "evidence of ... an arrest warrant" be understood to refer to a national arrest warrant issued in accordance with the procedural rules of the issuing Member State, and therefore distinct from the European arrest warrant?*
>
> *2. If the first question is answered in the affirmative, may the non-existence of a national arrest warrant constitute an implied reason for non-execution of the European arrest warrant?'*

31. The CJEU further stated at paras. 52-67; -

> *"[55] Moreover, compliance with the requirement laid down in Article 8(1)(c) of the Framework Decision is of particular importance since it means that, where the European arrest warrant has been issued with a view to the arrest and surrender by another Member State of a requested person for the purposes of conducting a criminal prosecution, that person should have already had the benefit, at the first stage of the proceedings, of procedural safeguards and fundamental rights, the protection of which it is the task of the judicial authority of the issuing Member State to ensure, in accordance with the applicable provisions of national law, for the purpose, inter alia, of adopting a national arrest warrant.*
>
> *[56] The European arrest warrant system therefore entails, in view of the requirement laid down in Article 8(1)(c) of the Framework Decision, a dual level of protection for procedural rights and fundamental rights which must be enjoyed by the requested person, since, in addition to the judicial protection provided at the first*

level, at which a national judicial decision, such as a national arrest warrant, is adopted, is the protection that must be afforded at the second level, at which a European arrest warrant is issued, which may occur, depending on the circumstances, shortly after the adoption of the national judicial decision.

[57] That dual level of judicial protection is lacking, in principle, in a situation such as that in the main proceedings, in which a 'simplified' European arrest warrant procedure is applied, since, under that procedure, no decision, such as a decision to issue a national arrest warrant on which the European arrest warrant will be based, has been taken by a national judicial authority before the European arrest warrant is issued.

[58] In the light of all the foregoing considerations, the answer to the first question is that Article 8(1)(c) of the Framework Decision is to be interpreted as meaning that the term 'arrest warrant', as used in that provision, must be understood as referring to a national arrest warrant that is distinct from the European arrest warrant.

[59] By its second question, the referring court seeks to ascertain, in essence, whether Article 8(1)(c) of the Framework Decision is to be interpreted as meaning that, where a European arrest warrant based on the existence of an 'arrest warrant' within the meaning of that provision does not contain any reference to the existence of a national arrest warrant, the executing judicial authority may refuse to give effect to it.

[60]It should be noted in that regard that, in the area governed by the Framework Decision, the principle of mutual recognition, which constitutes, as stated in particular in recital 6 of that decision, the 'cornerstone' of judicial cooperation in criminal matters, is given effect in Article 1(2) of the Framework Decision, pursuant to which Member States are in principle obliged to give effect to a European arrest

warrant (judgment in Aranyosi and Căldăraru, C-404/15 and C-659/15 PPU, EU:C:2016:198, paragraph 79).

[61] It follows that the executing judicial authority may refuse to execute such a warrant only in the cases, exhaustively listed, of obligatory non-execution laid down in Article 3 of the Framework Decision, or of optional non-execution, laid down in Article 4 and 4a of the Framework Decision. Moreover, the execution of the European arrest warrant may be made subject only to one of the conditions exhaustively laid down in Article 5 of that Framework Decision (judgment in Aranyosi and Căldăraru, C-404/15 and C-659/15 PPU, EU:C:2016:198, paragraph 80).

[62] It is clear that the absence of any indication in the European arrest warrant of the existence of a national arrest warrant is not one of the grounds for non-execution listed in Articles 3, 4 and 4a of the Framework Decision and nor does it fall within the scope of Article 5 of that decision.

[63] However, as the Advocate General also observed at point 107 of his Opinion, while those provisions of the Framework Decision leave no discretion as to the grounds for non-execution other than set out in those provisions, the fact nevertheless remains that those provisions are based on the premise that the European arrest warrant concerned will satisfy the requirements as to the lawfulness of that warrant laid down in Article 8(1) of the Framework Decision.

[64] Given that Article 8(1)(c) of the Framework Decision lays down a requirement as to lawfulness which must be observed if the European arrest warrant is to be valid, failure to comply with that requirement must, in principle, result in the executing judicial authority refusing to give effect to that warrant.

