THE HIGH COURT

[2022] IEHC 614

[2021 No. 360 EXT.]

BETWEEN

MINISTER FOR JUSTICE AND EQUALITY

APPLICANT

AND

SERGEJS RADIONOVS

RESPONDENT

JUDGMENT of Ms. Justice Caroline Biggs delivered on the 27th day of July, 2022

1. By this application, the applicant seeks an order for the surrender of the respondent to the Republic of Latvia pursuant to a European Arrest Warrant dated 17th of February 2021 ("The EAW"). The EAW was issued by Mrs. S. Pētersone, Prosecutor of the Prosecutor General's Office of the Republic of Latvia, as the issuing judicial authority.

2. The EAW seeks the surrender of the respondent in order to prosecute him in respect of alleged Robbery-type offences.

3. The respondent was arrested on 15th of December 2021, on foot of a Schengen Information System II Alert, and brought before the High Court on 16th of December 2021. The EAW was produced to the High Court on 21st of December 2021.

4. I am satisfied that the person before the Court, the respondent, is the person in respect of whom the EAW was issued. No issue was raised in that regard.

5. I am satisfied that none of the matters referred to in ss. 21A, 22, 23 and 24 of the European Arrest Warrant Act, 2003, as amended ("the Act of 2003"), arise for consideration

in this application and surrender of the respondent is not precluded for any of the reasons set forth in any of those sections.

6. I am satisfied that the minimum gravity requirements of the Act of 2003 have been met. 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. I am satisfied that correspondence can be established between the offences referred to in the EAW and offences under the laws of this State, viz. Robbery contrary to Section 14 of the Criminal Justice Theft and Fraud Offences Act, 2001.

8. Part E. of the EAW states:

"This warrant relates to in total: 2 (two) offences.

Description of the circumstances in which the offence(s) was (were) committed, including the time, place and degree of participation in the offence(s) by the requested person:

(1) Sergejs Radionovs is being held criminally liable for committing [sic] *stealing of movable property of another related to violence (robbery), in the following circumstances.*

On 17th July 2012 at about 01:00-02:00 AM, at the time not precisely determined during the pre-trial investigation, S. Radionovs, while under the influence of alcohol, was located not far from the bar "Alkoland" in Jēkabpils, Pormala iela 13, where he saw A. Kravčenoks, who came out of the bar and started to walk along M. Luteraiela, going in the direction of Draudzības aleja, S. Radionovs, acting for the purpose of enriching himself by acquiring A. Kravčenoks's [sic] *movable property, ran up to the latter from behind and, in order to paralyse the affected party's will to resist the stealing of his property* [sic], *intentionally committed one powerful hit on A. Kravčenoks's* [sic] *torso, hitting him in the right side of the back, thus causing*

him to feel physical pain, after which he pushed the affected party on the ground. Continuing his criminal activities which he had already started, while A. Kravčenoks was still lying on the ground and tried to cover his face with both hands in order to protect himself, S. Radionovs committed several kicks - exact number of which was not precisely determined during the pre-trial investigation, but not less than two - with his leg that landed [sic] *on the affected party's torso and face, thus causing him to feel physical pain and inflicting insignificant bodily injuries. Then S. Radionovs searched the pockets of A. Kravčenoks'*s [sic] *clothes […]*

In such a way, S. Radionovs, using violence, committed a robbery by stealing property belonging to A. Kravčenoks, thus causing him material loss in the amount of EUR 17.93, and also property belonging to E. Prikule, thus causing her material loss in the amount of EUR 85.37; and he also caused A. Kravčenoks to suffer physical pain and inflicted on him the following insignificant bodily injuries: subcutaneous hemorrhage [sic] *in the area of his left eye, several bruises on the torso.*

By his actions Sergejs Radionovs committed a criminal offence provided for by Paragraph 1 of Section 176 of the Criminal Law [sic].

(2) Sergejs Radionovs is being held criminally liable for committing stealing of movable property of another related to violence (robbery), committed in a group of persons, in the following circumstances.

On 22 October 2012 at about 21:00 o'clock, at the time not precisely determined during the pre-trial investigation, S. Radionovs and A.D., while both of them were under the influence of alcohol, were located outside the shopping centre "Aura" in Jēkabpils, Nākotnes iela 2, where they saw M. Skuja coming out of the store.

