Neutral Citation Number: [2012] IEHC 57

THE HIGH COURT

2010 161 EXT

IN THE MATTER OF THE EUROPEAN ARREST WARRANT ACT, 2003

AS AMENDED

BETWEEN/

THE MINISTER FOR JUSTICE AND LAW REFORM

Applicant

- AND -

JAROSLAW OSTROWSKI

Respondent

JUDGMENT of Mr. Justice Edwards delivered on the 8th day of February, 2012

1. Introduction:

The respondent is the subject of a European arrest warrant issued by the Republic of Poland on the 15th of April, 2010 in order that he might be prosecuted for the single offence particularised in the warrant. The offence in question relates to the alleged possession by the respondent of a very small quantity (0.72 grams) of marijuana. The warrant was endorsed for execution by the High Court in this jurisdiction on the 28th of April, 2010. The respondent was arrested at the Courts of Criminal Justice, Dublin, on the 4th of July, 2011 by Garda Niamh Brosnan and was brought before the High Court in the normal way pursuant to s. 13 of the European Arrest Warrant Act, 2003 (hereinafter referred to as "the Act of 2003"). At the s. 13 hearing the Court fixed a date for the purposes of s. 16 of the Act of 2003, and the respondent was admitted to bail pending the s. 16 hearing taking place. The matter was then adjourned from time to time until coming before the Court on the 8th of December, 2011 for the hearing of the s. 16 application.

The respondent does not consent to his surrender to the Republic of Poland. Accordingly, this Court is now being asked by the applicant to make an Order pursuant to s. 16 of the Act of 2003, as amended, directing that the respondent be surrendered to such person as is duly authorised by the issuing state to receive him. In the circumstances the Court must enquire whether it is appropriate to do so having regard to the terms of s. 16 of the 2003 Act.

The respondent, as is his entitlement, does not concede that any of the requirements of s. 16 aforesaid are satisfied. Accordingly, as no admissions have been made, the Court is put on inquiry as to whether all of the requirements of s. 16 of the 2003 Act, both controversial and uncontroversial, have been satisfied and this Court's jurisdiction to make an order directing that the respondent be surrendered is dependant upon a judicial finding that they have been so satisfied. In addition the Court is required to consider in the particular circumstances of this case two specific objections to the respondent's surrender, namely:

> (i) that the respondent's surrender ought to be refused in circumstances where the request for surrender involves conduct of a de minimis nature;
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> (ii) that the surrender of the respondent is prohibited by s. 37 of the Act of 2003 in that to surrender the respondent would cause an unjust and disproportionate interference with the respondent's constitutional rights and rights under EU law and rights under the European Convention on Human Rights.

2. Uncontroversial s. 16 Issues

The Court has received an affidavit of Detective Garda Niamh Brosnan, sworn on the 4th of August, 2011, and has also received and scrutinised a copy of the European Arrest Warrant in this case. Moreover the Court has also inspected the original European Arrest Warrant which is on the Court's file and which bears this Court's endorsement. The Court is satisfied following its consideration of this evidence and documentation that:-

> (a) the European arrest warrant was endorsed for execution in this State in accordance with s. 13 of the 2003 Act;
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> (b) the warrant was duly executed;
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> (c) the person who has been brought before the Court is the person in respect of whom the European arrest warrant was issued;
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> (d) the warrant is a prosecution type warrant relating to a single offence;
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> (e) the warrant is in the correct form;
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> (f) no question arises of the respondent having been tried in absentia (as the case is a prosecution case), and accordingly it is not a case in which the court would require an undertaking under s. 45 of the Act of 2003;

(f) correspondence can be demonstrated between the offence particularised in the warrant and the offence in Irish law of possession of a controlled drug, contrary to s. 3 of the Misuse of Drugs Act, 1977;

(g) as the offence in question under Polish law carries a potential maximum penalty of three years deprivation of liberty under Polish law, the requirements of s. 38(1)(a)(i) of the Act of 2003 with respect to minimum gravity are met.

In addition the Court is satisfied to note the existence of the European Arrest Warrant Act 2003 (Designated Member States) (No. 3) Order 2004, S.I. 206/2004 (hereinafter referred to as "the 2004 Designation Order"), and duly notes that by a combination of s 3(1) of the 2003 Act, and Article 2 of, and the Schedule to, the 2004 Designation Order, "Poland" (or more correctly the Republic of Poland) is designated for the purposes of the 2003 Act as being a state that has under its national law given effect to the Framework Decision (Council Framework Decision of 13th June, 2002 on the European Arrest Warrant and the Surrender Procedures between Member States (2002/584/JHA)).

3. The Evidence Adduced by the Respondent

The respondent has filed an affidavit sworn by him on the 17th of November, 2010. He makes the following averments as to matters of fact at paragraphs 4, 5, 9, 10, 11, 12, 13, 14, and 15 inclusive:

"4. My parents, my brother and sister and I moved to Ireland in 2004. Although I am currently unemployed I was fortunate enough to secure work as a chef in Limerick for a number of years. Upon our arrival, my family instantly liked Ireland and we made a collective decision to settle here. As a result, all of my immediate family are based here in Ireland in the Limerick area. Ireland has become our home and we all want to stay here for the long-term. I am very close to my family and I am concerned that I will have no family members left in Poland to turn to for assistance should I be returned to Poland. In addition, I do not have any address at which to stay or use for bail purposes in Poland because my parents have let out our family home in Poland.

5. The background to the alleged offence outlined in the European arrest warrant herein is as follows: In May 2006, I returned to Poland for a week-long holiday. It was at the end of this holiday that I was apprehended by a police woman who suspected me of being in possession of drugs. This police woman informed me that she would arrange to have the suspected drugs analysed in a laboratory. At all times, I co-operated with the police woman. I explained that I was simply visiting Poland and that I lived and worked in Ireland. I gave my address which at that time was 9 St John's Court, Brennan's Row, Limerick. The police woman then informed me that I was free to go and that I would be contacted later on. I lived at 9 St John's Court, Brennan's Row, Limerick until January 2009. I did not receive any correspondence in relation to the incident in Poland between May 2006 and January 2009. Furthermore, I arranged for any letters which arrived at 9 St John's Court, Brennan's Row, Limerick to be forwarded on to me at my subsequent address at 81 Oakfield, Fr Russell Road, Limerick but again I received no correspondence from the Polish authorities.

