

## THE HIGH COURT

[RECORD NO. 2018 No. 157 EXT]

## IN THE MATTER OF AN APPLICATION PURSUANT TO S. 33 (1) OF THE EUROPEAN ARREST WARRANT ACT 2003 AS AMENDED

BY:

THE DIRECTOR OF PUBLIC PROSECUTIONS

APPLICANT

JUDGMENT of Ms. Justice Donnelly delivered on the 16th day of July, 2018 and ADDENDUM dated 8th day of October 2018

## JUDGMENT

## Introduction

1. This is an *ex parte* application on behalf of the Director of Public Prosecutions ("the DPP") pursuant to s.33 of the European Arrest Warrant Act 2003 as amended ("the Act of 2003") for the issue of a European Arrest Warrant ("EAW") in respect of a person ("hereinafter the requested person"). In the present case, the formal criteria set out in the Act of 2003 for the issue of an EAW have been met. The Act of 2003 bestows upon the Court a discretion as regards the issuance of European arrest warrants. This judgment considers the concept of proportionality in the exercise of the discretion to issue an EAW and also the centrality of the role of the DPP in the overall operation of Ireland's scheme for the issuance of EAWs under the Act of 2003.

## The contents of the draft European Arrest Warrant

2. The draft EAW placed before me sets out the details of the investigation and allegation. In this case, the requested person was arrested in the final quarter of 2014 on suspicion of possession of a controlled drug for the purpose of selling and supplying it contrary to s. 15 of the Misuse of Drugs Act 1977. He was charged with that offence and was released on bail. He was required to attend court the following month but failed to do so. As a result, a warrant for his arrest was issued. He is a foreign national. The draft EAW quite properly indicates that the maximum sentence is one of imprisonment for life. Undoubtedly, the requested person would not receive such a sentence. Indeed, if there were to be a plea of guilty together with persuasive evidence in mitigation, it is not beyond the bounds of possibility that he might even receive a suspended sentence. It is however of significance that the alleged offence is one for the possession of a controlled drug for the purpose of sale or supply and not a charge of simple possession. There is a high public interest in the prosecution of such offences, hence all the more reason why the investigation and prosecution agencies of the state must act with due expedition. As this judgment will demonstrate, the fact that there is generally a high public interest in the prosecution of a particular type of crime does not mean that the question of proportionality in the issue of an EAW need not be addressed.

3. The draft EAW contains a statement that subsequent to the DPP's direction to prosecute in August 2015, reminder emails were sent to the Gardaí as to the requested person's whereabouts. Four emails in total were sent; one in December 2016 and three in 2017. The draft EAW then states that in December 2017, An Garda Síochána had a belief that the accused had fled the country and had been living in the United Kingdom or France. The DPP applied to the High Court on 14th May, 2018 to issue an EAW, in which further investigation was required regarding the prosecutorial delay in this case.

4. Although the respondent failed to appear in the District Court, no evidence was put before me, despite invitation, to explain the delay in applying for the issue of the EAW for the requested person. The only response to that request was an affidavit that explained how a particular Garda obtained freezing orders "between these dates, the 29/09/2014 and 18/10/2017" in relation to the cash that had been seized. The affidavit says that ongoing Garda enquiries were being made between the dates of the domestic warrant and the application for the EAW. The affidavit makes clear however, that "these inquiries were with the Criminal Assets Bureau in relation to the monies seized."

5. The natural inference is that the only Garda enquiries that were made in this case related to the monies that had been seized. No effort was made domestically to execute the warrant, and despite the fact that the requested person is a foreign national, no international enquiries were made. The interest of the Gardaí appears to have been solely in respect of the monies that had been seized.

