THE HIGH COURT

[2024] IEHC 538

[2024 No. 156 EXT]

BETWEEN

MINISTER FOR JUSTICE AND EQUALITY

APPLICANT

AND

MANUEL RUI SEIDI

RESPONDENT

JUDGMENT of Mr Justice Patrick McGrath delivered on the 28th August 2024

A. APPLICATION

1.1 By this application, the applicant seeks an order for the surrender of the respondent to Portugal pursuant to a European Arrest Warrant dated 8 July 2024 ("the EAW"). This EAW was issued by Judge Esmeraldina Alexandra Ferreira Duarte, Judge of the District of West Lisbon, as the issuing judicial authority.

1.2 The EAW is a prosecution warrant and seeks the surrender of the respondent in order to prosecute him for:

(a) An offence of acquiring counterfeit currency to be put into circulation, provided for and punishable by Article 266(1)(a) the Portuguese Penal Code by up to 5 years imprisonment;
(b) An offence of Drug Trafficking, provided for by Article 12(1), by reference to Table I-B, both of Decree Law No 15/93 of 22/01, and punishable by a term of imprisonment of between 4 and 12 years.

1.3 The issuing State has certified that the offences are *'ticked box offences'*, being offences which carry a maximum period of imprisonment of not less than three years and therefore ones for which it is not necessary to show correspondence under Article 2.2 of the

Framework Decision. The boxes ticked are *'illicit trafficking in narcotic drugs and psychotropic substances'* and *'counterfeiting of currency, including the euro'*. No issue is taken in relation to correspondence, and I am in any event satisfied that there is no manifest or apparent error in the said listing of the offences as 'ticked box offences'.

1.4 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.

1.5 I am satisfied that none of the matters referred to in section 22, 23 and 24 of the European Arrest Warrant Act, 2003, as amended ("the 2003 Act"), 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.

1.6 I am further satisfied that the EAW was issued by a judicial authority within the meaning of the Framework Decision and the 2003 Act.

1.7 There is an unusual history to these proceedings, and this is the second EAW which has been received in relation to these offences from Portugal. It is necessary to set this history out in order to fully consider the points of objection raised in this case.

First and Second EAWs

1.8 An EAW, dated the 14 of March 2022, was issued seeking the surrender of the Respondent [*'the First EAW']*]. Mr Seidi was arrested in this jurisdiction on foot of an SIS alert on the 9 of January 2024. He was remanded in custody and the first EAW was produced to the High Court on the 22 January 2024. The Respondent unsuccessfully applied for bail on the 13 of February 2014 and has remained in custody since arrest.

1.9 A section 16 hearing in relation to this first EAW commenced on the 21 of March 2024 and was adjourned to the 10 of May 2024 for resumed hearing and to allow a s20 request to issue to the Portuguese authorities. In response to that s20 request, it was confirmed that the domestic warrant for the arrest of the respondent was issued by the Public Prosecutor's Office, and this was in accordance with the requirements of Portuguese Law. It was further confirmed that the EAW of the 14 of March 2022 was also issued by the

said Public Prosecutors Office and once again this was in accordance with domestic Portuguese law.

1.10 The Public Prosecutors Office is the issuing judicial authority for Portugal pursuant to Article 6(1) of the Framework Decision. Both the domestic warrant and the EAW of the 21st of March 2022 issued from that body and there was no judicial oversight at either level, such not being required under Portuguese Law.

1.11 Following the absence of any judicial oversight being raised with the issuing judicial authority, a new EAW, namely the one presently before the Court, was issued on the 8th of July 2024. This Second EAW was in all material respects identical to the original EAW from 21 March 2022, save that it was subject to Judicial oversight in accordance with the decision of the CJEU in *Bob Drogi ,* Case – 241/15 (1 June 2016).

1.12 On the 15 of July 2015 this second EAW was endorsed by this Court and the applicant arrested on foot of the same. Upon the application of the Minister an order was made directing the withdrawal of the first EAW. The Respondent now remains in custody on foot of this second EAW.

