Neutral Citation: [2014] IEHC 647

THE HIGH COURT

Record No: 2011/31 EXT

IN THE MATTER OF THE EUROPEAN ARREST WARRANT ACT, 2003 AS AMENDED

BETWEEN/

THE MINISTER FOR JUSTICE AND EQUALITY

Applicant

- AND -

DARIUSZ STALKOWSKI

Respondent

JUDGMENT of Mr. Justice Edwards delivered on the 18th of November, 2014.

Introduction
In this case the respondent is the subject of a European arrest warrant issued by a competent judicial authority in the Republic of Poland which seeks his rendition both for the purposes of prosecution and also for the execution of a sentence. The warrant is dated the 29th October, 2010 and was endorsed for execution in this jurisdiction on the 26th January, 2011.

There are three main controversies in the case. In so far as the warrant seeks the respondent's rendition for the purposes of prosecution the respondent relies upon an abuse of process argument. In addition, the respondent seeks to resist his surrender both for prosecution and for the execution of the said sentence on the grounds of delay, and also on the grounds that his proposed rendition would involve a disproportionate interference with his rights to respect for family life, and privacy, as guaranteed under Article 8 of the European Convention on Human Rights (the E.C.H.R.). To that end, the respondent relies upon s. 37 (a) (i) and (ii) of the European Arrest Warrant Act 2003 (hereinafter "the Act of 2003").

Alleged abuse of process
The facts underpinning the abuse of process objection can be simply stated. The first offence for which the respondent is wanted for prosecution bears the Polish domestic file reference *'4Ds. 99/01'*. The offence is described in the warrant as *'appropriation of an entrusted thing'* which is an offence provided for in Article 284 § 2 of the Polish Penal Code. It is alleged that, on the 17th November 2000 in Toruñ, the requested person misappropriated the amount of PLN11, 550 which he had collected from a shop in the course of his duties as an escort. However, this otherwise straightforward matter is complicated by the fact that the respondent was originally charged with an offence under Article 284 § 1 rather than Article 284 § 2 of the Polish Penal Code. They represent slightly different variants of the same offence. Both attract a potential penalty of up to five years imprisonment. The critical difference from the point of view of the present proceedings is that an offence charged under Article 284.1 of the Polish Penal Code becomes statute barred in the issuing state after ten years whereas an offence charged under Article 284.2 of the Polish Penal Code becomes statute barred in the issuing state after twenty years.

The alleged abuse of process arises in the following circumstances. The respondent having been charged with an offence contrary to Article 284 § 1 of the Polish Penal Code, the case was before the District Court of Toruñ – 2nd Criminal Division in June 2010 at the behest of the District Prosecutor's Office and for the purpose of seeking from that Court an order for the temporary arrest and detention of the respondent for a period of 14 days.

(In this Court's experience such a step is the usual precursor in Poland to the issuance of a European arrest warrant in circumstances where a defendant cannot be located by the police and is believed to be abroad. The prosecutor applies for an order for the temporary arrest and detention of the defendant and once that order is granted it constitutes the enforceable domestic decision or warrant which then allows for the issuance of a European arrest warrant.)

At any rate, the Polish court appears to have adverted to the fact that the case against the respondent would, on the basis of the charge then preferred against him, become statute barred on the 17th November, 2010. That being the case the court took the step of writing to the District Prosecutor's Office in the following terms:

> "Case No II Kop 24/10 Toruñ, dated 14.06.2010.
>
> District Prosecutor's Office
>
> Toruñ Wschód
>
> 87-100 Toruñ, ul. Grudzi¹dzka 47
>
> The District Court of Toruñ - 2nd Criminal Division requests the opinion on the possibility to change the allegation presented to Dariusz Stalkowski in the Case No.4 Ds. 99/01 The person wanted in that case, is charged with committing crime in consisting in the fact that on 17 November 2000 in Toruñ he has appropriated money in the amount of PLN 11,500 in such a way that while performing escort duties for the National Security Office of Asekuracja Makspol he collected money from the takings of the Komfort store of Toruñ and did not pass them to the trezor of WBK bank to the detriment of the National Security Office of Asekuracja Makspol and of WBK Bank branch of Toruñ, i.e., the crime under Article 284 § 1 of k.k. into Article 284 § 2 of k.k. or 278 § 1 of k.k. (which would entail the partial change of its description), which in turn would result in a significant prolongation of the possible prosecution of the wanted person. This problem, in turn, is of particular importance for the effectiveness of the international search.
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> Accordingly, the District Court asks a request for an opinion of the Prosecutor's Office with regard to the abovementioned issues.

Attached are the files of the Case No. 4 Ds. 99/02 (1 Volume I)

President of the 2nd Criminal Division

Judge of the District Court"

Shortly after receiving this letter the District Prosecutor's Office withdrew the charge against the respondent under Article 284 § 1 of the Polish Penal Code and substituted for it a charge under 284 § 2 of the Polish Penal Code. This occurred on the 22nd June 2010. That having been done, on the 28th June, 2010, the District Court of Toruñ – 2nd Criminal Division issued an order for the temporary arrest and detention of the respondent for a period of 14 days. Then subsequently, on the 29th October 2010, the same court issued the European arrest warrant with which this Court is now concerned.

The respondent contends that the intervention of the District Court of Toruñ – 2nd Criminal Division represents an abuse of this Court's process. In making that case he relies upon the affidavit of the respondent's Polish lawyer, a Mr Mariusz Stelmaszczyk, sworn in these proceedings on the 21st January, 2014. In his said affidavit Mr Stelmaszczyk deposed, *inter alia*, to the following matters:

> "3. The crime under Article 284 § 1 k.k., for the commission of which Dariusz Stalkowski was accused in the decision of 23.02.2001 in the Case No. 4 Ds. 99/01 was threatened by a maximum penalty of three years imprisonment. In accordance with Article 101 § 1, point 4) k.k. and Article 102 of k.k. such the crime is time-barred after 10 years from its commission.
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> In the Case No. 4 Ds. 99/01 Dariusz Stalkowski was accused of a crime under Article 284 § 1 of k.k. committed on 17.11.2000. **Thus the crime was barred on 17.11.2010, whereby the proceedings on the Case No. 4 Ds. 99/01 should be written off**.
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> However, on 14.06.2010, still during the proceedings to issue a European Arrest Warrant (Case No. 11 Kop 24/10), the District Court of Toruñ sent to the Prosecutor's Office of Toruñ -Wschód, a letter in which it is stated that the crime under the Case No. 4 Ds. 99/01 was time-barred on the date 17.11.2000. Accordingly, the District Court of Toruñ asked the Prosecutor's Office to consider changing the legal classification of the crime alleged to: Dariusz Stalkowski to the crime under Article 284 § 2of k.k., and Article 278 § 1 of k.k. together with change of description of the way of commitment of the crime. **In addition, the District Court of Toruñ explained in that letter, that such a change (from Article 284 § 1 of k.k. into Article 284 § 2 of k.k. and Article 278 § 1 of k.k.) "would result in a significant extension of period of the possible prosecution of the sought person. This problem, in turn, is of particular importance for the effectiveness of the international search**."
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> It should be explained at that point that the crimes under Article 278 § 1 of k.k. and Article 284 § 2 of k.k. are threatened by a maximum penalty of five years imprisonment, which under the provisions of the Polish Crime Code are barred by 20 years period after the commission of the crime.
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> After having read the letter of the District Court of Toruñ, the Prosecutor has on 22.06.2010. issued a decision on change of the allegation and has charged Dariusz Stalkowski with a crime under Article 284 § 2 of k.k., that shall be barred only after November 17, 2020. **Dariusz Staikowski was never Informed about that change, and he was never presented the decision of 22.06.2010. While, the prosecutor did not justified in any way, why he changed to Dariusz Staikowski the allegation under Article 284 § 1 k.k. into Article 284 § 2 of k.k.**, even though, since the decision of 23.02.2001 to present charges of committing crime under Article 284 § 1 of k.k. not a single new evidence was presented, including not a single evidence that would alter the facts of the case and that would justify changing the description of how Stalkowski Dariusz had committed the alleged crime.
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> These facts justify the assumption that there may be an **illegal attempt to influence and pressurize** the Prosecutor conducting the Case No. 4 Ds, 99/01 by the District Court of Toruñ, even though according to Article 8 paragraph 1 of the Act on Prosecutor, **each Prosecutor is independent**, and any possible orders, guidelines and instructions may not apply to the content of a procedural action and can be given only by superiors of the prosecutors (and not the courts!). The ability to influence and pressure are additionally proved by the fact **that for some unknown reason the letter of the District Court of Toruñ of 14.06.2010 was not included by the Prosecutor to the files of Case No. 4 Ds, 99/01** (It is only included in the files of the District Court of Toruñ of the case concerning issuance of the European Arrest Warrant) as if they wanted to hide them from people reading files of the Case No. 4 Ds. 99/01.
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> The effect of changing the description of the legal classification into Article 284 § of 2 k.k. was a forced extension of the limitation period of the crime the commitment of **which was alleged to Dariusz Staikowski, which in turn made it possible to issue on 27.10.2010, the decision on the European Arrest Warrant**."
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> (Emphasis as in original)

Counsel for the respondent has opened various cases and authorities to this Court in relation to the abuse of process jurisdiction. These have included the conjoined cases of: *R (Bermingham) v. Director of the Serious Fraud Office* and *R v Government of the United States* [2007] QB 727; *Minister for Justice and Law Reform v Tobin (No 2)* [2012] IESC 37 (Unreported, Supreme Court, 19th June 2012); *Bolger v O'Toole*, (*Ex tempore*, Supreme Court, 2nd December 2002); the conjoined cases of: *R (Government of the United States of America) v Bow Street Magistrates Court* and *R (Central Examining Court, Criminal Court of the National Court, Madrid) v Bow Street Magistrates Court* [2007] 1 W.L.R. 1157; *Haynes v Court of Magistrates, Malta* [2009] EWHC 880 (Admin); *Symeou v Public Prosecutor's Office at the Court of Appeals, Patras, Greece* [2009] 1 WLR 2384; *Sofia City Court, Bulgaria v Dimintrinka Atanasova-Kalaidzhieva* [2011] EWHC 2335 (Admin); *Zakrzewski v Regional Court of Lodz, Poland* [2013] 1 W.L.R. 324 ; *Minister for Justice and Equality v Gherine* [2012] IEHC 535 (Unreported, High Court, Edwards J, 30th November 2012); *Akhtar Mohammed v The Court of Appeal, Paris* [2013] EWHC 1768; *The State (O'Callaghan) v O'hUadhaigh* [1977] I.R. 42; *R v Horseferry Road Magustrates' Court, ex parte Bennett* [1994] 1 A.C. 42; *R v Great Yarmouth Magistrates, ex parte Thomas and ors* [1992] Crim L.R. 116; *R v Brentford Justices, ex parte Wong* [1981] 1 QB 445; *R v Waltham Forest Justices* [1993] 97 Cr App R 287 ; *R v Wolverhampton Magistrates' Court and Stafford Crown Court, ex parte Uppal* [1995] Crim L.R 223 and *Minister for Justice, Equality and Law Reform v Brennan* [2007] 3 I.R.732.

The Court has read and considered all of these materials. While not all of them are directly relevant to the issue before the Court they undoubtedly serve to illustrate some of the many and diverse situations in which a Court may, in the exercise of its inherent jurisdiction, act with a view to seeking to protect its own process from being abused. Many of the cases cited, however, are not

extradition or rendition cases and do not concern the exercise of the abuse of process jurisdiction in that particular context. Moreover, of those that are indeed concerned with the exercise of the abuse of process jurisdiction in the sphere of extradition or rendition, many are concerned with a different type of allegedly abusive circumstance than that under present consideration e.g., *Minister for Justice and Law Reform v Tobin (No 2)* which concerned a possible *Henderson v Henderson* (1843) 67 E.R. 313 type of abuse; *Bolger v O'Toole* which was concerned with an estoppel / res judicata type issue and *Minister for Justice and Equality v Gherine* which concerned the maintenance of a request for a respondent's rendition so that he might be prosecuted, in circumstances where he had in fact already been tried *in absentia*, and which trial had resulted in him being convicted of one charge but acquitted of others.

The most ostensibly relevant cases, and those upon which the respondent, in particular, has placed most reliance, are the conjoined cases of: *R. (Bermingham) v. Director of the Serious Fraud Office* and *R. v Government of the United States*; the conjoined cases of *R. (Government of the United States of America) v Bow Street Magistrates Court* and *R. (Central Examining Court, Criminal Court of the National Court, Madrid) v Bow Street Magistrates Court; Symeou v Public Prosecutor's Office at the Court of Appeals, Patras, Greece; Sofia City Court, Bulgaria v Dimintrinka Atanasova-Kalaidzhieva and Mohammed v The Court of Appeal, Paris* [2013] E.W.H.C. 1768 (Admin). As none of these cases are Irish cases they do not represent binding precedents. Nevertheless, they are valuable for their persuasive influence. They must be approached with a little caution as they concern a jurisdiction assumed by the High Court of England and Wales in respect of extradition and rendition cases arising under the (UK) Extradition Act, 2003 which, while bearing similarity in some respects with the corresponding statutory regime in Ireland (under the Extradition Acts 1965 to 2012 and under the Act of 2003, as amended) establishes, in certain other respects, a markedly different statutory regime of extradition and rendition to that operated here.