9. I had assumed that the matter was not proceeded with in Poland. I was not aware that I was the subject of any criminal prosecution for the offence which the European arrest warrant relates to until I was arrested on or about 27 October 2009 pursuant to the previous EAW proceedings herein entitled *Minister for Justice Equality and Law Reform v Ostrowski*, Record No: 2009/089 EXT.

10. I say and believe that I contested the previous EAW proceedings herein. I hired a Polish lawyer named Mr Tomasz Romanczyk to examine the EAW and to advise me in relation to it. During the course of his investigation and examination of the Polish documents referred to in that EAW my Polish lawyer discovered that there was an error in Part B of the EAW. It transpired that the domestic order outlined in Part B of the EAW, namely, a decision of the District Court in Jelenia Góra on the 17th of May 2007 related to another person, not me. My Irish lawyers brought this error to the attention of the relevant State authorities here. On or about 26 January 2010, the EAW was "corrected" by the issuing judicial authority. Ultimately, the EAW proceedings went to hearing before the High Court. On or about 19th of March 2010 Mr Justice Peart refused an order for my surrender." (Judgment exhibited)

"11. I say and believe that it was a source of tremendous relief to me when the High Court refused to order my surrender to Poland. Following the last set of extradition proceedings I returned to my life in Limerick. I did not expect to hear any more about the matter because the alleged offence was relatively minor given that it purportedly relates to 0.72 grammes of cannabis. I simply wanted to put the whole process behind me and get on with my life in Limerick. I focused on my family and my friends in Limerick. I also developed an interest in the Jehovah's Witness faith and began to attend meetings at Kingdom Hall in Old Mill near Newcastle West. The arrival of a new EAW, a second arrest and subsequent extradition proceedings involving multiple court appearances for the exact same offence has been a very stressful experience for me and has significantly interfered with the enjoyment of my personal and family life.

12. Given that there was an error in the last EAW issued against me I am suspicious of the entire EAW procedure and I require proof that the decision of the District Court in Jelenia Góra specified in the instant EAW is immediately enforceable against me. In addition, I am dissatisfied with the description of the penalties which apply upon conviction of the offence as outlined in the EAW. In this regard, I say and believe and am advised that as a matter of law a European arrest warrant may only be issued where the offence in question meets the test of minimum gravity i.e. the offence is punishable by imprisonment or detention for a maximum period of not less than 12 months. I am advised that under Article 62(3) of *Counteracting Drug Addiction Act* of the 29th of July 2005 a person found in possession of a low amount of drugs is subject to a fine, the penalty of limitation of liberty or deprivation of liberty for a term of up to one year." (English translation of Article 62(3) of *Counteracting Drug Addiction Act* of the 29th of July 2005 exhibited.)

13. I believe it is likely that I would benefit from the provision contained in Article 62(3) which deals with lower gravity offences because the charge against me involves just not .72 grammes of marijuana. In that case, I would have to be sentenced to the absolute maximum penalty under Polish law, namely, the sentence of 12 months in order to satisfy the requirement of minimum gravity.

14. In these circumstances the conduct alleged against me is so trivial and the likelihood that I would receive a sentence of 12 months is so remote that it will be disproportionate to surrender me to the issuing state.

> 15. In addition, I will suffer significant adverse consequences if I am surrendered to Poland. Firstly, I will face a deprivation of my right to liberty. Secondly, my right to private and family life will be disproportionately infringed as all of my family are now based in Ireland and there is a substantial risk that I will become destitute and homeless upon my release from custody in Poland."

4. The Previous Proceedings

It is common case that the European arrest warrant currently before the Court is a second European arrest warrant issued by the issuing judicial authority for the same offence, and in circumstances where the High Court had refused to surrender the respondent on foot of an earlier European arrest warrant dated the 7th of January, 2009. It is clear from the judgment in *Minister for Justice Equality and Law Reform v. Ostrowski* [2010] IEHC 200 (unreported, High Court, Peart J., 19th March 2010), in which Peart J. sets out his reasons for refusing surrender on foot of the first warrant, that that warrant had contained patent errors. In that case the respondent had also raised the same issues concerning the *de minimus* nature of the offence and the alleged disproportionality of the proposal to surrender him that he raises in the present proceedings. However, the Court did not consider it necessary to rule upon these objections in circumstances where it was not satisfied in any event to surrender the respondent on account of the errors contained in the warrant that was before it.

In so ruling Peart J. remarked at the end of his judgment:-

> "The other point of objection raised by the respondent is that given the very small quantity of drugs behind this charge of possession, some de minimis exception should be considered to be available to the respondent, and that it would be unjust and disproportionate to order his surrender him to Poland, given the fact that while an offence under Article 62.1 of the Polish Penal Code has the possibility of a sentence of three years imprisonment, there is no reality in the idea that possession of such a small quantity as 0.72 grammes of marijuana could lead to a sentence of even twelve months imprisonment, if indeed any sentence would be imposed at all.
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> The question whether such proportionality type of argument should avail this respondent is something which it is unnecessary to decide on the present application. In the event that the Polish judicial authority considers it necessary to have another warrant endorsed which does not contain the errors referred to in this application, then this question can be addressed on any further application for the respondent's surrender."

Surrender on foot of the present (second) warrant was initially specifically objected to on grounds additional to those set out earlier in this judgment including, inter alia, an objection that the surrender of the respondent was prohibited by the principle of *estoppel* and/or *res judicata*. That objection is no longer being proceeded with and it is now accepted on behalf of the respondent that there was no legal inhibition to the issuing state "coming again" so to speak, and issuing the second European arrest warrant with which this Court is now concerned. The jurisprudence of the Supreme Court in cases such as *Minister for Justice, Equality and Law Reform v. Ó Fallúin/Fallon* [2010] IESC 37 (unreported, Supreme Court, Finnegan J., 19th May 2010) and, more recently, *Minister for Justice, Equality and Law Reform v Koncis* [2011] IESC 37 (unreported, Supreme Court, Denham C.J., 29th July 2011) puts their entitlement to do that beyond doubt.

