Neutral Citation: [2014] IEHC 51

THE HIGH COURT

IN THE MATTER OF THE EUROPEAN ARREST WARRANT ACT 2003 (AS AMENDED)

2013 No. 175 EXT.

Between/

THE MINISTER FOR JUSTICE & EQUALITY

Applicant

-AND-

T.E.(No 2)

Respondent

JUDGMENT of Mr. Justice Edwards delivered on the 24th day of January 2014

Introduction:
The respondent is the subject of a European arrest warrant issued by the Republic of France on the 11th July, 2013. The warrant was endorsed by the High Court for execution in this jurisdiction on the 16th July, 2013, and it was duly executed on the 26th July, 2013. The respondent was arrested by Sergeant K. on that date, following which she was brought before the High Court on the same day pursuant to s. 13 of the European Arrest Warrant Act 2003 (hereinafter "the Act of 2003"). In the course of the s. 13 hearing a notional date was fixed for the purposes of s. 16 of the Act of 2003 and the respondent was remanded on bail to the date fixed. Thereafter, the matter was adjourned from time to time, ultimately coming before the Court for the purposes of a surrender hearing.

The respondent does not consent to her surrender to the Republic of France. Accordingly, this Court is now being asked by the applicant to make an order pursuant to s. 16 of the Act of 2003 directing that the respondent be surrendered to such person as is duly authorised by the issuing state to receive her. The Court must consider whether the requirements of s. 16 of the Act of 2003, both controversial and uncontroversial, have been satisfied and this Court's jurisdiction to make an order directing that the respondent be surrendered is dependant upon a judicial finding that they have been so satisfied.

Uncontroversial s. 16 issues
The Court has received an affidavit of Sergeant K. sworn on the 15th October, 2013 testifying as to his arrest of the respondent and as to the questions he asked of the respondent to establish the respondent's identity. In addition, counsel for the respondent has confirmed that no issue arises as to either the arrest or identity of the respondent.

The Court has also received and has scrutinised a true copy of the European arrest warrant in this case. Further, the Court has taken the opportunity to inspect the original European arrest warrant which is on the Court's file and which bears this Court's endorsement.

I am satisfied following my consideration of these matters that:

(a) The European arrest warrant was endorsed for execution in this State in accordance with s. 13 of the Act of 2003;

(b) The warrant was duly executed;

(c) The person who has been brought before the Court is the person in respect of whom the European arrest warrant was issued;

(d) The warrant is in the correct form;

(e) The warrant purports to be a prosecution type warrant and the respondent is wanted in France for trial in respect of the two offences particularised in Part E of the warrant as follows:

> "- laundering, as an organised criminal gang, by investment, concealment or conversion, of the proceeds of the crimes of procuring and/or of living off immoral earnings, committed as an organised criminal gang, and of trafficking in human beings, committed as an organised criminal gang;
>
> - criminal conspiracy for the purposes of preparing to commit the crimes of procuring and/or of living off immoral earnings, committed as an organised criminal gang and of trafficking in human beings, committed as an organised criminal gang."

(f) The underlying domestic decision on which the warrant is based is an arrest warrant issued on the 18th June, 2012 by Judge G. Examining Magistrate in Lyon, France.

(g) The issuing judicial authority has invoked para. 2 of article 2 of Council Framework Decision 2002/584/JHA on the European arrest warrant and the surrender procedures between Member States, O.J. L190/1 18.7.2002 (hereinafter referred to as "the Framework Decision") in respect of both offences listed in Part E, by the ticking of the box in Part E.I of the warrant relating to "Participation in a Criminal Organisation", and also the box relating to "Laundering of the Proceeds of Crime". Accordingly, subject to the Court being satisfied that the invocation of para. 2 of article 2 is valid (i.e. that the minimum gravity threshold is met, and that there is no basis for believing that there has been some gross or manifest error), it need not concern itself with correspondence;

(h) The minimum gravity threshold in a case in which para. 2 of article 2 of the Framework Decision is relied upon is that which now finds transposition into Irish domestic law within s. 38(1)(b) of the Act of 2003, as amended, namely that under the law of the issuing state the offence is punishable by imprisonment for a maximum period of not less than three years. It is clear from Part C (1) of the warrant, read in conjunction with the information concerning the nature and legal classification of the offences set out within Part E that both offences carry a potential penalty of up to ten years imprisonment, and up to twice that term of imprisonment in the case

of repetition of the offences. Accordingly, the minimum gravity threshold is comfortably met;

(i) The description of the circumstances in which the offences in question were committed as set out in the warrant is as follows:

> "Following several complaints made by Nigerian prostitutes regarding the acts of violence committed against them, they brought to the attention of the judicial authorities that they had been taken to Italy, then to France and had afterwards been forced into prostitution in order to repay an imaginary debt in the amount of 50,000 Euros.
>
> Investigations revealed that several procuresses known by the name 'Mama' participated in networks transporting young Nigerian women for the purposes of forcing them into a life of prostitution in France and notably in Grenoble (Isere, France).
>
> Financial analyses revealed that the funds handed over by the victims, from which the 'Mamas' benefited and which were in the amounts representing several tens of thousands of Euros, transited via T.E.'s bank accounts in Ireland before being transferred to Nigeria. The procuresses asked her to carry out the transfers of funds by Western Union Money Order. By knowingly receiving on a very regular basis the sums gathered in this way by the procuresses so as to send those funds to Nigeria by means of a financial arrangement of her own devising, T.E. permitted the conversion of the proceeds of acts of procuring. By engaging in such collections of funds she herself is also a part of a highly structured organisation committing acts of procuring. The offences of which she is accused were committed in Grenoble, (Isere, France) on French national territory and on an indivisible basis in Nigeria and in Ireland, between 1st April 2008 and 14th March 2011, and at all events within a time period to which the Statute of Limitations does not yet apply."