R. (Bermingham) v. Director of the Serious Fraud Office and *R. v Government of the United States* concerned an extradition request by the United States of America in respect of three British citizens who were wanted to face trial on fraud charges before the United States District Court for the Southern District of Texas. The requested persons sought to resist their extradition on numerous grounds one of which was that the requesting State was seeking to abuse the process of the United Kingdom courts in two respects: firstly, in refusing to disclose any of the evidential material it possessed beyond what was contained in the extradition request, and secondly, in deliberately delaying the seeking of the requested persons' extradition pending the enactment of a new statute, thereby denying the requested person's legal safeguards that they would otherwise have enjoyed. The question of whether the District judge hearing the extradition case possessed any inherent jurisdiction to refuse an extradition order on the ground that the proceedings were an abuse of the process of the court on the part of the prosecutor was hotly disputed. The District judge concerned proceeded on the basis that he had such jurisdiction. However, he found that there had not in fact been any abuse of the Court's process. Ultimately, the District judge ordered for the requested persons' extradition. The requested persons then appealed the District judge's extradition order and the appeal was heard by a divisional High Court consisting of Laws L.J. and Ouseley J.

Dealing with the question as to whether or not an extradition court has an inherent jurisdiction to refuse an extradition order on the ground that the proceedings were an abuse of the process of the court on the part of the prosecutor, Laws L.J. stated (at paras. 93 to 97):

> "93.In *Atkinson* [1971] AC 197 the House of Lords held that under the Extradition Act 1870 the magistrate to whom application for a committal was made had no power to refuse on the ground that natural justice so required. Lord Reid accepted (at 232) that there can be cases where 'it would clearly be contrary to natural justice to surrender a man although there is sufficient evidence to justify committal'. But he held that the Secretary of State's discretionary power to refuse to surrender a man committed by the magistrate was an adequate safeguard, it being the legislature's intention that the power should be used 'whenever in his view it would be wrong, unjust or oppressive to surrender the man'. Then he said (233):
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> > 'If I had thought that Parliament did not intend this safeguard to be used in this way, then I would think it necessary to infer that the magistrate has power to refuse to commit if he finds that it would be contrary to natural justice to surrender the man. But in my judgment Parliament by providing this safeguard has excluded the jurisdiction of the courts'
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> 94. In *Schmidt* [1995] 1 AC 339 the House of Lords had to consider an argument that extradition proceedings under the 1989 Act were vitiated by abuse of process: the applicant had been induced to come to the United Kingdom by a ruse on the part of a police officer. Lord Jauncey referred to "the principal safeguard" resting in "the general discretion conferred upon the Secretary of State by Parliament in section 12" (379A-B), and held, following *Atkinson*, that the magistrate acting under the 1989 Act possessed no abuse jurisdiction (379B). Their other Lordships agreed.
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> 95. In *Gilligan* [2001] 1 AC 84 their Lordships' House was concerned with proceedings brought under the Backing of Warrants (Republic of Ireland) Act 1965. In one of the two linked cases heard by their Lordships the Irish authorities had applied to a stipendiary magistrate for an order that the applicant, who was wanted on 18 arrest warrants issued in Dublin and had also been arrested and charged with offences in England, be handed over to the Garda. The applicant contended that the application was abusive, claiming among other things that he had been improperly arrested in England so as to hold him while the Irish charges were drawn up. It was held that the magistrate possessed no abuse jurisdiction. Lord Steyn referred (97G) to the ability of the Irish courts to guard against abuses; this was seen as an analogue to the protection in extradition cases under the 1989 Act afforded by the Secretary of State's discretion, which as I have shown was critical in *Schmidt*.
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> 96. In my judgment the reasoning in these cases of high authority has no application in the context of the 2003 Act. Under its provisions the Secretary of State has no statutory discretion to refuse extradition. The safeguard emphasised in *Atkinson* and *Schmidt* is lacking. Moreover in Part I cases, and Part II cases where the category 2 territory has (like the United States) been designated for the purpose of s.84, the prosecutor is not required to establish a *prima facie* case on the evidence. Under the old law that requirement was itself an important discipline. Its absence makes the need for a residual abuse jurisdiction all the plainer.
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> 97. I should not leave the point without considering the nature of the juridical exercise involved in concluding, as I would, that the judge conducting an extradition hearing under the 2003 Act possesses a jurisdiction to hold that the prosecutor is abusing the process of the court. Lord Reid, in the passage from *Atkinson* which I have cited, would if necessary have *inferred* that the magistrate had power to refuse to commit. Now, it is plain that the judge's functions under the 2003 Act, and those of the magistrate under the predecessor legislation, are and were wholly statutory. He therefore possesses no inherent powers. But that is not to say that he may not enjoy an *implied* power. The implication arises from the express provisions of the statutory regime which it is his responsibility to administer. It is justified by the imperative

that the regime's integrity must not be usurped. Where its integrity is protected by other powers, as in *Atkinson*, *Schmidt* and *Gilligan*, the implication is not justified. But under the 2003 Act that is not the case. The implication of an abuse jurisdiction – Lord Reid's inference – follows."

The existence in United Kingdom law of an implied (or "inherent" as it is known in Irish law) jurisdiction of the type alluded to by Laws L.J. in *R (Bermingham) v Government of the United States of America* was put beyond doubt in the conjoined cases, *R (Government of the United States of America) v Bow Street Magistrates Court* and *R (Central Examining Court, Criminal Court of the National Court, Madrid) v Bow Street Magistrates Court*. The first of these conjoined cases concerned a husband and wife with the surname Tollman and the judgment in these conjoined cases expounded what has now become known (at least in some quarters) as the "Tollman principles." Moreover, for convenience, this Court will henceforth refer to these conjoined cases collectively as "*Tollman*".

In the first of these conjoined cases, the one that actually concerned the Tollmans, the claimant government had initially sought their extradition in 2003 pursuant to the (UK) Extradition Act 1989. In January 2004 the (UK) Extradition Act 2003 came into force, although the (UK) Extradition Act 2003 (Commencement and Savings) Order 2003 as amended, provided that it would not apply to any request for extradition received on or before the 31st December, 2003. In April, 2004 the claimant, believing that the extradition of Mr and Mrs Tollman could be more satisfactorily achieved under the Act of 2003, withdrew its requests for their extradition and, in October 2004, made new requests, in substantially similar form, under Part 2 of the Act of 2003. Mr and Mrs Tollman contended that the proceedings under the Act of 2003 were unlawful because that Act did not apply to the requests for their extradition or, in the alternative, that the use of the Act of 2003 amounted to an abuse of the process of the court in that the withdrawal and resubmission of the extradition requests was a deliberate attempt to defeat the provisions of the Commencement Order. Mr and Mrs Tollman sought full disclosure of any material that would assist in determining those issues. The District judge ruled that the Act of 2003 applied to the proceedings. He also ruled that he had power to make an order for disclosure in relation to the abuse of process application since, for that purpose, he was acting outside the extradition hearing and he made an order for disclosure as sought, subject to determining the question of legal professional privilege and public interest immunity. In a further ruling the District judge dismissed the claimant's claims for public interest immunity and legal professional privilege in relation to the documents sought. The claimant applied for judicial review, seeking, *inter alia*, a declaration that the Act of 2003 applied to the proceedings, a declaration that the District judge should hear any evidence and argument that the extradition requests were an abuse of process in the context of Part 2 of the Act of 2003 and an order quashing the order for disclosure.

