

## THE HIGH COURT

[2014 No. 134 Ext]

BETWEEN

THE MINISTER FOR JUSTICE AND EQUALITY

APPLICANT

AND

GIULIANO GHERINE

RESPONDENT

**JUDGMENT of Ms. Justice Donnelly delivered the 28th day of July, 2016.**

1. The attempt by Italy to secure the surrender from Ireland of this respondent, together with his sister, Giliola Sadiku, has a protracted history. On 30th November, 2012, the High Court (Edwards J.) refused to surrender this respondent for the purpose of the prosecution of certain drugs offences on foot of a European Arrest Warrant ("EAW") issued by a judicial authority of the Italian Republic on 3rd October, 2008 ("the first EAW"). The respondent was alleged to have participated in a variety of ways in the activities of an illicit drug trafficking organisation/enterprise.

2. The first EAW was received in this jurisdiction in late January 2009, and that EAW was endorsed by the High Court for execution on 4th February, 2009. On 24th April, 2012, the respondent was arrested on the first EAW, brought before the High Court and granted bail thereafter.

3. The respondent claimed in his points of objection to the first EAW, that he was at risk of double jeopardy. In the affidavit of his solicitor, a judgment was exhibited to the effect that he had been tried *in absentia* in Italy on 18th January, 2011, convicted of a single offence but acquitted of several others. He had been sentenced to thirteen years imprisonment in respect of the offence for which he was convicted.

4. As a result of those averments, the Irish central authority immediately sought further information from the issuing judicial authority. The reply from the Italian central authority was that:

*"...[t]his Office has no jurisdiction in relation to the two above-mentioned subjects. From information gathered shows [sic] that have been convicted by a judgment of the Court of Castrovillari of 18.1.2011, Gigliola GHERINE penalty of ten years and six months in prison and Giuliano GHERINE penalty of thirteen years in prison. The judgment was upheld by the Court of Appeal of Catanzaro and the process is currently pending before the Court of Cassation in Rome."*

5. In his decision with respect to the first EAW, Edwards J. held at para. 13 of his judgment in *Minister for Justice and Equality v. Gherine* [2012] IEHC 535:

*"A person cannot be surrendered for the purpose of serving a sentence in relation to an offence on foot of a warrant that seeks his or her rendition for the purpose of prosecuting him or her for that offence."*

Edwards J. then stated at paras. 16-18 of the same judgment:

*"The Court wishes to state, however, that it regards what has occurred in this case as disconcerting and very serious. Even though the respondents were tried, and verdicts were rendered, in the issuing State as far back as the 18th of January 2011, neither the issuing judicial authority, nor the Italian Central Authority, saw fit to communicate that fact to the Irish Central Authority, or to cause it to be communicated to this Court as the executing judicial authority, until the 7th of November 2012, in excess of twenty two months later and only the day before the respondents' surrender hearings. They allowed the respondents to be arrested and deprived of their liberty (albeit only briefly) on foot of jurisdictionally flawed warrants, and they allowed this Court to unwittingly deal with the respondents for the last 7 months, as though they were fugitives, in respect of matters for which they had in fact been acquitted. Moreover, in respect of the single offence for which they have both been convicted, neither the issuing judicial authority, nor the Italian Central Authority, saw fit to ensure that this Court was advised that the respondents were no longer wanted for prosecution. The Irish Central Authority should have been advised immediately (if it had been so advised it would in turn immediately have advised this Court); the existing warrants should have been withdrawn; and if it was desired to pursue the respondents further it was incumbent on the Italian authorities to issue new European arrest warrants covering only the offence for which the respondents have each, respectively, been convicted and seeking their rendition for the purposes of having them serve the sentences of imprisonment imposed upon them.*

*The European arrest warrant system depends upon member states having mutual trust and confidence in each other. Moreover, it is predicated upon the principle of mutual recognition, which is described in recital no 6 to the Framework Decision as 'the cornerstone of judicial co-operation'. This Court was asked to 'recognise' the European arrest warrants in this case on the basis of mutual recognition, and further, on the basis of trust and confidence between member states, to give effect to European arrest warrants that purported to seek the respondents for the purpose of prosecuting them, in circumstances where they had already been tried!*

*While there may not have been a deliberate attempt to abuse this Court's process, what occurred in the present case, if replicated, could potentially have implications for the trust and confidence which this Court currently has in relation to the Italian State, its Court and institutions."*

6. Edwards J. was so concerned about the matter that he directed the central authority in the State to inform both the issuing judicial authority and Eurojust of the reasons for the court's refusal to order surrender in each of the cases. That information was passed on through the relevant channel.

7. On 10th May, 2013, the Office of the State Prosecutor General of Catanzaro, an issuing judicial authority of Italy, issued an EAW ("the second EAW") seeking the surrender of the respondent to serve the thirteen years sentence of imprisonment which had been imposed upon him by the Court of Appeal of Catanzaro on 20th February, 2012 and enforceable on 20th March, 2013 (which was

stated on the second EAW to be an amendment of the judgment of 18th January, 2011 by the Court of Castrovillari). The second EAW was endorsed by the High Court on 1st July, 2014. It had been received in this jurisdiction under covering letter dated 13th May, 2013. The delay in the endorsement of the warrant is a matter of relevance to the proceedings herein. The circumstances leading to that delay will be outlined later in this judgment.