There is no reason, upon a consideration of the underlying facts as set out above, to believe that the ticking of the boxes relating to "Participation in a Criminal Organisation", and "Laundering of the Proceeds of Crime" was in error;

(j) No issue as to trial *in absentia* arises in the circumstances of this case and so no undertaking is required under s. 45 of the Act of 2003;

(k) There are no circumstances that would cause the Court to refuse to surrender the respondent under s. 21A, s.22, s.23 or s.24 of the Act of 2003, as amended.

In addition, the Court is satisfied to note the existence of the European Arrest Warrant Act 2003 (Designated Member States) (No. 2) Order 2004 (S.I. No. 130 of 2004) (hereinafter "the 2004 Designation Order"), and duly notes that by a combination of s. 3(1) of the Act of 2003, and article 2 and the Schedule to the 2004 Designation Order, "France" (or more correctly the Republic of France) is designated for the purposes of the Act of 2003 as being a State that has under its national law given effect to the Framework Decision.

Point of Objection
The sole point of objection being proceeded with in this case is a Part 3 objection in which the respondent invokes s. 44 of the Act of 2003. The objection is pleaded as follows:

> "1. The surrender of the respondent is contrary to section 44 of the European Arrest Warrant Act, 2003 (the "2003 Act"). Section 44 provides that:
>
> > *if the offence specified in the European arrest warrant issued in respect of him or her was committed or is alleged to have been committed in a place other than the issuing state and the act or omission of which the offence consists does not, by virtue of having been committed in a place other than the State, constitute an offence under the law of the State.*
>
> The foregoing provision has been interpreted by the Supreme Court as requiring the reciprocity of the enforceability of warrants in relation to extra-territorial offences. It was submitted in respect of a previous warrant issued by the issuing state against the respondent that such reciprocity does not exist and that objection is repeated. By decision of the 21st day of June, 2013, this Court (Edwards J.) held that there was such correspondence. While the respondent accepts that a similar decision will be made in the herein set of proceedings, the respondent reserves her right to, inter alia, apply for a certificate of appeal on this issue.
>
> 2. Without prejudice to the generality of the foregoing, the European Arrest Warrant herein (the "E.A.W.") seeks the surrender of the respondent on the basis that she did, in Ireland, knowingly receive funds arising from acts of procuring and/or by being part of a highly structured organization committing acts of procuring. If the factual situation were reversed, namely the Irish state sought a French national for knowingly receive [sic] funds arising from acts of procuring and/or by being part of a highly structured organization committing acts of procuring, the Irish state could not prosecute (and consequently could not seek the surrender of) a person from France unless the conditions set out in section 8 of the Criminal Justice (Money Laundering) Act, 2010 and/or section 71 of the Criminal Justice Act, 2006 were met and/or that a criminal organisation within the meaning of section 70 of the Criminal Justice Act, 2006 was alleged to exist. Such is not the case herein."

No pre-judgment of the s. 44 issue
The Court is concerned to record that although the same issue as has been raised in these proceedings was raised unsuccessfully in respect of the earlier, but very similar, European arrest warrant, on foot of which the Court refused to surrender the respondent on unrelated grounds (the respondent had successfully sustained an objection under s. 21A of the Act of 2003), these are different proceedings, and no question of issue estoppel or *res judicata* arises.

Moreover, as the respondent points out in her pleadings she is entitled to re-litigate the point. She is represented on this occasion by different counsel, with new written submissions and fresh arguments; and in circumstances where the run of the case, in terms of this issue, has been quite different to the last time, it is appropriate to reassure the respondent that I have sought to approach the s. 44 issue in these new proceedings with a completely open mind, and without pre-judging it in any way.

Submissions
The Court has helpfully been provided with written submissions on both sides, which were amplified by counsel in the oral arguments presented to the Court.

The Law

The relevant statutory provision

S.44 of the Act of 2003 provides:

> "A person shall not be surrendered under this Act if the offence specified in the European arrest warrant issued in respect of him or her was committed or is alleged to have been committed in a place other than the issuing state and the act or omission of which the offence consists does not, by virtue of having been committed in a place other than the State, constitute an offence under the law of the State."

S. 44 as interpreted by the Supreme Court

The meaning and application of s. 44 of the Act of 2003 was considered by the Supreme Court in *Minister for Justice, Equality and Law Reform v Bailey* [2012] I.E.S.C. 16 (Unreported, Supreme Court, 1st March, 2012). The Court has considered carefully the judgments in that case. It may be helpful in the context of the present case to quote some passages from that of Denham C.J who stated at paras. 19-39:

> "19. The Framework Decision provided grounds for optional non-execution of a warrant. It states in Article 4 that the executing judicial authority may refuse to execute the warrant in a number of circumstances, including, in paragraph 7:-
>
> > '4.7: where the European arrest warrant relates to offences which:
> >
> > (a) are regarded by the law of the executing Member State as having been committed in whole or in part in the territory of the executing Member State or in a place treated as such;
> >
> > or
> >
> > (b) have been committed outside the territory of the issuing Member State and the law of the executing Member State does not allow prosecution for the same offences when committed outside its territory.'
>
> 20. The Framework Decision thus provides two options in Article 4.7 for non execution of a warrant. The choice of applying the options was made by the Oireachtas.
>
> 21. In Ireland, the initiating legislation was the Act of 2003. Article 4.7(a) was ultimately not incorporated as part of Irish legislation, and thus it is not an option open to the Court.
>
> 22. The option described in Article 4.7.b of the Framework Decision was implemented by the legislature in the provisions of s. 44 of the Act of 2003, which has not been amended in any later legislation and which retains the same wording since its enactment.
>
> 23. It appears to me that the words of s. 44 are clear: a person shall not be surrendered if two specific conditions are satisfied. The first part of the section states that:-
>
> "A person shall not be surrendered under this Act if the offence specified in the European Arrest Warrant in respect of him or her was committed in a place other than the issuing State …"
>
> The first of these conditions is that the offence was committed or alleged to have been committed in a place other than the issuing State. In this case the offence of murder of Mme. Toscan du Plantier took place in Ireland and thus outside the issuing State, which is France. Therefore, the first condition is met. However, this finding is insufficient to prohibit surrender under s. 44 of the Act of 2003 and it is necessary to consider the balance of the section, the second condition.
>
> 24. This first issue therefore turns on the meaning of the words in the balance of s. 44, which sets the second condition as:-
>
> "and the act or omission of which the offence consists does not, by virtue of having been committed in a place other than the State, constitute an offence under the law of the State".
>
> It is helpful to read the third phrase before the second, in construing the meaning of the section. This would thus be:
>
> "and the act or omission of which the offence consists does not constitute an offence under the law of the State, by virtue of having been committed in a place other than the State".
>
> These are clear words and so may be considered and applied literally. The section prohibits the surrender of a person where the act of which the offence consists does not constitute an offence in Ireland by virtue of having been committed, i.e. because it was committed, in a place other than Ireland.
>
> 25. The terms of s. 44 are an option, exercised by Ireland, grounded on Article 4.7.b. of the Framework Decision.
>
> 26. The European Arrest Warrant procedure is based on the concept of mutual trust and confidence between judicial authorities of the Member States. However, Article 4.7 of the Framework Decision and s. 44 of the Act of 2003 reflect other principles also. It is necessary to analyse the Article and the section to determine the issue raised by the appellant.
>
> 27. The travaux preparatoires on Article 4.7 of the Framework Decision, and thus on the foundations of s. 44 of the Act of 2003, are of interest. It is unfortunate that they were not opened to the Court by counsel.
>
> 28. The concept of reciprocity has long been utilised by States in making extradition treaties.
>
> 29. The European Convention of Extradition 1957 provided in its Article 7:

Article 7 - Place of Commission

'1. The requested Party may refuse to extradite a person claimed for an offence which is regarded by its law as having been committed in whole or in part in its territory or in a place treated as its territory.

2. When the offence for which extradition is requested has been committed outside the territory of the requesting Party, extradition may only be refused if the law of the requested Party does not allow prosecution for the same category of offence when committed outside the latter Party's territory or does not allow extradition for the offence concerned.'

30. Article 26 provided for reservations, stating:-

'1. Any Contracting Party may, when signing this Convention or when depositing its instrument of ratification or accession, make a reservation in respect of any provision or provisions of the Convention.

2. Any Contracting Party which has made a reservation shall withdraw it as soon as circumstances permit. Such withdrawal shall be made by notification to the Secretary General of the Council of Europe.

3. A Contracting Party which has made a reservation in respect of a provision of the Convention may not claim application of the said provision by another Party save in so far as it has itself accepted the provision.'

31. The Explanatory Memorandum on Article 7 states:-

'Paragraph 1 permits a Party to refuse extradition for an act committed in whole or in part within its territory or in a place considered as its territory. Under this paragraph it is for the requested Party to determine in accordance with its law whether the act was committed in whole or in part within its territory or in a place considered as its territory. Thus, for example, offences committed on a ship or aircraft of the nationality of the requested Party may be considered as offences committed on the territory of the Party.

Paragraph 2 was inserted in order to take into account the law of countries which do not allow extradition for an offence committed outside the territory of the requesting Party. This paragraph provides that extradition must be granted if the offence has been committed outside the territory of the requesting Party, unless the laws of the requested Party do not authorise prosecution for an offence of the same kind committed outside its territory, or do not authorise extradition for the offence which is the subject of the request.

Under the terms of Article 26, a reservation may be made in respect of this paragraph, making it subject to reciprocity.'

32. Thus, under the previous Extradition system, where treaties were made between states, the specific treaty could make provision for a reservation, and make it subject to reciprocity.

33. The document dated 4th December, 2001, from the Permanent Representatives Committee, to Council, entitled "Proposals for a Council Framework Decision on the European Arrest Warrant and the surrender procedures between Member States", 14867/01 COPEN 79 CATS 50 stated:

'3. Grounds for optional non-execution.

3.1 Grounds linked to the place where the act on which the grounds for the European arrest warrant was committed:

Several delegations (NL/EL/IRL/L,/DK/A and S) wanted to introduce additional grounds for optional non-execution, making it permissible to refuse to execute a European arrest warrant issued for acts committed in whole or in part on the territory of the executing Member State or committed outside the territory of the issuing Member State, if the law of the executing Member State does not allow prosecution of offences of the same type committed outside the territory of the executing Member State. This question should be examined together with the French proposal referred to in point 1 above.

The Presidency will make a proposal to COREPER/COUNCIL on this point as part of an overall compromise.'

The Framework Decision annexed (as of 4th December 2001) included:

"7. [Where the act on which the European arrest warrant is based was committed in whole or in part in the territory of the executing State or in a place treated as the territory of that Member State, and the competent authority of the executing State undertakes to conduct the prosecution or to execute the sentence 2.]"

The footnote 2 stated:-

"NL (supported by EL/IRL/L/DK/A and S) has made a broader proposal, based on Article 7 of the 1957 European Extradition Convention:

'Where the European arrest warrant envisages offences which:

(1) are regarded by the law of the executing Member State as having been committed in whole or in part in its territory or in a place treated as the territory of that Member State;

(2) have been committed outside the territory of the issuing member State and the law of the executing Member State does not allow prosecution for the same offences when committed outside the territory of the executing Member State.'"

Thus, Ireland was one of the delegations seeking to introduce additional grounds for optional non-execution at this stage of the consideration of the proposed Framework Decision.