[65] That being so, before adopting such a decision, which, by its very nature, must remain the exception in the application of the surrender system established by the Framework Decision, as that system is based on the principles of mutual recognition and confidence, the executing judicial authority must, pursuant to Article 15(2) of the Framework Decision, request the judicial authority of the issuing Member State to furnish all necessary supplementary information as a matter of urgency to enable it to examine whether the fact that the European arrest warrant does not state whether there is a national arrest warrant may be explained either by the fact that no separate national warrant was issued prior to the issue of the European arrest warrant or that such a warrant exists but was not mentioned.

[66] If, in the light of the information provided pursuant to Article 15(2) of the Framework Decision and any other information available to the executing judicial authority, that authority reaches the conclusion that, although it is based on the existence of an 'arrest warrant' for the purpose of Article 8(1)(c) of the Framework Decision, the European arrest warrant was in fact issued in the absence of any national arrest warrant separate from the European warrant, that authority must refuse to give effect to the European warrant on the basis that it does not satisfy the requirements as to lawfulness laid down in Article 8(1) of the Framework Decision.

[67] In the light of the foregoing considerations, the answer to Question 2 is that Article 8(1)(c) of the Framework Decision is to be interpreted as meaning that, where a European arrest warrant based on the existence of an 'arrest warrant' within the meaning of that provision does not contain any reference to the existence of a national arrest warrant, the executing judicial authority must refuse to give effect to it if, in the light of the information provided pursuant to Article 15(2) of the Framework Decision and any other information available to it, that authority concludes that the

European arrest warrant is not valid because it was in fact issued in the absence of any national warrant separate from the European arrest warrant."

32. Akin to the *Bob Dogi* case, the respondent could not comprehensively say that the use of a purportedly invalid entry on the SIS system is one of the grounds for non-execution listed in Articles 3, 4 and 4a of the Framework Decision. That, however, is where the analogy ends. Those provisions of the Framework Decision leave no discretion as to the grounds for non-execution other than what is set out in those provisions. Nor does it fall within the scope of Article 5 of the Framework Decision. Nevertheless, the fact remains that those provisions are based on the premise that the European arrest warrant concerned will satisfy the requirements as to the lawfulness of that warrant laid down in Article 8(1) of the Framework Decision. The EAW in this case *does* satisfy the requirements of article 8 (1) of the Framework decision.

33. The respondent also relies upon the case of *State (Trimbole) v The Governor of Mountjoy Prison* [1985] IR 550, in support of his assertion of abuse of process. Therein, it was Held by the Supreme Court (Finlay C.J., Henchy, Griffin, Hederman and McCarthy JJ.) in dismissing the appeal and affirming the judgment of Egan J.;-

"The courts have not only an inherent jurisdiction but a positive duty (i) to protect persons against the invasion of their constitutional rights; (ii) if invasion has occurred, to restore as far as possible the person so damaged to the position in which he would have been if his rights had not been invaded; and (iii) to ensure as far as possible that persons acting on behalf of the executive who consciously and deliberately violate the constitutional rights of citizens do not for themselves or their superiors obtain the planned results of that invasion."

34. In so holding, Finlay C.J. stated;-

"It is clear that not every unlawful arrest, even though is may be classified as conscious and deliberate gives to a person so arrested, after his necessary release from illegal detention, any immunity from the proper enforcement of due processes of law or makes him unamenable to answer to criminal offences in our courts.

It is equally clear that a person wanted for extradition in this country as the result of a valid request for extradition under lawful treaty or reciprocal arrangements could not by reason only of the fact that he was subjected in the first instance to an unlawful arrest gain any long term or permanent immunity form extradition. The finding of the learned trial judge in this case, however is quite a difference situation and is in effect a finding that the unlawful arrest was part and parcel of a planned operation prompted by delay in bringing into operation the reciprocal extradition agreements, and therefore the application of the Act of 1965 as between Australia and Ireland. Dealing with this matter Egan J stated as follows:-

'It might be possible to theorise in this matter but the only rationale explanation for the s 30 arrest on the 25th of October 1984 was to ensure that the prosecutor would be available for arrest and detention when Part II of the Act of 1965 would apply to the Commonwealth of Australia. There was a gross misuse of Section 30 which amounted to a conscious and deliberate violation of his constitutional rights. There were no extraordinary excusing circumstances…'"

35. The findings of fact here made by the learned trial judge, and the inferences he drew from them are, in this Court's view, well established. On the evidence before him, he was entitled to find that the unlawful s. 30 arrest was a precaution purposely put in operation so as to try and avoid the possibility that the prosecutor would leave the

jurisdiction or otherwise become unavailable for arrest of a provisional warrant under section 27. Finlay C.J. further stated; -