In the second case, the claimant court issued European arrest warrants against seven defendants, pursuant to Part 1 of the (UK) Extradition Act 2003, after two earlier attempts to secure their extradition had failed because the warrants were defectively drafted. The defendants contended that the warrants, which alleged the importation and exportation of cocaine, were so poorly drafted and translated that they did not satisfy the requirements of Part 1 of the Act. They further claimed that the warrants included a "catch-all" description of the criminal conduct in impeccable English which was attributable to advice improperly given by the Crown Prosecution Service in circumstances that amounted to an abuse of process. The District judge ordered the claimant and the Crown Prosecution Service to disclose all documents relevant to the issue of what input, drafting or other help the British authorities had given the claimant, save any documents in relation to which a claim for public interest immunity or legal professional privilege was made and upheld. The claimant sought judicial review of that decision.

The judicial review proceedings were heard by a divisional High Court. Giving judgment for the Court, Lord Phillips of Worth Matravers C.J., enunciated the applicable principles (at paras. 82 to 84) as follows:

> "82.Recently, in the case of *Bermingham and Others* [2006] EWHC 200 (Admin) this court held that, under the 2003 Act, the magistrates' court has jurisdiction to ensure that 'the regime's integrity' is not usurped by abuse of process, although the question whether abuse is demonstrated has to be 'asked and answered in light of the specifics of the statutory scheme'. We shall revert to this decision when we come to consider the appeal in the United States case. At this stage we simply endorse the conclusion that the judge conducting extradition proceedings has jurisdiction to consider an allegation of abuse of process. Indeed, we would go further than this and apply to extradition proceedings the statement made by Bingham LJ, in relation to conventional criminal proceedings in *R v Liverpool Stipendiary Magistrate, ex part Ellison* [1990] RTR 220, 227:
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> > 'If any criminal court at any time has cause to suspect that a prosecutor may be manipulating or using the procedures of the court in order to oppress or unfairly to prejudice a defendant before the court, I have no doubt that it is the duty of the court to inquire into the situation and ensure that its procedure is not being abused. Usually no doubt such inquiry will be prompted by a complaint on the part of the defendant. But the duty of the court in my view exists even in the absence of a complaint.'
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> 83. The 2003 Act places a duty on the judge to decide a large number of matters before acceding to a request for extradition. To these should be added the duty to decide whether the process is being abused, if put on enquiry as to the possibility of this. The judge will usually, though not inevitably, be put on enquiry as to the possibility of abuse of process by allegations made by the person whose extradition is sought.
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> 84. The judge should be alert to the possibility of allegations of abuse of process being made by way of delaying tactics. No steps should be taken to investigate an alleged abuse of process unless the judge is satisfied that there is reason to believe that an abuse may have taken place. Where an allegation of abuse of process is made, the first step must be to insist on the conduct alleged to constitute the abuse being identified with particularity. The judge must then consider whether the conduct, if established, is capable of amounting to an abuse of process. If it is, he must next consider whether there are reasonable grounds for believing that such conduct may have occurred. If there are, then the judge should not accede to the request for extradition unless he has satisfied himself that such abuse has not occurred. The common issue in the two sets of appeals before the court relates to how he should do this."

The divisional High Court concluded that the District judge's decision to order disclosure had been inappropriate: (i) because the disclosure rules form part of an adversarial process which differs from extradition proceedings , and (ii) because such an order would have to be made either against a judicial authority within the European Union or against a foreign sovereign state that was requesting the Secretary of State to comply with treaty obligations, and the only sanction for a failure to comply with it would be to reject the request for extradition.

Lord Philips continued (at paras. 89 to 93):

> "89. The appropriate course for the judge to take if he has reason to believe that an abuse of process may have occurred is to call upon the judicial authority that has issued the arrest warrant, or the State seeking extradition in a Part 2 case,

for whatever information or evidence the judge requires in order to determine whether an abuse of process has occurred or not.

90. The information and evidence obtained should be made available to the party contesting extradition. We agree with Mr Gordon that the standards required by Article 13 of the ECHR should apply to the extradition proceedings. Equality of arms requires that, in normal circumstances, the party contesting extradition should be aware of, and thus able to comment on, the material upon which the court will be basing its decision.

91. What if the judicial authority or the requesting State is only prepared to provide the court with the information or evidence on terms that it is not shown to the party contesting extradition? We do not consider that principles of public interest immunity or legal professional privilege are germane, for the judge is not in a position to order the judicial authority or the requesting State to disclose information or evidence if it is not prepared to do so. Nor is it possible to adopt directly the approach to a claim for public interest immunity laid down by the House of Lords in *R v H and others* [2004] 2 AC 134. That approach is only viable when the tribunal considering the material for which immunity is claimed differs from the tribunal that will be determining the substantive issues.

92. There may be occasions where a judicial authority or requesting State is content that the court should see evidence but, on reasonable grounds, is not prepared that this should be disclosed to the person whose extradition is sought. The evidence might, for instance, disclose details of ongoing investigations into suspected co-defendants. The judge will be capable of evaluating the material that is provided to him, whether it is favourable or unfavourable to the person resisting extradition. The issue will then be whether, if a decision is reached without allowing that person the chance to comment on the material, the procedure will fail to satisfy the requirement of fairness. That question will be fact specific and must be left to the judge to decide on the particular facts. If the judge concludes that fairness requires that the material be disclosed, but the requesting authority or State is not prepared to agree to this, then the appropriate course will be for the judge to hold that fair process is impossible, that to grant the application for extradition in the circumstances would involve an abuse of process, and to discharge the person whose extradition is sought.

93. We believe that the scenario described above will be rare. Once it has been shown that there is an issue of abuse of process that requires investigation, it should be possible, provided that the parties act reasonably, to agree material facts, or that the material necessary to resolve any issue is placed in the public domain."

The divisional High Court ultimately granted the claimant in the first case the reliefs sought by it by way of judicial review. In the second case it quashed the order for disclosure made by the District judge, and directed that at the resumed hearing the District judge should first decide whether there was an arguable case of abuse of process in respect of which he required further information or evidence, and, if there was, he should proceed in accordance with paras. 84 to 91 of the Court's judgment.

The ambit of the jurisdiction identified in *R (Bermingham) v Government of the United States of America* and, confirmed in *Tollman*, was further considered in *Symeou v Public Prosecutor's Office at the Court of Appeals, Patras, Greece* [2009] 1 WLR 2384 (Laws L.J. and Ouseley J.) in which Ouseley J., giving the judgment of the court, stated:

"33 …The focus of this implied jurisdiction is the abuse of the requested state's duty to extradite those who are properly requested, and who are unable to raise any of the statutory bars to extradition. The residual abuse jurisdiction identified in *R (Bermingham) v Director of the Serious Fraud Office* [2007] QB 727 and the *Tollman* case [2007] 1 WLR 1157 concerns abuse of the extradition process by prosecuting authority. We emphasise those latter two words. That is the language of those cases. It is the good faith of the requesting authorities which is at issue because it is their request coupled with their perverted attempt and purpose which constitutes the abuse. If the authorities of the requesting state seek the extradition of someone for a collateral purpose, or when they know that the trial cannot succeed, they abuse the extradition processes of the requested state.