34. At the 2396th Council Meeting - Justice, Home Affairs and Civil Protection - Brussels, on the 6th and 7th December, 2001, the Council examined a draft Framework Decision on the European Arrest Warrant and the surrender procedures between Member States, on a compromise proposal. The Presidency was able to record the agreement of 14 delegations on its compromise. One delegation was unable to support the proposal. The main features of the compromise were:-

• The arrest warrant is broad in scope. In particular, it gives rise to surrender in respect of 32 listed offences … without verification of the double criminality of the act and provided that the offences are punishable in the issuing Member State by a custodial sentence of a maximum of at least 3 years.

• A territoriality clause making it optional to execute an arrest warrant in respect of offences committed in the executing State for acts which took place in a third State but which are not recognised as offences by the executing State.

• A retroactivity clause making it possible for a Member State to process requests submitted prior to the adoption of the Framework Decision under existing instruments relating to extradition.

35. On the 6th December, 2001, the Presidency noted agreement of 14 delegations on the draft Framework Decision, one delegation could agree only on a narrower list of offences in Article 2(2). The draft Article 4 was headed as grounds for optional non-execution. It contained seven sections by which "[t]he executing judicial authority may refuse to execute the European arrest warrant" if the conditions in any section were adopted into domestic law. The draft Article 4.7 was:-

'The executing judicial authority may refuse to execute the European arrest warrant […]

7. Where the European arrest warrant envisages offences which:

(3) are regarded by the law of the executing Member State as having been committed in whole or in part in its territory or in a place treated as the territory of that Member State;

(4) have been committed outside the territory of the issuing member State and the law of the executing Member State does not allow prosecution for the same offences when committed outside the territory of the executing Member State.'

This draft indicates an agreement that the second option not to surrender would lie when the offence in issue had been committed outside the territory of the issuing Member State and the law of the executing Member State does not allow prosecution for the same offence when committed outside the territory of the executing Member State.

36. The final wording agreed upon for Article 4.7 of the Framework Decision was:-

'7. where the European arrest warrant relates to offences which:

(a) are regarded by the law of the executing Member State as having been committed in whole or in part in the territory of the executing Member State or in a place treated as such;

or

(b) have been committed outside the territory of the issuing Member State and the law of the executing Member State does not allow prosecution for the same offences when committed outside its territory.'

37. Ireland did not opt for Article 4.7.a. But the roots of Article 4.7.b. may be seen in Article 7 of the European Convention on Extradition, 1957, and there is a clear line of thought through to Article 4.7.b. of the Framework Decision.

38. Whether one classifies it as an option as to extra-territoriality or reciprocity, Article 4.7.b. makes provision for an exception to the requirement of surrender which is a fundamental principle of the Framework Decision.

39. Article 4.7 has been described as an example of the principle of reciprocity in the Framework Decision. As stated in Blextoon and van Ballegooij, eds., Handbook on the European Arrest Warrant, (T.M.C. Asser Press, 2005) in chapter 6. The Principle of Reciprocity, by Harman van der Wilt at p. 74:-

"Only one provision in the Framework Decision alludes to the principle of reciprocity. According to Article 4, s. 7 sub. (b), the executing judicial authority is allowed to refuse the execution of a European Arrest Warrant, whenever such a warrant envisages offences which have been committed outside the territory of the issuing Member State and the law of the executing Member State does not allow prosecution for the same offences when committed outside the territory of the executing Member State. In the corresponding situation the executing state would simply not be able to issue an arrest warrant due to a lack of jurisdiction. The provision restores the equilibrium by offering this state the possibility to restrict the scope of its performances to its own expectations in similar circumstances. This

section mirrors Article 7, s. 2 of the European Convention on Extradition."

Application of s. 44 to the "Laundering" Offence
There are two conditions that the respondent must satisfy if she is to successfully invoke s.44.

Condition Number One.

The respondent must establish that the offence specified in the European arrest warrant issued in respect of her was committed or is alleged to have been committed in a place other than the issuing state. The issuing state is France. Accordingly she must establish that the conduct constituting the "laundering" offence occurred in a place other than France.

In this Court's view the respondent faces a difficulty in satisfying condition number one, in as much as the description of the circumstances in which the offence is alleged to have been committed which is contained with Part E of the warrant states:

> "The offences of which she is accused were committed in Grenoble, (Isere, France) on French national territory and on an indivisible basis in Nigeria and in Ireland"

The allegation is clearly that the offences in question were transnational offences that were capable of being committed, and were in fact committed, in more than one place. This arises in circumstances where the respondent is alleged to have been party to a joint enterprise involving participants based in a number of countries. It is a feature of the doctrine of joint enterprise as we know it in this jurisdiction that the participants in a joint enterprise are each criminally liable for acts done in pursuance of the joint enterprise regardless of where they are done, provided they are within the scope of the agreement, be it tacit or express. It is clearly to be inferred from the European arrest warrant currently before the court, and the very detailed supporting document that accompanied it under cover of a letter from the issuing judicial authority dated 31st December 2013, that joint enterprise is a concept known to French law and that in France offences committed in common design are charged as having been committed "in an organised group"

In this instance the specific conduct attributed to the respondent is that she participated as a member of an organised group in a money laundering exercise to benefit that group, by receiving into her bank account in Ireland from her friend R.O., another member of the said organised group, who was based in France, monies representing the earnings of Nigerian women trafficked into France and forced into a life of prostitution there, notably in Grenoble, and in turn forwarding the said monies to another member of the said organised group based in Nigeria. The allegations of laundering against the respondent do not isolate, and are not confined to, her personal money laundering actions. The actions of all of the members of the organised group are being attributed to her, and in those circumstances it is correct for the issuing judicial authority to assert that the offences were committed by her on French national territory and on an indivisible basis in Nigeria and in Ireland.