> *"If the challenge to the legality of the prosecutor's detention had been based on a want of jurisdiction in the District Court, or if the successful challenge to the original arrest has been one of the form creating an illegality but not constituting either a conscious and deliberate violation of his constitutional rights or the abuse of a process of the court, then in those instances, undoubtedly on the authority of the decisions in Re Brian Francis 1963 97 ILTR 160 and in Re Singer (no. 2) 1964 98 ILTR 112 the orders of the District Court, having been made within jurisdiction, would justify the detention of the prosecutor irrespective of the method by which he had been brought before the court. I have no doubt, however that different considerations apply to a challenge arising from the discretion at common law to prevent abuse of process of the processes of the court and the duty under the constitution to vindicate the constitutional rights of the prosecutor."*

36. In this regard, it is clear that when the SIS was entered in 2019, the EAW had not yet been endorsed by a court. This occurred on the 5th of August 2021, and the respondent was arrested shortly thereafter. It is suggested that that the Austrian authorities were reckless in allowing the SIS alert to remain in place notwithstanding this flaw on the original EAW, and were so reckless in circumstances where a similar situation arose in relation to another co-respondent on foot of a EAW pertaining to him. In this Court's view there is no evidence whatsoever suggestive of, much less confirming, an abuse of process in relation to the Austrian authorities use of the SIS system. In that regard, this Court is mindful of the words of Murray J. in *Minister for Justice v. Altaravicius [2006] IESC 23*; -

"[70] The circumstances in which and the extent to which a Court in this country could review a decision of a judicial authority in another country as to the correctness of its decision is not a matter which needs to be considered in this case. Suffice it to say that a mere assertion that there was a defect, let alone a mere statement that there may have been a defect, as in this case, in the manner in which the European Arrest Warrant was issued is not sufficient to raise an issue and put a Court on inquiry as to that matter. Apart from the fact that such an approach would make extradition or surrender wholly unworkable, it would be entirely inconsistent with the provisions of the 2003 Act as well as the objectives and provisions of the Framework Decision itself. So far as there is an analogy with discovery, to seek it on the basis outlined would be speculative and classically a fishing expedition."

37. This Court also has regard to the important words of O'Donnell J. at para. 3 of *Minister for Justice and Equality v J.A.T. (no. 2)* [2016] IESC 17; -

"[3] In the interests of clarity in future cases, I respectfully suggest that phrases such as "de facto abuse" or "harassment and oppression", if they are to be invoked in argument, require greater refinement and precision. Something is either an abuse of process, or it is not. Harassment and oppression are concepts drawn from the case law derived from Henderson v. Henderson (1843) 3 Hare 100, 67 E.R. 313, and their use risks blurring two strands of case law that deserve to be distinguished. I also, respectfully, doubt that it is appropriate or useful to introduce a concept of "duty of care" on the part of requesting authorities or the Irish authorities. If a warrant is defective, that is enough, and it is superfluous at best, and possibly misleading at worst, to address the question of the care used or the reason for the defect. But the idea that a duty of care is owed to subjects of a warrant might give rise to a deflection of attention from the warrant to the

efficiency of the requesting or executing authorities. It is important that courts should be astute to detect and prevent improper or mala fide conduct, but it is equally important that a valuable jurisdiction is not diluted by allowing the legal test to spread into negligence and to become the familiar search for something that can be described as careless. Furthermore, caution should be exercised in addressing the law of European Arrest Warrants in the light of law surrounding previous bilateral or even multilateral extradition treaties. The Framework Decision, with all of its many difficulties, is a matter of the law of the European Union, and was intended to provide a new and streamlined process for surrender between member states of the Union, and to that extent represented a significant departure from the earlier approach. While the legal background to a provision is important, it is also necessary to recognise that the purpose of any new provision is to effect a change, sometimes radical, from the existing law, and it is necessary to give full effect to that change once identified."