34. The abuse jurisdiction of the requested state does not extend to considering misconduct or bad faith by the police of the requesting state in the investigation of the case or the preparation of evidence for trial.

35. The reason for the distinction lies in the respective functions of the courts of the requested and requesting state in the European arrest warrant framework. The former are entitled to ensure that their duties and the functions under the Extradition Act 2003 Part 1 are not being abused. It is the exclusive function of the latter to try the issues relevant to the guilt or otherwise of the individual. This necessarily includes deciding what evidence is permissible, and what weight should be given to particular pieces of evidence having regard to the way in which an investigation was carried out. It is for the trial court in the requesting state to find the facts about how statements were obtained, which may go to admissibility or weight, both of which are matters for the court conducting the trial. It is the function of that court to decide whether evidence was improperly obtained and if so what the consequences of the trial are. It is for the trial judge to decide whether its own procedures have been breached.

36. As those issues are for decision by the trial court in the requesting state, it cannot be an abuse of the extradition process of the requested state for such an issue to be shown to exist and for its resolution to be available only in the courts of the requesting state. The courts of the requested state cannot decide, let alone do so on partial and incomplete evidence, what it is for the courts of the requesting state within the European Arrest Warrant Framework (European Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender of procedures between member states … 'the framework decision') to decide about such issues and with what effect on the trial."

The case *Sofia City Court, Bulgaria v Dimintrinka Atanasova-Kalaidzhieva* merely illustrates an instance of the application of the *Tollman* principles and does not further develop the jurisprudence. In the particular circumstances of that case a divisional High Court upheld on appeal a finding by a Senior District judge at Westminster Magistrate's Court of abuse of process by a Bulgarian prosecutor.

Returning to the circumstances of the present case, counsel for the respondent submitted that while the statutory regime contained within the Act of 2003 does not provide explicitly for a bar to surrender on limitation grounds; the Court's jurisdiction on abuse of process grounds can be used as a bar. In *Mohammed v The Court of Appeal, Paris* the High Court of England and Wales (Queen's Bench Division) considered whether the surrender of a person should be ordered in circumstances where he alleged that the execution of the sentence the subject matter of the warrant was time-barred. The Court highlighted a number of deficiencies in the requested person's argument; firstly, the opinion of the French lawyer engaged by the requested person was equivocal as to whether or not the sentence was in fact time barred and secondly, there was unequivocal evidence from the French Authorities that indicated that execution of the sentence was not in fact time barred. While, on the facts of the case before it, such a contest was more properly a

matter for the courts of the issuing state, Foskett J. accepted that such a limitation point might, in certain circumstances, be properly brought in the executing state as a bar to surrender. He stated (at para. 12):

> "12. This leads to the conclusion, in my judgment, that a point of this nature may be available in response to a request for extradition, albeit in the rarest of circumstances. It would be futile to try to define those circumstances save to say that, as it seems to me, the clearest possible evidence of bad faith would be required, coupled with unequivocal evidence that the sentence was indeed time-barred. That cannot possibly be said about the circumstances of this case."

It was further urged upon the Court that, in considering the alleged abuse of process issue that the respondent has raised, it should adopt and approve of the Tollman principles for application in extradition and rendition proceedings in this jurisdiction.

In response, counsel for the applicant points out that, to date, there has been no Irish case where the Tollman principles have been applied to an "abuse of process" argument about a request under the European Arrest Warrant Act, 2003. Indeed, he observes, the cases which have been concerned with an alleged "abuse of process" before the High Court and Supreme Court have involved successive European arrest warrant applications against the requested person for one reason or another. Such cases include *Minister for Justice and Law Reform v Tobin (No 2)* [2012] IESC 37 (Unreported, Supreme Court, 19th June 2012) and *Minister for Justice and Equality v. J.A.T.* [2014] IEHC 320 (Unreported, High Court, Edwards J, 9th May, 2014).

Counsel for the applicant submitted that there are sound reasons why the Irish courts have not considered a Tollman type argument in European arrest warrant applications. There is a general presumption contained in s.4A of the Act of 2003 that the issuing state will act in accordance with its international obligations to respect fundamental rights and freedoms. Furthermore, it was submitted the jurisprudence of the Supreme Court indicates that the High Court must trust the criminal justice system in the issuing state unless some fundamental defect and lack of fairness in procedures has been exposed: *Minister for Justice, Equality and Law Reform v. Brennan* [2007] 3 I.R. 732.

In *Minister for Justice, Equality and Law Reform v. Brennan* Murray C.J. (as he then was) stated (at paras. 35 – 38 inclusive):

> "35. There is no doubt that the operation of the process for surrender as envisaged by the Act of 2003, as amended, is subject to scrutiny as to whether in any particular case it conforms with constitutional norms and in particular due process so that, for example, the respondent in such an application has an opportunity to be duly heard in the proceedings.
>
> 36. However the argument of the respondent goes much further. He has contended that the sentencing provisions of the issuing state, in this case the United Kingdom, did not conform to the principles of Irish law, as constitutionally guaranteed, governing the sentencing of persons to imprisonment on conviction before our courts for a criminal offence.
>
> 37. The effect of such an argument is that an order for surrender under the Act of 2003, and indeed any order for extradition, ought to be refused if the manner in which a trial in the requesting state including the manner in which a penal sanction is imposed, does not conform to the exigencies of our Constitution as if such a trial or sentence were to take place in this country. That can hardly have been the intention of the Oireachtas when it adopted s. 37(1) of the Act of 2003 since it would inevitably have the effect of ensuring that most requests for surrender or extradition would have to be refused. And indeed if that were the intent of the Framework Decision, which the Act of 2003 implements, and other countries applied such a test from their own perspective, few, if any, would extradite to this country.
>
> 38. Indeed it may be said that generally extradition has always been subject to a proviso that an order for extradition, as with any order, should not be made if it would constitute a contravention of a provision of the Constitution. I am not aware of any authority for the principle that the extradition or surrender of a person to a foreign country would contravene the Constitution simply because their legal system and system of trial differed from ours as envisaged by the Constitution."