8. This second EAW was received under covering letter from the Ministry of Justice in Italy ("the Ministry"), which is the designated central authority under the Council (EC) Framework Decision of 13th June, 2002 (2002/584/JHA) on the European arrest warrant and the surrender procedure between Member States ("the 2002 Framework Decision"). The Ministry for Justice stated that it was very regretful for the "*disconcertment expressed by the Irish High Court since it is based on erroneous information.*" The Ministry pointed out that the first EAW had been sent to the Irish authorities on 19th January, 2009 when the respondent and his sister were under investigation in Dublin. The Ministry's view was that the Italian authorities had always been very collaborative with the Irish authorities. The Ministry said that it must be pointed out, contrary to what was stated in the judgment of the Irish court, that when the Ministry sent the EAWs on 19th January, 2009 after the respondent and his sister as wanted persons had been located in Dublin, that neither this respondent nor his sister had been convicted yet by a final judgment. That judgment only became final in the weeks prior to the issue of this first EAW.

9. The Ministry stated that the fact that the respondent and his sister had been acquitted of the offence contained in the EAW did not invalidate the arrest warrant issued by the Italian judicial authority. It was stated that the judgment was only final on 20th March, 2013 and that was why, at the time the Irish High Court rendered its judgment, the order for preliminary custody issued against the respondent was still effective, although the said order was restricted to the only count for which he and his sister had been convicted. The Ministry referred to the significant delay between February, 2009 when the Ministry were told that the EAW had been endorsed for execution, and April, 2012 when the respondent was arrested. According to the Ministry, it was only told of the arrest by the Irish authorities on 7th November, 2012.

10. The Ministry stated that it was known that Italian legislation provides for the possibility that a defendant unlawfully at large be tried *in absentia*. It was stated that during the trial, an imposed precautionary measure remained valid and effective and that the relevant EAW issued for investigative purposes. It was stated that the law did not provide for any obligation to notify foreign authorities of the conclusion of the phase of preliminary investigation and prosecution which, in this case, had been conducted even before the respondent and his sister were located in Ireland. It was also stated that it was clear that the Italian authorities did not misrepresent the facts of the trial and that they behaved properly in strict compliance with national and international legislation.

#### **Points of objection**

11. The respondent's points of objection were wide ranging. The first point of objection claimed that surrender was prohibited by the provisions of Part 3 of the European Arrest Warrant Act, 2003, as amended ("the Act of 2003") and in particular s. 22 (although this is not a section within Part 3) as well as s. 37, s. 41 and s. 45 of the Act of 2003. At the hearing, the respondent did not advance a claim under s. 22 or s. 41 of the Act of 2003.

12. The second point of objection concerned s. 11 of the Act of 2003 and asserted a fundamental failure to comply with the requirements thereof and with the provisions of the 2002 Framework Decision and "*in particular but without prejudice to the generality Article 8 thereof in that substantial relevant details have been omitted*". At the hearing of the action, the respondent relied on this point of objection in claiming that the details in respect of the circumstances upon which the offence had been committed were inadequately detailed in the EAW.

13. An objection to surrender in reliance on Article 3 of the European Convention on Human Rights ("ECHR") by virtue of prison conditions in Italy was also advanced. Further objection to surrender was on the basis that, notwithstanding that this was a list offence within the meaning of Article 2.2 of the 2002 Framework Decision, the offence cited in the warrant was ill-defined and did not correspond to an offence in this State.

14. The respondent also claimed that, although the High Court refused surrender and took the additional step of referring the case to Eurojust, the letter accompanying the EAW from the Italian Ministry of Justice purports to cast blame on the High Court and seeks to assert that there was no defect in the original documentation. The respondent claimed that, where the issuing judicial authority has clearly not accepted or respected the prior decision of the High Court, this offends against fundamental principles, including mutual trust, at the core of the EAW procedure. It was submitted that, on that basis alone, and without prejudice to the other grounds, the respondent should not be surrendered.

15. It was also separately claimed that there has been an unwarranted, unexplained and prejudicial delay in the processing of the surrender request for the respondent and it is claimed that the surrender of the respondent would be disproportionate and unfair in all the circumstances. It was surprising that the points of objection made no express reference to abuse of process because that was an issue upon which a great deal of the respondent's argument was focused at the hearing.

#### **The procedural background of the present proceedings**

16. The application for surrender on the second EAW came on for hearing on 20th July, 2015. At that hearing, counsel for the respondent indicated that the s. 45 matter (*trial in absentia*) was the only issue before the court. That statement by counsel subsequently became the source of some controversy, when, after the court had given a preliminary ruling in the case, counsel for the respondent sought to have the matter adjourned for the hearing of other issues as outlined in the points of objection. Ultimately, this Court permitted the respondent to advance those other grounds, which required the filing of an affidavit of the respondent. That affidavit was not filed until November, 2015. The court re-iterates the necessity for all parties to prepare for extradition cases with a sense of urgency. The court must deal with EAW cases within the shortest possible time frame commensurate with the interests of justice. Late filing of affidavits will only be accepted when the circumstances can be justified.