In the *Ó Fallúin/Fallon* case Finnegan J., with whom the other members of the Court agreed, stated:-

> "It is, of course, part of our jurisprudence that there should not be repeated attempts to procure a conviction: E.S. v. Judges of the Court Circuit Court and the Director of Public Prosecutions [2008] I.E.S.C. 37. However proceedings under the European Arrest Warrant Acts are not criminal proceedings and the same principles will not apply. In the present case the attempted extradition was discontinued without any decision being made. Again the European arrest warrant of the 21st June 2004 resulted in an order for the appellant's surrender: all issues of law raised by him were determined against him and an order for his surrender made. His appeal against the order of the High Court was withdrawn. His surrender on foot of that European arrest warrant did not occur solely because of the failure to effect his surrender within the times stipulated in the Acts: again there was no decision on any issue which could create an estoppel in the appellant's favour or give rise to res judicata. Counsel for the appellant did not draw to the court's attention any issue either in the three judgments delivered in the High Court on the European arrest warrant of the 21st June 2004 or in the judgment in the Supreme Court on the application under Article 40.4.2 which could conceivably give rise to an estoppel or issues of res judicata. I am satisfied that neither estoppel nor res judicata arises."

Moreover, in her judgment in the Koncis case, Denham C.J (nem diss) stated at para 33:-

> "While there is no express provision in the European Arrest Warrant Act, 2003, as amended, referred to as "the Act of 2003", for a second warrant to "go again", it is not expressly excluded. I am of the opinion that as long as the procedures are in accordance with the Act of 2003 and that fair procedures have been followed that there is no reason why a second warrant on the same offences could not be issued, it would depend on all the circumstances of the case."

5. Submissions on behalf of the Respondent

Counsel for the respondent, Ms. McGillicuddy B.L., in opening her oral submissions to the Court, immediately referred to the passage just quoted from the judgment of Denham *C.J. in Koncis* and sought to emphasise the caveat therein that "it would depend on all the circumstances of the case." While accepting the general entitlement of an issuing state to issue a second European arrest warrant in circumstances where surrender has already been refused on the basis of having "mended their hand", counsel for the respondent submitted, correctly in this Court's view, that the Court must, in considering whether to surrender the respondent on foot of a second warrant by means of an issuing state seeks to come again, have regard to all the circumstances of the case, including the fact that the issuing State is seeking to come again. She submitted that before the Court can order the surrender of the respondent it must, having taken account of all of the relevant circumstances, be satisfied that to do so would be proportionate to the legitimate aim being pursued by the issuing State.

Counsel urged upon the Court that in all the circumstances of this particular case the proposed interference with her client's rights, and in particular his right to liberty, his right to enjoy physical and mental health, and his right to respect for family life, would be disproportionate to any legitimate aim being pursued by the issuing State and that, accordingly, the Court should refuse to surrender the respondent. She pointed to the facts as deposed to by the respondent in his affidavit. He was first arrested on the 19th of October, 2009 in respect of the first warrant. He was arrested in Limerick, detained overnight and brought to the High Court the following day. He was admitted to bail at that stage and the case progressed in the ordinary way. He retained a Polish lawyer who detected some defects in the warrant which lead ultimately to this Court refusing to surrender the respondent on foot of the first

warrant. The Court delivered its judgment on the 19th of March, 2010. Counsel places particular reliance on the remarks of Peart J. to the effect that, in the event of the issuing State seeking to come again on foot of a second warrant, the Court could consider at that stage the arguments based on the de minimus nature of the offence and the alleged disproportionality, that he had found unnecessary to consider. In the instant case the respondent's residential address was available to the authorities in the issuing State should they have wished to contact him after surrender on the first warrant was refused. They did not attempt to contact him or to make him aware that they were contemplating issuing a new European arrest warrant. While counsel accepts that generally speaking that would not be regarded as a practical or realistic step for the authorities in an issuing State to take, she urges that it was something that ought to have been contemplated by them in the particular circumstances of this case. In that regard she points to, and relies upon, the averments contained in paragraphs 5 and 9 of the respondent's affidavit. It was urged that they could also have summonsed him and, in the event that he did not turn up, they could have proceeded against him in *absentia.*

Counsel for the respondent has urged upon the Court that her client comes before the Court with very clean hands. He has put forward a version of events that is not contradicted in any way. He co-operated in Poland and he did not hear anything more about the matter until he was arrested on foot of a European arrest warrant. When he was successful in opposing his surrender on foot of that warrant the Polish authorities made no attempt to contact him and less than a month after Peart J. delivered his judgment they issued the second European arrest warrant with which this Court is now concerned. That second warrant was transmitted very quickly to this jurisdiction and was endorsed for execution here on the 28th of April, 2010. For reasons which are not explained, the respondent whose exact whereabouts were known since the first EAW proceedings, was not arrested in execution of the second warrant until early July 2011.

Counsel has urged that there is no evidence before the Court to suggest that the issuing State gave the issue of proportionality any consideration at all before deciding to issue a second European arrest warrant. She submitted that there is a growing awareness among E.U. member States that there is a need for member States to conduct a proportionality check in cases such as the present, and she stated that this awareness is reflected in a European Commission Report published in April 2011. The document to which counsel was alluding is a Report from the Commission to the European Parliament and the Council on the implementation since 2007 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (COM/2011/175, Final, 11 April 2011), in which it is stated at p. 7, inter alia, that:

> "Confidence in the application of the EAW has been undermined by the systematic issue of EAWs for the surrender of persons sought in respect of often very minor offences. In this context, discussions in Council arising from the conclusions of the Member State evaluations show that there is general agreement among Member States that a proportionality check is necessary to prevent EAWs from being issued for offences which, although they fall within the scope of Article 2(1) of the Council Framework Decision on the EAW, are not serious enough to justify the measures and cooperation which the execution of an EAW requires. Several aspects should be considered before issuing the EAW including the seriousness of the offence, the length of the sentence, the existence of an alternative approach that would be less onerous for both the person sought and the executing authority and a cost/benefit analysis of the execution of the EAW. There is a disproportionate effect on the liberty and freedom of requested persons when EAWs are issued concerning cases for which (pre-trial) detention would otherwise be felt inappropriate. In addition, an overload of such requests may be costly for the executing Member States. It might also lead to a situation in which the executing judicial authorities (as opposed to the issuing authorities) feel inclined to apply a proportionality test, thus introducing a ground for refusal that is not in conformity with the Council Framework Decision or with the principle of mutual recognition on which the measure is based.
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> In the follow up to the recommendations in the final report on the fourth round of mutual evaluations, the Council included an amendment to the handbook on the EAW in respect of proportionality. This report was adopted by Council in June 2010. The amended handbook now sets out the factors to be assessed when issuing an EAW and possible alternatives to be considered before issuing an EAW. If the amended handbook is followed by Member States, it will provide a basis for some consistency in the manner in which a proportionality check is applied. The Commission endorses this approach and urges Member States to take positive steps to ensure that practitioners use the amended handbook (in conjunction with their respective statutory provisions, if any) as the guideline for the manner in which a proportionality test should be applied.
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> The Commission is of the view that against the background of general agreement in Council on the merits of a proportionality test and the undermining of confidence in the EAW system where a proportionality test is not applied, it is essential that all Member States apply a proportionality test, including those jurisdictions where prosecution is mandatory. The Council Framework Decision is a tool for Member States to use when they consider it necessary to have a person present on their territory in order to prosecute that person or to enforce a custodial sanction upon that person. The agreed handbook provides guidance on the uniform implementation of this tool. Article 2(1) of the Council Framework Decision provides that 'A European arrest warrant <u>may</u> be issued for acts…' It is within this discretionary area that issues addressed in the handbook (including the operation of a proportionality test) are discussed and agreed upon. To ensure the mutual trust that is essential to the continued operation of the EAW, judicial authorities in all Member States must respect the agreements reached in this discretionary area."