Counsel for the respondent has argued that the Court should regard condition number one as having been satisfied on the basis that at least some of the conduct complained of occurred outside of France, and in support of this he relies upon this Court's judgment in *Minister for Justice and Equality v Adam Stuart Busby* [2013] I.E.H.C. 455 (Unreported, High Court, Edwards J., 30th of July 2013). However, in this Court's view the *Busby* case is clearly distinguishable in that the extraditee had acted alone in that case and it was not alleged that he was party to a joint enterprise of any sort. The *Busby* case concerned a threat communicated by telephone, and the concern in that case arose in circumstances in which the conduct complained of took place in one jurisdiction but the effect or result of that conduct was, by virtue of the miracle of modern telecommunications, instantaneously felt in another jurisdiction. It was held that in such circumstances the offence could be regarded as having been committed in both places simultaneously, but that to the extent that it was regarded as having been committed outside of the issuing state by virtue of its effect being felt in the other state, it was to be regarded as an extraterritorial offence. In the present case, however, we are not concerned with a single action perpetrated in one jurisdiction with a concurrent effect or result in another jurisdiction. The circumstances of the present case are completely different.

In the present case the relevant feature is that the essence of the offending conduct is being a participant in an organised group that was engaged in money laundering activities (of which there were many), just some of which took place in France. These activities were perpetrated on behalf of the group by different members of the group at different times, in circumstances where the law of the issuing state allows all members of the group to be held jointly responsible for all of those activities.

In those circumstances the act of one participant committed in France can be regarded as the act of all of the participants. It is alleged in this case that monies, the proceeds of prostitution and people trafficking, were collected in France by R.O. and transferred to a bank account held in Ireland by the respondent. The issuing state is attributing those actions of R.O. to the respondent because both parties are said to have been participants in the organised group which this activity was intended to benefit, and that is sufficient to ground the laundering charge preferred against the respondent as having occurred within the territory of France.

In the previous case (*Minister for Justice and Equality v Egharevba* [2013] I.E.H.C. 323; (Unreported, High Court, Edwards J., 19th June, 2013) I had expressed significant doubts as to whether condition number one could be satisfied, but had proceeded to consider condition number two upon the assumption that it could, and with the intention of re-visiting the issue for the purpose of expressing a firm view one way or the other in the event that it was necessary to do so. In circumstances where the Court found that condition number two could not be satisfied it was unnecessary to revisit condition number one and express a firm view as to whether or not it could in fact be satisfied. However, in the present case, having heard the issue as to whether or not condition number one can be satisfied argued afresh, the Court is now in a position to express a firm view.

It seems to the Court that, for the reasons outline above, the respondent cannot establish that condition number one is satisfied with respect to the laundering offence.

Condition Number Two

In this Court's view the inability of the respondent to satisfy condition number one is dispositive of the s. 44 issue in so far as the "laundering" offence is concerned. However, in circumstances where counsel for the respondent has flagged, reasonably in the circumstances of this case, that in the event of the Court finding against his client on the s.44 issue, he is likely to seek a certificate under s. 16 (11) of the Act of 2003, the Court will proceed to examine whether condition number two could be satisfied, assuming just for the purpose of the exercise that condition number one can be satisfied, i.e. that the offences, the subject matter of the warrant, are in fact extraterritorial in so far as France is concerned.

For condition number two to be satisfied, the respondent would have to be in a position to demonstrate that the act or omission of which the offence consists does not, by virtue of having been committed in a place other than the State, constitute an offence

under the law of the State. Adopting Denham C.J.'s suggestion in *Minister for Justice, Equality and Law Reform v Bailey* [2012] I.E.S.C. 16 (Unreported, Supreme Court, 1st March, 2012) that it may be helpful to read the second clause before the third, the reordered provision requires the respondent to demonstrate that the act or omission of which the offence consists does not constitute an offence under the law of the State, by virtue of having been committed in a place other than the State.

This Court agrees with counsel for the respondent that in order for a person to be surrendered on foot of a surrender request based on an extra territorial offence, there must be reciprocity. The Court further agrees with counsel for the respondent that reciprocity does not mean that the respondent could also be prosecuted in the State for the allegations in the E.A.W., but rather, if the roles were reversed and the respondent was a French citizen resident in France, whether such acts could be prosecuted in Ireland.

In this Court's view they could, under s.72(1) of the Criminal Justice Act, 2006 (hereinafter the Act of 2006), and the necessary reciprocity exists.

S. 72(1) of the Act of 2006 provides:

"A person who, for the purpose of enhancing the ability of a criminal organisation to commit or facilitate –

(a) a serious offence in the State, or

(b) in a place outside the State, a serious offence under the law of that place where the act constituting the offence would, if done in the State, constitute a serious offence,

knowingly, by act –

(i) in a case to which paragraph (a) applies, whether done in or outside the State, and

(ii) in a case to which paragraph (b) applies, done in the State on board an Irish ship or on an aircraft registered by the State,

participates in or contributes to any activity of the organisation is guilty of an offence."

Section 72 goes on to further provide in subsections (2) to (5) thereof:

"(2) In proceedings for an offence under subsection (1), it shall not be necessary for the prosecution to prove that—

(a) the criminal organisation concerned actually committed a serious offence in the State or a serious offence under the law of a place outside the State where the act constituting the offence would, if done in the State, constitute a serious offence, as the case may be,

(b) the participation or contribution of the person concerned actually enhanced the ability of the criminal organisation concerned to commit or facilitate the offence concerned, or

(c) the person concerned knew the specific nature of any offence that may have been committed or facilitated by the criminal organisation concerned.

…

(4) For the purposes of this section, facilitation of an offence does not require knowledge of a particular offence the commission of which is facilitated, or that an offence actually be committed.

(5) A person guilty of an offence under this section shall be liable on conviction on indictment to a fine or imprisonment for a term not exceeding 5 years or both."

A "serious offence" is defined in s.70(1) of the Act of 2006 as "an offence for which a person may be punished by imprisonment for a term of 4 years or more."

It should be noted in passing that the provisions just quoted are from s. 72 as originally enacted. A new s. 72 was substituted by s. 6 of the Criminal Justice (Amendment) Act 2009 and the new section came into effect on the 23rd of July, 2009. The relevance of this is that the underlying acts are stated in the warrant to have taken place "between the 1st of April 2008 and 14th March 2011."