S. Radionovs and A.D. - driven by a desire to acquire property, acting in a group of persons pursuant to prior agreement, for the purpose of stealing A. Kravčenoks's [sic] *property - followed the latter. At the most convenient moment, when the affected party was located outside the garages of the garage cooperative "Draudzība" on Viesītes iela, S. Radionovs, acting in order to paralyse M. Skuja's will to resist the stealing of his property* [sic], *from behind committed one intentional kick with his leg on the area of the affected party's back and head, as a result of which M. Skuja fell on the ground. While M. Skuja was lying on the ground, A.D. - acting in a coordinated manner and abetting S. Radionovs's* [sic] *actions - acting in a group of persons with S. Radionovs committed together with the latter several intentional hits - exact number of hits committed by each of them was not precisely determined during the pre-trial investigation, but not less than one - kicking the affected party's torso with a leg. Then A.D., acting in order to lessen the affected party's ability to resist, for the purpose of committing a robbery, used his knee to push M. Skuja's head and torso to the ground and stole from his pocket a mobile phone "Nokia 2610" for the value of EUR 56.91 with a SIM card located inside of it, the value of which was EUR 4.27; meanwhile S. Radionovs searched the pockets of M. Skuja's clothes and stole money in the amount of not less than EUR 2.85, after which both S. Radionovs and A.D. ran away from the location of the event, taking along the stolen property.*

In such a way, S. Radionovs and A.D.M acing [sic] *in a group of persons, realizing their common joint criminal intention directed towards the commission of robbery, committed certain coordinated actions and by the use of violence committed a robbery by stealing property belonging to M. Skuja, thus causing him material loss in the amount of EUR 64.03, and he also cause M. Skuja to*

suffer physical pain and inflicted on him the following bodily injuries – thorax bruise with fractures of X, XI ribs, hemorrhage [sic] *in the splenic tissues without spleen rupture, air intake into the abdominal cavity without any dangerous symptoms, which are considered to be moderate bodily injuries that – by their very nature – cause health disorder for a period exceeding 3 weeks.*

By his actions Sergejs Radionovs committed a criminal offence provided for by Paragraph 2 of Section 176 of the Criminal Law."

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

10. The respondent has objected to surrender on the following terms:

- That the European arrest warrant herein is not a warrant, order or decision of a judicial authority for the purposes of the European Arrest Warrant Act, 2003 as amended and/or is not a judicial decision within the meaning of Article 1 and/or 6 of the Framework Decision and/or the European Arrest Warrant Act, 2003, including Section 2 thereof, as the Prosecutor is not a judicial authority and the respondent's surrender should be refused. The respondent is not relying upon this point of objection and indicated same on the 3rd of March 2022.
- That surrender of the respondent should be refused given the inordinate delay in the requesting state seeking a European arrest warrant and taking steps to enforce same. No reason has been provided for the delay between the issuing of the warrant on the 17th of February 2021 following a court order of Zemgale District Court on the 10th of September 2020 and the offences which were alleged to have been carried out on the 11th of July 2012 and the 22nd of October 2012, respectively. The warrant does not indicate whether the respondent was arrested for these offences or any steps the Latvian authorities took to prosecute this matter in the intervening period of in or

around nine years. Further, the warrant does not refer to a period of Statute of Limitations relating to the prosecution of these offences. The proposed surrender of the respondent ought to be refused pursuant to Section 37 of the Act of 2003, Article 8 ECHR and his personal rights pursuant to Bunreacht na hÉireann in the context of the extensive unexplained delays in issuing the warrant and arresting the respondent.

- The surrender of the respondent would be a breach of, or a disproportionate interference with, his rights pursuant to Article 8 of the European Convention on Human Rights and/or his family rights under Article 8 of the European Convention on Human Rights and/or the Constitution and/or Article 7 of the Charter of Fundamental Rights of the European Union and, as a consequence, surrender of the respondent would be in breach of Section 37 of the European Arrest Warrant Act, 2003.

11. The crux of the respondent's case relates to the delay from 2012 to 2018. The respondent swore an affidavit dated 2nd March 2022, wherein he averred to the following:

- He is a 30-year-old Latvian national. He has a Latvian passport which is in the possession of An Garda Síochána. His date of birth is the 27th January 1992. He has been living in Ireland since October 2019 and resides with his partner Nadia and her 11-year-old daughter in rental accommodation in Tullow. They have been in a relationship since 2013.
- He says that he has registered to work in Ireland, and he has worked for the majority of his time at Ballintemple Nurseries, Co. Carlow as a labourer. His partner also works at this location as a fruit picker.
- He says that he has health difficulties with his liver and back which he takes medication for. He attends the Family Medical Centre under the supervision of Dr. Rabbani in Tullow.