17. At issue before the High Court at the hearing on 20th July, 2015, was that the matters required by s. 45 of the Act of 2003 had not been provided for in the EAW. This Court ultimately decided that it would exercise its powers under s. 20 of the Act of 2003 to seek further information from the issuing judicial authority as to the time frame within which the respondent could appeal his conviction *in absentia* on being surrendered to Italy. Although there had been no response from the Italian judicial authorities to requests made by the central authority since the date of the endorsement of the EAW, this Court decided to give one final opportunity to the Italian authorities to reply to this matter. The respondent appealed and, by judgment dated 2nd March, 2016, the Court of Appeal dismissed that appeal.

18. By the time the matter returned to the High Court for continued hearing, the Italian judicial authority had responded and given an indication that the respondent would have 30 days in which to appeal the decision on surrender. The respondent takes issue with that response, averring that his brother-in-law had been extradited from Albania to Italy, and, despite having been convicted *in*

*absentia*, was thereafter denied a right of appeal. The respondent engaged the services of an Italian lawyer and it is the respondent's contention that this lawyer's evidence demonstrates that there will be no guaranteed right of appeal.

19. At the renewed hearing of this application on 26th May, 2016, the central authority clarified that, on 21st June, 2013 and 13th August, 2013, *i.e.* prior to application for endorsement of the second EAW, the central authority had written to the Italian central authority under the provisions of s. 20 of the Act of 2003. The central authority sought an amended warrant to include the information required at the amended point (d) as required by Council (EC) Framework Decision of 26th February, 2009 (2009/299/JHA) on the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial ("the 2009 Framework Decision") or, in the alternative, the information required as per Article 4A of the 2002 Framework Decision as inserted by the said 2009 Framework Decision.

20. These letters had not been presented to this Court at the initial hearing in July, 2015 and had not been given to the respondent or his legal representatives until just prior to the hearing on 26th May, 2016. It should be said, however, that those requests had been brought to the attention of Edwards J. in July, 2014 when he endorsed this second EAW. It is also the case that the existence of prior correspondence with the Italian central authority had been referenced in the request for information that had been sent on 2nd July, 2014, the day after the endorsement of the EAW by the High Court. However, the content of the previous correspondence was not made clear on the face of the later correspondence.

21. It is of importance that all correspondence with a central authority or an issuing judicial authority be placed before the High Court when the High Court is exercising functions under the Act of 2003. Furthermore, such correspondence should be made available to a respondent unless, for good reason, the High Court directs otherwise. At this remove, it is not possible to say what effect, if any, those unanswered requests would have had on the decision of this Court on 20th July, 2015, to seek further information under s. 20 of the Act of 2003. The existence of that prior correspondence will be considered again in the context of the issues under consideration in this judgment.

### **Section 11 of the Act of 2003**

22. Under point (e) of the second EAW, it is stated that the warrant relates in total to one offence. Under the description of the circumstances in which the offence was committed, including the time, place and degree of participation in the offence by the requested person, it is stated as follows: "Gherine Giuliano, with other persons, promoted, started, led, organised and financed an organisation for drug trafficking, namely for importing, illegal possessing for sale purposes, buying, transporting, offering, placing on sale, transferring narcotic drugs like cocaine, heroin and marijuana in Sibari area."

23. In the second EAW, under the heading "nature and legal classification of the offence [...]", there is a reference to Article 73 of the Presidential Decree No. 309 of 9th October, 1990. This relates to a situation where three persons or more associate to commit more than one crime among those crimes envisaged by Article 73 and states that "anyone who promotes, starts, leads, organises or finances the organisation shall be punished for that alone, by imprisonment for not less than twenty years. [...] Anyone who participates in the organisation shall be punished by imprisonment for not less than ten years. [...] the punishment shall be increased if the members of the organisation are ten or more or if among the participants there are persons addicted to using narcotic or psychotropic substances.". Under point E.II of the EAW, the box "participation in a criminal organisation" is ticked as well as the box "illicit trafficking in narcotic drugs and psychotropic substances".

24. The central authority sought further information by letter dated 22nd May, 2015, with regard to the description of the circumstances of the offence. The issuing judicial authority was asked for the following:

- (a) To the greatest extent possible, the time of the commission of the offences;
- (b) To provide the names of the other individuals involved in the offence and;
- (c) The specific role Mr. Gherine played in the commission of the offence.

25. Via the offices of the Ministry, the office of the Prosecutor General replied by letter dated 26th May, 2015 as follows:

- "(1) the time of commission of the offence extended until November 2008  
(when a remand in custody order was applied in respect of the offences  
leading to a final judgment of conviction currently enforced);
- (2) the other persons involved in the offence who acted in complicity with the  
offender can be identified as (...listed...).
- (3) GHERINE Giuliano's role in the commission of the offence leading to his  
conviction was to promote, direct, organise an association aimed at drug  
trafficking which was at the basis of his conviction."