## The law

6. Chapter 2 of the Act of 2003 relates to the issuing of European arrest warrants. Section 33(1) provides:

"A court may, upon an application made by or on behalf of the Director of Public Prosecutions, issue a European arrest warrant in respect of a person where it is satisfied that-

(a) a domestic warrant has been issued for the arrest of that person but has not been executed, and

(b) a term of imprisonment or detention of not less than 4 months has been imposed on the person in respect of the offence concerned and the person is required to serve all or part of that term of imprisonment or detention, or, as the case may be, the person would, if convicted of the offence concerned, be liable to a term of imprisonment or detention of 12 months or more than 12 months."

7. The use of the word "may" in the Act of 2003 provides the High Court with a discretion whether to issue an EAW where an application is made to the court.

## Proportionality

8. The overuse of the EAW mechanism has been a concern of many member states. In this jurisdiction, in *Minister for Justice and Equality v Ostrowski* [2013] IESC 24, a case involving the execution of an EAW in this jurisdiction, the Supreme Court, while recognising that proportionality was a matter for member states, identified why it was important that member states only issue an EAW where it was proportionate to do so. At para. 6 of his judgment, MacMenamin J. stated:

"If the absence of a proportionality test in applying states is not addressed by those charged with the monitoring [of] the operation of the EAW procedures, one can envisage that, in some member states, questions may arise as to whether the "apparent absence" of a proportionality test on the part of surrendering states can be in accordance with fundamental rights whether identified under that Member State's own Constitution or under EU fundamental rights law."

9. The Council Framework decision of the 13th June, 2002 on the European arrest warrant and the surrender procedures between Member States ("the Framework Decision") at Recital 7 states that:

"in accordance with the principle of proportionality, [set out in Article 5 on the Treaty establishing the European Community], this Framework Decision does not go beyond what is necessary in order to achieve [the objective of replacing the system of multilateral extradition]".

10. At an institutional level, the European Union has been concerned with disproportionate recourse to the mechanism of the European arrest warrant. The European Commission has produced a *Handbook on how to issue and execute a European arrest Warrant* (28.09.2017) C(2017)6389. In the Handbook, the Commission refers to the notion of proportionality as follows at para 2.4:

"A EAW should always be proportional to its aim. Even where the circumstances of the case fall within the scope of Article 2(1) of the Framework Decision on EAW, issuing judicial authorities are advised to consider whether issuing a EAW is justified in a particular case. Considering the severe consequences that the execution of a EAW has on the requested person's liberty and the restrictions of free movement, the issuing judicial authorities should consider assessing a number of factors in order to determine whether issuing a EAW is justified. In particular, the following factors could be taken into account: (a) the seriousness of the offence (for example, the harm or danger it has caused); (b) the likely penalty imposed if the person is found guilty of the alleged offence (for example, whether it would be a custodial sentence);

(c) the likelihood of detention of the person in the issuing Member State after surrender;

(d) the interests of the victims of the offence.

Furthermore, issuing judicial authorities should consider whether other judicial cooperation measures could be used instead of issuing a EAW. Other Union legal instruments on judicial cooperation in criminal matters provide for other measures that in many situations, are effective but less coercive (see Section 2.5)."

The European Commission went on to state:

"On a more general note, applying the proportionality check before issuing a EAW can reinforce mutual trust among Member State's competent authorities. Therefore, it significantly contributes to the effective operation of the EAW throughout the Union".

#### **Ireland and Proportionality in the Issue of a European Arrest Warrant**

11. A consideration of proportionality in the issue of EAWs is seen by the European Commission as entirely consistent with the Framework Decision. In the view of the European Commission, an issuing judicial authority is therefore permitted under the Framework Decision to issue or not a European arrest warrant. This is an understandable interpretation of the Framework Decision. If it were otherwise, the Framework Decision would have had the effect of making it compulsory to issue an EAW in all cases coming within the areas covered by the Framework Decision. In this jurisdiction, it has never been the case that there is no prosecutorial discretion in cases where there are otherwise good grounds for pursuing a prosecution. Prosecutorial discretion was part of the common law. It was not affected by the Prosecution of Offences Act, 1974, which established the office of the Director of Public Prosecutions. This position is reflected in the DPP's Guidelines for Prosecutors [4th Edition – October 2016]. The Guidelines do not mandate prosecution in all cases, but permit, inter alia, consideration of whether prosecution is in the public interest.