- He has lived openly throughout his entire time in the State. For the avoidance of doubt, he says that he has always presented himself and conducted his business using his correct personal details, and he has never used an alias at any stage.
- He says that he was arrested on the 16th December 2021 and brought before this Court on foot of an SIS Alert. He was remanded in custody. On the 21st of December, two warrants were produced before this Court which were issued in Latvia on the 17th February 2021 and the 26th February 2021 respectively. He was remanded on bail and has complied with same.
- The Latvian authorities seek his surrender for the purposes of a prosecution warrant in respect of two offences. He says that he was arrested for both offences set out in the warrant. He was initially detained for two days in October 2012 in a police station and was then remanded in prison for five months without sentencing. The matter came before the Court every two months. He was granted a state appointed solicitor who he met with very briefly.
- As far as he is aware, no bail application was made on his behalf. He was released on the 18th of April 2013 because detention was changed to police supervision and was subject to conditions and police checks. From his recollection the police supervision ended on November 28th 2013. He does not understand why it took so long for these cases to come to Court considering the authorities knew he was in prison serving a sentence on other matters. In fact, the response from the issuing authority dated the 16th of February 2022 sets out that he was interrogated on the 6th of August 2018 which is when he was in prison.
- His solicitor Anna Nore contacted him about these cases and he engaged her to represent him. He did not appear in Court on 10th September 2020. He had sent a medical note to Court to state he couldn't attend in January 2020 but he understands

that the Court imposed a fine of €100 for non-attendance. He could not travel to the Court in August 2020 and sent a document from his employer in respect of Covid-19 to the Court by way of email outlining restrictions and quarantine rules.

- He received a summons in this case (No. 11210054312) to attend Court on the 2nd of March 2022. He has endeavoured to contact Ms. Nore to represent him but there have been difficulties with instructing her and receiving responses. He says that he will need to get another lawyer and his solicitor in this case, and has suggested a lawyer based in Latvia.

12. By way of Section 20 request this Court sought the following information by way of letter dated the 10th January 2022:

"1. In relation to the warrant dated 17 February 2021 (corresponding to Irish High Court record 2021/360/EXT) relating to two alleged offences dated 17 July 2012 and 22 October 2012, please set out fully the reason(s) for the delay in issuing the warrant approximately 8 years after the dates of the alleged offences.

2. Is there a statute of limitations for both alleged offence(s) relevant to the European Arrest Warrant and, if so, please specify?"

13. By way of additional information dated the 18th of January, the issuing judicial authority stated:

"In response to the request of the competent authority of Ireland of 10 January 2022 (No. 191/216/21) for additional information within the extradition case of the accused Sergejs Radionovs, identity code 270192-11183, we provide the following information.

It follows from the files of the criminal case that criminal proceedings No. 11210054312 were initiated on 17 July 2012 for a c1iminal offence under Section 176(1) of the Criminal Law (for stealing of movable property of another

related to violence) and criminal proceecli11gs No . 11210083612 were initiated on 22 October 2012 for a criminal offence under Section 176(2) of the Criminal Law (for stealing of movable property of another , committed by a group of persons with participation of A.D. as an accomplice, related to violence). On 25 October 2021, by decision of the person directing the proceedings, both these proceedings were merged into the criminal proceedings with the number - 112 10054312.

The pre-trial criminal proceedings (investigation) within the framework of the merged criminal proceedings had been conducted from 25 October 2012 until 30 October 2018, when a decision was made to bring the criminal case to court.

The criminal liability limitation period is regulated by Section 56(1)4), 5) of the Criminal Law providing for that a person may not be held criminally liable if from the day when he or she committed the criminal offence, the following time period has elapsed, namely - ten years after the day of committing a serious crime and fifteen years after the day of committing an especially serious crime. It follows that to both these criminal offences is applicable a limitation period. As can be seen from the files of the criminal case, the limitation period in the criminal offence of 17 July 2012 under Section 176(1) (a serious crime) of the Criminal Law shall be ten years, but the limitation period in the criminal offence of 22 October 2012 under Section 176(2) (an especially serious crime) of the Criminal Law shall be fifteen years.

Section 56(2) of the Criminal Law provides that the limitation period shall be calculated from the day when the criminal offence has been committed until when chargers are brought.