26. On 15th July, 2015, shortly before the original hearing of this application, the central authority wrote to the Italian authorities stating that counsel has raised concerns in relation to the following:

"Paragraph (1) of the letter dated 26.05.2015 from the Office of the Prosecutor General attached to the Court of Appeal of Catanzaro stated that "*the time of commission of the offence extended until November 2008*". To the greatest extent possible, please confirm the commencement date or the approximate commencement date of the offence." (emphasis in original)

That letter was never responded to by the Italian authorities; subsequent responses were received but these related to point (d) of the EAW and other matters raised in the affidavit of the respondent.

### **Submissions of counsel on s. 11 of the Act of 2003**

27. On 26th May, 2016, the hearing of the application for surrender had to be adjourned. The court specifically requested that both

parties address at the resumed hearing on 1st June, 2016, the issue of compliance with s. 11 of the Act of 2003 in light of the replies received.

28. Counsel for the minister submitted that the EAW and the additional information contained all the information required by s. 11(1A)(f) of the Act of 2003 namely "the circumstances in which the offence was committed or is alleged to have been committed, including the time and place of its commission or alleged commission, and the degree of involvement or alleged degree of involvement of the person in the commission of the offence". Counsel submitted that the area in which this is alleged to have occurred was set out, the type of narcotic drugs were set out and the respondent's role was set out. It was also submitted that it was not necessary to set out the evidence on which the conviction was obtained. It was also submitted by counsel, that should this court not be satisfied with that information, the court could also rely upon the information contained in the previous EAW. Furthermore, counsel submitted that counsel for the respondent had failed to indicate the type of information that he contended was missing.

29. Counsel for the respondent objected to the information in the first EAW being used to supplement the information in the second EAW. However, he did point to an apparent discrepancy; in additional information given in respect of the first EAW, it was stated that the offences for which the respondent was sought are exclusively those included in the box "illicit trafficking in narcotic drugs and psychotropic substances" to the exclusion of all others. In the second EAW, both that box and "participation in a criminal organisation" are ticked. This is despite the respondent having been convicted of one of the offences set out in the first EAW. Counsel for the respondent sought primarily to place the dearth of information in the context of inadequacy of information for this Court to assess the gravity of the case when assessing any potential breach of Article 8 ECHR rights if the respondent is surrendered. However, counsel also relied upon the lack of time of commission of the offence being indicated and any real information regarding the specific role of the respondent. He relied generally upon the lack of compliance with s. 11(1A)(f) of the Act of 2003.

### **The analysis and determination of the Court on s. 11(1A)(f) of the Act of 2003**

30. In *Minister for Justice v. Stafford* [2009] IESC 83, the Supreme Court (Denham J., as she then was) stated at para. 15 "[i]t is required that there be a description of the acts upon which the warrant is based. This is similar to the situation under the Extradition Act 1965, as amended, and indeed classically in extradition law. A description of the acts, or the acts alleged, are the facts upon which the executing judicial authority may apply the law. By describing the acts the facts are before the court and so a decision may be made as to whether there is, for example, double criminality. [...]"

31. In *Minister for Justice Equality & Law Reform v. Desjatnikovs* [2009] 1 I.R. 618, Denham J. also stated at para. 35 that "an arrested person is entitled to be informed of the reasons for his arrest and have any charge against him in plain language which he can understand. Also, in view of the specialty rule, the facts upon which a warrant is based should be clearly stated.". Edwards J. in *Minister for Justice & Equality v. Cahill* [2012] IEHC 315, identified from the case law three objectives behind the requirement that a description of the acts or acts alleged, be set out on the warrant. The first was to enable the High Court to see if it should endorse the EAW, the second was to allow for correspondence (where required) to be established and the third was "to enable the respondent to know precisely for what it is that his surrender is sought. A respondent is entitled to challenge his proposed surrender and in order to do so needs to have basic information about the offences to which the warrant relates. Among the issues that might be raised by a respondent are objections based upon the rule of specialty, the ne bis in idem principle and extra-territoriality to name but some. In order to evaluate his position, and determine whether or not he is in a position to put forward an objection that might legitimately be open to him to raise, he (and also his legal advisor in the event he is represented) needs to know, in respect of each offence to which the warrant relates, in what circumstances it is said the offence was committed, including the time, place, and degree of participation in the offence by the requested person." (Para. 18 of Cahill).

32. In *Cahill*, Edwards J. referred at para. 22 to the necessity to provide "reasonably detailed circumstances" in relation to each offence set out in the EAW. In the case of *Minister for Justice and Equality v. S.T.* [2016] IEHC 297, a case involving an allegation of historic sexual abuse, this Court held at para. 26 that "[i]n the form of EAW contained in the annex to the 2002 Framework Decision, time, as well as place, is specifically mentioned as part of the circumstances that must be described. Where a very wide time frame is given to cover an allegation, particularly an allegation covering a period of years, there is a correspondingly greater requirement to give greater detail as to the surrounding circumstances of the alleged offence. Those circumstances may illustrate the reason for the wide time frame. Such illustration will assist the executing judicial authority with respect to all the matters with which it must be satisfied, but it will also give to a respondent the information that he requires as a minimum."