12. Furthermore, the DPP's Guidelines set out further "special factors" which may apply where the extradition of a suspect to face trial will be required. Paragraphs 4.26 and 4.27 set out:

"The extradition of persons required to answer any charge of an offence or to serve a sentence imposed will always involve expense to the State. In the case of serious offences, it will generally be appropriate to incur that expense where there are reasonable prospects of conviction, to maintain confidence in the administration of the law and to deter offenders fleeing from justice.

Where it is proposed to take steps to secure extradition, in addition to the assessment of the prosecution case in accordance with these guidelines, particular attention should be paid to the following factors:

a) any delay after discovery of the suspected offender;

b) the nature and gravity of the offence or offences alleged against the fugitive."

13. The DPP's Guidelines amount to a clear statement from the DPP that she will operate a proportionality test prior to making an application for the issue of a European arrest warrant. That is correct and proper and in accordance with the general aims set out in the European Commission handbook. While the list in the Guidelines does not correspond in full with the list set out in the Commission handbook, this does not present any difficulty. The list in the Guidelines is not an exhaustive list as it states that "particular attention should be paid..." Similarly, the Commission Handbook list is not exhaustive as it also uses the phrase "in particular...". Therefore, I am quite satisfied that delay is an appropriate factor to consider and is one the DPP in the course of her Guidelines has accepted.

14. It is noted that the 2016 Guidelines have been amended with respect to extradition matters since the 2010 Guidelines were published. The 2016 Guidelines no longer state that a factor to bear in mind is the likely disposition following conviction. Given that the Commission Handbook refers to the likely penalty to be imposed, it appears that the DPP Guidelines, by its amendment, differ. The DPP appears to no longer take into account the specific case before it in terms of the actual penalty likely to be imposed. This may have consequences for how the High Court should address the issue of proportionality.

15. It is also important to note that the reference to delay in that part of the Guidelines referring to extradition is supplementary to the reference to delay in the general part of the Guidelines referring to domestic prosecution. In other words, delay is to be considered twice by the DPP, once in the context of considering whether the prosecution should proceed, and a separate consideration as to whether an EAW should be sought.

16. The contents of the Guidelines are also unusual in that they appear to suggest that it is the expense to the State that should cause a fresh consideration of proportionality. While some expense to the State will be caused where Gardaí have to attend abroad to bring a person back to Ireland, it is also clear that executing member states will incur expense in searching for, arresting, keeping a person in custody, and also potentially providing legal aid for an arrested person. More particularly, the extradition proceedings may in themselves impose severe restrictions on the requested person and it is important to ensure that they are not disproportionate to the actual prosecution against the requested person in respect of the particular offence.

17. The provisions of s.33(1) also permit this Court to operate a test of proportionality. In particular, the principle of mutual trust would not be advanced if this Court were to issue EAWs which satisfy the strict criteria of the Act of 2003, but were completely disproportionate in their effects on a requested person and indeed on a requesting member state. In determining whether an EAW is a proportional instrument in a given case, the High Court is entitled to take into account the matters to which the European Commission refer in their Handbook. That decision on proportionality is in effect a second step that takes place after the DPP has taken her own decision in accordance with her Guidelines.

### **The DPP's response in the present proceedings**

18. In the present proceedings, the DPP submitted to the Court case-law regarding the prohibition of domestic trials where there has been delay (see in particular *Drew v DPP* [2016] IEHC 144). The DPP submitted that in the context of the established jurisprudence regarding delay and fair trial, blameworthy delay *simpliciter* was not sufficient to prohibit a prosecution. The DPP submitted that consideration of the public interest in prosecuting the person was also to be considered.