It follows from the files of the criminal case that the accused Sergeis Radionovs was charged with both criminal offences on 10th October 2018, when he was served with the indictment in accordance with Section 406 of the Criminal Procedure Law. It can be concluded that the criminal liability limitation period has not expired for both these criminal offences of the accused Sergejs Radionovs."

14. This Court sought further information by way of a Section 20 request dated the 16th of February 2022 in the following terms:

"1. Whilst it is understood that the proceedings merged but in circumstances where the two offences allegedly occurred in July and October 2012 please explain how it took until 2018 before the proceedings merged? In particular, please outline what steps were taken during those 6 years.

2. Please also explain the delay between 2018 and the proceedings commencing in the Court on 30 October 2021."

15. In a response dated the 21st February 2022 the issuing judicial authority indicated:

"In reply to the request of the competent authority of Ireland of 16 February 2022 (No.191/216/21) on provision of the further information in the extradition case in respect of defendant Sergejs Radionovs, identity code 270192-11183, herewith we provide the following information:

In respect of first question: From the case files stems out that the person directing the proceedings by the decision of 25 October 2012 merged into single

proceedings two criminal procedures No.1120054312 and No.11200836 12, granting them the number 1121005412, and namely:

On 17 July 2012 was taken the decision [sic] *on launching the criminal procedure (No.11210054312) pursuant to the Section 176(1) of the Criminal Law (robbery) on the grounds of application of victim A.K. of 17 July 2012.*

Victim A.K. was interrogated on 17 July, 24 July 2012, and on 17 April 2013; on 22 January 2018 was conducted the verification of victim A.K. testimonies on the crime spot [sic].

On 30 July 2012 was taken the decision on applying the forensic medical examination to victim A.K. On 9 August 2012 in the case was received [sic] *the expert's opinion No.130.*

On 7 August 2012 the person directing the proceedings took the decision on seizure for seizing from SIA "Express Credit" the mobile telephone Nokia 2330 classic and the purchase contract. The inspection of the seized items was held on the same day. On 8 August 2012 the person directing the proceedings returned the seized mobile telephone Nokia 2330 classic to its owner - victim A.K.

On 8 April 2013 witness E.P. was interrogated. On 7 May 2013 witness S.S.-K. was interrogated.

On 24 July 2012 the person directing the proceedings requested the mobile communications provider, which is providing the services of the public mobile telephones network, to disclose the saved data.

On 22 October 2012 was taken [sic] *the decision on launching the criminal procedure (No.11 210083612) pursuant to the Section 176(1) of the Criminal Law (robbery) on the grounds of application of victim M.S.*

Victim M.S. was interrogated on 22 October, on 1 and 21 November 2012; on 22 January 2018 was conducted [sic] *the verification of victim A.K. testimonies on the crime spot.*

On 29 November 2012 was taken the decision on applying the forensic medical examination to victim M.S. On 4 December 2012 in the case was received the expert's opinion No.199.

On 7 August 2012 the person directing the proceedings took the decision on seizure for seizing from SIA "Express Credit" the mobile telephone Nokia 2330 classic and the purchase contract. The inspection of the seized items was held on the same day. On 8 August 2012 the person directing theproceedings returned the seized mobile telephone Nokia 2330 classic to its owner - victim A.K.

On 22 October 2012 witness LB. was interrogated. On 23 October 2012 witness E.O. was interrogated.

On 23 October, on 1 November 2012, on 8 April 2013 was interrogated witness H.M.

On 25 October, on 1 November 2012, on 21 January, on 8 April 2013 was interrogated witness K.M.

On 22 October 2012 the person directing the proceedings took the decision on seizure for seizing from the shopping centre "Aura" the video record of 22 October 2021. The video records were seized from the shopping centre on the same day.

On 23 October 2012 the person directing the proceedings requested the mobile communications provider, which is providing the services of the public mobile telephones network,to disclose the saved data.

On 24 October 2012 the person directing the proceedings applied to the court with the motionto conduct the search in the place of residence of suspect Sergejs Radionovs. The search was allowedby the decision of investigation judge of 25 October 2012. The search was conducted on 26 October 2012.

On 24 October 2012 the person directing the proceedings applied to the court with the motion to conduct the search in the place of residence of V.P., the criminal procedure against whom is detached into separate proceedings. The search was allowed by the decision of investigation judge of 25 October 2012. The search was conducted on 26 October 2012. By the decision of the person directing the proceedings of 30 October 2012 on seizure from person V.P. was seized the mobile telephone Nokia.