2. ALLEGED ABUSE OF PROCESS

2.1 The Respondent submits that surrender ought to be refused as:

'The issue of this second European arrest warrant is an egregious abuse of process in circumstances where the first European arrest warrant that it replaces was knowingly issued unlawfully in deliberate and conscious breach of the Respondent's rights under the Constitution, the ECHR and the European Charter including his right to trial in due course of law and liberty'

2.2 The Respondent submitted that the first EAW was invalid on the basis that Article 8(1)(c) of the Framework Decision, read in light of Article 47 of the Charter and previous decisions of the CJEU, meant that the requirements inherent in the effective judicial protection that must be provided to a person such as this Respondent, who is the subject of an EAW for criminal prosecution, were not satisfied as the first EAW and the domestic

decision on which it was based (the domestic warrant) were issued by a public prosecutor and in circumstances where it could not be reviewed by a Court in the issuing state prior to surrender.

2.3 The authorities cited by the Respondent in this regard include Case C-241/15 *Bob – Dogi* (Judgment of 1 June 2016), Case C-206/20, *VA* (Judgment of 22 June 2021) and Case-648/20 PPU *PI* (Judgment of 10 March 2021).

2.4 In *Bob-Dogi* a Romanian national, Mr Bob-Dogi, was the subject of an EAW issued by a Hungarian Judicial Authority for prosecution in relation to an offence of causing serious bodily harm. The EAW had been issued in Romania on the basis of a so-called 'simplified procedure'. At paragraph 56 of its judgment the Court referred to the dual level of protection entailed in the EAW system as follows:

> *'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 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 national judicial decision.'*

2.5 The relevant facts in the subsequent *PI* case are similar to those in issue in this case. In *PI* the Bulgarian Public Prosecutor (who like the Portuguese Public Prosecutor here had satisfied the criteria for classification as an 'issuing judicial authority' under Article 6(1) of the Framework Decision) had issued an EAW seeking the surrender of *PI* for prosecution for an offence of theft. This EAW was based on a national arrest warrant also issued by the public prosecutor and authorising the detention of *PI* for a period of up to 72 hours. The question referred by the UK Court (the executing judicial authority) to the CJEU was whether the issue of both the domestic warrant and the EAW by a public prosecutor, without the involvement of any court prior to surrender, was compatible with the dual level of protection required under the Framework Decision as found in *Bob-*

Dogi and whether it provided effective judicial protection. The CJEU found that this process did not satisfy those requirements.

2.6 In the present case it was only following this issue being raised with the issuing judicial authority by way of correspondence under s20 of the 2003 Act in relation to the First Warrant, that the Portuguese authorities agreed that the requirements of effective judicial protection were not satisfied with the first EAW and issued a second EAW on the 28th of June 2024 which was then issued under the oversight of Judge Duarte of the West Lisbon District.

2.7 At Part b of this second warrant, it is stated:

> *'The defendant was arrested in compliance with the European arrest warrant* [the first EAW] *issued by the Public Ministry in the case file, on 09/01/2024, where he still remains, having been requested by the Irish authorities for clarifications regarding the judicial confirmation of the warrants issued, in the light of the U.S. Court of Justice jurisprudence, which has come to understand that the issuance of a European arrest warrant falls within the jurisdiction of the judge.*
>
> *As has been said the warrants issued by the Public Prosecutors office were issued under the aforementioned legal provisions, in the exercise of their own powers, and there is no legal provision in national law that expressly refers to the need for a review or confirmation of an arrest warrant issued by the Public Prosecutor's office by the investigating judge. That said, for this purpose, both under national law and for the issuing of a European arrest warrant, in this particular case being the commission of a drug trafficking offence, punishable by between 4 and 12 years in prison, the Public Prosecutor's Office can do so and assumes the status of judicial authority for this purpose.*
>
> *However, the U.S.C. J.* [CJEU] *has imposed that the judicial authority for this is only the judge, and it is true that national legislation (Law 65/2003 of 23 August) had not yet brought its rules into line with this additional requirement, and not infrequently member states have asked for clarification, as in this case, in order to comply with this jurisprudence.'*

2.8 The Respondent submits that it is evident that the issuing judicial authority ('IJA') issued the first EAW in full knowledge that it was unlawful and, in circumstances where the Respondent was remanded in custody and refused bail, in deliberate and conscious breach of his rights including his right to trial in due course of law and right to liberty under the Constitution, ECHR and Charter.