19. In making those submissions, the DPP did not appear to consider that the question of proportionality of the mechanism of the EAW was a separate issue to the question of whether a prosecution for the offence should take place. As can be seen above, disproportionality may arise by virtue of the nature of an EAW, which is in effect a European Union wide international arrest warrant with direct consequences not only for the requested person, but in terms of resources to be expended by European police forces and the executing member state where the person may be arrested. The direct consequences for the requested person may be far greater by virtue of being subject to cross-border rendition than for those prosecuted in domestic proceedings.

20. The DPP's attitude to the question of proportionality in this case is exacerbated by the fact that this Court is aware that there have been gross delays in the past in seeking the issuance of European arrest warrants. These cases have involved gross delay on the part of An Garda Síochána as well as, in some cases, the Office of the DPP. Indeed, in some cases in the past, including those involving allegations of murder, there have been delays of up to 12 months by the DPP making an application after a request by An Garda Síochána for the issue of such a warrant. It is the understanding of the Court that significant re-organisation of the DPP's office, by providing for a specific section in the office to deal with international criminal co-operation applications, has led to major improvements in that regard. Unfortunately, the same improvements do not appear to have been made by An Garda Síochána in its procedures for ensuring that domestic warrants are executed, if necessary, by the application for a European arrest warrant. Delays measured in terms of years are unfortunately not unknown to this Court. The delay in this case is demonstrative of that.

### **Decision**

21. Ireland, through the DPP, exercises an initial proportionality filter prior to the application for a European arrest warrant. The use of such a filter is provided for by the DPP in her Guidelines as set out above. The manner in which this application has been made to the Court, namely the lack of any information about the question of delay until this Court questioned the delay and the reliance on case-law concerning domestic prosecutions, raises a very clear concern that the DPP has not considered her own Guidelines in this case.

22. Where this Court has a discretion whether to issue an EAW, it is important that the Court can be assured that, at the very least, the DPP has made a specific determination that, even in light of the delay and the nature and gravity of the alleged offence, it is still proportionate to seek the extradition of the requested person. In the present case, no such assurance appears forthcoming.

23. Prior to this Court exercising its own considerations of proportionality, it is necessary to seek information from the DPP as to the actual procedure applied by the office prior to making applications for the issue of an EAW and to seek an assurance, that, if the Guidelines that have been published are still effective, such Guidelines have been considered and applied in the present case. If that procedure has not been followed, the High Court will be bound to seek further information about the particular circumstances of this requested person as well as any other information that would usually factor into the DPP's decision in accordance with her own Guidelines to make an application for the issuance of a European arrest warrant.

24. Furthermore, in light of the change in the DPP's Guidelines between 2010 and 2016, the Court will request the DPP to address it on the impact of those changes. This change may have consequences for the extent of the information that the High Court must be given in particular cases. In cases in which it may *prima facie* appear that a non-custodial sentence is a likely or even reasonably possible result, the High Court may have to be given further information as to all the background circumstances, including those of the requested person. This is to ensure that the High Court will not issue an EAW for a person for whom a custodial sentence is either highly improbable or perhaps reasonably unlikely. The nature of the test which this Court should impose in deciding on the question of the disproportionate issue of an EAW should be addressed by the DPP in any future submissions.

### **ADDENDUM dated 8th day of October 2018**

#### **The DPP's Guidelines**

25. The DPP duly made further submissions to this Court on the issues raised in the judgment dated 16th July, 2018. The DPP accepted that publication of the judgment could not be prevented and indeed it was in the public interest to publish and disseminate judgments. It was indicated to the Court that with removal of paragraphs 2 and 3, which recite the factual background of the case and allow for the identification of the requested person, the (already redacted) judgment was suitable for publication. I have amended the original paragraph 2 and removed the contents of the original paragraph 3 entirely. The making of these amendments satisfies both the public interest in the dissemination of judgments and the requirement for anonymity in the issue of warrants.