Defendant S. Radionovs was detained on 12 October 2012 at 01.20 o'clock and then released on 12 October 2012 at 16.15 o'clock.

Defendant Sergejs Radionovs was detained on 23 October 2012 at 22.05 o'clock. By the decision of 25 October 2012 Sergejs Radionovs was found to be the suspect pursuant to the Section176(3) of the Criminal Law. By the decision of investigation judge of 25 October 2012 to Sergejs Radionovs was applied the security measure - arrest. The decision was appealed. His complaint was rejected by the decision of 6 November 2021 of the appeal instance court judge. On 18 April 2013 the security measure applied to Sergejs Radionovs - arrest - was replaced with the surrender to the police supervision. The security measure was lifted on 28 November 2013.

Defendant Sergejs Radionovs was interrogated on 12 October, 25 October 2012, on 16 April 2013 and on 6 August 2018; the verification of his testimonies on the spot was conducted.

The person directing the proceedings on 10 October 2018 took the decision on bringing the criminal charges against Sergejs Radionovs. The accusation was issued on 11 October 2018. On 30 October 2018 was taken [sic] *the decision on lodging the criminal case with the court.*

In respect of second question:

The given criminal case was received in Zemgale District Court (further referred as "Court") on 31 October 2018. By the decision of judge of 5 November 2018 the trial of the case was scheduled to 28 February 2019.

The case examination commenced on 28 February 2019. The court hearing was adjourned to 17 May 2019, because the victims and witnesses did not appear to the court hearing.

The court hearing of 17 May 2019 was adjourned to 5 June 2019, because defendant Sergejs Radionovs and co-accused A.D. had the complaints about the health problems and due to that they were not escorted to the court hearing.

On 5 June 2019 the court hearing was adjourned to 20 September 2019 for ensuring to defendant Sergejs Radionovs [sic] *a new defence counsel.*

The court hearing of 20 September 2019 was adjourned to 18 December 2019, because witnesses and one victim did not appear.

The court hearing of 18 December 2019 was adjourned to 21 January 2020 according to the Section 490 of the Criminal Procedure Law because of the sick leave of Prosecutor (public accuser). Defendant Sergejs Radionovs was informed about the court hearing of 21 January 2020 at 10.15 o' clock by the court summons sent to the electronic email address. Defendant did not appear for the court hearing. The court found as unjustified the non-appearance reasons [sic] *mentioned by defendant and applied to him the procedural sanction - fine*

100 EUR. The Section 463(2) of the Criminal Procedure Law provides for that if [the] *defendant has not appeared for the court hearing, then the trial of the criminal case shall be adjourned, therefore the court hearing was adjourned.*
By the decision of judge of 26 May 2020 according to the Section 490 of the Criminal Procedure Law the next court hearing was scheduled to 5 August 2020 at 10.00 o'clock; defendant S. Radionovs was informed about it according to the procedures laid down by the law. Defendant S. Radionovs did not appear for the court hearing. The court found as unjustified the non-appearance reasons mentioned by defendant Sergejs Radionovs. The court according to the Section 463(2) of the Criminal Procedure Law adjourned the court hearing to 10 September 2020 at 14.00 o'clock. At the same time was taken the decision on the procedural coercive measure, namely, on coercive bringing of defendant Sergejs Radionovs to the next court hearing.
Defendant Sergejs Radionovs did not appear for the court hearing of 10 September 2020 at 14:00 o'clock, he did not notify the reasons of his non-appearance. From the service report of 10 September 2020 of the Public Order Police Division of Rfga Latgale Station of Riga Regional Department of the State Police, attached to the case, stems out that the coercive bringing of defendant Sergejs Radionovs to the court hearing of 10 September 2020 at 14.00 o'clock was not possible, because the place of residence notified by Sergejs Radionovs - Maskavas iela 59-14, Riga, does not exist. The court found that defendant Sergejs Radionovs has not appeared for the court hearing and that the court has no justifying information about the reasons of his non-appearance to the court hearing. As defendant Sergejs Radionovs three times without any justifying reasons has not appeared before the court, and his coercive bringing was not possible

because he had notified the non-existing address, the court found that he is therefore evading from the court [sic] *and is delaying the court proceedings. The court by its decision applied to Sergejs Radionovs the security measure - arrest - for the term provided for by the Section 277(6) of the Criminal Procedure Law (in respect of chargespursuant to the Section 176(2) of the Criminal Law) and circulated Sergejs Radionovs as wanted.*

Defendant Sergejs Radionovs appealed the court decision. By the decision of Zemgale Regional Court (appeal instance court) of 20 October 2020 the decision of district court was affirmed and the complaint of defendant Sergejs Radionovs was rejected.