While such a report enjoys no specific legal standing in a case such as the present, and indeed the Court cannot take it specifically into account as evidence because of the hearsay nature of it and the fact that it has not been formally exhibited in some affidavit, it is nonetheless appropriate to remark that the proposition advanced by counsel for the respondent, namely that it is essential that all member states apply a proportionality test before issuing a European arrest warrant, is hardly a revolutionary proposition in circumstances where the principle of proportionality (and likewise subsidiarity) is well established as a general principle of E.U. law. It has long been recognised that proportionality can be used to challenge E.U. action itself, and also the legality of state action which falls within the sphere of application of E.U. law.

Counsel further submitted that as part of its proportionality check the issuing judicial authority should have considered the seriousness of the offence, the length of any possible sentence, and whether the case might be dealt with by means of an alternative approach that would be less onerous, less burdensome and less expensive for all concerned. She contends that there is no evidence that any of those things were taken into account by the issuing judicial authority before issuing the second warrant in this case.

It was further contended that in circumstances where the issuing judicial authority does not appear to have considered proportionality, this Court should now do so.

In that regard, counsel relied upon a number of cases including the well known judgment of Peart J. in *Minister for Justice, Equality and Law Reform v. Gorman* [2010] 3 I.R. 583; the decision of the High Court of England and Wales, Queens Bench Division, in *Julian*

Assange v. Swedish Prosecution Authority [2011] EWHC 2849 (Admin); and the decision of the Higher Regional Court in Stuttgart, Germany in General Prosecution Service v. C (Decision of February 25, 2010 – 1 Ausl. (24) 1246/09) which is reported on in some detail, and then commented upon, within the article entitled *"Proportionality and the European Arrest Warrant"* [2010] Crim L.R. 474, co-authored by Judge Professor Joachim Vogel of the University of Tubingen and Professor J.R Spencer of the University of Cambridge.

The judgments in *Julian Assange v. Swedish Prosecution Authority and in General Prosecution Service v. C,* respectively, emanating as they do from foreign courts, are not binding in any way on this Court and can only be of persuasive influence. Moreover, it is most unusual in this jurisdiction for the Court to be referred to the judgment of a Court from a civil law jurisdiction, not least because of the absence of any jurisprudence within civil law jurisdictions based upon legal precedent such as exists in common law jurisdictions. However, there is nothing in principle to prevent this Court from considering the judgment of a German Court and attaching such persuasive value to it as seems appropriate.

It is appropriate to review the cases relied upon by counsel for the respondent in a little detail.

The decision in *Minister for Justice, Equality and Law Reform v. Gorman* is, as the Court has already stated, well known and, to the best of this Court's knowledge, it represents the only case to date, and certainly the only one in which there is a reserved judgment, in which an Irish Court has refused surrender on proportionality grounds. While the case turned on its own unique facts, it is an important judgment because it gives judicial recognition to the principle that an Irish Court can concern itself in an appropriate case with issues of proportionality in considering whether to surrender a respondent on foot of a European arrest warrant. In *Gorman*, it was suggested that the proposed surrender would interfere with the respondent's right to respect for his private/family life under Article 8 of the European Convention on Human Rights, and Peart J., having considered various decisions of the European Court of Human Rights to which he had been referred, formulated a four part test to be applied in such cases. He said at p. 609:-

> "It seems to me to follow that for the purposes of the present application for the respondent's surrender, this Court is required to consider the following questions in arriving at a conclusion as to whether an order for the surrender of the respondent to the United Kingdom would constitute a breach of this State's obligations under the Convention or its protocols: (1) does surrender constitute an interference with the respondent's private/family right; (2) if so, is that interference one that is in accordance with law; (3) if further so, is the interference, by surrender of the respondent, in pursuit of a legitimate aim or objective; (4) and further if so, whether that interference is necessary in a democratic society (the latter meaning that it is justified by a pressing social need) and proportionate to the legitimate aim pursued."

The case of *Julian Assange v. Swedish Prosecution Authority* enjoys a certain popular notoriety in as much as Mr. Assange is the operator of the controversial website known as "Wikileaks". Mr. Assange, a UK resident, visited Sweden in 2010 to give a lecture and while there is alleged to have had unlawful sexual relations with two women. A police investigation ensued and a decision was made to initiate a prosecution against Mr. Assange. However, as Mr. Assange had left Sweden and returned to the U.K. before the investigating magistrate had interviewed him, the Swedish Prosecution Authority successfully applied for the issue of a European arrest warrant seeking his surrender for purposes of prosecuting him for the offences in question. Mr. Assange objected unsuccessfully to his surrender on various grounds at a hearing before a Senior District Judge. He then appealed against the Senior District Judge's order to the Queens Bench Division of High Court, which convened a two judge divisional court to hear the appeal. The judgment of the Court was delivered by the President of the Queens Bench Division, Sir John Thomas, on the 2nd of November, 2011. One of the grounds of appeal was based upon proportionality and the President, in the course of his judgment, dealt with that issue at paragraphs 155 to 160) as follows:-