Counsel for the applicant further submitted that an earlier expression of the reluctance of the Supreme Court to become involved in an assessment of the laws and procedures of the issuing state is reflected in the decision of that Court in *Minister for Justice, Equality and Law Reform v. Altaravicius (No 1)* [2006] 3 I.R. 148. In that case, the Supreme Court refused an order for discovery of the domestic arrest warrant which underpinned the European arrest warrant Murray C.J. stated at paras. 41 – 42:

> "41. Although I have concluded that the presumption referred to in s. 4A is not relevant to the circumstances of this case it is undoubtedly the case that extradition arrangements, whatever their form, between this country and other states have been applied by the courts on the presumption that those states have complied or will comply in good faith with their obligations under the relevant treaty or statutory provisions governing those arrangements. Generally speaking extradition arrangements and the like are based on recipricocity and mutuality. Each country enters into such arrangements on the presumption that the other country will comply with their requirements and apply them in good faith. In Ellis v. O'Dea (No. 2) [1991] I.R. 251 at p. 262 McCarthy J. stated:-
>
> > "The making of the extradition arrangements presupposes that the Government and the Oireachtas are satisfied, amongst other things, that, an Irish citizen being extradited to the United Kingdom, as in this instance, or to any other state with which Ireland has such arrangements, will not have his constitutional rights impaired."
>
> In Wyatt v. McLoughlin [1974] I.R. 378 at p. 390 Finlay J. stated:-
>
> > "I am satisfied that I am entitled to have regard to the fact that an extradition Act is necessarily the consequence, … of an agreement between two sovereign states reposing confidence in each other, and I should not, in the first instance, suppose that the court and other authorities of the country by which extradition is sought are using a deceit so as to secure the apprehension of the plaintiff."
>
> I take this as a correct statement of the law and it is not affected by the decision of this court in that case on appeal. In fact an example of that approach is to be found in the statement of Walsh J. (at p. 395) in giving a majority judgment in the appeal in Wyatt v. McLoughlin when he stated:-
>
> > "Until there is some reason to believe to the contrary, it is to be assumed that a statement of facts such as the one appearing on the warrant executed in this case, or any warrant sent here for execution, is a truthful statement

of the facts of the case in respect of which the arrest is sought."

That approach is again underscored by the principles and objects recited in the preamble to the framework decision when it refers to mutual recognition of judicial decisions, judicial cooperation and a high level of confidence between member states.

42 That is not to say, as the judgments which I have cited and others have made clear, that the courts are prevented from examining applications for surrender with a view to being satisfied that relevant legislation has been complied with and personal rights which are guaranteed are not infringed. But they do so with a benefit of a presumption that the issuing state complies with its obligations. If there is cogent evidence to the contrary then an issue may arise. A mere assertion of non-compliance or the mere raising of a possibility of non-compliance, which is the case here, is not sufficient to dislodge the presumption of compliance. If that were the case it would in effect convert the presumption of compliance into a presumption of non-compliance."

Dealing with the application for discovery of the domestic warrant, Murray C.J. held at para. 47 that:

"In this particular case there was no evidence before the High Court which raised, as a matter of probability or otherwise, that the European arrest warrant may not have been duly issued or that its execution would give rise to a denial of constitutional rights."

Counsel for the applicant submitted that the reasoning in the cases of *Brennan* and *Altaravicius*, respectively, applies to the instant case and to the issues raised by the respondent. First, it is not the role of the High Court in a European arrest warrant application to provide a mechanism for judicially reviewing the laws and procedures of the issuing state. It is only where there is a fundamental defect in the justice system in the issuing state that the High Court should intervene and prohibit surrender. Secondly, the case of *Altaravicius* reinforces that proposition by noting that the High Court has to be satisfied that a European Arrest Warrant has been issued by the issuing state. The judgment in *Altaravicius* acknowledges that the Court is obliged to consider whether any personal rights of the requested person are infringed by the application itself, but it emphasises that the Court can only act on cogent evidence that establishes that a personal right is in fact infringed upon.

It was submitted that it would be inappropriate for this Honourable Court to engage in such an exercise unless there is evidence of some sort of flagrant denial of the precepts of fundamental fairness in the issuing state that would infringe the respondent's personal rights. This Court was referred in that regard to its own judgment in *Minister for Justice and Equality v. Shannon* [2012] IEHC 91(Unreported, High Court, Edwards J, 15th February, 2012) where it stated:

"The Court agrees with counsel for the applicant that the respondent's case under this heading is misconceived. It is fundamentally misconceived because it asks the Court to engage in a completely artificial, and indeed inappropriate, exercise and that is to exercise a supposed jurisdiction that is premised on the application of the Constitution to the laws of England and Wales and to pore over the issuing state's criminal justice process to determine, as the court is invited to do, that it differs in different respects from what is constitutionally mandated in this jurisdiction. In this Court's view it is clear from the Supreme Court judgments both in Minister for Justice, Equality and Law Reform v. Brennan and in Minister for Justice, Equality and Law Reform v. Stapleton that to do so would be entirely inappropriate."

Later on in the same judgment, this Court continued:

"The fact that the rules are different in the issuing state does not render them fundamentally defective. To establish that, the respondent would have to be in a position to demonstrate that the laws of the issuing state differ fundamentally from universally held notions of what constitutes fairness and fair procedures e.g. the presumption of innocence, the right to defend oneself at a trial, matters of that sort. The fact that the Law in England and Wales on the admissibility of evidence of bad character is merely different to the law in Ireland is insufficient in itself to establish a fundamental defect in the system of justice in the issuing state. The Irish position on the admissibility of such evidence is not universally, or even widely, considered to be fundamental to fairness and fair procedures."

Counsel for the applicant submitted that these authorities establish that the Irish Courts will not enter into an examination of the criminal procedure laws of the issuing state unless there is clear and cogent evidence of a fundamental defect in the system of justice in the issuing state, such that the requested person would not receive a fair trial, or would not have his fundamental rights respected, in that state. Accordingly, in counsel for the applicant's submission, there is no basis for applying the Tollman principles in this jurisdiction to European arrest warrant cases.

It was further submitted that, when one looks at the facts of the present case, there is no cogent evidence tending to show a fundamental defect in the system of justice of the issuing state. The height of the respondent's evidence is that the charge may have been changed against him. There is no suggestion that this is something that is illegal under Polish law, and it was submitted that the respondent's expert's silence on that matter is significant. Rather, all the Court has before it is commentary to the effect that there may have been an attempt to influence or pressurise the prosecutor in question. Counsel for the applicant characterises this as speculative, and says that no inference or implication to that effect arises from a proper reading of the letter dated the 14th June, 2010 from the District Court of Toruñ - 2nd Criminal Division to the District Prosecutor's Office.

Finally, counsel for the applicant contends that while the respondent has referred the Court to a significant amount of case law about abuse of process in domestic criminal proceedings where there is an alleged "manipulation" of statutory time periods, this jurisprudence is neither apposite nor relevant to the circumstances of the present case as the High Court is not engaged in a judicial review of the procedures and practices followed or adopted in the present case within the Polish criminal justice system.

The Court's decision on the abuse of process issue.

The Court agrees with counsel for the applicant that the starting point in this, and in every European arrest warrant case, is that there is a rebuttable non-statutory presumption that an issuing state and its authorities, including the issuing judicial authority, have acted in good faith in issuing and transmitting to the authorities in an executing state, including an executing judicial authority, a European arrest warrant seeking the rendition of the person who is the subject of that warrant for a legitimate purpose contemplated by Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (hereinafter "the Framework Decision"). That such a presumption exists is clear from the remarks of Murray C.J. in *Minister for Justice, Equality and Law Reform v. Altaravicius (No 1)* [2006] 3 I.R. 148, upon which the applicant has placed reliance, and which were quoted above. In addition, the aforementioned non-statutory presumption is complimented by an additional statutory presumption created by s.4A of the Act of 2003 as amended by s.69 of the Criminal Justice (Terrorist Offences) Act 2005, but which

is prospective only in effect. The s.4A presumption is also a rebuttable presumption.