To the extent relevant, s. 72 in its amended form provides:

"72.— (1) A person is guilty of an offence if, with knowledge of the existence of the organisation referred to in this subsection, the person participates in or contributes to any activity (whether constituting an offence or not)—

(a) intending either to—

(i) enhance the ability of a criminal organisation or any of its members to commit, or

(ii) facilitate the commission by a criminal organisation or any of its members of,

a serious offence, or

(b) being reckless as to whether such participation or contribution could either—

(i) enhance the ability of a criminal organisation or any of its members to commit, or

(ii) facilitate the commission by a criminal organisation or any of its members of,

a serious offence.

(2) A person guilty of an offence under this section shall be liable on conviction on indictment to a fine or imprisonment for a term not exceeding 15 years or both.

(3) The reference in subsection (1) to the commission of a serious offence includes a reference to the doing of an act in a place outside the State that constitutes a serious offence under the law of that place and which act would, if done in the State, constitute a serious offence.

(4) In proceedings for an offence under this section it shall not be necessary for the prosecution to prove—

(a) that the criminal organisation concerned or any of its members actually committed, as the case may be—
(i) a serious offence in the State, or

(ii) a serious offence under the law of a place outside the State where the act constituting the offence would, if done in the State, constitute a serious offence,

(b) that the participation or contribution of the defendant actually—
(i) enhanced the ability of the criminal organisation concerned or any of its members to commit, or

(ii) facilitated the commission by it or any of its members of,

a serious offence, or

(c) knowledge on the part of the defendant of the specific nature of any offence referred to in subsection (1)(a) or (b).

…"

If, applying the principle of reciprocity, and the circumstances of the present case were "plugged in" so to speak, to the provisions of s. 72(1) (as originally enacted) the result is as follows:

"A person [*in this instance T.E., a French citizen living in France*] who, for the purpose of enhancing the ability of a criminal organisation to commit or facilitate –

(a) a serious offence [*money laundering, contrary to s. 31(3) of the Criminal Justice Act 1994 and/or s. 7 of the Criminal Justice (Money Laundering and Terrorist Financing) Act 2010*] in the State [*i.e in Ireland*]

knowingly, by act [*in this instance receiving in France monies that are the proceeds of crimes committed in Ireland, lodging them to her bank account in France, and later transferring them to Nigeria by means of Western Union Money transfer*] –

(i) in a case to which paragraph (a) applies, whether done in or outside the State [*i.e., Ireland*],

participates in or contributes to any activity of the organisation is guilty of an offence."

A number of points need to be made. Since 1994, money laundering has been an offence in Ireland, and whether it arises under s. 31 of the Criminal Justice Act 1994 (since repealed) or under S. 7 of the Criminal Justice (Money Laundering and Terrorist Financing) Act 2010, it undoubtedly qualifies as a serious offence for the purposes of s.70(1) of the Act of 2006.

It is clear from the European arrest warrant that money laundering is also an offence under French law, carrying up to ten years imprisonment. While there is no evidence before me as to whether money laundering is an offence under Nigerian law or, if so, what the penalties are, it matters not for the purposes of the exercise that the Court is currently engaged in.

The circumstances of the offences set out in the European arrest warrant make it clear that the money laundering activities of the organised group in question were transnational and involved participants in France, Ireland and Nigeria, acting in concert, handling the proceeds of crime by passing them from one to the other. It is therefore the case that the criminal organisation collectively committed, or facilitated the commission, of serious offences both in Ireland and in France; and that it also engaged in activities that may have involved the actual commission or the facilitation of the commission, of similar type offences in Nigeria, if indeed money laundering is an offence there.

The point requires to be made that s.72(1) as originally enacted criminalised participation in or contribution to any activity of a criminal organisation which is done for the purpose of enhancing the ability of that organisation to commit or facilitate a serious offence in the State . It is not necessary that the serious offence which the criminal organisation may have intended to commit, or has actually committed, is prosecutable extra-territorially because the focus is on the intention to commit, or the actual commission of, the serious offence in question in the State. The critical features of the provision are (i) that a criminal organisation should have intended to commit, or have actually committed, a serious offence in Ireland; and (ii) that the person charged under s.72(1) should have participated in or contributed to any activity that was done for the purpose of enhancing the ability of that organisation to commit or facilitate the commission of that serious offence. Moreover, (iii) s.72(1)(i) makes it clear that it matters not whether the activity in question was done in or outside the State.

It seems clear to this Court that even if Ireland was in the shoes of the French, and T.E. was a French citizen based in France at all material times, she could, applying the above analysis, nevertheless be prosecuted in Ireland under s. 72(1) of the Act of 2006 as originally enacted.

If the same exercise is engaged in with respect to s.72(1) as substituted by s.6 of the Criminal Justice (Amendment) Act 2009, one gets the same result. When the circumstances of the present case are "plugged in" to the provisions of s. 72(1) (as substituted) the result is follows:

> "72.— (1) A person [*in this instance T.E., a French citizen living in France*] is guilty of an offence if, with knowledge of the existence of the organisation referred to in this subsection, the person participates in or contributes to any activity (whether constituting an offence or not) [*in this instance receiving in France monies that are the proceeds of crimes committed in Ireland, lodging them to her bank account in France, and later transferring them to Nigeria by means of Western Union Money transfer*] —
>
> (a) intending either to—
> (i) enhance the ability of a criminal organisation or any of its members to commit, or
>
> (ii) facilitate the commission by a criminal organisation or any of its members of,
>
> a serious offence [*money laundering, contrary to s. 31(3) of the Criminal Justice Act 1994 and/or s. 7 of the Criminal Justice (Money Laundering and Terrorist Financing) Act 2010*], or
>
> (b) being reckless as to whether such participation or contribution could either—
> (i) enhance the ability of a criminal organisation or any of its members to commit, or
>
> (ii) facilitate the commission by a criminal organisation or any of its members of,
>
> a serious offence [*money laundering, contrary to s. 31(3) of the Criminal Justice Act 1994 and/or s. 7 of the Criminal Justice (Money Laundering and Terrorist Financing) Act 2010*]."