He continued at para. 8 therein; -

"[8] I am prepared to accept, for the purposes of this argument, that there are circumstances where a second or subsequent warrant may be issued for tactical reasons which may accordingly amount to an abuse of process. Certainly, obiter dicta in Turin v Barone [2010] E.W.H.C. 3004 might support this approach. I also accept that while abuse of process normally involves an improper motive (and certainly can be more readily identified when that is present) it is not necessarily confined to such circumstances. It may be that a situation can be arrived at in an individual case, perhaps without culpability and certainly without improper motive, but where it can nevertheless be said that to permit proceedings to continue would be an abuse of the Court's process in the sense that it would no

longer be the administration of justice. I also do not rule out the possibility that there may be a case where the facts are so extraordinary that they call for explanation. However, in the present context, it must be kept in mind that the issue for an Irish court, in respect of which it is required to administer justice, relates principally to the surrender, and it is the process in relation to that which must be the primary focus of any such inquiry. I would not, therefore, have considered that the issuance of a second warrant in this case amounts to, or even comes close to being an abuse of the process. I do not think that if the second warrant had been issued reasonably promptly, and in relation to a person of full health, and with less forceful claims under Article 8, that it would be considered that the issuance of a second warrant after refusal of surrender on an earlier warrant would, by itself, be a ground for refusal of surrender."

38. In this Court's view, there is no evidence of abuse of process. The facts are not so extraordinary that they call for an explanation and the assertion of abuse of process is speculative. As such, these grounds of objection are dismissed.

39. **Is surrender prohibited by Section 21 A?**

The respondent submits that there is an unusual feature of the present case. As explained in his Affidavit herein of the 28th September 2021, the respondent has, since the date of the alleged 2013 offences, had several interactions with the Austrian authorities, without any steps having been taken to charge him with the said offences. Of particular significance, he says, is the fact that he was stopped by the authorities at Vienna Schwechat Airport on the 8th May 2018, and required to sign a document addressed to the very prosecuting authority (the Public Prosecutor in Ried im Innkreis) who has issued the EAW. The said document contained the same file reference number (4 St 243/13t) as is contained in the EAW. The respondent submits

that it may well be that the Public Prosecutor in Ried im Innkreis would like to question the respondent in respect of the alleged offences, but s.21A(l) ofthe European Arrest Warrant Act 2003 prohibits surrender for such purposes.

40. The respondent also submits that since he appears to be a person of interest in the Public Prosecutor's investigation, it is open to the Austrian authorities to utilise the procedures available under Part 5 of the Criminal Justice (Mutual Assistance) Act 2008, which would enable the respondent to give sworn evidence before a court in this jurisdiction for use in the criminal investigation in Austria. In fact, the Austrian authorities sent such a request to the Belgian authorities in respect of the respondent in August 2016, *after* the witness in question had supposedly given a statement which named the respondent as having been involved. There is certainly no indication that any further evidence came to light since this mutual assistance request was sent to Belgium, and accordingly there is no reason why the matter could not and should not be dealt with by way of mutual assistance now. The respondent in his Affidavit has stated that he would be happy to give evidence in this manner.

41. The respondent advances a supposition that because he was stopped by Austrian authorities at Vienna airport on 8th May 2018 and that he has, on certain unspecified dates, had *"several interactions with the Austria authorities"*, the EAW has been issued for investigation rather than prosecution. The issuing judicial authority in a letter dated the 23rd of March 2022 confirmed why it has not been possible to interview him. In any event, the fact of there being a previous opportunity to question a respondent does not, in this Court's view, prohibit surrender under Section 21 A. No caselaw has been opened to the court in support of this suggestion.

42. Section 21A(2) of the *European Arrest Warrant Act*, 2003 states; -

"Where a European Arrest Warrant is issued in respect of a person who has not been convicted of an offence specified therein, it shall be presumedthat a decision has been made to charge the person with, and try him or herfor that offence in the Issuing State unless the contrary is proved."

43. At the top of the EAW, in common with all standard form EAWs, a recital appears as follows; -

"This warrant has been issued by a competent judicial authority. I request that the person mentioned below be arrested and surrendered for the purpose of conducting a criminal prosecution or executing a custodial sentence or detention order."