2.9 The Respondent refers to Case C – 158/2021 *Puig Gordi & Others* (21 January 2023) which confirmed that the Framework Decision does not preclude the issuing of several successive EAWs against a requested person after the execution of a previous EAW has been refused by a Member State, provided that the execution of a new EAW does not infringe Article 1(3) of the Framework Decision and the issuing of the later EAW is proportionate. The CJEU did however go on to say that the issue of an EAW in breach of fair trial rights principles established by that Court is a breach of the principles of mutual trust and confidence stating:-

> *' 142. However, first, it follows from the Court's case-law that the issuing of a European arrest warrant the execution of which would lead to an infringement of Article 47 of the Charter and should, in the circumstances set out by the Court's settled case law, be refused by the executing judicial authority as not compatible with the principles of mutual trust and sincere cooperation (see, by analogy, judgment of 11 November 2021, Gavanozov II, C – 852/19, EU;C:2021:902, paragraph 60)*

3. PRINCIPLES THAT APPLY TO ABUSE OF PROCESS

3.1 The principles that apply to abuse of process cases in the area of Extradition have been considered in a considerable number of decisions of the Superior Courts.

3.2 In her Judgment in *Minister for Justice and Equality v. J.A.T. No.2* [2016] IESC 17, a case that also involved the issuing of two EAWs, Denham C.J. addressed abuse of process as follows:

> *'72. In general, if there is an abuse of process by authorities they should not benefit. The rule of law, and the right to fair procedures, requires that such a general principle be applied*;

73. Of course, there may be circumstances where a court considers that there has been an abuse of process, but to a limited degree, and applying the principle of proportionality, a surrender procedure should proceed. However, such a finding would arise only in a situation where a process was found to be an abuse, but in a limited manner and with limited effect.

74. In this case there is an accumulation of factors.

75. It is clear, and remains the law, that simply because a second European arrest warrant is issued that does not of itself indicate any abuse of process. See Bolger v O'Toole, unreported, Supreme Court, 2nd December, 2002, *and Gibson v Gibson*, *ex tempore, Supreme Court, 10th of June 2004, Keane C.J..*

In analysing a case where there has been a finding of an abuse of process, the circumstances of each case are relevant and critical to the ultimate decision.

76. I have reviewed the circumstances of this appeal, which include the following factors:-

(a) this is the second EAW issued in relation to the offences alleged;

(b) failings in the first EAW could have been addressed in the first application;

(c) a considerable time has passed since the alleged offences and a considerable time has passed since the arrest of the appellant on the first EAW;

(d) the medical condition of the appellant, who is a vulnerable person;

(e) the medical condition of the appellant's son, for whom the appellant is a significant carer;

(f) the family circumstances;

(g) the oppressive effect which the two sets of EAW's have had on the appellant; on his son; and on his family;

(h) no explanation has been given for delays;

(i) there has been no engagement by the authorities with the issues as to the first EAW or the delays:

(j) the Central Authority has a duty to bring to the attention of the issuing State authorities defects or internal contradictions in a warrant, and to consider whether all the documentation is complete and clear, before being relied upon for the purpose of seeking to endorse an EAW;

(k) the duty of the Court to protect fair procedures; and

(l) the principle that a party in litigation should not benefit from proceedings which were de facto abusive of the Court's process."

3.3 Having set out these factors, Denham C.J. concluded:-

> " *85. While no single factor, as set out above, governs this appeal, in circumstances where the High Court has found, correctly in my view, that there has been an abuse of process, I am satisfied that the factors, referred to in this judgment, taken cumulatively, are such that there should not be an order for surrender of the appellant*."

3.4 It is furthermore clear that an abuse of process may arise without bad faith as stated by Hunt J. in *Minister for Justice v. Bailey* [2017] IEHC 482:

> *" Abuse of process can arise without any institution acting in bad faith. It may be caused, as it was in this case, by the cumulative effect of the circumstances of the case rendering an abuse of process on the individual concerned. These principles are all expressed in the judgment of Denham C.J. in Tobin (No. 2). 'Abuse of process' is described in the same case by Hardiman J. in characteristically vivid and eloquent terms. I can do no better than borrow his words. He described it at para. [313] as:- "a many headed concept whose manifestations range from the deliberate maintenance of legal proceeding without probable cause… to a ham fisted or unthought out conduct of litigation, particularly by making two or more actions where one would do, which tends to oppress the other party and to cause him expense and/or distress."*

3.5 In *Minister for Justice v Downey* [2019] IECA 182 Peart J. emphasised the exceptional nature of the jurisdiction in this regard stating

> *"[19.] It is clear from J.A.T (No. 2) that there can be circumstances which justify the High Court refusing an application for surrender on the basis of abuse of process. But it is equally clear firstly that such cases require some exceptional circumstance to justify such refusal, but, and critically, that the abuse asserted to exist must be of the processes of the High Court here dealing with the application for surrender, and therefore must relate to the application for surrender itself, and not to the prosecution of the offences which the respondent will face if he/she is surrendered. The different question whether there might be an abuse of process were the respondent put on trial*

for the offences for which surrender is sought is not a matter for determination in this jurisdiction on an application for surrender. Absent any suggestion that there is no possibility of a fair hearing of any application to have his trial on these offences stayed, and there has been no such suggestion made by the appellant, it is in my view clear that any such question of abuse of process will be a matter to be pursued by the appellant before the courts in the requesting jurisdiction."