26. I have decided to publish the redacted judgment in tandem with this addendum because it provides a more complete picture of the determination of the Court. I wish to take the opportunity to clarify, in case there be any uncertainty, that the judgment does not state that the Guidelines were mandatory. As the High Court in *Fleming v Ireland* [2013] IEHC2 authoritatively stated at para. 132, in its judgment, delivered by Kearns P. (as he was then):

" These guidelines are general in nature, or, to put it another way, are non- offence specific and have no statutory force. The stated intention of the guidelines is to give general guidance to prosecutors so that a fair, reasoned and consistent policy underlies the prosecution process. "

27. The High Court has a discretion in terms of issuing EAWs, as per s. 33 as indicated by the use of the word "may". The concern of the High Court in the judgment of the 16th July, 2018, was to ensure that EAWs were not being disproportionately issued in this jurisdiction. In those circumstances, the exercise by the DPP of an apparent proportionality test was of assistance to the High Court, as the High Court could rely upon a general assurance that the DPP was only seeking an EAW where there had already been scrutiny of the application in terms of proportionality. If there is no such general assurance, the High Court may well have to be more proactive in seeking out more detailed information which touches on the proportionality issue.

28. Counsel for the DPP made careful written and oral submissions to the Court on the issue of the Guidelines and the Act of 2003. The written submissions expressly state that the Guidelines are not "guidelines in relation to what factors should be taken into account in deciding to apply for a EAW but rather described the relevance of the potential need to apply for a warrant to the decision as to whether or not to prosecute or to continue with a prosecution which has already been commenced." The DPP's position was that, assuming that there is enough evidence to prosecute, the factors set out in the Guidelines go towards the public interest requirement for there to be a prosecution or a continuation of a prosecution.

29. It is in that context that the DPP explained the removal of "the likely disposition following conviction" as an explicit criterion from the 2016 Guidelines. She states in written submissions that "given that this is a factor which is to be considered in a decision to prosecute generally and there was significant overlap with the requirement to consider the gravity of the offence as set out in para 4.27(b) (of the 2016 Guidelines), its inclusion in para 4.27 was unnecessary surplusage."

30. The DPP's explanation as to what the purpose of the Guidelines is in respect of EAWs is difficult to understand. In the first place, the section in the Guidelines is entitled "SPECIAL FACTORS WHICH MAY APPLY WHERE THE EXTRADITION OF A SUSPECT TO FACE TRIAL WILL BE REQUIRED". That heading implies that the decision has already been made to prosecute e.g. "suspect to face trial". It is even more difficult to understand why the phrase "likely disposition following sentence" was removed as "surplusage" whereas the reference to "delay" remained despite "delay" having an entire section dedicated to it immediately preceding the section on extradition. Similarly, the nature and gravity of the offence was already included in public interest considerations for prosecution.

31. According to the DPP's submission, there is no proportionality test applied to applications for an EAW, instead the requirement to apply for an EAW feeds into whether the prosecution is to be taken or continued. This would mean that where the DPP is requested by An Garda Síochána to seek the issuance of an EAW, a decision by the DPP not to do so is in truth a decision to discontinue the prosecution. The DPP was unable to be precise about how this operates where a domestic bench warrant has already issued. It is entirely unclear if the DPP has in place a process to then apply to (or instruct An Garda Síochána to apply to) the relevant court to withdraw proceedings as well as seeking the cancellation of the domestic bench warrant. The implication of the DPP's submission is that such an application should follow. It would be unsatisfactory to have a person deprived of their liberty on foot of a domestic bench warrant where, in truth, the proceedings have been withdrawn. That is of course, separate to the issue of whether they are to be prosecuted for a breach of recognisances.