The decision of Zemgale District Court of 10 September 2020 was sent on 11 September 2020 for enforcement to the State Police.

The State Police in its notification of 25 September 2020 (No.20/16/23-467126) on the search for Sergejs Radionovs informed the court that Sergejs Radionovs is circulated as wanted, the wanted person's case No. 221000920 is initiated.

Moreover, the State Police in its notification of 28 January 2021 (No.20/16/23-42569) on searching for Sergejs Radionovs informed that it is established that Sergejs Radionovs has left the territory of the Republic of Latvia.

By the decision of judge of 21 January 2021 according to the Section 490 of the Criminal Procedure Law and referring to the information circulated by the competent authorities of the Republic of Latvia and provided recommendations on limiting the spread of the coronavirus disease "Covid-19", as well as the Decree of the Cabinet of Ministers No.655 of 6 November 2020 "On Declaring the Emergency Situation" the examination of the criminal case scheduled to 4 February 2021 at 10.00 o'clock was suspended.

On 11 February 2021 the Court applied to the competent authority (the International Cooperation Division of the Department for Analysis and Management of the Prosecutor General's Office) with the proposal to issue the European Arrest Warrant against Sergejs Radionovs.

By the decision of the competent authority of 11 February 2021 was issued the European Arrest Warrant against Sergejs Radionovs and he was circulated as wanted.

The Court on 5 August 2021 requested the International Cooperation Department of the Criminal Police Department of the State Police to provide information about the search results. On 5August 2021 the competent authority informed the Court that they have not any information on possible location of Sergejs Radionovs abroad."

16. <u>Is surrender prohibited by Section 37 of the Act of 2003?</u>

Chronology:

- 17/7/12 – First offence
- 12/10/12 – Respondent detained in respect of the first offence
- 22/10/12 – Second offence
- 23/10/12 – Respondent detained in respect of the second offence
- 25/10/12 – Respondent found to be a suspect by judge in relation to second offence
- x/10/12 – Appeal of this decision
- 25/10/12 – 30/10/18 – pre-trial investigation
- 8/4/13 - Last step taken (in immediate aftermath) to investigate second offence
- 7/5/13 – Last step taken (in immediate aftermath) to investigate first offence
- 16/4/13 – Respondent arrested
- 18/4/13 – Police supervision started

- 28/11/13 – Police supervision finished
- 22/1/18 – Fourth interview of a victim in each of the cases
- 6/8/18 – Respondent arrested
- 10/10/18 – Decision to charge the respondent made with both offences
- 11/10/18 – Accusation issued
- 30/10/18 – Decision to lodge the criminal case with the court
- 31/10/18 – Criminal case received by Zemgale District Court
- 5/11/18 – Judge decided to schedule trial on 28th February 2019
- 28/2/19 – Case commenced
- 17/5/19 – Case adjourned for victims and witnesses and the respondent and co-accused had health difficulties
- 5/6/19 – Case adjourned as respondent to obtain a new defence counsel
- 20/9/19 – Case adjourned due to non-appearance of witness and victim
- 21/1/20 – 21/1/21 – A number of adjournments due to non-appearance of respondent
- 11/2/21 – Decision taken to issue EAW
- 25/10/21 – Decision taken to merge both investigations
- 6/11/21 – Appeal of the decision of 25th October 2012, rejected

17. In many cases involving delay, the issues relate to the delay on the part of the issuing state in bringing EAW proceedings with due expedition. This is not such a case. This is a case in which the respondent complains about the delay within a domestic state in the investigation stage of the proceedings, and in circumstances where the respondent had a trial date, but he failed to attend. This form of complaint relates to purported frailties within the investigation stage of proceedings of the domestic state. Such matters would ordinarily not concern this Court. Nevertheless, this Court has considered the general test which must be applied where

an application for surrender is opposed on grounds related to 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."*

18. In *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; -

> *"[80] … 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*."

19. 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."