3.6 In *Minister for Justice and Equality v. Campbell* [2020] IEHC 344 ,Donnelly J conducted a comprehensive review of the law on abuse of process insofar as it might apply to extradition and surrender cases. There Lithuania sought the surrender of Mr. Campbell in respect of serious firearms/terrorist offences alleged to have been committed between 2006 and 2007. A European arrest warrant was previously issued in December 2008, the respondent was arrested in January 2009 in this jurisdiction on foot of same and granted bail. In May 2009, while dropping his wife to work, he was arrested in Northern Ireland on foot of the same European arrest warrant and remanded in custody. In July 2009, the European arrest warrant before the High Court in Ireland was withdrawn. In 2013, Belfast Recorder's Court refused to surrender Mr. Campbell and an appeal in respect of same was refused. Mr. Campbell was released by the Northern Irish authorities and returned home.

3.7 Shortly after his release in 2013, Lithuania issued a second European arrest warrant which was received by the Irish authorities in October 2016. This second EAW was endorsed by the High Court in November 2016, and Mr. Campbell was arrested and brought before the High Court in December 2016. Proceedings were contested on grounds, *inter alia*, of abuse of process, inhuman prison conditions in Lithuania and the competency of the Lithuanian Prosecutor General's Office to issue a European arrest warrant. In July 2020, Donnelly J. ordered the surrender of Mr. Campbell.

3.8 In relation to the plea of abuse of process, Donnelly J. reviewed the decisions of the Supreme Court in *Minister for Justice and Equality v. Tobin* [2012] IESC 37, [2012] 4 I.R. 147, *Minister for Justice and Equality v. J.A.T* [2014] IEHC 320 *, Minister for Justice and Equality v. J.A.T. No. 2* [2016] IESC 17, [2016] 2 I.L.R.M. 262 and *Minister for Justice and Equality v. Downey* [2019] IECA 182. A

3.9 In *Minister for Justice v Angel* [2020] IEHC 699 Burns J later summarised the principles as set out by Donnelly J in *Campbell* as follows:

> *'(a) there is no bar to bring a fresh application to the Court for surrender*
> *(b) there can be circumstances which justify or require the High Court refusing an application for surrender on the basis of abuse of process;*
> *(c) a finding of an abuse of process should not be made lightly*
> *(d) it is only where the case has exceptional circumstances that an abuse of process will be found (although exceptionality is not the test) and that the abuse of process is that of the High Court in this jurisdiction rather than a concern about an abuse of process to put the requested person on trial;*
> *(e) there is broad public interest in bringing things to finality in one set of proceedings;*
> *(f) there is a strong public interest in Ireland complying with its international obligations and surrendering individual in accordance with the relevant extradition provisions;*
> *(g) a repeat application for surrender is not per se abusive of process. It would only be an abuse of process where to do so is unconscionable in all the circumstances;*
> *(h) mala fides or an improper motive is not a necessary precondition for an abuse of process; and*
> *(i) the Court should look to the cumulative factors which may make an application for surrender oppressive or unconscionable '*

3.10 In *Campbell*, Donnelly J. identified the true issues in that case as delay and the fact that Mr. Campbell had spent four years in custody in Northern Ireland, with almost three years of same spent in solitary confinement, awaiting the outcome of an application for surrender. As for the delay from the date of the alleged offences, approximately 14 years, no specific adverse consequences for Mr. Campbell or his family had been identified. The Lithuanian authorities were not entirely to blame for the delay. Mr. Campbell had gone to Northern Ireland where he was arrested. That was not the fault of the Minister or the Lithuanian authorities. The length of the proceedings in this jurisdiction was not due to Lithuania but was a consequence of legal challenges. The maximum time for which Lithuania had failed to ensure protection of human rights regarding detention conditions

was under nine years from issue of the first European arrest warrant in 2008 to the assurance it gave in 2017. Time spent in custody would be taken into account should he be convicted but if surrendered, he was quite likely to be remanded in custody awaiting trial. The offences alleged were very serious.