> "155. Mr Assange submitted that even if under the EAW he was technically a person accused of offences, it was disproportionate to seek his surrender under the EAW. That was because, as he had to be questioned before a decision was made on prosecution, he had offered to be questioned over a video link. It would therefore have been proportionate to question him in that way and have reached a decision on whether to charge on before issuing the EAW.
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> 156. It is clear from the report of the European Commission on the Implementation of the Framework Decision (COM(2011)175, Final, 11 April 2011), that there was general agreement between the member states, as a result of the use of the EAW for minor offences technically within the Framework Decision, that a proportionality check was necessary before a judicial authority in a Member State issued an EAW. This statement was a strong reminder to judicial authorities in a Member State contemplating the issue of an EAW of the need to ensure that the EAW was not used for minor offences. It is not a legal requirement. There is, however, almost universal agreement among prosecutors and judges across Europe that this reminder to conduct a proportionality check should be heeded before an EAW is issued.
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> 157. It was submitted on behalf of Mr Assange that proportionality was also a requirement of the law on the following basis. The Framework Decision as an EU instrument is subject to the principle of proportionality; reliance was placed on the effect of the Charter of Fundamental Rights, *R(NS) v SSHD* [2010] EWCA Civ 990 and the decision of the Higher Regional Court in *Stuttgart in General Public Prosecution Service* v C (25 February 2010), as reported at [2010] Crim LR 474 by Professors Vogel and Spencer. We will assume that Mr Assange's argument that an EAW can only be used where proportionate, complex as it is, is well founded without lengthening the judgment still further to express a view on it.
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> 158. However, the argument fails on the facts. First, in this case the challenge to the issue of the warrant for the arrest of Mr Assange failed before the Court of Appeal of Svea. In those circumstances, taking into account the respect this court should accord the decision of the Court of Appeal of Svea in relation to proceedings governed by Swedish procedural law, we do not consider the decision to issue the EAW could be said to be disproportionate
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> 159. Second and in any event, this is self-evidently not a case relating to a trivial offence, but to serious sexual offences. Assuming proportionality is a requirement, it is difficult to see what real scope there is for the argument in circumstances where a Swedish Court of Appeal has taken the view, as part of Swedish procedure, that an arrest is necessary.
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> 160. We would add that although some criticism was made of Ms Ny in this case, it is difficult to say, irrespective of the decision of the Court of Appeal of Svea, that her failure to take up the offer of a video link for questioning was so unreasonable as to make it disproportionate to seek Mr Assange's surrender, given all the other matters raised by

> Mr Assange in the course of proceedings before the Senior District Judge. The prosecutor must be entitled to seek to apply the provisions of Swedish law to the procedure once it has been determined that Mr Assange is an accused and is required for the purposes of prosecution. Under the law of Sweden the final stage occurs shortly before trial. Those procedural provisions must be respected by us given the mutual recognition and confidence required by the Framework Decision; to do otherwise would be to undermine the effectiveness of the principles on which the Framework Decision is based. In any event, we were far from persuaded that other procedures suggested on behalf of Mr Assange would have proved practicable or would not have been the subject of lengthy dispute."

The case of *General Prosecution Service v. C* concerned a Liberian national who lived at various times in Germany and in Spain. In 2009 he was charged by the Spanish authorities with a drugs offence involving the attempted sale of a bag containing 0.199gram of cocaine (with a purity of 51.13%) under Article 368 of the Spanish Criminal Code. At the time that he was charged by the Spanish authorities he was in fact in prison in Germany serving a sentence for non-payment of fines. Accordingly, the Audiencia Provincial de Barcelona/Spain issued a European arrest warrant against him. Mr C contested his surrender before the Courts in Germany on grounds, *inter alia,* that it would represent a disproportionate interference with his rights to surrender him in all the circumstances of the case. He was unsuccessful. However, in its judgment in the C case the Higher Regional Court in Stuttgart made it clear that under German constitutional law, a German Court's decision to issue a domestic arrest warrant in execution of a European arrest warrant must satisfy a proportionality test. It then went on to say:

> "3. The extradition arrest is also proportional under German constitutional law.
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> (a) In its decision of November 18, 2009 – 1 Ausl. 1302/99, the court refused, due to lack of proportionality, to issue an arrest warrant against a person wanted under a Lithuanian European arrest warrant. The wanted person did not have any known criminal record and was charged with possession of 1.435 grams methamphetamine without commercial purposes -- possibly for consumption. The maximum sentence -- certainly not applicable in the case -- was imprisonment for two years. In that case, it seemed disproportionate to arrest and extradite the wanted person, even after taking full account of the legitimate prosecution interest of the issuing Member State.
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> (b) The present case must be distinguished and gives the court an opportunity to determine the effects of the proportionality principle under German constitutional law on the execution of European arrest warrants through German arrest warrants.
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> aa) Article 12 first sentence FD EAW stipulates:
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> "When a person is arrested on the basis of a European arrest warrant, the executing judicial authority shall take a decision on whether the requested person should remain in detention, in accordance with the law of the executing Member State." (Emphasis added by the court.)

It follows that the extradition arrest must be in full conformity with the executing member state's extradition arrest law. The FD EAW does not modify that legal regime. However, the principle of mutual recognition requires Member States to shape their extradition arrest law in a way that enables them also to execute European arrest warrants through corresponding national arrest warrants.

In Germany, extradition arrest is regulated by §§15 et seq. IRG [IRG is an acronym for *Gesetz ueber die internationale Rechtshilfe in Strafsachen* or, in English, the German Act on International Mutual Assistance in Criminal Matters.] These fees provisions allow for mutual recognition because extradition arrest may be ordered unless the extradition would be clearly inadmissible. Therefore, German courts must not investigate whether there is a sufficient cause to suspect the requested person of having committed the offence; rather, German courts only examine whether the execution of the respective European arrest warrant is admissible and if so obligatory, or whether there are grounds for refusal recognised by the FD EAW as transposed into German law. Extradition arrest may even be ordered in doubtful cases.

> bb) A German arrest order is a sovereign act by a German state authority and remains such an act even if it is issued in execution of a European arrest warrant. Therefore, the order must be fully in conformity not only with §§15 et seq. IRG, but also with German constitutional law. It follows that the principle of proportionality which forms part of the rule of law as recognised by the German Federal Constitutional Court fully applies to German extradition arrest orders even if issued in execution of the European arrest warrant. Since German constitutional law enjoys automatic priority over "simple" legislation, it does not matter that the IRG does not explicitly mention a proportionality check of extradition arrest warrants.

The proportionality check of a German extradition arrest warrant must not be confused with a proportionality check of the underlying European arrest warrant itself. Many experts hold that, due to the principle of mutual recognition, it is not possible for the executing member state to check the proportionality of a European arrest warrant. However, it may be noted that the Council of the European Union assesses the problem of disproportional European arrest warrants to be a "priority".