44. The principles applying to this issue are set out in the case of *The Minister for Justice Equality and Law Reform v Olsson* [2011] IESC 1, [2011] 1 IR 384 (hereinafter "*Olsson*"), In *Olsson*, the Swedish Police were required to interview the respondent in order to formally conclude their criminal investigation, after which the final decision on whether or not to prosecute him would be taken. In those specific circumstances, the High Court ordered his surrender and indeed the Supreme Court dismissed his appeal on this and other points. In doing so, the court noted at para. 26; -

"[26] The issue here, however, is not merely one of the evidence before the court. As is apparent, s. 21A(2) of the Act of 2003, as inserted by s. 25 of the Act of 2005, contains a presumption that a decision has been made to charge the person and try him or her for the offence. Furthermore, the opening lines of the European arrest warrant itself, request that the person mentioned below "be arrested and surrendered for the purposes of conducting a criminal prosecution ..." That statement, and the further statements made in Ms. Maderud's affidavit in relation to the practice of the Kingdom of Sweden, must also be read in the light of recital 10 of the Framework Decision which describes "[t]he mechanism of the European

arrest warrant [as being] based on a high level of confidence between Member States".

Further at para. 33, O'Donnell J. indicated that; -

"[33] When s. 21A speaks of "a decision" it does not describe such decision as final or irrevocable, nor can it be so interpreted in the light of the Framework Decision. The fact that a further decision might be made eventually not to proceed, would not therefore mean that the statute had not been complied with, once the relevant intention to do so existed at the time the warrant was issued. The Act of 2003 does not require any particular formality as to the decision; in fact, s. 21 focuses on (and requires proof of) the absence of one. The issuing state does not have to demonstrate a decision. A court is only to refuse to surrender a requested person when it is satisfied that no decision has been made to charge or try that person. This would be so where there is no intention to try the requested person on the charges at the time the warrant is issued. In such circumstances, the warrant could not be for the purposes of conducting a criminal prosecution."

At para. 36, O'Donnell J. concluded that; -

"[36]... In short the intention of the Swedish prosecution authority to bring the respondent before the Swedish Court for the purpose of being charged is but a step in the prosecution process. For the reasons set out above the High Court was correct to conclude that the respondent was not being sought only to be questioned as part of the investigation and that there was a decision to charge the respondent within the meaning of the Act of 2003. Certainly even without the presumption contained in s. 21A(2), the section requires clear proof. Once a court finds the European arrest warrant to be in order (and therefore on its face a request made for the purpose of prosecution or trial), then before a court can refuse to surrender

a person requested under such a warrant, it must be satisfied by cogent evidence to the contrary that a decision has not been made to charge the particular person with, and try him or her for, the offence."

45. In deciding this issue, therefore, the Court must have regard to the following:

a. S. 21A(2) of the Act of 2003 contains a presumption that a decision has been made to charge the person and try him for the offence.

b. The opening lines of the EAW itself, request that the person mentioned below *"be arrested and surrendered for the purposes of conducting a criminal [prosecution]"*.

c. Recital 10 of the Framework Decision which describes the mechanism of the European arrest warrant: "[It] is based on a high level of confidence between Member States. Its implementation may be suspended only in the event of a serious and persistent breach by one of the Member States of the principles set out in Article 6(1) of the Treaty on European Union, determined by the Council pursuant to Article 7(1) of the said Treaty with the consequences set out in Article 7(2) thereof."

d. Part B of the EAW states that the decision on which the warrant is based on a judicially authorised apprehension order of the Prosecution Office of Ried im Innkreis.

e. A court is only to refuse to surrender a requested person when it is satisfied that no decision has been made to charge or try that person. This would be so where there is no intention to try the requested person on the charges at the time the warrant is issued. In such circumstances, the warrant could not be for the purposes of conducting a criminal prosecution.

f. There must be strong and cogent evidence to rebut the presumption in s.21A of the Act of 2003. There is no such evidence in this case.

g. The issuing judicial authority has confirmed by way of additional information that, while a further step must be taken prior to charge, i.e. the interview of the respondent, which is a mandatory process, the indictment will be drawn up and the case referred for trial.

46. I am satisfied that surrender of the respondent is not precluded by reason of s. 21A of the Act of 2003. This ground of objection is dismissed.

47. **Is surrender prohibited by Article 8/Abuse of Process?**

The respondent submits that in circumstances where almost 9 years have passed since the alleged offences, and where the Austrian authorities had the opportunity to question the respondent both in Austria and in this jurisdiction under Part 5 of the Criminal Justice (Mutual Assistance) Act 2008, but have failed to do so, it is submitted that the surrender of the respondent would constitute a breach of and/or a disproportionate interference with his right to respect for his family and private life under Article 40.3.1 and Article 41 of the Constitution, Article 8 of the European Convention on Human Rights and Article 7 of the Charter of the Fundamental Rights of the European Union, and his surrender is therefore prohibited by s. 37 (1) of the European Arrest Warrant Act 2003 and/or that the request for the surrender constitutes an abuse of process and/or is oppressive and unnecessary in the circumstances.