3.11 Donnelly J. was not convinced by the argument on delay and was not satisfied that it was a crucial factor which inexorably pointed to an abuse of process, even in the absence of an explanation for same which was a factor to be taken into account. The fact that it took time for Lithuania to bring its prisons in line with human rights standards and/or seeking surrender before it did so was not mala fides or an abuse of process. In conclusion on this issue, she held at para. 124:-

> *"Having considered all the factors relevant to the abuse of process, I am satisfied that individually or cumulatively there is no abuse of process. However unique the circumstances are in this case, they do not reach a level of unjust harassment or oppression that means it would be an abuse of the processes of this Court to surrender him. This point of objection must accordingly fail."*

3.12 In *Angel* Burns J rejected a claim of abuse of process where previous EAWs had issued. In that case the respondent was arrested on 29 December 2017 in Northern Ireland on foot of a European arrest warrant issued by Romania. He was remanded in custody. At that stage, the respondent was in custody for other domestic matters in Northern Ireland. On 12 September 2018, that European arrest warrant was withdrawn but the respondent was immediately arrested in respect of a fresh European arrest warrant issued by Romania. The fresh European arrest warrant had been issued because there had been a recalculation of the original sentences imposed on the respondent. On 13 September 2018, the respondent was remanded in custody. On 30 November 2018, the respondent was arrested and detained on a Belgian European arrest warrant. On 15 February 2019, the Romanian European arrest warrant was heard before HHJ Miller QC and the respondent was discharged due to both the inhumane conditions that pertained in Romanian prisons at that time and the inadequacy of the assurances which had been given regarding same.

3.13 Following 15 February 2019, the respondent remained in detention in Northern Ireland on foot of the Belgian European arrest warrant only. On 11 June 2019, the Belgian authorities withdrew the relevant European arrest warrant, apparently on the basis of the amount of time the respondent had already served in custody in Northern Ireland on foot of the sentence. As regards the domestic proceedings, the respondent had been given a two-year suspended sentence on 25 July 2018.

3.14 At some stage following his discharge in Northern Ireland, he left that jurisdiction and came into this jurisdiction where he was arrested on foot of the same Romanian European arrest warrant. He was admitted to bail in this jurisdiction. His personal circumstances were not found to have been exceptional.

3.15 Consistent with established principles, as set out in previous case law, Burns J held that the refusal of surrender by the Northern Irish court did not automatically operate as a bar to a fresh application to the Court on foot of the same warrant and therefore the mere application to this Court of foot of a fresh EAW did not amount in itself to an abuse of the process. On the facts of that case, Burns J concluded that the respondent could not point to any exceptional circumstances other than his discharge in Northern Ireland. There was for example no egregious delay in the processing of this matter. The respondent submitted that the requesting state or the applicant should have disclosed to the Court when seeking endorsement of the EAW that it had already been adjudicated upon and surrender refused by a court in Northern Ireland. He did not accept that that fact in itself was a bar to making the application for surrender and that the failure to disclose those details at the application for endorsement stage amounted to an abuse of process. Furthermore, he concluded there was no evidence of *mala fides* on the part of the requesting state or the applicant herein.

3.16 As in the present case, the respondent in *Angel* also submitted that he might not be credited with the time served in custody in Northern Ireland on foot of an earlier European arrest warrant. However, as here, the respondent did not adduce any evidence to support this contention.

3.17 Burns J dismissed this argument, referring in this regard to the presumption under Section s. 4A of the Act of 2003, namely :*"It shall be presumed that an issuing state will comply with the requirements of the Framework Decision, unless the contrary is shown."*

3.18 He cited the Judgment of the Supreme Court in *Minister for Justice and Equality v. Vestartas*' [2020] IESC 12 where MacMenamin J explained how that provision concerns the duties and obligations of an issuing state concerning the manner in which it will deal with the person, both if surrendered and after surrender has taken place. If there is cogent evidence of non-compliance, then issues may arise which an Irish court might have to address. However, a mere assertion of non-compliance, or the possibility of non-compliance, will not be sufficient to dislodge the presumption.