A proportionality check of a German extradition arrest warrant must include -- at the very least -- the following aspects of the specific case at hand: the wanted person's rights to liberty and safety; the cost and effort of a formal extradition proceeding including extradition arrest; the significance of the charge; the severity of the possible penalty. The interest of the issuing member state to prosecute -- as expressed in the European arrest warrant -- must be recognised within the limits of art. 1 (3) FD EAW, § 73 second sentence IRG. Finally, reasonable alternative options for the issuing member state must be considered, such as the wanted person's formal summoning and/or questioning and/or in absentia proceedings insofar as they conform to European standards and can be executed in case of a conviction.

In particular, extradition arrest can be disproportionate if the charges relate to petty offences and the expected sanctions are disproportionate to arrest and extradition both as a burden for the requested person and for the executing Member State. The court, but also the General Public Prosecution Service and various Member States have long noticed that a considerable number of European arrest warrants relate to petty offences. The major purpose of such European arrest warrants seems to be to enforce the wanted person's presence in the issuing Member State's trial courts, in particular where the issuing Member State's law does not provide for in absentia proceedings. However, the requested person's presence during a trial in the prosecuting member states courts may also be enforced by a formal summons through mutual legal assistance; such a summons may include a warning as to the legal consequences of culpable disregard of the summons. Politically speaking, it might seem regrettable that there is, for the time being, no proper "European summons"; however, the gap must not be filled by simply issuing European arrest warrants.

cc) Given the specific case at hand, the court does not deem extradition arrest to be disproportionate. At the moment, Mr. C is

serving a substitute prison sentence until March 12, 2010. Additional extradition arrest would not constitute a major burden for him because the court and the General Public Prosecution Service will expeditiously decide on the merits of the extradition. Therefore, costs and efforts of a formal extradition proceeding can be kept within reasonable limits. As mentioned above at II.1.c., the alleged offence is -- taking all relevant aspects of the case into account -- not a petty one. If convicted, Mr C must expect a considerable prison sentence. The court recognises and accepts the Spanish prosecution interests as expressed in the European arrest warrant. Spain does not have reasonable alternative options; in particular, a formal summons will presumably not suffice to ensure Mr C's presence at the Spanish trial, and in absentia proceedings are not possible under applicable Spanish law, nor would execution of a possible prison sentence be ensured."

6. Submissions on behalf of the Applicant
Counsel for the applicant, Ms Cathleen Noctor B.L., has submitted that deprivation of liberty and interference with family life are normal and usual consequences of an order for surrender and that there is nothing exceptional, unusual or disproportionate in the respondent potentially having to face those consequences.

Counsel submitted further that counsel for the respondent was effectively asking the Court to speculate as to what sentence the respondent might receive before the Polish Courts in the event of his being convicted, and in doing so to take into account potential mitigating circumstances such as the quantity of drugs, the fact that he was on holidays, his co-operation with the authorities, the fact that his family is here, the fact that he was working and so on. In counsel's submission it would not be appropriate for the Court to approach the matter in that way.

In response to the submission that the issuing state could have summonsed the respondent and convicted him in his absence if he failed to turn up, counsel for the applicant submitted that if that had happened the applicant would undoubtedly have been met with the response that, as the respondent was convicted in his absence, a s. 45 undertaking would be required. The court enquired of counsel as to what would have been the position if he had been tried in absentia and such trial had resulted in the outcome of him receiving a non-custodial sentence, such as a fine. Counsel was asked whether, in that event, the authorities could not simply have written to him notifying him of the fine. Further, assuming that had been done, and that he duly paid the fine, would that not be an end of the matter? Counsel replied that it would be inappropriate for the Court to base its decision on speculation as to such matters.

In relation to proportionality, counsel for the applicant drew the Court's attention to Farrell and O'Hanrahan, *The European Arrest Warrant (*Dublin: Clarus Press, 20111) at p.177 under the heading "principle of proportionality". While it does state that the Council of the European Union has in the past expressed concern at the use of the European arrest warrant for what are patently minor offences, and that it would appear that the Council is of the view that the deployment of the European arrest warrant in such circumstances breaches the principle of proportionality, significantly it did not suggest that the minor nature of the underlying crimes would give rise to a basis for refusing surrender in an individual case. Rather the Council went on suggest that the issue of proportionality should be considered by the issuing state. The implication was that it would be undesirable for the requested state to sit in judgment on what was or was not to be considered a disproportionate use of state power.

7. The Court's Decision
In the Court's view the issue of proportionality arises for consideration at two distinct points in the European arrest warrant procedure. First, it arises when an issuing judicial authority is considering whether or not to issue a European arrest warrant. Secondly, it arises when an executing judicial authority is considering whether or not to surrender a person who is the subject of a European arrest warrant to the issuing State. These are separate and distinct steps in the process and ought not to be conflated.

The Court considers that counsel for the respondent is correct in suggesting that the issuing judicial authority in this case was obliged to conduct a proportionality check before issuing the second European arrest warrant in this case. The obligation in question is both a political and a legal obligation. It is a political obligation because, as has been pointed out by the EU Commission and the EU Council, and by various other parties, including judges and academic commentators, the view is widely held that the European arrest system was never intended to be used for trivial or petty offences, and to do so is contrary to the spirit of the Framework Decision. Perhaps more importantly, it is also a legal obligation because the Framework Decision creating the European arrest warrant is part of the whole corpus of EU law, in application of which member states must have regard to the core principles of proportionality and subsidiarity. Indeed, this is reflected in Recital (7) to the Framework Decision.

All of that having been said, however, the Court is also of the view that it is not open to the respondent in seeking to oppose his surrender on foot of the second European arrest warrant in this case to invite this Court, as the executing judicial authority, to conclude that the issuing judicial authority failed to carry out the required proportionality check before issuing that warrant. The twin pillars on which the European arrest warrant system is built are the principles of mutual trust and confidence between members states on the one hand, and judicial co-operation and mutual recognition of judicial actions on the other hand. As regards the second of these two pillars, Recital (6) to the Framework Decision records that the European Council has characterised the principle of mutual recognition as the "cornerstone" of judicial cooperation.

This Court must in recognition of these twin pillars proceed on the presumption that the issuing judicial authority has acted in good faith and in accordance with its legal obligations. While such a presumption is always capable of being rebutted, at least in theory, in practice it will almost always be impossible for a respondent to adduce evidence of sufficient cogency to rebut the presumption that an issuing judicial authority had due regard to the principle of proportionality before issuing a European arrest warrant; for the very reason that it is impossible to know exactly what was in the mind of another person and such circumstantial evidence as might exist would almost never be sufficient in itself to justify the drawing of what would be a very far reaching inference to the contrary. More fundamentally, to invite this Court to in effect review the decision of the issuing judicial authority to issue a European arrest warrant in circumstances where the Framework Decision mandates mutual recognition of judicial decisions is, it seems to this Court, both inappropriate and contrary to the whole spirit of the Framework Decision.