33. In the present case, it is accepted by counsel for the minister that the EAW does not give a commencement time for the offence for which the respondent has been convicted. In response to the request for the time of the commission of the offences "to the greatest extent possible", the Italian authorities replied that the time of commission of the offence extended until November 2008. That date is of significance because it extends beyond the date on which the first EAW was issued in October 2008. To that extent at least, recourse to the facts set out in the first EAW would not assist in understanding the time span of the offence for which surrender is now sought.

34. Even if one turns to the first EAW for information about the commencement date of the offence, the information is very sparse. The first EAW sets out an accusation against this respondent in relation to four offences, listed as count 2, count 3, count 4 and count 15.

35. Count 2 in the first EAW relates to an offence set forth in various articles of the Italian Criminal Code and of the Presidential Decree No. 203 (perhaps an incorrect reference as later references in the first EAW and the second EAW are to Decree No. 309 of October 9th 1990, including Art. 73 of the latter). This is an allegation that "in complicity with Smajlaj Finisk, Kondacki Liliana and other unidentified persons, acting independently [...] SMAJLAJ instructed GHERINE to deal with some unidentified persons in Palermo for the sale of an unspecified quantity of cocaine, but however not less than one kilogram; KONDAKCI's task was to transport the aforesaid narcotic substance to Palermo; KUBAZECAJ's task was to receive the narcotic substance refused by the persons in Palermo which was then transported to Sibari by Gherine and Kondacki as ordered by Smajlaj; they unlawfully purchased, handed over, transported and possessed a large quantity of cocaine, not less than 1 kg., for drug peddling purposes. The large quantity of narcotic substance constitutes an aggravating circumstance. Offence committed in Sibari and Palermo in October 2005."

36. Count 3 in the first EAW relates to an allegation that "in complicity with Smajlaj Finisk, Kondacki Liliana and other unidentified persons, acting independently [...] SMAJLAJ instructed GHERINE to deal with some unidentified persons in Florence for the sale of a haul of cocaine, the quality or quantity of which was not specified; KONDAKCI's task was to transport the aforesaid narcotic substance to Florence; they unlawfully purchased, handed over, transported and possessed a hand of cocaine for drug peddling purposes, the quantity or quality of which was not specified. Offence committed in Florence in October 2005."

37. Count 4 in the first EAW, relates to an allegation that in complicity with others, "they sold, purchased, imported from Albania into the national territory, and, in any case, they sold, transported and unlawfully possessed [...] large quantities of narcotic substances."

The first EAW states that this was imported from Albania by Smajlaj Finisk and Smajlaj Luan and was received in Italy by this respondent, his sister and others who delivered it to other named persons. It is stated that this offence was "committed in 2005, 2006 and 2007 in Cosenza, Altomonte and other nearby areas by Gherine Giuliano as promoter and organizer."

38. Count 15 as set out in the first EAW is the offence, according to counsel for the minister, for which this respondent was convicted and for which his surrender is sought. This offence appears to accuse the respondent of participating in an association set up for the purpose of committing several offences among those set forth in Art. 73 of the Presidential Decree No. 309 of 9th October, 1990 concerning large quantities of cocaine. This offence was said to be committed in Sibari *and nearby areas* by the respondent as organiser and promoter, "by putting into practice said criminal conducts." (emphasis added). I say "appears to accuse" because in the first EAW, there is a reference in the description of the offence to a Gherine Anca at one point but to a Gherine Giuliano at a latter point. In additional information, there is a reference to a Gherine Anca as being the wife of Gherine Giuliano, but there is no attempt to clarify the reference to her in count 15.

39. Under count 15, no date for the offence is listed. Other factors distinguish it from the counts on the second EAW; the drug specifically mentioned in the first EAW is cocaine, whereas the second EAW refers to drugs "like cocaine, heroin and marijuana". The place of commission is also different, in the first EAW the place is "Sibari and nearby areas" whereas in the second EAW it is "Sibari area". The role alleged against the respondent expanded from being an organiser and promoter in the first EAW, to promoting, starting, leading, organising and financing the organisation in the second EAW. In the additional information to the second EAW, there was a further clarification which referred to "promoted, directed and organized" – the allegation of "directing" being conspicuously absent from the allegations in the first EAW.

40. Additional information dated 20th April, 2009 was also provided in respect of the offences set out in the first EAW. In that additional information, count 2 is detailed as concerning "the possession and transport of a kilogram of a narcotic substance the quality of which was not exactly specified and relevant to a bargaining which took place with people from Palermo. The role performed by GHERINE on behalf of the organisation was twofold: on the one hand he was entrusted with the collection of the money which was the proceeds of the exchanges of the narcotic substances and, on the other hand, they used him as a carrier to perform the exchanges that FINISK kept running from Albania. The investigative activity revealed that **GHERINE Giuliano, who had also family ties with the FINISK brothers** was at disposal of the SMAJLAJ brothers and did not fear to be controlled by the law enforcement authorities as he did not have a criminal record." (emphasis in original)

41. Count 3 is detailed in this additional information as concerning "a new criminal conduct perpetrated a few days afterwards with absolutely specular modalities in respect of the case already examined and that, also in this case, involved SMAJLAJ, GHERINE, and LILJANA, who were this time the protagonists of the sale of a narcotic substances to a living person in the Florence area and unidentified. Actually it was possible to trace the identity of this person (who was apparently arrested as a result of an autonomous intervention of the police forces of that area), but the reconstruction of the fact was made possible through the interceptive activity".

