Neutral Citation Number: [2013] IEHC 54

THE HIGH COURT

Record No.: 2009 340 Ext.

IN THE MATTER OF THE EUROPEAN ARREST WARRANT ACT 2003

Between/

THE MINISTER FOR JUSTICE AND EQUALITY

Applicant

-AND-

R. P. G.

Respondent

JUDGMENT of Mr Justice Edwards delivered on the 18th day of July 2013

Introduction:
The respondent is the subject of a European arrest warrant issued by Poland on the 28th of May, 2009. The warrant was endorsed by the High Court for execution in this jurisdiction on the 26th of August, 2009, and it was duly executed on the 22nd of May, 2012. The respondent was arrested by Detective Sergeant J.W. on that date and he was brought before the High Court on the following day pursuant to s. 13 of the European Arrest Warrant Act 2003 (hereinafter "the Act of 2003"). In the course of the s. 13 hearing a notional date was fixed for the purposes of s. 16 of the Act of 2003 and the respondent was remanded on bail to the date fixed. Thereafter the matter was adjourned from time to time, ultimately coming before the Court for the purposes of a surrender hearing.

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

Uncontroversial s. 16 issues

The Court has received an affidavit of Detective Sergeant J.W. sworn on the 18th of December, 2012 testifying as to his arrest of the respondent and as to the questions he asked of the respondent to establish the respondent's identity. In addition, counsel for the respondent has confirmed that no issue arises as to either the arrest or identity.

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

I am satisfied following my consideration of these matters that:

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

(b) The warrant was duly executed;

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

(d) The warrant is in the correct form;

(e) The warrant purports to be both a prosecution and sentence type warrant. To the extent that it is a prosecution type warrant, the respondent is wanted in Poland to face trial in respect of 16 of the 24 offences particularised in Part E of the warrant. To the extent that it is a conviction type warrant the respondent is wanted to serve four different sentences imposed upon him by Courts in Poland in respect of the remaining 8 of the said 24 offences.

The 16 offences in respect of which the respondent is wanted for prosecution are particularised at Part E.2.I inclusive of the warrant, and are listed therein as "a." to "p." inclusive. They are all of a similar nature and are charged as offences contrary to Article 278§1 of the Polish Penal Code.

The first group of offences of which the respondent has been convicted and is wanted to serve a sentence are particularised at Part E.2.II of the warrant. There are two offences in this group, listed therein as "a." and "b." respectively, and they are characterised as offences contrary to Articles 284§3 and 291§1 of the Polish Penal Code.

The second group of offences of which the respondent has been convicted and is wanted to serve a sentence are particularised at Part E.2.III of the warrant. There are four offences in this group, listed therein as "a." to "d." inclusive, and they are characterised as offences contrary to Articles 263§2, 284§3, 270§1 and 286§1, respectively, of the Polish Penal Code and Article 62 item 1 of the Polish Act of 29th July 2005 on counteraction against drug addiction.

There is then a further single offence of which the respondent has been convicted and is wanted to serve a sentence, and this is particularised at Part E.2.IV of the warrant. This is characterised as an offence contrary to Articles 286§1 and 191§1 of the Polish Penal Code.

Finally, there is a further single offence of which the respondent has been convicted and is wanted to serve a sentence which is particularised at Part E.2.V of the warrant. This is characterised as an offence contrary to Articles 178a§1 and 244 of the Polish Penal Code.

(f) To the extent that the warrant seeks the respondent's surrender for prosecution purposes the underlying domestic decision on which the warrant is based consists of a Decision of the District Court in Bielsko-Biala of the 19th of April 2007, file ref III K 523/05, rendering the respondent liable to enforcement of preliminary detention.

(g) To the extent that the warrant seeks the respondent's surrender for the purpose of executing custodial sentences there are four underlying domestic enforceable judgments consisting of:

- judgment of the District Court in Bielsko-Biala of 27th of April 2005, file ref III K 994/02;
- judgment of the District Court in Bielsko-Biala of 20th of January 2006, file ref III K 1076/04;
- judgment of the District Court in Pszczyna of 3rd March 2006, file ref II K 387/04;
- judgment of the District Court in Bielsko-Biala of 6th of October 2006, file ref IX K 865/06.