3.19 On this issue Burns J further referred to Article 26 of the Framework Decision which provides as follows:-

> *"(1) The issuing Member State shall deduct all periods of detention arising from the execution of a European arrest warrant from the total period of detention to be served in the issuing Member State as a result of a custodial sentence or detention order being passed.*
>
> *(2) To that end, all information concerning the duration of the detention of the requested person on the basis of the European arrest warrant shall be transmitted by the executing judicial authority of the central authority designated under Article 7 to the issuing judicial authority at the time of the surrender."*

3.20 He pointed out that it is clear from the wording of Article 26 that it is for the issuing member state to deduct the periods of detention arising from the execution of a European arrest warrant from any period of detention to be served in the issuing member state. The obligation placed upon the executing member state is to transmit all information concerning the duration of the detention of the requested person on the basis of the European arrest warrant. He also observed that if there were a dispute between the respondent and the issuing member state as to whether or not a particular period of detention is to be deducted, then that dispute should be resolved in proceedings before the issuing member state in the first instance and if necessary, could be adjudicated upon by

the Court of Justice of the European Union ("the CJEU") if it is alleged that the issuing member state has failed to properly implement or interpret the provisions of article 26 of the Framework Decision. The concept of mutual trust and confidence between member states underpins the Framework Decision and the European arrest warrant system. There was nothing before him to indicate that the Romanian authorities would not properly give effect to the provisions of Article 26 of the Framework Decision. In such circumstances, Burns J proceeded on the basis that the Romanian authorities will deduct such periods of detention as is required pursuant to article 26 of the Framework Decision.

3.21 He therefore concluded that on the facts of that case, the circumstances did not appear to be of an exceptional nature and fell well short of reaching *'what may be regarded as a level of unjust harassment or oppression that would render it an abuse of the process of this Court to surrender the respondent.'*

3.22 This issue was again considered more recently by Naidoo J in *Minister for Justice v Nowakowski* [2023] IEHC 253. That was a case where there had been a previously unsuccessful application for the surrender of that Respondent from Ireland to Poland. It was a case where the Respondent was being sought in relation to events fifteen years previously and where he had left Poland in 2008 having been sentenced for offences which were not minor in nature.

3.23 In the view of Naidoo J, the circumstances in that case did include some of the factors that were present in the authorities such as *JAT (No 2)*. These included: two European arrest warrants were issued, surrender was refused in respect of the first warrant and there was a notable lapse of time between that refusal to surrender in 2015 and the issuing of the second warrant in 2021, refusal to surrender was not because of a technical defect in the formal content of the warrant, or due to some logistical difficulty transferring the respondent to the requesting State, it was because of a legitimate concern on the part of the court hearing the application about the respondent's medical condition, which the requesting State did not address to the satisfaction of Hunt J (who had refused the first application for surrender).

3.24 Naidoo J was of the view that no further request having been issued within a reasonable period after the refusal to surrender, the respondent was justified in thinking

that the matter had reached finality. He accepted that the issuing of a second warrant was not, of course, impermissible and said that, depending on the circumstances, five and a half years might not, in and of itself, amount to an egregious delay. However, the fact that it occurred after refusal of surrender on substantial grounds meant this delay did require an explanation. Explanations sought by this Court from the IJA to explain, in particular, the delay in issuing the second warrant, had not been addressed. He then concluded as follows: -

'The issuing of the second warrant does not prima facie amount to an abuse of process, indeed it occurs routinely. However, where, as in this case, the amended warrant was issued more than five years after the IJA had failed to give adequate assurances to a different composition of this Court, it was, in my view, appropriate to seek an explanation for the delay so as to ensure that the respondent was not, to adopt the language of the Supreme Court in Tobin (No. 2), being " vexed twice in the same matter" in circumstances that might be seen as oppressive absent an explanation from the requesting State.

The abuse of process contended for in this case does not involve any suggestion of bad faith or a deliberate intention to disrupt or interfere with the proper administration of justice and the conclusion of abuse of process is not to be made lightly in any circumstances. It is a vital feature of the administration of justice throughout the EU that Member States comply with international obligations and surrender individuals in accordance with the relevant extradition provisions. The offences in this case are not minor. However, in what I consider to be exceptional circumstances, I am satisfied that the issuing of the second warrant five and a half years after surrender had been refused by Hunt J., taken together with the total time that has elapsed since the offences were committed, the respondent's medical condition and the failure of the IJA to engage adequately with this Court's request for an explanation for the delay does amount to an abuse of process.