That, however, is not the end of the matter. Although the Court must presume, and act upon the presumption, that the issuing judicial authority acted lawfully and had due regard to the principle of proportionality in deciding to issue the European arrest warrant, this Court, as the executing judicial authority, is separately entitled, and indeed obliged, to consider the issue of proportionality afresh when the matter comes before it. However, it must do so not from the perspective of whether or not the issuing of the European arrest warrant was proportionate in all the circumstances of the case, but rather whether the execution of that warrant, and in particular any decision to surrender the respondent, would at that point be proportionate in all the circumstances of the case.

The circumstances to be taken into account would include the matters likely to have been taken into account by the issuing judicial authority and any new or additional circumstances arising since the warrant was issued pertinent to the particular situation of the

respondent, and in particular circumstances referable to his fundamental rights under the Constitution, the Charter of Fundamental Rights and the European Convention on Human Rights. The circumstances of each case will inevitably be unique to a greater or lesser extent, but the Court agrees that the matters identified by the Higher Regional Court in *Stuttgart in General Prosecution Service v. C* case are likely to be amongst those that the Court would take into account, *viz "the wanted person's rights to liberty and safety; the cost and effort of a formal extradition proceeding including extradition arrest; the significance of the charge; the severity of the possible penalty",* except that for "the cost and effort of a formal extradition proceeding including extradition arrest" the Court would substitute "the cost and burden to those concerned of effecting a surrender in the particular case". Regard would also have to be had to the prosecution interests of the issuing State, any likely interference with fundamental rights of the respondent in addition to the rights to liberty and safety specifically mentioned, and any extraneous circumstances adding to the burden of the respondent, such as delay, unusual particular features of the procedure giving rise to anxiety or adding to the respondent's uncertainty as to his fate e.g., a second or subsequent warrant where surrender has already been refused, and any other relevant matters.

The Court has carefully considered the circumstances of the present case. The first thing to be said is that the Court rejects without hesitation the argument based solely on the so-called *de minimus* nature of the offence. The fact of the matter is that the Framework Decision, and the Act of 2003 implementing that instrument in this jurisdiction, sets the bar with respect to minimum gravity. In the present case the respondent is wanted for prosecution. In such circumstances, and where the issuing judicial authority has not sought to invoke the provisions of paragraph 2 of Article 2 of the Framework Decision, the minimum gravity threshold is that the offence should be punishable under the law of the issuing state by imprisonment or detention for a maximum period of not less than 12 months (Article 2(1) of the Framework Decision reflected in s. 38(1)(a)(i) of the Act of 2003). The warrant in this case makes it clear that the offence with which the respondent is charged potentially carries up to three years imprisonment. In those circumstances, minimum gravity is met and, in terms of any issue concerned with the entitlement of the issuing state to seek the respondent's surrender for the offence in question, having regard to its gravity or seriousness, that is the end of the matter in so far as this Court is concerned.

Moreover, this Court would not wish the message to go out that it considers possession of prohibited drugs to be a minor, petty or trivial matter, even if the quantity is small and it was only for personal consumption. It is not to be so regarded.

Nevertheless, it is true to say that it would be most unlikely that a person in the position of the respondent would receive a custodial sentence in Ireland if he were prosecuted for the corresponding offence of possession of a controlled drug, contrary to s. 3 of the Misuse of Drugs Act, 1977. It is not for the Court to speculate, and in this the court agrees with counsel for the applicant, as to what sentence might be imposed upon him in Poland. It would have been open to the respondent to adduce evidence from a Polish lawyer on that subject but he has not done so. He does, however, assert in his affidavit that the likelihood of him receiving a 12 month (or, by implication, any) custodial sentence is remote. On balance, I consider that some weight can probably be attached to his evidence in that regard, notwithstanding the absence of independent expert evidence as to sentencing policy in Poland, in circumstances where it is consistent with what would happen in Ireland, and where the applicant has not actively sought to engage with respondent's assertion for the purpose of disputing it. Accordingly, the inherent unlikelihood of the respondent receiving a custodial sentence is a circumstance, but only one of a number of circumstances, which the Court should take into account in considering whether surrendering the respondent would be a proportionate measure in all the circumstances of this case.

The Court has carefully considered all of the circumstances of the case urged upon it by counsel for the respondent. Having done so, I have concluded that exceptionally, and in the particular circumstances of this case, it would not be a proportionate measure to surrender Mr. Ostrowski to Poland on foot of the second European arrest warrant in this case. In arriving at this conclusion the Court has been influenced by the following considerations.

As has been stated, the Court considers that it is inherently unlikely that the respondent will receive a custodial sentence if returned. Notwithstanding that, he has already spent some short time in custody and he will almost certainly suffer some further deprivation of his liberty if surrendered, if only while waiting on remand to be brought before a Court in Poland for the purpose of seeking bail or the Polish equivalent of our bail. However, there is a significant prospect that he would spend longer than that in custody. The Court accepts that if he is returned on foot of a European arrest warrant his prospects of securing bail pending trial will inevitably be reduced. Moreover, it is a matter of concern that he no longer has any family in Poland and therefore might have additional difficulty in getting bail as he will not be able to provide a residential address in Poland.

Counsel for the respondent submitted that there were some measures that the Polish authorities could possibly have taken that might have obviated any need to issue a European arrest warrant. It was suggested that they could perhaps have summonsed him and if he failed to turn up then to have tried him in *absentia*, although it was acknowledged that if a custodial sentence was in fact imposed after a trial in *absentia* it might be problematic to secure his rendition from Ireland on foot of a European arrest warrant to serve such a sentence. Alternatively, it was further suggested, they could simply have written to Mr. Ostrowski, whose whereabouts was known to them, and informed him that the matter was not going to be dropped. Such a letter could have invited him to return voluntarily, failing which resort would be had to another European arrest warrant seeking his rendition.

The Court has considered these submissions and agrees with counsel for the applicant that it is inappropriate to engage in speculation in regard to such matters. However, just in so far as the suggested letter is concerned, it seems to the Court that in very many cases the writing of such a letter would not be a realistic or appropriate step to expect the authorities in an issuing state to take, not least because it might provoke a real fugitive to flee yet again. Of course, every case is different but it really is not helpful to speculate on steps that might have been theoretically open to the Polish authorities.