(h) The issuing judicial authority has invoked paragraph 2 of article 2 of Council Framework Decision 02/584/J.H.A. on the European arrest warrant and the surrender procedures between Member States, O.J. L190/1 of 18.7.2002 (hereinafter referred to as "the Framework Decision"), in respect of the 16 offences for which the respondent is wanted for prosecution and listed in Part E.2.I at "a." to "p." inclusive, by the ticking of the box in Part E.I of the warrant relating to "Fraud, including that affecting the financial interests of the European Communities within the meaning of the Convention of 26 July 1995 on the protection of European Communities' financial interests";

(i) The issuing judicial authority has also invoked paragraph 2 of article 2 of the Framework Decision in respect of two of the four offences for which the respondent is wanted to serve a sentence and listed in Part E.2.III, namely those at "a." and "d." respectively, by the ticking of the boxes in Part E.I of the warrant relating to "Organized or armed robbery" and "Forgery of administrative documents and trafficking therein";

(j) Accordingly, subject to the Court being satisfied that the invocation of paragraph 2 of article 2 is valid (*i.e.* that the minimum gravity threshold is met, and that there is no basis for believing that there has been some gross or manifest error), it need not concern itself with correspondence in respect of those offences in relation to which there is a ticked box;

(k) The minimum gravity threshold in a case in which paragraph 2 of article 2 of the Framework Decision is relied upon is that which now finds transposition into Irish domestic law within s. 38(1)(b) of the Act of 2003, as amended, namely that under the law of the issuing state the offence is punishable by imprisonment for a maximum period of not less than three years. It is clear from Part C (1) of the warrant, read in conjunction with the information concerning the nature and legal classification of the offences set out within Part E that the 16 offences at E.2.I "a." to "p." inclusive carry a potential penalty of 5 years, that the offence at E.2.III "a." carried a potential penalty of 8 years, and that the offence at E.2.III "d." carried a potential penalty of 5 years. Accordingly, the minimum gravity threshold is comfortably met in respect of the ticked box offences;

(l) Further, the Court has considered the description of the circumstances set forth in the warrant in relation to the offences particularised at E.2.I "a." to "p.", and E.2.III "a." and "d." respectively, and it is clear that there has been no gross or manifest error in the ticking of boxes in Part E.I of the warrant.

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

In addition, the Court is satisfied to note the existence of the European Arrest Warrant Act 2003 (Designated Member States) (No. 3) Order 2004 (S.I. No. 206 of 2004) (hereinafter "the 2004 Designation Order"), and duly notes that by a combination of s. 3(1) of the Act of 2003, and article 2 and the Schedule to the 2004 Designation Order, "Poland" (or more correctly the Republic of Poland) is designated for the purposes of the Act of 2003 as being a State that has under its national law given effect to the Framework Decision.

Correspondence and Minimum Gravity – non ticked offences

Correspondence

Correspondence requires to be demonstrated in respect of the offences particularised at E.2.II "a." and "b." respectively, at E.2.III "b." and "c." respectively, at E.2.IV, and at E.2.V.

The circumstances of the offences particularised at E.2.II "a." and "b." are that the respondent:

"a. in the middle of January 2002 in Bielsko-Biała, acting jointly and in arrangement with the identified persons, misappropriated 450 kilograms of the aluminium construction elements in the shape of structural sections of different length which he had found, of joint value of 20.000 zlotys to the detriment of the Żywiecka Brewery, joint stock company.

b. On 26th January 2002 in Bystra, in the District of Bielsko, acting jointly and in arrangement with the identified persons, accepted from an unknown person -acquired by burglary to the Kazimierz Jakubiec's Scrap Buy Up Station- 450 kilograms of the aluminium construction elements in the shape of structural sections of different length of joint value of 20.000 zlotys,"

Counsel for the applicant has invited the Court to find correspondence with the offences in Irish law of, in the case of "a.", theft contrary to s. 4 of the Criminal Justice (Theft and Fraud Offences) Act, 2001 (hereinafter "the Act of 2001"), and in the case of "b.", handling stolen property contrary to s. 18 of the Act of 2001. This was not opposed by counsel on behalf of the respondent. Having considered the alleged underlying facts as set out the Court is satisfied to find correspondence with the suggested s. 4 and s. 18 offences.