Moreover, subsection (3) of the new form of s. 72 expressly states that the reference in subsection (1) to the commission of a serious offence includes a reference to the doing of an act in a place outside the State that constitutes a serious offence under the law of that place and which act would, if done in the State, constitute a serious offence. It is declaratory of what this Court believes to have been the position in any event, but provides welcome clarity and puts the matter beyond doubt.

It therefore seems to the Court that in the circumstances where, if the roles were reversed and the respondent was a French citizen resident in France, she could nevertheless be prosecuted in Ireland under s.72(1) of the Act of 2006, both in its original form and in its amended form, condition number two also cannot be satisfied.

Application of s. 44 to the "Conspiracy" Offence

Condition Number One

The respondent must establish that the offence specified in the European arrest warrant issued in respect of her was committed or is alleged to have been committed in a place other than the issuing state. The issuing state is France. Accordingly, she must establish that the conduct constituting the "conspiracy" offence occurred in a place other than France.

It is important to remember that the essence of a conspiracy is that it involves at least two persons entering into an agreement, usually clandestinely, to do a specified act or acts. It is not an offence in itself to conspire, and not all conspiracies are crimes. However, if the specified act or acts is/are criminal, then an agreement entered into to perform that act or those acts constitutes a criminal conspiracy and is itself an offence. Properly characterised, the offence of conspiring to commit a substantive crime constitutes an inchoate offence deriving from the choate offence which is the subject matter of the agreement. Once an agreement to commit a crime has been entered into, the offence of criminal conspiracy has been committed and it matters not whether the choate crime which is the subject matter of the conspiracy has been carried out or not. Moreover, once the agreement is entered into, the offence of criminal conspiracy is committed on a continuing basis for so long as the agreement continues to subsist.

Applying these long established principles to the facts of the present case, the allegation is that the respondent entered into an agreement with the other persons said to constitute the organised criminal gang to launder monies representing the earnings of Nigerian women trafficked into France and forced into a life of prostitution there, and for the purposes (to quote from the warrant) "of preparing to commit the crimes of procuring and/or of living off immoral earnings, committed as an organised criminal gang and of trafficking in human beings, committed as an organised criminal gang". In other words, there was an overarching conspiracy by members of the organised gang to traffic women into France, force them into a life of prostitution there and live off the immoral earnings thereby generated, and in preparation for committing those planned crimes there was also a sub-conspiracy, to which the respondent is alleged to have been a party, to establish a money laundering system by means of which the proceeds of the said crimes could be sent off shore and ultimately transferred to Nigeria. We are primarily concerned with the sub-conspiracy rather than the over arching conspiracy in the context of the present rendition request.

The uncontroverted evidence is that the respondent is of Nigerian ethnicity, but is a naturalised Irish person having been granted citizenship of this State in June 2012, and that she has resided here since 2001. There is no evidence that she has ever resided in France, or that she has ever visited France. In those circumstances, the Court is bound to conclude that at whatever time the respondent entered into the agreement said to constitute the criminal conspiracy she was not personally in France. In the circumstances the Court cannot be satisfied that she personally entered into the alleged criminal conspiracy in France. There is simply no evidence that she did. She may well have done so in Ireland, or in Nigeria, or elsewhere for all the Court knows, but there is no evidence that she did so in France. In the circumstances, in the absence of evidence to the contrary, the Court is prepared to accept the respondent's contention that the alleged conspiracy offence (as distinct from alleged acts committed in furtherance of that alleged criminal conspiracy) occurred in a place other than France, and that accordingly it is an extraterritorial offence. In the circumstances the Court will proceed on the basis that the respondent has satisfied condition number one with respect to the conspiracy offence.

Condition Number Two

For condition number two to be satisfied, the respondent would have to be in a position to demonstrate that the act or omission of which the offence consists does not, by virtue of having been committed in a place other than the State, constitute an offence under the law of the State. Once again, adopting Denham C.J.'s suggestion that it may be helpful to read the second clause before the third, the reordered provision requires the respondent to demonstrate that the act or omission of which the offence consists does not constitute an offence under the law of the State, by virtue of having been committed in a place other than the State.

In this Court's view the conduct constituting the alleged criminal conspiracy offence in this case would constitute an offence under the law of the State, even if committed in a place other than the State, under s.71 of the Act of 2006, and the necessary reciprocity exists.

In its original form, s. 71 stated:

> "(1) Subject to subsections (2) and (3), a person who conspires, whether in the State or elsewhere, with one or more persons to do an act—
>
> (a) in the State that constitutes a serious offence, or
>
> (b) in a place outside the State that constitutes a serious offence under the law of that place and which would, if done in the State, constitute a serious offence,
>
> is guilty of an offence irrespective of whether such act actually takes place or not.
>
> (2) Subsection (1) applies to a conspiracy committed outside the State if—
>
> (a) the offence, the subject of the conspiracy, was committed, or was intended to be committed, in the State or against a citizen of Ireland,
>
> (b) the conspiracy is committed on board an Irish ship,
>
> (c) the conspiracy is committed on an aircraft registered in the State, or
>
> (d) the conspiracy is committed by an Irish citizen or a stateless person habitually resident in the State.
>
> (3) Subsection (1) shall also apply to a conspiracy committed outside the State in circumstances other than those referred to in subsection (2), but in that case the Director of Public Prosecutions may not take, or consent to the taking of, proceedings for an offence under subsection (1) except in accordance with section 74 (3).
>
> (4) A person charged with an offence under this section is liable to be indicted, tried and punished as a principal offender.
>
> (5) A stateless person who has his or her principal residence in the State for the 12 months immediately preceding the commission of a conspiracy is, for the purposes of subsection (2), considered to be habitually resident in the State on the date of the commission of the conspiracy."