32. The DPP relies in her written submissions upon the European Commission handbook and the decision in *Ostrowski* to highlight that the issue of proportionality only arises for consideration by the *issuing judicial authority* and is for the purpose of ensuring that the EAW process is not utilised in "patently minor offences". One major implication of her submission is that the DPP does not differentiate between the decision to prosecute and the decision to apply for an EAW. Therefore, according to the logic of the DPP's submission, even where "patently minor offences" are quite properly being pursued for prosecution in this jurisdiction, the DPP is thereafter either obliged to apply for an EAW if the suspect leaves the country or to make a decision terminating the criminal proceedings on that account.

33. This binary approach is mandated by the DPP's interpretation of her own Guidelines. That approach leaves the continuation of prosecutions in this jurisdiction subject to assessment of the presence in, or absence of the accused from, this country at a particular time. Those accused who have left the country, having taken a bench warrant, may find that the entire proceedings have been discontinued against them. They will have gained an advantage over a person who remained in the jurisdiction. That should be distinguished from the position of a person who will not be pursued abroad but would remain liable for prosecution should they return to the jurisdiction of the Irish courts.

34. In adopting her approach to prosecutorial decisions in the context of extradition, the DPP has taken the importance of being cognisant of the serious implications of cross-border extraditions and elevated it to a position where it impacts on the amenability of an accused to the jurisdiction of the Irish courts, either now or in the future. In fairness to the DPP, she indicated through counsel, that a decision to discontinue would not prevent the reopening of that decision should the accused return to the jurisdiction. While that may be so, the practical realities of such an approach together with the legal implications of same, would surely render that situation an exception rather than a rule. On the other hand, the continuation of proceedings, especially where there is a domestic warrant in existence, is far more likely to produce the immediate action that the knowledge of the presence of the person in this jurisdiction demands. In short, if proceedings remain in being in this jurisdiction, An Garda Síochána is under an obligation to arrest and bring that person before the Courts on foot of the bench warrant.

35. This Court is cognisant that the purpose of these proceedings is not to review the decision by the DPP and repeats again that the only role of the Court is to decide whether to issue the EAW for the suspect. It is in that context that the Court must consider the issue of proportionality. Furthermore, the Court is not to be taken as finding, or even implying that, there is or would be any *mala fides* on the part of the DPP in her approach to consideration of extradition in the context of decisions on prosecution. The DPP has conscientiously considered that her role is that of decision making in respect of prosecutions and it is only in that context that extradition matters are considered by her office under her Guidelines.

36. The Court notes however that the DPP's submission amounts to an acceptance on her part that the DPP plays no role in ensuring that there is no disproportionate overuse of the EAW; her only role is to decide on the initiation or continuation of prosecutions. It must be acknowledged that a by-product of the DPP's approach may well be that few, if any, disproportionate applications will be made, as the end result of the DPP's prosecutorial decision making may be to weed out cases where an EAW would clearly be disproportionate to the end to be achieved in any proposed prosecution.

37. The DPP's submission also submits that s.33(1) of the Act of 2003 does not provide authority "for the extension of a duty of proportionality on an issuing judicial authority to the prosecutor applicant...". That appears to be a correct interpretation of s. 33(1) of the Act of 2003. It is not necessary for the Court to consider whether the DPP is otherwise entitled, arising from her statutory functions, to adopt a proportionality approach to applications for European arrest warrants. As the Court made clear in its judgment of July 2016, it is for the High Court to exercise its own discretion under s. 33(1) of the Act of 2003, but it did so in the context of a certain understanding of the DPP's Guidelines with respect to extradition. All future decisions of the issuance of EAWs will have to take into account the revised understanding of those Guidelines as set out in this addendum.