The circumstances of the offences particularised at E.2.III "b." and "c." are that the respondent:

> "b. on 27th November 2003 in Bielsko-Biała, in his apartment, at the Podgórze 20/3 street, possessed arms in the form of a pistol handgun of Reck make, model PK 800, cal 8 mm, PTB 186/02, without due permit,
>
> c. on 27th November 2003 in Bielsko-Biała, being detained by the Police functionaries, possessed 0,184 grams of marihuana on him,"

Counsel for the applicant has invited the Court to find correspondence with the offences in Irish law of, in the case of "b.", possession of an unlicensed firearm contrary to s. 2 of the Firearms Act, 1925 (as amended) and in the case of "c.", possession of a controlled drug contrary to s. 3 of the Misuse of Drugs Act 1977 (as amended). Again, this was not opposed by counsel on behalf of the respondent. Having considered the alleged underlying facts as set out the Court is satisfied to find correspondence with the suggested s.2 and s. 3 offences.

As stated previously there is a single offence at E.2.IV. For the avoidance of doubt this is the case notwithstanding that the particulars in that subsection of the warrant are unnecessarily prefixed with an "a". The circumstances of the single offence particularised at E.2.IV are that the respondent:

> "a. [i]n November 2002 in Janowice, acting jointly and in arrangement with [M.P., W.G., R.M. and D.G]., in order to gain a financial benefit, misled [J.K.] on his intentions to sell a mobile phone of the Nokia 6310i make in the manner that he showed the harmed person the phone and after setting the sale conditions , the sentenced handed the harmed one an empty packing, beguiling out - in return of it - the amount of 350 zlotys and a radio set of "Pionier" make."

Additional information contained in an undated letter from the issuing judicial authority to the Irish Central Authority and provided to the Court pre-endorsement of the warrant further states:

> "The offence from point IV … is a fraud from article 286 paragraph 1 of the Penal Code. Punishable conduct of perpetrator of this offence consists in making intentionally another person dispose of his/her own or another person's property disadvantageously by deceiving, profiting by his/her error or profiting by inability to understand the act undertaken duly. Therefore, acting of the fraud offender is a dishonest act, because his aim is to bring another person to dispose of his/her own or another person's property disadvantageously. In this case the wanted person handed the wronged person empty packaging deceiving him that there was a Nokia 6310i mobile telephone in it and by it he brought the wronged person to dispose of his/ property disadvantageously in a form of cash in the amount of 350 PLN and a Pioneer radio-player of 350 PLN value. Acting of the wanted person was undoubtedly a dishonest act."

Counsel for the applicant has invited the Court to find correspondence either with the offence in Irish law of theft contrary to s. 4 of the Criminal Justice (Theft and Fraud Offences) Act, 2001 (hereinafter "the Act of 2001"), or with the offence of making gain or causing loss by deception contrary to s. 6 of the Act of 2001. Once again, these suggestions were not opposed by counsel on behalf of the respondent. Having considered the alleged underlying facts as set out the Court is satisfied to find that correspondence can be demonstrated with both the suggested s. 4 and s. 6 offences. It goes without saying that it would have been sufficient if the Court were satisfied that correspondence could be demonstrated with either of them.

Finally, the circumstances pleaded in respect of the single offence particularised at E.2.V are that the respondent:

> "on 17th April 2006, at 3.40 a.m. in Bielsko-Biała, at the Żywiecka street, intentionally infringed road traffic principles defined in article 45 item 1 of the Code on Road Traffic in this way that he drove a car of Opel Record make, registered number [XXXXX] being in the state of insobriety (Test I-0,97mg/l; II Test - 0,98 mg/l of alcohol in the exhaled air, and moreover against the adjudged by District Court in Bielsko-Biała, by virtue of the sentence on 23rd May 2005, court files: IX K 1277/04, ban on driving for a period of one year."