20. The respondent has referred the Court to the judgment of the Supreme Court in *Minister for Justice and Equality v. Palonka* [2022] IESC 6. This Court notes the following extract from the judgment of Charleton J.; -

"[19] One of the questions reverted to the High Court by this Court was as to the motivation or cause of apparently waiting until the failure of the request for surrender on the 2003 offence before the Polish authorities then sought a second extradition on the 1999 offence. This was analysed by Burns J who felt that that on enquiry "no simple or straightforward answer has been provided in respect of this question" by the Polish authorities. Burns J noted the significant lapse of time as between the requests for the second 2003 offence, which resulted in the first EAW, and the second EAW which related to the 1999 offence. As Burns J held: "There undoubtedly was a significant lapse of time between the 2006 activation of the sentence in respect of the July 1999 offence and the issue of the EAW in respect of same." He summarised the documentation as indicating a breakdown of communications as opposed to any deliberate scheme:

a. After the suspended sentence was activated on 16th January, 2006, an order issued on 17th February, 2006 against the respondent to report to the penal institution in Hrubieszów. When he did not appear, a warrant for compulsory appearance issued and an additional search was initiated. As he could not be located, enforcement proceedings were suspended by the Regional Court in Hrubieszów on 17th July, 2006. A wanted notice issued on 18th July, 2006.

b. The Regional Court in Hrubieszów requested the District Prosecutor's Office in Zamość to issue a European arrest warrant against the respondent. By letter dated 21st September, 2006, the District Prosecutor in Zamość refused to apply for a European arrest warrant, stating that the case files did not provide information about the place the respondent was staying at and that there was no evidence that the wanted person was staying abroad.

c. The District Court in Poznań had issued a European arrest warrant (III Kop 31/06) seeking surrender of the respondent on 6th March, 2006 ("the 2006 warrant"). This warrant was never executed. The 2006 warrant was sent to Ireland but, by letter dated 17th October, 2012, the Irish authorities asked the issuing judicial authority to provide an amended warrant incorporating the changes to the form of the warrant brought about by European Council Framework Decision 2009/299/JHA. The Polish authorities sent a fresh warrant which issued on 6th November, 2012 ("the 2012 warrant"). In the 2012 warrant, it was indicated that the respondent may be residing in the Netherlands.

d. After the decision of the District Prosecutor in Zamość to refuse to issue a European arrest warrant (see point b. above), the respondent was still being sought by way of wanted notice. In 2012, the Regional Court in Hrubieszów started requesting documents that were necessary to apply for a European arrest warrant. At the same

time, the County Police Headquarters in Hrubieszów were trying to establish where the respondent was staying. The Regional Court in Hrubieszów was advised that the respondent was being sought on the basis of the European arrest warrant issued by the District Court in Poznań on 6th March, 2006 reference III Kop 31/06.

e. On 12th October, 2012, Police Headquarters in Hrubieszów received information via Interpol that the respondent was staying in Ireland at apartment 19 Preston Mills, Drogheda. Having received this information, the Regional Court in Hrubieszów decided not to issue a European arrest warrant in respect of the convicted person because on the same day, the Court was advised that a European arrest warrant had already been issued in respect of the respondent by the District Court in Poznań. The reason given for the Regional Court in Hrubieszów not issuing or seeking to issue a European arrest warrant in respect of the sentence activated by order of 16th January, 2006 is that if the respondent was surrendered on foot of the 2006 warrant, issued by the District Court in Poznań, it would be possible to execute that activated sentence if the Respondent consented to it, which is provided for in Polish law.

f. On 26th March, 2018, the Regional Court in Hrubieszów received a copy of the 2006 warrant but was not aware of, and did not have a copy of, the 2012 warrant.

g. The Regional Court in Hrubieszów indicates that it was not aware of the arrest of the respondent in Ireland until it was informed by letter dated 27th March, 2018 by the Regional Police that the respondent had been arrested and detained on foot of a European arrest warrant, had lodged an appeal against his surrender and that the extradition procedure had been withheld (in fact, surrender of the respondent on foot of the 2012 EAW was ordered by the High Court but subsequently refused by the Court of Appeal on 18th May, 2015). The Regional Court in Hrubieszów indicates that it was

not aware that the respondent's detention in Ireland was on foot of the 2012 EAW (presumably, as opposed to the 2006 warrant).

h. The police were responsible for all searches for the respondent. In the course of the police investigations, it was established that the respondent was probably in the Netherlands and then in Ireland. The Respondent was arrested in Ireland on foot of the 2012 EAW on 28th December, 2013 but the Regional Court in Hrubieszów indicates it was not aware of this fact until 27th March, 2018.