42. Count 4 is detailed as concerning "a number of conducts of exchanges of a narcotic substance which lasted for some time, since they involved the relations between the SMLAJ (sic) and a member of the local criminality (MAGLIARI Saverio). Also in this count the role of GHERINE is that of intermediary between the two men, as demonstrated by the outcomes of the operation, culminating with the exchange of narcotic substances, carried out between 20th and 23rd November 2005. It was possible to identify the quantity and quality of the narcotic substance, whereas in the preceding exchanges the reference to heroin was obvious."

43. It is not entirely clear if the response dated 20th April, 2009, covered count 15, as there is no specific reference to that count, while there was a specific reference to count 2, 3, and 4 as outlined above. However, there is a reference to an investigation of an organisation involved in the "traffic of large quantities of several types of narcotic substances, [...] under members of the powerful SMAJLAJ family from Skonder. [...]". It is stated that they "succeeded in introducing into Italy large quantities of narcotic substances of the heroin, cocaine and marijuana type.". It is stated that "[t]he SMAJLAJ's, operating also out of the Calabria Region, through the direction of FINISK, who operated directly from Albania, at least until he was also arrested, at the end of 2005 [...]". It is stated that investigations started in November 2005 into a drug traffickers' association of an ethnic group of Albanians in which were involved two named Smajlaj family members who it is said both directed the activities of a series of persons resident in Italy. It is then stated that the investigation revealed the involvements of named others, including the respondent and his sister, who "helped SMAJLAJ to run the traffic in narcotic substances *for some time*". (emphasis added)

44. From the foregoing, it can be seen that no specific time period is set out for the participation in this offence – although the implication in the reference to "for some time" is that it was for some limited period of time. The only time/date referred to is November 2005 but that appears to be the beginning of the investigation. From the information provided, it appears that it was only later that the investigation allegedly revealed the involvement of this respondent. Thus, that cannot be taken as a starting period. In relation to count 4, it states that it concerns several conducts of exchanges of drugs which lasted "for some time". That time period is undefined. It states that "[a]lso in this count, the role of Gherine is that of intermediary between the two men, as demonstrated by the outcomes of the operation, culminating with the exchange of narcotic substances, carried out between 20th and 23rd November 2005".

45. The specific reference to "a description of the circumstances in which the offence was committed" and the "time, place and degree of participation in the offence by the requested person" is part of the mandatory content of an EAW as set out in Article 8 para. 1(e) of the 2002 Framework Decision. It is required in the form of the EAW set out in the Annex to the 2002 Framework Decision and it has been transposed as a requirement in this jurisdiction by the provisions of s. 11(1A)(f) of the Act of 2003. It is unsurprising that this is so, because for the reasons set out in the cases referred to above, this information is critical to many aspects of the decision-making process for an executing judicial authority, as well as providing important information to a requested person.

46. Time of commission of an offence (meaning the date or dates covered by the offence or alleged offence) is a crucial aspect of any criminal charge. At its most basic, it permits an accused to consider the question of alibi; even for offences covering extended periods, the potential for an alibi must be considered. Within the EAW context, a requested person is entitled to know that information from the outset so that, even before surrender, preparation for the defence in the issuing state can begin. Moreover, in specific cases, the time can be vital as it may cover age immunity (*i.e.* if the requested person was under the age of criminal responsibility at the time of the alleged offence), double jeopardy (*i.e.* the requested person may have been convicted of such an offence previously), extraterritoriality (*i.e.* the date of the offence being relevant to consideration of this issue), and the rule of specialty (*i.e.* in terms of identifying the precise offence for which surrender is ordered). In relation to offences which have a transnational quality (or indeed which may be prosecuted here if extraterritorial in nature), it is of course important that the information be provided, so that a requested person and the court can ascertain if the exercise (or potential exercise) by the Director of Public Prosecutions in this jurisdiction of any of her functions could affect the surrender.

47. Clearly, not all of the foregoing considerations will apply in every case. However, the requirement to ensure that a respondent has sufficient information about the offence for which his/her surrender is sought applies in all cases, as does the requirement to provide sufficient information so that the rule of specialty can be respected. Furthermore, given that this EAW relates to alleged acts concerning the importation and possession of narcotic drugs, the provisions of s. 20 of the Misuse of Drugs Act, 1977 may have some bearing on rights now or in the future with regard to the prosecution of this alleged offence in this jurisdiction.