However, the Court does not agree with counsel for the applicant that in order to rebut either the non-statutory presumption in respect of past conduct, or the statutory presumption in respect of future conduct, a respondent must necessarily be able to point to a fundamental defect in the system of justice in the issuing state. That is certainly required if an objection to surrender is based upon some perceived egregious circumstance deriving from a systemic or structural problem with the criminal justice system in the issuing state, such as was instanced by Murray C.J. in *Minister for Justice, Equality and Law Reform v. Brennan*. However, even where there is nothing systemically or structurally wrong with the system of justice in the issuing state, both the non-statutory presumption in respect of past conduct, and the statutory presumption in respect of future conduct, are capable of being rebutted by evidence of bad faith on the part of issuing state and its authorities, including the issuing judicial authority. For a requesting state to make an extradition or rendition request in bad faith would constitute an attempt to abuse the process of the courts of an executing state. While this will be true in every such case, it is recognisable as such with particular clarity within the European arrest warrant system in circumstances where the Framework Decision proclaims the system's mechanism to be based upon "a high level of confidence between member states", and that the principle of mutual recognition which underpins it represents the "cornerstone" of judicial co-operation.

While this Court has had to determine a number of cases in which there were objections to extradition or rendition on the basis of alleged abuses of the process, it has had to consider relatively few cases in which the alleged abuse of process was based upon actions said to have been motivated and carried out in bad faith by the authorities in an issuing state, be those authorities the police, the prosecutor, the issuing state's central authority or the issuing judicial authority. However, the Court did directly consider such issues in the related cases of *Minister for Justice and Equality v Brunell* [2014] IEHC (Unreported, High Court, Edwards J, 21st February 2014) and *Minister for Justice and Equality v McArdle* [2014] IEHC (Unreported, High Court, Edwards J, 21st February 2014). Amongst the issues that the Court was required to engage with and determine in both of these cases was a contention on the part of the respondents that the prosecutor in the issuing state, who was also the issuing judicial authority, having been advised of the terms of s. 21A of the Act of 2003 as amended by s.79 of the Criminal Justice (Terrorist Offences) Act 2005 by the Irish Central Authority, had acted in bad faith by strategically preferring charges against the respondents solely for the purpose of circumventing the said s. 21A, and that in doing so he had attempted to abuse the process of this court. While the Court ultimately found in both cases that there was no cogent evidence of bad faith on the part of the prosecutor, and consequently no attempt to abuse this Court's process, the Court recognised the existence of an inherent jurisdiction to protect its own process in the event of it being so satisfied.

This Court was not asked to consider and approve of the Tollman principles in the cases of *Brunell* and *McArdle*, respectively, and it has not been suggested that they have ever been considered by any differently constituted High Court in this jurisdiction, or indeed by the Supreme Court.

This Court has no difficulty in approving of the following propositions expounded at para. 84 of the judgment of Lord Phillips of Worth Matravers C.J., in *Tollman*:

> "No steps should be taken to investigate an alleged abuse of process unless the judge is satisfied that there is reason to believe that an abuse may have taken place. Where an allegation of abuse of process is made, the first step must be to insist on the conduct alleged to constitute the abuse being identified with particularity. The judge must then consider whether the conduct, if established, is capable of amounting to an abuse of process. If it is, he must next consider whether there are reasonable grounds for believing that such conduct may have occurred. If there are, then the judge should not accede to the request for extradition unless he has satisfied himself that such abuse has not occurred."

However, while the *Tollman* principles embrace much more, I do not consider that it is necessary to go beyond approving the passage quoted in the circumstances of the present case. It is unnecessary to do so because the Court is simply not satisfied that the conduct identified as constituting the alleged abuse of process in this case is in fact capable of amounting to an abuse of this Court's process. There is insufficient evidence of a cogent nature of anything unlawful or improper having been done, by either the District Prosecutor or by the District Court of Toruñ - 2nd Criminal Division. Equally, there is no cogent evidence of anything having been done in bad faith. The letter from the Court to the prosecutor dated the 14th June, 2010 merely requests an "opinion" from the prosecutor concerning whether a change of charge was possible. It offers no threat or inducement. It simply points out in a matter of fact way that the substitution of an Article 284 § 2 charge for the existing Article 284 § 1 charge "would result in a significant prolongation of the possible prosecution of the wanted person" and that this would address a "problem" which is "of particular importance for the effectiveness of the international search."

While such a communication might appear to be unorthodox or unusual when viewed through the prism of our common law legal system with its adversarial criminal procedure, it requires to be recognised that Poland has a fundamentally different civil legal system with an inquisitorial criminal procedure. In the latter type of system the relationship between court and prosecutor is different in many respects to that which obtains in our own legal system. There is no evidence that a communication of the type described is unorthodox or unusual or irregular in Poland The high water mark of the evidence adduced by the respondent is the "assumption" of his Polish lawyer that "there may have been (the Court's emphasis) an illegal attempt to influence and pressurise the prosecutor", who is independent of the court. In the Court's view counsel for the applicant is right in characterising this as nothing more than speculation. The Polish lawyer does not say in terms that what occurred was in fact illegal, or that undue pressure or influence was in fact brought to bear. He does not suggest that it is unheard of in Poland for a Court to seek the opinion of the prosecutor in a case before it concerning an issue of the type canvassed in the letter of the 14th June, 2010. The Polish lawyer merely speculates that because the prosecutor preferred a new charge shortly after receiving the court's letter that he might have been unduly influenced. However, the Court can not act on such speculation and there is no cogent evidence otherwise to support an inference of bad faith or illegality.

A further point that ought to be made is that the communication complained of, and the substitution of charges, predated the issuance of the European arrest warrant, and it all occurred within the issuing state. The point made by counsel for the applicant to the effect that this Court has no power or jurisdiction to judicially review decisions of the authorities in Poland is well made. If the respondent believes that he was subjected to an unfair procedure by the prosecutor before the District Court of Toruñ - 2nd Criminal Division, he must look to the authorities and/or the courts of the issuing state for his remedy. The respondent's Polish lawyer has confirmed that it is open to him to apply to the Ombudsman, alternatively to the General Prosecutor, in Poland requesting them to make a complaint in cassation on his behalf.

The Court is not disposed in the circumstances to uphold the objection based upon abuse of process.

Objection based upon delay as a stand alone ground
Unlike the (U.K.) Extradition Act 2003, the (Irish) Act of 2003 does not contain any provision permitting refusal of surrender on the

grounds of delay. Moreover, there is nothing in the Framework Decision that contemplates refusal of surrender on the grounds of delay *per se*.