3.25 Having found there to be an abuse of process, Naidoo J then considered what consequences resulted from that finding and stated:-

'*Having decided that there has been an abuse of process, I must then ask whether it was of such a limited degree that, applying the principle of proportionality, surrender*

should nonetheless be ordered. As highlighted above, I do not consider the offences in respect of which extradition is sought to be minor. However, the penalty imposed suggests that the conduct involved did not lie at the upper end of the spectrum of seriousness for offences of this kind. Furthermore, I accept the respondent's averment that since the commission of the offences he and his father are now on good terms with each other. I accept that averment because it is quite likely that after more than a decade family members have reconciled, but also because the respondent's affidavits contain other details that might be said to be declarations against interest, which in my view adds to the credibility of his averment about the current state of his relations with his father. I also take into account the respondent's ongoing and potentially life-threatening medical condition and the impact that his surrender would have on his family. I do not consider the abuse of process to be insignificant and in all the circumstances, I am not satisfied that surrender should be ordered.'

3.26 The Respondent submits that an improper motive in this case arises from the issuing of an EAW knowingly bypassing the judicial oversight required as a matter of law to protect the Respondents rights, as per the Judgment of the CJEU in *Bob – Dogi*, and therefore doing this in deliberate and conscious violation of those protections. It is submitted that the IJA knew that the Respondent was being deprived of his liberty on foot of an EAW knowingly issued in breach of his rights to trial in due course of law and liberty and in circumstances where, this being a prosecution warrant, he is presumed innocent. Furthermore, no assurances have been provided that, should he be convicted and sentenced, time will be taken into account for the time spent in custody on foot of the first warrant.

3.27 The Respondent distinguishes the facts of this case from those in *Campbell*. In this case the IJA knew that there would be a violation of rights when it sought the surrender of the Respondent, as at that time not only was it aware of its obligations of judicial oversight under the Framework Decision but it issued an EAW knowing that this was done in breach of those obligations (the *Bob – Dogi* judgment had been delivered by the CJEU in 2016) and in circumstances where this had previously been brought to their attention by other executing judicial authorities. The Respondent contends that, whereas the extent of a State's obligations in relation to its prisons (the issue in *Campbell*) were

not clearly defined at the time when surrender was first unsuccessfully sought in that case, here the same cannot be said for the reasons already set out above.

3.28 Finally, the Respondent says that the only remedy for this abuse of process is a refusal of surrender and notes in this regard the comments of O'Donnell J at paragraph 12 of his Judgment in *JAT (No 2)* where he states that the normal and logical remedy for an abuse of process is the striking out or staying of the proceedings constituting the abuse.

3.29 The Applicant submits that, insofar as the Second Warrant is concerned, all relevant provisions of the 2003 Act have been complied with. The first warrant was issued in full compliance with the law of Portugal which did not require any judicial oversight. Save for the question of judicial oversight, the Warrant not only issued from the same authority but is in near identical terms.

3.30 The Applicant further submits that there has been no breach of the fundamental rights of the Respondent and nor has there been any breach of the fundamental legal principles enshrined in Article 6(1) of the Treaty of the European Union as provided for in Article 1(3) of the Framework Decision.

3.31 It is further submitted by the Applicant that, in the event that he is convicted of the alleged offences, the question of whether he will receive credit is a matter solely within the competence of the requesting state. There is no evidence he is at risk of an unfair trial and the Applicant says he has not suffered any prejudice.

4. CONCLUSION

4.1 There are two questions which I must consider and determine in this case:

(a) Has there been an abuse of process as a result of the manner in which these proceedings have been conducted before this Court; and
(b) If there has been such an abuse of process, what is the consequence of the same.

4.2 The Respondent says that the Portuguese authorities acted with bad faith or with mala fides in the circumstances of this case. Such submission is made on the basis that, since

the decision of the CJEU in *Bob – Dogi*, they were presumed to have been aware of the necessity of judicial oversight at some stage in Portugal prior to the issue of an EAW, whether at the point where the underlying domestic warrant was issued or at the point of the issue of the EAW itself. In this case it is clear that, though they were aware of the requirements of such oversight as a matter of EU law, in this case an unlawful EAW was issued and sent to this Court for execution. In other words this EAW was sent by the IJA in Portugal in the knowledge that there had been no judicial oversight. This was only corrected when this issue was brought to their attention by questions raised by this Court and it was only then that they issued a second EAW which complies with the necessity of judicial oversight. This is described as an egregious breach by the IJA which undermines the principle of mutual trust which lies at the heart of the EAW system.