i. On 15th June, 2018, the Regional Police applied to the Regional Court in Hrubieszów for the issue of an European arrest warrant in respect of the sentence activated by order dated 16th January, 2006. The procedure meant requesting information from relevant institutions and sending necessary documents concerning the convicted person. Waiting for the said documents appears to have taken a long time. Not until all the information and documents were collected did the Regional Court in Hrubieszów file a request with the District Court in Zamość to issue the EAW, which issued on 23rd January, 2019.

j. In Poland, the police are responsible for making enquiries as to the whereabouts of wanted persons. A list of wanted persons in connection with European arrest warrants is not publicly available in Poland. In order to find out whether a European arrest warrant has been issued against a particular person, a search is performed, presumably by an authorised person such as a police officer, on the National Criminal Register, to establish if there were domestic warrants or wanted notices in respect of a person. If a warrant or wanted notice is turned up, an inquiry can then be made for information as to whether a European arrest warrant has been issued by the relevant Court."

The aforementioned chronology lead Mr. Justice Charleton to conclude at para. 31; -

"[31] This is not a case of potential infringement of fundamental rights. Rather, what is involved is a real, exceptional and oppressive disruption to family life in the most extreme and exceptional of circumstances. Of itself, that would not justify a refusal to surrender as delay does not create rights, but delay may enable the growth of circumstances where a new situation has emerged that engages Article 8 of the European Convention in a genuinely exceptional way as set in the context of the individual procedural circumstances of the case. Burns J could not definitively state as to why on the failure of the EAW for the 2003 offence, it was to the 1999 offence, after the exceptional delay described by him, that the authorities looked. While there is no requirement in European law which would support any argument that a requesting state should trawl up and centralise every potential offence for which a person might be requested, it was the answer to that question which this Court saw as central in seeking further information through the High Court.

[32] It follows that the absence of information on that cru-cial matter brings into focus the 23-year delay involved, the long stasis through failing to revert to the earlier 1999 offence, the presence of the person sought in this jurisdiction since 2005, the establishment of roots and family life in this country, and, while balance is not in issue, this delay underlines the exceptional nature of what has been sought in the context of these cannabis offences. Surrender will therefore be refused."

Similarly, Mr. Justice Hogan concluded at para 11 of his judgment; -

"[11] It is perfectly evident that each stage of the Polish judicial process and police investigations was beset by some degree of delay and confusion. I am perfectly prepared to accept that this unhappy sequence of events was caused by a series of understandable human errors. The net result, however, is that this Court is faced with executing an EAW warrant in respect of a (relatively) minor offence which was

committed by Mr. Palonka some 23 years ago when he was just 18 years of age. The confusion of which I have spoken has meant that the Polish authorities did not avail of a number of opportunities to apply for an EAW in respect of this offence prior to making a belated application in this regard in 2019. Had the 6 Polish authorities acted otherwise it would have been entirely possible for them to have sought to have an EAW executed in either 2006 or 2007. Alternatively, one or more EAWs in respect of both the 1999 offence and the 2003 offence could have been processed by the Irish courts at the same time in 2012 and 2013 had the Polish authorities considered such an approach to have been appropriate."

21. Numerous and significant steps were taken in relation to these proceedings leading to trial date on the 28th February 2019. There is no objectionable delay from the date of the offences to the date of trial. It is clear from the additional information received, that any further delay from the 21st January 2020 onward, in respect of the prosecution of these proceedings, lies at the doorstep of the respondent. He fled the jurisdiction in flagrant breach of his obligations to the authorities. He knew that he was under a duty to remain in his place of residence and, that if he had to leave, that he was under a duty to advise the authorities of any change of address. He did not comply with these obligations and the issuing state therefore did not, and could not, have known his whereabouts.

22. Furthermore, the delay of six years is in relation to the pre-trial and trial process in the issuing state and is, therefore, not a matter that should concern this Court. In any event, six years in such circumstances cannot amount to a delay that is so egregious that it amounts to a breach of the respondent's fair trial rights.

23. I am satisfied that the respondent's situation is not beyond the norm and there are no factual circumstances which, in this Court's view, rebut the presumption in Section 4a of the 2003 Act.

24. In this Court's view, surrender is not precluded by reason of Part 3 of the Act of 2003 or another provision of that Act.

25. 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 Latvian Republic.