Section 4 of the Criminal Justice Act of 2009 later effected some minor amendments to s. 71 of the Act of 2006. However, these are of no consequence in the present proceedings.

Once again, if, applying the principle of reciprocity, the circumstances of the present case are "plugged in" to the provisions of s. 71(1) & (2) of the Act of 2006, the result is follows:

> "(1) Subject to subsections (2) and (3), a person [*in this instance T.E., a French citizen living in France*] who conspires, whether in the State [i.e. Ireland] or elsewhere, with one or more persons to do an act—
>
> (a) in the State [*i.e. Ireland*] that constitutes a serious offence[*i.e., money laundering, contrary to s. 31(3) of the Criminal Justice Act 1994 and/or s. 7 of the Criminal Justice (Money Laundering and Terrorist Financing) Act 2010*] , or
>
> (b) in a place outside the State [*e.g., France*] that constitutes a serious offence under the law of that place [*i.e., laundering as an organised criminal gang, by investment, concealment or conversion, of the proceeds of the crimes of procuring and/or of living off immoral earnings, committed as an organised criminal gang, and of trafficking in human beings, committed as an organised criminal gang, contrary to articles 324-1, 324 -3, 324-4, 324-5, 324-6, 324-7 and 324-8 of the French Penal Code*] and which would, if done in the State, constitute a serious offence [*i.e , money laundering, contrary to s. 31(3) of the Criminal Justice Act 1994 and/or s. 7 of the Criminal Justice (Money Laundering and Terrorist Financing) Act 2010*]
>
> is guilty of an offence irrespective of whether such act actually takes place or not.
>
> (2) Subsection (1) applies to a conspiracy committed outside the State [i.e., outside Ireland] if—
>
> (a) the offence, the subject of the conspiracy [i.e., money laundering], was committed, or was intended to be committed, in the State or against a citizen of Ireland,
>
> (b) the conspiracy is committed on board an Irish ship,

(c) the conspiracy is committed on an aircraft registered in the State, or

(d) the conspiracy is committed by an Irish citizen or a stateless person habitually resident in the State."

In the Court's view, even if roles were reversed as postulated, and T.E., a French citizen, resident in France, had entered a conspiracy in France to launder monies representing the earnings of Nigerian women trafficked into Ireland and forced into a life of prostitution here, she would be prosecutable in Ireland by virtue of s.71(2)(a) because the money laundering activity (i.e., the handling and transferring of the proceeds of crime), the subject of the conspiracy, was committed, or was intended to be committed, in the territory of Ireland *inter alia*. That has to be the case where the monies have originated in Ireland and were initially transferred offshore from there, even though they later passed through an account in France [belonging to T.E.in reversed role scenario] and were in turn forwarded to Nigeria.

Moreover, that this should be so is entirely consistent with the approach taken by the Irish Supreme Court in *Ellis v O'Dea (No.2)* [1991] 1 I.R. 251. In that case the United Kingdom (hereinafter the U.K.) was seeking to extradite the appellant from Ireland to face various charges including, *inter alia*, a charge of conspiring in Ireland to cause explosions in the U.K. The appellant had attempted before the High Court to resist his extradition on various grounds but without success. He then appealed to the Supreme Court. The principal judgment was delivered by Finlay C.J. (with whom Griffin, Hederman, McCarthy and O'Flaherty JJ. agreed). In the course of his judgment, Finlay C.J. considered (in the context of a correspondence issue) whether a person entering into a conspiracy outside Ireland in furtherance of which an overt act is done in Ireland is amenable to trial in the courts of Ireland. In doing so, he enunciated the following proposition at p. 258:

> "….it is a fundamental principle of the Irish common law, applicable to the criminal jurisdiction of the Irish courts, that a person entering into a conspiracy outside Ireland in furtherance of which an overt act is done in Ireland is amenable to trial in the courts of Ireland. I am equally satisfied that a person who, though located outside Ireland, does an act which either in itself or by reason of the conduct of an accomplice has the effect of completing a criminal offence in Ireland, is amenable to the Irish courts. The broad reason underlying these two principles is, or course, that the criminal law must take cognisance of any crime committed within the State and must make persons, if charged before it, amenable for that crime, irrespective of where they were located at the time of its commission. It would be the very negation of an adequate criminal jurisdiction and an absurdity if a person joining in a criminal act being either a conspiracy or a joint venture could escape responsibility by reason of the fact that he has committed no overt act within the jurisdiction."

It therefore is this Court's view that in the circumstances where, if the roles were reversed and the respondent was a French citizen resident in France, she could nevertheless be prosecuted in Ireland under s.71 of the Act of 2006, condition number two also cannot be satisfied in respect of the conspiracy offence.

Conclusion
In circumstances where, with respect to both of the offences to which the European arrest warrant relates, the respondent has not been able to demonstrate the existence of the two conjunctive requirements that are required to be established for a valid invocation of s. 44 of the Act of 2003, the Court must decline to uphold the s. 44 objections raised in this case.

That being the position, and there being no other grounds arising under Part 3 of the Act of 2003 on foot of which the Court should regard the surrender of the respondent as being prohibited, it is appropriate that the respondent should be surrendered in respect of both offences covered by the European arrest warrant, and the Court will make an order to that effect under s. 16(1) of the Act of 2003.

It might well be the case that the prosecuting authorities in France will ultimately treat the laundering and conspiracy offences as alternatives, and only proceed in respect of one of them. Certainly there is a convention in this country that a conspiracy charge ought not to proceed when the substantive offence can be proved. However, that is a matter for the prosecuting authorities, and possibly the courts, in France and it is not a matter that need concern this Court in its capacity as the executing judicial authority in respect of this warrant.