Furthermore, and more fundamentally, the Court reiterates that whether or not the Polish authorities considered any particular step suggested as having been open to them is not something with which this Court can concern itself for the reasons already stated, namely this Court must have regard to the principle of mutual recognition and presume that due regard was had by the issuing judicial authority to the principle of proportionality in deciding to issue the warrant.

Nevertheless, it is not disputed that the facts, whatever the reasons for them might be, are that the respondent was not told before the second European arrest warrant issued that the issuing state intended to pursue the matter further, nor was he afforded the option of returning voluntarily before a second European arrest warrant was applied for. This Court considers that, without enquiring into the reasons for them, it is entitled to take those facts into account in deciding whether at this point in time it is proportionate to surrender the respondent in execution of the second European arrest warrant. The Court is therefore prepared to attach some, but not much, weight to this aspect of the matter as being part of the overall circumstances of the case.

The Court is also concerned in this particular case with the fact that although the second warrant was endorsed by the High Court at the end of April 2010 the respondent, whose whereabouts were known, was not arrested until early July 2011. No explanation is given for this, and while there may have been good reasons for it, and the Court neither speculates nor infers that there was anything

sinister in it, the inescapable fact is that the respondent was led into a false sense of security for some 15 months or thereabouts and was allowed to believe, reasonably, during that time that the matter had in fact been dropped by the Polish authorities. That balloon of security was dramatically punctured when the Gardaí eventually came looking for him and arranged with him to execute the second European arrest warrant by appointment at the CCJ building in Dublin on the 4th of July, 2011.

The issuing judicial authority was of course legally entitled to come again, and this Court does not criticise it for doing so, but the manner in which effect was given to their decision to do so, and in particular the manner in which increased stress and anxiety was caused to the respondent, which I am satisfied on the basis of his affidavit he did suffer, is something that I am entitled to, and have, taken into account. I also have also taken into account the extent to which he and his family have established roots and ties in Ireland.

The Court has also taken into account the burden to the respondent and his family of having to endure, in the event of his surrender, the ordeal of being repatriated to Poland in custody and effectively as a fugitive, although the evidence from his affidavit, which was not disputed by the applicant, suggests that he did not in fact flee Poland to avoid being prosecuted. The evidence, such as it is, is to the effect that he was only visiting Poland on holiday when his alleged crime was detected, and it was known and appreciated at all times that his presence in Poland was temporary and for the purposes of vacation. He was fully co-operative with the police while there, and he was neither required, nor requested, to remain in Poland. On the contrary his evidence, which is not contradicted, is that, having provided the police woman with his address in Ireland, he was then told by her that he was free to go and that he would be contacted later on.

To surrender the respondent would undoubtedly be an interference with, and would disrupt in a significant way, his family life. Interference with family life is, of course, as this Court has pointed out in *Minister for Justice, Equality and Law Reform v. Bednarczyk* [2011] IEHC 136 (unreported, High Court, Edwards J., 5th April 2011), and other cases, only to be expected where a person faces or potentially faces a significant term of detention or deprivation of liberty. In such circumstances the detention or deprivation of liberty giving rise to such interference is usually considered to be a proportionate measure and not in breach of a respondent's right to respect for his family life. However, this case has unusual features, and is arguably in a different category, in as much as the Court accepts that he is unlikely to receive a custodial sentence if returned to Poland, and also that he is not a fugitive in the usual sense of that term.

Moreover, the Court also takes into account that at least some of his family could be expected to accompany him, or follow him, to Poland and there would be a burden of expense on them as well as on the respondent himself.

There will also be a burden of further expense on both this State and on the issuing state. In this regard, this Court has already remarked upon the burden that arises upon surrender in that regard in an *obiter dictum* in its recent judgment in *Minister for Justice and Equality v. Martynas Žigelis*, (unreported, High Court, Edwards J., 17th January 2012). I said in that case:-

> "What were, however, of concern to this Court were the costs associated with effecting a physical surrender in circumstances where, in the event of the respondent being so surrendered, he would on a "revolving door" basis have to be immediately released by a Court in the issuing state on his arrival. In that regard, Article 30 of the Framework Decision provides:
>
> > "1. Expenses incurred in the territory of the executing Member State for the execution of a European arrest warrant shall be borne by that Member State.
> >
> > 2. All other expenses shall be borne by the issuing Member State."
>
> It seemed to this Court that it was in the interests of neither State to have to pointlessly incur those costs …."

(It should be appreciated, and the Court readily acknowledges, that it was not concerned in *Žigelis* with any issue of proportionality. That case concerned an entirely different issue.)

Finally, the Court has very much taken into account the prosecution interests of the issuing state. In that context I reiterate certain remarks that I made in my judgment in *Bednarczyk*, to which case I referred earlier in this judgment, viz:

> "It is of the essence of statehood that a sovereign state should be free to operate a police and criminal justice system for the prevention of crime and disorder and the protection of the rights and freedoms of its citizens and others. The entitlement to operate a police and criminal justice system must include the entitlement to operate a prison system, and in appropriate cases to deprive people of their liberty by sending them to prison."

Moreover, I again acknowledge the views of Lord Phillips in *Norris v. Government of the United States of America* (No. 2) [2010] A.C. 487, and those of Laws L.J. in *R (H.H.) & Anor v the Deputy Prosecutor of the Italian Republic, Genoa (Italian Judicial Authority) & Ors* [2011] EWHC 1145 (Admin), both of which I have previously referred to with approval in my judgment in *Minister for Justice, Equality and Law Reform v. D.L.* [2011] IEHC 248 (unreported, High Court, Edwards J., 22nd June 2011), to the effect that in extradition cases the Court is concerned, *inter alia,* with the strong public interest in surrendering fugitives from justice; that extradition is not to be equated with deportation in asylum or immigration cases, and (per Laws L.J. at para. 63 in *R (H.H.)*) that the "public interest in extradition is systematically served by the extradition's being carried into effect, subject to the proper procedures".

Nevertheless, having weighed all of the relevant circumstances in the balance, and having afforded each circumstance its appropriate weight, I have not been satisfied overall that it would be a proportionate measure to order the surrender of the respondent on foot of the European arrest warrant presently before me. I have concluded rather that in the particular circumstances of the respondent's case it would represent a disproportionate interference with his fundamental rights, and particularly his right to liberty, his right to enjoy physical and mental health, and his right to respect for family life, to surrender him at this time.

8. Conclusion

The Court upholds the specific objection based upon proportionality and will refuse to make an order for the respondent's surrender under s. 16 of the 2003 Act.