48. Undoubtedly, therefore, the provision of a time period for an offence is essential information in an EAW. In this particular case, the time period had not been stated. Even when requested by the central authority to indicate the time period to the greatest extent possible, the Italian judicial authority simply provided that the time of commission of the offence extended until November 2008. Most importantly, no start date for the commission of the offence has been provided.

49. In so far as the minister has argued that, if necessary, the court should have regard to the first EAW, the details of the first EAW and the additional information set out above, demonstrate that the time period for the alleged offence was entirely unclear in that first EAW. In so far as the minister submitted that the time period set out in count 2, 3 and 4 could be taken into account, such an argument does not withstand scrutiny. In the first place, the respondent has not been convicted on counts 2, 3 and 4 and to take into account what was said in relation to that would violate the presumption of innocence. In respect of counts 2 and 3, they appear to be single acts of which the respondent was acquitted. Any reference to the dates of those allegations must be entirely irrelevant, therefore, for the purpose of establishing a fixed time period for the alleged offence of participation in the criminal organisation which, on its face, appears to take place over a considerable (unspecified) period.

50. Moreover, the offence in count 4 cannot be linked with the offence in count 15 as the place of commission is different. In count 4, it took place in Cosenza, Altomonte, whereas count 15 relates to Sibari and nearby areas. Indeed, the reference to "nearby areas" also differentiates count 15 from the offence for which the respondent's surrender is sought. Furthermore, the additional information in relation to the first EAW refers to areas other than the Sibari area. There is also a reference to a man called FINISK in that additional information which does not match any of the names that were provided in the additional information to the second EAW as being complicit in the offence set out in that EAW. Finally, the role set out for this respondent in count 4 of that EAW is that of an intermediary between Smajlaj, apparently the main director of the criminal activities, and a member of the local community, such a description is completely at odds with the concept of him being a person who promoted, started, led, organised, financed and in particular, *directed*, an organisation for drug-trafficking.

51. In an EAW, there is no necessity to set out the evidence upon which the requested person's culpability is determined or indeed to set out minute details of the offence. What is important is that sufficient information is given to enable the respondent and the court to consider all relevant matters. In this case, sparse details were given in relation to the offence for which this respondent is sought. Further detail was requested by the central authority, but very little extra detail was given apart from the identity of those also alleged to be complicit. This is an offence of promoting, starting, leading, organising, leading or financing a criminal organisation. No details of any act of promoting, starting, leading, organising or financing has been given despite the request for details of "the specific role Mr. Gherine played in the commission of the offence."

52. The Italian judicial authority appears to have simply transposed the wording of the statutory offence into the section of the EAW which deals with the details of the offence. The EAW goes on to specify in slightly wider fashion the nature of the crimes that the criminal organisation was involved in, namely that it was an organisation for drug trafficking, "for importing, illegal possessing for sale purposes, buying, transporting, offering, placing on sale, transferring narcotic drugs like cocaine, heroin and marijuana in Sibari area". The Court has a concern that the limited information provided about the degree of participation of this respondent, other than by a recital of the statutory offence, may not meet the minimum threshold of information that must be provided in an EAW. Without deciding on whether this would be sufficient information of itself, the Court is quite satisfied that the failure to provide such detail when, taken with the failure to clarify the time frame involved, is also a substantial defect in the information provided.

53. I have considered that the respondent has apparently had in his possession the judgment in which he was acquitted of three offences and convicted of one offence. What has been exhibited is a limited part of that judgment which does not include any information beyond that indicated above. The judgment has not been incorporated into the EAW and additional documentation by the Italian judicial authority, nor has the minister sought to rely upon it to provide the facts. Indeed, it is difficult to see how the possession of a judgment by a respondent could obviate the necessity to provide the information in the EAW. If that was the case, the fact that a person was present at his or her trial would necessarily mean that the issuing judicial authority was relieved of the duty to provide the information required by Article 8 of the 2002 Framework Decision and s. 11 of the Act of 2003. On the contrary, the provision of the information is required to satisfy the objectives set out in *Cahill* and must be provided in each case.

54. The Court having concluded that the information provided does not satisfy s. 11(1A)(f) of the Act of 2003, an issue now arises as to whether this Court should exercise its power under s. 20(1) of the said Act. The Court of Appeal in the interlocutory appeal in this case gave an example of brevity in the description of the acts for which surrender is sought as a reason why the High Court might seek further information through the s. 20 procedure. While the court has an entitlement to seek this information, the exercise of the power to seek such information is an exercise of discretion in any particular case. The exercise of that discretion "*require[s] consideration of the prior unanswered requests and delay*" (para. 35 of *Minister for Justice and Equality v. Sadiku* [2016] IECA 65).

55. In this case, the past history of the proceedings must inform the exercise of the discretion. The relevant part of the decision of Edwards J. in respect of the first EAW has been set out above, but it should also be stated that, when requested by the central authority to comment on the respondent's claim that he had been tried *in absentia* and acquitted on certain offences, the reply had been a short one saying that the respondent had a penalty of thirteen years in prison imposed, which judgment was upheld by the Court of Appeal of Catanzaro and the process was pending before the Court of Cassation in Rome. That reply in the first set of proceedings had not explained, or at least expanded upon, any of the issues that were addressed in the covering letter of the Ministry of Justice sent with the second EAW. The fact that this is the second EAW in relation to a request for surrender in respect of the same offence, is a factor the Court must take into account, as well as the circumstances in which surrender came to be refused.