Counsel for the applicant has invited the Court to find correspondence with the offences in Irish law of driving under the influence of an intoxicant contrary to s. 49 of the Road Traffic Act 1994, and/or driving while disqualified contrary to s.38 of the Road Traffic Act, 1961. The possibility of Court finding correspondence with either or both offences was not opposed by counsel on behalf of the respondent. Having considered the alleged underlying facts as set out the Court is satisfied to find correspondence with the suggested s. 38 offence. It is unnecessary in the circumstances to consider whether there could also be correspondence with the s.49 offence put forward.

Minimum Gravity

The threshold for the purposes of minimum gravity is that set out in s. 38(1)(a)(ii) of the Act of 2003, namely that a term of imprisonment or detention of not less than 4 months has been imposed on the person in respect of the offence in the issuing state, and the person is required under the law of the issuing state to serve all or part of that term of imprisonment.

The situation with respect to the offences particularised at E.2.II "a." and "b."is that an aggregate sentence of 1 year and 6 months imprisonment was imposed in respect these offences, and accordingly minimum gravity is satisfied.

The situation with respect to the offences particularised at E.2.III "b." and "c." is that an aggregate sentence of 1 year and 6 months imprisonment was imposed in respect all four offences grouped at E.2.III, and accordingly minimum gravity is satisfied.

The situation with respect to the single offence particularised at E.2.IV is that a sentence of 1 year and 6 months imprisonment was imposed in respect this offence. Once again, minimum gravity is satisfied.

Finally, a sentence of 6 months imprisonment was imposed in respect of the offence at E.2.V, and accordingly minimum gravity is satisfied in respect of that matter also.

Points of Objection

The respondent relies upon three substantive points of objection. He raises an objection based on s. 45 of the Act of 2003 in respect of one group of conviction offences; also a flight point pursuant to s. 10 of the Act of 2003; and finally a fundamental rights objection pursuant to s. 37(1) of the Act of 2003 alleging that his surrender would be a disproportionate measure in terms of any legitimate aim being pursued in that it would breach his right to respect for family life, and the cognate and corresponding rights of his children, guaranteed under article 8 of the European Convention on Human Rights and Fundamental Freedoms (hereinafter "the Convention" or "the ECHR").

The S.45 Objection
Although Part D of the warrant states expressly that "no decision was rendered in absentia", the respondent sought to suggest in his affidavit that he had in fact been tried *in absentia* for the road traffic offence particularised at point V in part E of the warrant. In the circumstances the Court, though it was arguably not obliged to do so, decided to seek further information from the issuing judicial authority. Before setting out the information received it is important to record that there was apparently a trial at first instance before the District Court in Bielsko-Biala bearing Polish domestic record no. IX K 865/06 and leading to a judgment of 6th October, 2006, and a subsequent appeal hearing before the Regional Court of Bielsko-Biala bearing Polish domestic record no. VII Ka 1373/06 leading to a judgment of the 19th of March, 2007 which varied the sentence imposed by the court of first instance.

The additional information is contained in a letter from the issuing judicial authority dated the 21st of January 2013, and states:

> "In reply to point 1 of your letter of January 16, 2013 we kindly advise that the convicted [R.P.G.] did not appear at the main trail, held before the District Court in Bielsko-Biala on October 6, 2006 regarding the case ref. No. IX K 865/06. Please be also advised that it was the only hearing held in the case ref. No. IX K 865/06. R.P.G collected court summons to attend the hearing **in person** on August 31, 2006. In view of the foregoing, pursuant to Article 377 paragraph 3 of the Code of Criminal Procedure the District Court in Bielsko-Biala, made a decision on October 6, 2006 to conduct hearing without participation of the accused person.
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> Article 377 of the Polish Code of Criminal Procedure provides that "*If the accused, notified of the date of hearing, states that he will not participate in the hearing or prevents himself being brought to the hearing, the court may continue the hearing without his presence, unless it finds the presence of the accused indispensable*."
>
> Furthermore, in reply to point 2 of your letter, we inform you that the convicted [R.P.G.] also did not appear at the hearing which was held before the Circuit Court in Bielsko-Biala on March 19, 2007, case ref. No. VII Ka 1373/06. Likewise, it was the only hearing to have been held in the case ref. No. VII Ka 1373/06. Notice of the date of the trial regarding the case VII Ka 1373/06 was sent on February 6, 2007 to the address indicated by the convicted person (viz. ulica Podgórze 20/3, 43-300 Bielsko-Biala) but it was sent back upon issuance of two advice notes - on February 12, 2007 and February 20, 2007. with annotation "not called for within the due time".
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> Article 75 paragraph 1 of the Polish Code of Criminal Procedure stipulates that "*An accused who is not detained, is obligated to appear whenever summoned while the criminal proceedings are in process. and to advise the agency conducting the proceedings of any change of residence or sojourn exceeding 7 days. The accused is to be so informed at his first hearing*". Article 139 paragraph 1 of the Polish Code of Criminal Procedure provides, in turn, that "*If a party to the proceedings has changed his place of residence and has failed to notify the agency before which the proceedings are pending of his new address, or if he has not resided under a designated address, a document dispatched to the address last designated by such a party shall be considered to have been served*".
>
> In view of the fact that the convicted person failed to comply with the duty of notifying the Court of his change of residence or sojourn and did not collect the Notice at the address of his residence which had been notified by him, the notice informing of the date of the trial in the case ref. No. VII Ka 1373/06 sent to his address shall be deemed to have effectively served.
>
> In reply to item 4 of your letter we advise that in line with the content of Article 540b § 1 (1) of the Code of Criminal Procedure "*court proceeding may be re-opened noon request of an accused person submitted within the set time limit in the month in which he learnt about the judgment rendered against him if the case was hear, without the present of the accused, who had not been served the notice informing on the date of the court session or trial, or if he was served such notice in any manner other than personally, providing that he will demonstrate that he has not been informed of the date and of the fact that a default judgment may be rendered*.
>
> The rule referred to above entitles the convicted [R.P.G.] to apply for re-opening the proceedings, providing that, pursuant to Art. 540b § 1 (1) of the Code of Criminal Procedure, he will file an appropriate application and demonstrate that the date of proceedings did not come to his knowledge and that a default judgment may he passed.
>
> If the application for re-opening the proceedings is allowed, the court reverses the decision which this application relates to and refers the case to a court of competent jurisdiction to have it reviewed under the same principles as it has been previously heard."
>
> [Emphasis as in original].

The additional information of January 21st, 2013 makes it clear that the respondent was not in fact present either for his trial at first instance in respect of the driving offence, or at the subsequent appeal hearing following which the original sentence was varied. However, it is equally clear that he actually knew about the time and place of the hearing at first instance because he collected the court summons in person. I am satisfied that in the circumstances there is no requirement for an undertaking as to a re-trial in respect of the driving offence, and the court is not disposed to uphold the s. 45 objection.

The S.10 "Flight" Objection
It is agreed by all concerned that as this warrant pre-dates the coming into force of the amendments to s.10 of the Act of 2003 effected by the Criminal Justice (Miscellaneous Provisions) Act, 2009, it is necessary for the applicant to satisfy the Court that the respondent fled from the issuing state to evade justice (i.e. flight in the Tobin sense spoken of by Fennelly J in *Minister for Justice, Equality and Law Reform v. Tobin (No 1)* [2008] 4 I.R. 42).