48. In a supplemental affidavit dated the 2nd June 2022 the respondent averred to the following:

- He says that, as stated in his previous Affidavit of the 28th September 2021, he lives in Gorey with his wife and their two children. One of the children was born on the 19th December 2007 and is now 14 years old. In May 2013, when he was 5 years old, he was diagnosed with Autism Spectrum Disorder.

The child and the respondent are very close, and he is more relaxed and comfortable with the respondent than with anyone else. The respondent tries to help him to learn more about life and to deal with the challenges he faces, and they spend a lot of time together when he is not in school. He often comes around with the respondent collecting things for his business. He is a car lover - they have a vintage car that they maintain together and they go to car events. Having this interest is working out well and the respondent is hoping that he could work with cars in the future and survive by himself as he gets older. He finds even short periods when the respondent is away very stressful and the time the respondent spends with him is very important to him. They do not highlight the child's autism to people generally but the respondent wanted to let the Court know that this is an issue of real concern for him in the context of the request for his surrender to Austria.

- The respondent referred to two reports relating to the child - the report of Registered Clinical Psychologist Dr. Jane McNicholas dated 29th May 2013 containing the initial diagnosis of Autism Spectrum Disorder and the report of Paediatric Occupational Therapist Ms Sarah Geraghty dated 1st September 2020 regarding the child's preparation for secondary school.

49. The Supreme Court set out the test which must be applied where an application for surrender is opposed on the grounds of Article 8 of the ECHR. In *Minister for Justice and Equality v Vestartas* [2020] IESC 12 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."

MacMenamin J. went on to state 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."

50. In *The Minister for Justice and Equality -v- Smits* [2021] IESC 27, the Supreme Court noted at para. 62; -

"[62] Dealing with the issue of the elapse of time, McMenamin J. noted indications that the trial judge might have thought this could in itself suffice to defeat an EAW application, by reference to the decision of this Court in Finnegan. However, the decision in Finnegan had clearly been limited to the unusual facts of that case. Delay could not alter the public interest considerations unless it reached a point where it

was so lengthy and unexplained as to amount to an abuse of process, or to raise other constitutional or ECHR issues. On the facts in Vestartas, delay was a matter of legitimate concern but was to be viewed against the background of private and family circumstances that fell very far short of those in J.A.T. (No.2)."

It was further stated by O'Malley J. in the same case that;-

"It is not obvious that a person who absconds in the knowledge that he or she is subject to a final order of imprisonment should thereby become entitled to a level of court protection not available to those who commence their sentences but might wish to have it reduced after some passage of time. In this jurisdiction, when an appeal has been disposed of, and the final order made, the criminal justice process is complete so far as the criminal courts are concerned. If there is an issue as to the lawfulness of a person's imprisonment, that issue will be dealt with by courts exercising a different jurisdiction."

51. In *Minister for Justice and Equality -v- D.E.* [2021] IECA 188, the Court of Appeal stated at para. 67; -

"[67] The questions certified by the High Court were as follows: "In the context of proceedings under the European Arrest Warrant Act 2003 as amended, where a respondent objects to surrender on the basis that same is precluded by s. 37 of the said Act as it would be in breach of the respondent's rights under art. 8 ECHR and having particular regard to the provisions of art. 8(2) ECHR:

1. Can personal or family circumstances, in and of themselves, provide a basis upon which surrender might be precluded by s. 37 of the Act of 2003?

2. What is the appropriate test to be applied by the Court in determining whether such an objection is sustained and that surrender should be refused?

3. In so far as exceptionality may be a relevant factor in determining such an objection, what is the appropriate test to be applied by the Court in determining whether the circumstances found to exist are so exceptional as to justify refusal of surrender"

For the reasons set out in this judgment, it is appropriate to answer all three questions by repeating the principles set out at para 59 above:

(i) *In an application for surrender, the court is not carrying out a general proportionality test on the merits of the application. The court should apply the specific terms of the 2003 Act, albeit subject to a careful consideration of whether, if necessary, applying a proportionality test to Article 8 Convention rights, to order surrender would involve a violation of that ECHR right to the extent of being incompatible with the State's obligations under the Convention. (Vestartas).*