In the present case, counsel for the respondent has sought to argue that the Court has an inherent jurisdiction to refuse surrender on the grounds of delay based on domestic jurisprudence which requires bench warrants, committal warrants and other domestic warrants of apprehension to be executed promptly and without delay.

In support of this argument the Court has been referred to passages from *Minister for Justice and Equality v Stapleton* [2008] 1 I.R. 669; *Minster for Justice Equality and Law Reform v Hall* [2009] IESC 40 (Unreported, Supreme Court, Denham J (nem diss) 7th May 2009); *Minister for Justice and Equality v Ostrowski* [2013] IESC 24, (Unreported, McKechnie J., Supreme Court, 15th May 2004); *Cunningham v. The Governor of Mountjoy Prison* [1987] ILRM 3; *Dutton v District Justice O'Donnell* [1989] I.R. 218; *Dalton v Governor of the Training Unit Glengarriff Parade* [1999] 1 ILRM 439; *Casey v. Governor of Cork Prison* [2000] IEHC 64 (Unreported, High Court, Herbert J, 13th September 2000); *Dunne v Director of Public Prosecutions* (Unreported, High Court, Carney J., 6th June, 1996); *Director of Public Prosecutions v Cormack and Farrell* [2009] 2 I.R. 208.

In this Court's assessment a European arrest warrant is not analogous to a bench warrant or a domestic arrest warrant. In the *Dunne* case, Carney J. stated:

> "A warrant of apprehension is a command issued to the Gardai by a Court established under the Constitution to bring a named person before that Court to be dealt with according to law. It is not a document which merely vests a discretion in the Guards to apprehend the person named in it; it is a command to arrest that person immediately and bring him or her before the Court which issued it. That it is a command to arrest rather than merely an authority or permission to arrest can be clearly seen from the terms of the warrant in the instant case. Addressing the Superintendent of An Garda Siochana at Crumlin Garda Station it says:
>
> > *"THIS IS TO COMMAND YOU to whom this warrant is addressed to arrest the said Shane Dunne of 26 Rutland Avenue, Dublin 12 and to bring him without any delay before me or another Justice or Peace Commissioner to be dealt with according to law."*

Carney J. added:

> "Members of An Garda Siochana to whom a warrant is issued for execution must be accountable to the Court which issued the warrant for its prompt execution and in default of a prisoner being expeditiously produced, have an explanation for his non-production and furnish an explanation of what steps were taken to bring about his apprehension."

A European arrest warrant, on the other hand, is not a command to anybody. It merely communicates a request. Specifically, it is the vehicle by means of which one participant state in the European arrest warrant system makes a rendition request to another participant member state in respect of a named individual. The system is predicated upon the principle of mutual recognition of judicial decisions and therefore contemplates that all substantive decisions in regard to any such a request, whether it be the issuing or the executing of a European arrest warrant, shall be taken by a competent judicial authority. Accordingly, the boilerplate text to be found at the commencement of every European arrest warrant states:

> "This warrant has been issued by a competent judicial authority. I ***request*** that the person mentioned below be arrested and surrendered for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order." (Emphasis added).

Moreover, a European arrest warrant issued by a competent judicial authority, and transmitted to Ireland, does not, in and of itself, authorise the arrest of the subject person or the restraint of that person's liberty. It requires to be presented to the High Court for endorsement in accordance with s. 13 of the Act of 2003, and only when it has been endorsed by the High Court is a member of An Garda Síochána authorised to arrest the subject person on foot of it. However, once a European arrest warrant is endorsed the Gardaí are not subject to a command to apprehend the subject person in the same way as they are in the case of a domestic warrant of apprehension. They are expected to make reasonable efforts to locate and apprehend the subject person so that this State may fulfil its international obligations under the Framework Decision, but no more than that. To borrow a phrase from counsel for the Director of Public Prosecutions in the *Dunne* case already referred to, they are not required to drop everything and engage in a national manhunt until the subject person is apprehended.

This is also the case in respect of domestic bench warrants. The position was succinctly stated by Kearns J. in *Director of Public Prosecutions v Cormack and Farrell* [2009] 2 IR 208 (at para. 42) when he stated:

> "In the context of delay therefore, the legal position in relation to the execution of bench warrants may be simply stated. There is an obligation on the Garda Siochana to execute same promptly or within a reasonable time. A failure to do so may amount to blameworthy prosecutorial delay. However, members of the gardai can not automatically be assumed to be in default where immediate execution of warrants does not occur, bearing in mind the multiple other duties and obligations requiring to be performed by them. They may encounter all sorts of difficulties when endeavouring to execute bench warrants which are brought about by deceit and false information given to them. Nonetheless, it must be the case that a point in time will arise where the continuing failure to execute a bench warrant will amount to blameworthy prosecutorial delay sufficient to trigger an enquiry whether an applicant's right to an expeditious trial has been compromised to such a degree as to warrant prohibition. It is impossible to be more specific as to what timeframe for the execution of a warrant should obtain other than to stress that warrants must be executed promptly or at least within a reasonable time."

However, the argument that the respondent is seeking to make in the present case is not based upon any identified prejudice to him. Rather he is arguing that the mere existence of culpable prosecutorial delay (if indeed any such delay does exist), is sufficient in and of itself, to justify the Court in not surrendering him. I cannot agree. The jurisprudence represented by *Dunne* and other cases is concerned with two things (i) the maintenance of public confidence in the Courts and the legal system – it would be inimical to the maintenance of such confidence that a court's orders or commands should be disregarded; and (ii) the protection and vindication of important personal rights enjoyed by the person who is the subject of a bench warrant, committal warrant or other domestic warrant of apprehension. In the case of a European arrest warrant there is no Court order amounting to a command to arrest. Rather there is a statutory power of arrest vested in a member of An Garda Siochana who is in possession of an endorsed European arrest warrant, and a corresponding duty to exercise that power where the subject person is located so as to allow the State to fulfill its international obligations. In so far as the protection of rights is concerned, the European arrest warrant system makes provision for that in s. 37 of the Act of 2003. If a respondent contends that he has suffered, or will suffer, prejudice to a specific right on account

of delay he can invoke s.37. Delay is frequently relied upon as a relevant factor in Article 8 based s. 37 objections. However, it may be that in respect of some alleged prejudices the respondent's obligation is to seek his remedy before the courts of the issuing state. Thus, in *Minister for Justice and Equality v Stapleton* [2008] 1 I.R. 669, the Supreme Court has held that, save in very exceptional cases, a claim that a respondent's right to a fair trial in the issuing state has been prejudiced by delay is a matter that ought properly to be ventilated before the Courts of the issuing state.

The Court is not disposed to uphold the objection based upon delay as a stand alone ground.

Article 8 based s. 37 objection.
The Court is also not disposed to uphold this objection. The evidence in the case does not remotely approach what is required to justify a finding that the proposed rendition of the respondent would be a disproportionate interference with his right to respect for family life. The Court will give its detailed reasons for this conclusion *ex tempore*.