4.3 Given the nature of this egregious breach, the Respondent submits that this is a case where the only remedy is a refusal of surrender. The Respondent submits that the IJA simply cannot be allowed to benefit from its misconduct in this case.

4.4 I agree that the first EAW was not lawful as the process prior to its issuance in Portugal was not subject to any judicial oversight. It is also clear that the necessity for such judicial oversight is something of which the Portuguese authorities were aware as they candidly informed this Court, in correspondence following a section 20 request, that their legislation of 2003 has not yet been amended to comply with the *Bob – Dogi* requirements and furthermore this issue has previously been raised by other executing judicial authorities.

4.5 Looking at the matter in its entirety it does not however seem to me that, though the First Warrant ought not to have issued, there was mala fides or bad faith on the part of the IJA. It ought certainly not to have happened, but the absence of judicial oversight was immediately corrected by the issuance of the Second EAW. Furthermore, they candidly accepted that there was a lack of judicial oversight, their domestic legislation was yet to be updated and that this was a matter which they had had to address by way of 'clarification' with other EAWs at the request of other states.

4.6 As has been observed in a number of the decisions referred to above, a finding of abuse of process is one which ought not to be made lightly. Furthermore, there is a strong public

interest in Ireland honouring its international obligations under various treaties and agreements, including of course the Framework Decision. This Court should consider the cumulative factors in this case and consider whether there are exceptional circumstances such as to lead to the conclusion of abuse of process. Is this a case where, looking at all the facts cumulatively, it can be said that there are exceptional circumstances which show a level of unjust harassment or oppression such that it could be said to be an abuse of the process of this court to order surrender?

4.7 The first EAW should not, in circumstances where the IJA were aware of the necessity of judicial oversight and the absence of the same as a matter of course in Portuguese Law, have been forwarded to this jurisdiction seeking Mr Seidi's surrender. It is clearly not acceptable that a party to the Framework Decision issues an EAW which they should have known was unlawful. Furthermore this Court does not agree with the Portuguese IJA's description of the issue of a new EAW, which it has also apparently done in relation to EAWs sent to other members states who have similarly raised questions about 'judicial oversight', as simply a 'clarification'. In addition the Respondent was detained for a number of months on foot of an EAW which was unlawful, in that it had been issued without the necessary judicial oversight.

4.8 On the other hand, many of the types of additional oppressive factors that were identified in cases such as *JAT (No 2)* or *Nowackowski,* are not present in this case. By way of example:-

a. There is no allegation of any delay on the part of the issuing judicial authority, either in issuing the First EAW or, when the issue of judicial oversight was brought to its attention, in issuing the Second EAW;
b. The Second EAW complies with the requirements of judicial oversight and, apart from this, in all other respects mirrors in its content the First EAW;
c. Once the issue of an absence of judicial oversight was brought to the attention of the IJA, not only was this matter resolved expeditiously but, in their reply in correspondence, the IJA candidly informed this Court that firstly, such oversight is not required as a matter of Portuguese Law, secondly their domestic legislation has not to date been amended to make this a necessary requirement and thirdly, this issue is one that has been raised and in relation to which they have previously issued what

they referred to as ‘clarification’ (in other words submitted a second warrant which has been subject to judicial oversight);

d. There has been no failure on the part of the IJA to engage with the issues raised by this Court, as executing judicial authority;
e. There is no suggestion that the Respondent, if surrendered, will not be afforded all fair trial rights as guaranteed under Article 6(1) of the Convention;
f. The Respondent has not raised any personal or Article 8 family / privacy issues by way of objection;
g. The Respondent does not have any issues in relation to his health which might be affected by surrender;
h. There is no evidence before the Court that the Respondent would not, upon surrender, be credited with the time served in custody during these proceedings in accordance with the terms of Article 26 of the Framework Decision.

4.9 Having considered all the factors in this case relevant to abuse of process, I am not satisfied that there has been an abuse of process. Although this Court does not excuse the failures of the IJA to ensure that the First Warrant had the necessary judicial oversight prior to its issue, the cumulative circumstances in this case do not in my view reach a level of unust harassment or oppression that means it would be an abuse of the processes of this court to order surrender.

4.10 Accordingly, this point of objection must fail.

4.11 In these circumstances it is not necessary to consider the second question, namely whether, if an abuse of process had been established, this is a case where surrender should be refused.

4.12 I therefore intend to make an order for surrender of the Respondent under s16 of the 2003 Act.