56. In the present (second set of) proceedings, the Court has already been required to revert to the Italian authorities in respect of a matter in relation to which the central authority had already requested information. The Court did so on the basis that it was appropriate to make "one final request". It is entirely unsatisfactory that the Court has been put in the position that there has been a substantial lapse of time before considering whether to make a second request. The blame for the further delay can be laid at the respondent's feet as he was in a position to, but did not, make his entire case at the initial stage. In those circumstances, the Court would ordinarily have no hesitation in seeking further information on these other points, which could and should have been argued before the Court at the hearing in July 2015. What causes the Court to hesitate is that not all the information about the requests to the Italian authorities was before the Court in July 2015 at the time the Court decided to exercise its discretion under s. 20 of the Act of 2003. The Court was not aware that the failure to provide the full information required by s. 45 of the Act of 2003 had been

brought to the attention of the High Court at the endorsement stage and had been the subject matter of two previous unanswered requests by the central authority. Indeed, that would have been a factor that the Court would have had to weigh in the balance before deciding whether to exercise its discretion under s. 20 of the Act of 2003. In those circumstances, it is appropriate for this Court to take account of the entirety of the proceedings and consider whether it is appropriate and in the interests of justice to seek further information, at this time.

57. Surrender under the EAW system is ideally a simplified system of extradition. Although it is never a simple system, it is simplified by the provision of a set form which covers set information. In this case, the second EAW was clearly deficient in two significant respects: the completion of point (d) concerning trial *in absentia* and the completion of point (e) regarding the description of the circumstances in which the offence was committed. The failure to complete point (d) was compounded by a persistent failure to respond to requests for completion of same. That failure to respond at an early stage led, ultimately, to the s. 20 request and to the appeal and to the consequential delay which followed.

58. The Court is presented with a situation where the very question it would now ask under s. 20 of the Act, *i.e.* confirmation of the date of commencement of the proceedings, has already been asked a year ago in unequivocal terms by the central authority. It has not been answered. In light of the persistent failures to answer what are reasonable requests, combined with the particular history of the earlier proceedings, which, even accepting that there may be an explanation based upon the Italian legal system (which said explanation should have been given in the original proceedings), has meant that what should have been a straightforward application for surrender has instead progressed over many years and over two sets of proceedings. While some of the delay has been as a result of the manner in which the respondent ran his case, the bulk of the delay has been caused by the failure of the issuing judicial authority/issuing state to respond within a reasonable time frame to the requests which have been posed by the central authority in the State and by this Court under s. 20 of the Act of 2003.

59. This Court can have no confidence that the detail that was sought a year ago will be provided within a further reasonable time should another request be granted. Most importantly, this Court is of the view that this Court, as well as this respondent, is entitled to expect that a simplified procedure operates to reduce delay and minimise court time. From the respondent's perspective, he has had to endure two sets of drawn out proceedings, he has been on bail with all the restrictions that entails and he has not been provided with basic information in this EAW about the offence for which his surrender is sought. The central authority has quite properly requested the information which is necessary for this Court to decide the matter. It has not been forthcoming from the issuing judicial authority or from the issuing state. In light of the persistent failures to present information in a timely fashion, the Court is of the view that it will not exercise its discretion under s. 20 of the Act of 2003 to seek this information.

60. The Court has also considered whether the provisions of s. 45C of the Act of 2003, as amended, requires the court to order surrender despite the failures of the issuing judicial authority/issuing state to give the details of time and commission of the offences as required by the 2002 Framework Decision and s. 11 of the said Act. It could not be said that these are either defects or omissions of non-substantial details or that they amount to only a technical failure to comply with the Act of 2003. For the reasons set out above, this information is vital for the consideration of an executing judicial authority as well as a requested person in respect of EAWs generally and this EAW in particular. Furthermore, even if they were said to be non-substantial details or amount to a technical failure, the Court, in this case, could not be sure that no injustice would be caused to the respondent by making the order for his surrender.

## **Conclusion**

61. As has been demonstrated in this judgment, the omission in this EAW and additional information, of the details concerning the circumstances in which the offence was committed, especially as regards the time of its commission and the degree of involvement of the respondent, amounts to a clear breach of s. 11(1A)(f) of the Act of 2003. As the Irish Superior Courts have repeatedly stated, these are important matters which must be set out in an EAW.

62. For the reasons set out above, I have decided not to exercise my discretion under s. 20(1) of the Act of 2003 to seek further information. Furthermore, the identified defects are not matters which nonetheless require the order for surrender to be made by virtue of the provisions of s. 45C of the Act of 2003.

63. The warrant before the Court purports to be an EAW but it is a warrant which does not comply with the provisions of the 2002 Framework Decision or the provisions of the Act of 2003. It is defective in essential respects and is not a valid warrant. In those circumstances, the court refuses the surrender of this respondent to Italy on foot of this EAW.