### ***The concept of proportionality***

38. The Court observes that the DPP is of the view that it is only in the case of “patently minor offences” that no EAW should be issued. In the view of the Court, the use of the phrase “patently minor offence” will not assist in defining when it is disproportionate to issue a European arrest warrant. “Minor offence” is a phrase that has a particular constitutional resonance; Article 38.2 permits minor offences to be tried by courts of summary jurisdiction. It is neither necessary nor helpful for this Court to attempt to set out the constitutional meaning of minor offences. The Court will simply note that the District Court, as a court of summary jurisdiction, has a limit of a maximum of 12 months imprisonment that it can impose for a single offence. In the Act of 2003, surrender is permitted for offences that carry a maximum of 12 months imprisonment or more. Using minor offence in its constitutional sense, the Act of 2003, expressly permits extradition for these offences. In light of that clear legislative permission, it would be wrong for this Court to rule that all these “patently minor offences” can no longer be the subject of an EAW issued by the High Court.

39. The consideration of proportionality is more nuanced than the mere invocation of a shorthand phrase. The European Commission’s handbook has recognised those nuances and has cross-referenced a number of matters which includes the interests of the victims of an offence. It is not beyond the bounds of possibility that a case where an accused, due to age, infirmity or antiquity of the offence is unlikely to be given a prison sentence could nonetheless be properly the subject matter of an EAW due to the particular interest of the victim in seeking the vindication of a criminal conviction, which is also an important component of the public interest. These are all matters to be weighed in the balance in each particular case.

40. The Court is of the view that the appropriate consideration to be applied is one of “likelihood” of penalty to be applied. This accords with the wording used by the Commission in its handbook (which is not binding on this Court) but more importantly, it represents the type of assessment, which a court, not being a sentencing court, is more easily able to make in terms of generalities. If it is likely that a non-custodial sentence will not be imposed, this will usually be apparent from a general overview of the facts of the particular case and the type of offence alleged. The test of “possibility” would require a more detailed examination of the minutiae of the circumstances of the offence, the offender and particular sentencing trends, then the Court is equipped to carry out at the stage of issue of a warrant. This is not to say that sometimes more detailed information may be necessary even to carry out an assessment of likelihood.

41. The DPP has assured the Court that she is prepared to provide the Court with further information as to the circumstances of an offence or an offender as required by the Court, in those marginal cases where the Court may have to make a detailed consideration of proportionality. That is welcomed by the Court.

### ***The present case***

42. The facts of the present case demonstrate a catalogue of institutional inertia, particularly by An Garda Síochána, in seeking to have this suspect, who deliberately absented himself from court proceedings in this jurisdiction, brought to trial. This inertia is all the more inexplicable as he was sought for a serious offence of drug trafficking, in which the Gardai were simultaneously making applications to forfeit the money seized. The purpose of the proportionality test is not, however, to punish institutional failings but to assess whether the issue of an EAW is a justified measure in all the circumstances. There is a public interest in the prosecution of crime, even, and sometimes especially, when that requires cross-border co-operation. The use of international arrest warrants may not be justified where their effects on the requested person (and the requested state) are disproportionate to the end to be achieved. That disproportion may arise where, inter alia, due to the lack of gravity of the offence and other factors, the requested person is unlikely to face a custodial penalty. Each case must be decided on its own facts.

43. The Court is satisfied that the offence for which this requested person has been prosecuted is serious namely a drug trafficking offence, although the Court recognises that not every possession of a controlled drug for sale or supply charges may automatically be so. The facts of the offence and the context in which it was committed will be important. In this case, the nature of the drug, the amount of the drug and the value of the drug were all significant in bringing this into the realm of a more serious allegation of drug trafficking. The circumstances of the alleged offence add to the seriousness, in particular where significant amounts of cash alleged to be the proceeds of crime were also seized. The fact that the person failed to appear in court in answer to bail is also of significance in the present case. I am satisfied that this is a case where on its face it cannot be found that it is likely that a non-custodial sentence would be imposed if there is a conviction. Naturally, if there is a conviction, the ultimate decision on sentencing will rest with the sentencing court.

44. On the basis of the foregoing, it is not disproportionate to issue this European arrest warrant and therefore the Court will accede to the application.