(ii) *Surrender (or extradition) presupposes an impact on the personal or family life of a requested person. Having regard to Article 8(2), surrender (or extradition) carried out pursuant to legislation is in principle an acceptable interference with the right to respect for those rights. (Ostrowski, JAT (No. 2), Vestartas).*

(iii) *When faced with an Article 8 objection to surrender, the function of the Court is to decide if the surrender is incompatible with the State's obligation under the European Convention on Human Rights. That requires a very high threshold. Any inquiry must bear in mind that s. 10 requires a court to surrender in accordance with the provisions of the 2003 Act and s. 4A of that Act obliges the court to presume that the issuing state has complied and will comply with its fundamental rights obligations. (Vestartas).*

(iv) *The evidential burden of proving incompatibility lies on the requested person. (Rettinger and Vestartas).*

(v) The assessment of the claimed impact of surrender on personal and family rights must be a rigorous one. (Rettinger and JAT (No. 2)).

(vi) The evidence must be cogent and must reach the level of incompatibility (Vestartas).

(vii) Exceptionality is not the test for incompatibility, but it will only be in a truly exceptional case that surrender will be found to be incompatible with the State's obligations under Article 8 of the Convention. (JAT No. 2 and Vestartas).

(viii) For an Article 8 objection to succeed, there must be clear cogent evidence sufficient to rebut the presumption in s. 4A of the 2003 Act. (Vestartas).

(ix) No elaborate factual analysis or weighing of matters is necessary unless it is clear that the facts come close to a case which would be truly exceptional in nature thereby engaging the possibility that surrender may be incompatible with the State's obligations under the Convention. (JAT (No.2)).

(x) The requirement that the circumstances must be shown to render the order for surrender incompatible with the State's obligations under Article 8 necessitates that the incursion into the private and family rights referred to in Article 8(1) is 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. (Vestartas).

(xi) Where the facts, assessed as set out above, come close to being truly exceptional in nature thereby engaging the possibility that surrender might be incompatible with the State's obligations, the Court will engage in a proportionality test of whether the high public interest in the prevention of disorder and crime (and the protection of the rights of others) is overridden by the personal and family circumstances (taken where appropriate with all the cumulative circumstances)

of the requested person. That is a case-specific analysis which will be required in very few cases."

52. The delay in this case could not be considered "*egregious".* Moreover, the respondent's objection in relation to the issuing State's failure to question him in Austria is fully explained by the issuing judicial authority in the additional information dated the 8th of May 2018. The respondent asserts, without any factual basis for doing so, that he will be sent to Belgium in relation to an EAW where surrender was refused by Hunt J. There is no basis for such an assertion and in any event, the issuing judicial authority has confirmed in the clearest terms he will not be surrendered to Belgium, save in accordance with the Framework decision. Specifically, by way of additional information dated 24th March 2022, the issuing judicial authority stated:

"We will not turn over Mr. Bardhoku to the Belgian Authorities or a third party country, since this is only possible if the Irish Authorities will give their approval. It is also possible to give the guarantee, that Mr. Bardhoku will be turned over back to Ireland, if he should be condemned."

53. The respondent is, of course, deserving of sympathy, in light of his son's autism diagnosis and all that entails. Nevertheless, his family circumstances are not so beyond the norm as to prohibit surrender. The Court has had regard to the judgment of Ms. Justice Donnelly in *Minister for Justice and Equality v D.E.* [2021] IECA 188 (see above) wherein she states at para. 5; -

"[5] The appellant's objection to his surrender is raised in what the appellant maintains is a highly unique set of family circumstances - namely the severe disabilities of his son and his wife, his role as sole carer for them and the consequential impact upon them in the event of his surrender."

Donnelly J. further states at para. 66 therein;-

> *"[66] In the present case, the family factors are difficult, but they are not such as to reach the high threshold to demonstrate that they are close to the margin where surrender might be said to be incompatible with the State's obligations to respect personal and family life."*

This Court notes that the respondent is not the sole carer for his son, and despite his challenging circumstances there is, in this Court's view, insufficient evidence to rebut the presumption under s. 4A of the 2003 Act. Consequently, the respondent's objections on the basis of respect for family and private life, and abuse of process are dismissed.

54. I am satisfied that surrender of the respondent is not prohibited by reason of Part 3 of the Act of 2003 or another provision of that Act.

55. It, therefore, follows that this Court will make an order pursuant to s. 16 of the Act of 2003 for the surrender of the respondent to the Republic of Austria.