Although it is for the applicant to demonstrate flight, and the respondent is not required to prove that he did not flee, the warrant in this case expressly alleges flight. It is stated, inter alia, at Part F of the warrant that "[*R. G.] hides himself from the limb of the law and makes conduct of penal proceedings at the court and execution the sentenced penalties to him – impossible"*

In response to this the respondent has made the case in his affidavit that the 16 offences at E..2 .I are alleged to have occurred in 2003. He admits having been questioned by the police, being charged, and being brought before a court in Poland in relation to them. However, he says that his case was adjourned on a number of occasions and that despite the fact that he remained in Poland and lived openly there until 2006 when he came to Ireland, his trial did not proceed during that time. He complains that the Polish authorities failed to prosecute him in a timely manner.

In relation to the offences at E.2.II, E2.III and E.2.IV he says, correctly, that he although he received sentences in respect of these matters, these sentences were initially suspended for between three and five years. He fails to acknowledge, however, that he knowingly breached the conditions upon which his sentences were suspended by evading the probation officer's supervision, and that this was why the suspensions were lifted.

In relation to the offence at E.2.V, he states that he was already in Ireland when judgment was entered in this matter. The background to this has already been recited in the section of this judgment relating to the s. 45 point.

The respondent makes the following further points at paragraph 11 of his affidavit:

> "I say that during 2006 I was trying to find work but had difficulty getting work in Poland. I say that in May 2006 I travelled to Norway and worked on a construction project for two months. I say that I then returned to Poland in July 2006 and worked in a factory for approximately one month. I say that during this time a friend contacted me with from Ireland and told me that work was available in Ireland. I say that I travelled to Ireland on the August 2006 to find work. I say that I have been working in Ireland since shortly after my arrival here. I say that I was free to travel to Ireland and I did not flee from Poland."

The Court considers that the respondent's affidavit omits some important details, and that he has been less than fully candid. The respondent acknowledges that he was before the Courts in Poland in respect of the offences at E.2.I. He acknowledges that the case was adjourned from time to time. In circumstances where he was engaging and participating in those proceedings, and knew that those proceedings were ongoing, it is simply not credible that he would have regarded himself as being at liberty to absent himself from Poland and come to Ireland without informing the Court and/or the Prosecutor and/or the Police of his intentions. Moreover, he was concurrently under three separate regimes of supervision and it is inconceivable that he could believed that he was free to come to Ireland without telling anyone. As this Court said in *Minister for Justice, Equality and Law Reform v Ciechanowicz* [2011] IEHC 106 (unreported, High Court, Edwards J., 18th March, 2011):

> "…it is …of the essence of any kind of probation supervision that the supervisor should be made aware of where the probationer is residing, and that if during the period of probation there is to be any change in where the probationer is residing the supervisor should be informed. Moreover, it is also of the essence of probation supervision that the probationer should stay in regular contact with, and be readily available to, his supervisor."

These matters provide circumstantial evidence that in the circumstances of this case goes some way to supporting an inference of flight. However, what puts the matter over the line in so far as this Court is concerned is that the respondent would have known that as a consequence of being convicted for the driving offence he was automatically going to have the suspension of at least one his sentences lifted (i.e. the sentence for the offences at E.2.IV). Whatever possible discretion might exist under Polish law for not lifting suspensions for failure to stay in touch with a supervisor, there is, as this Court well knows from the hundreds of Polish cases that have come before it over the last three years, no discretion in regard to that where a new offence is committed. The respondent knew well he was being prosecuted for the driving offence. He collected the summons in person. Despite this, he came to Ireland and failed to turn up for his trial. He also did this in circumstances where he was also being prosecuted in other ongoing, admittedly adjourned and much delayed, proceedings, and where he was the beneficiary of suspended sentences and under a regime of supervision in respect of several other matters. He could not credibly or reasonably have been of the view that he was free to come to Ireland, and the only reasonable inference is that he fled to evade justice. The Court is not disposed to uphold the s. 10 objection.

The S. 37(1) "Article 8" Objection

Relevant Statutory and Convention Provisions

S. 37(1)(a) of the Act of 2003 provides:

"A person shall not be surrendered under this Act if—

(a) his or her surrender would be incompatible with the State's obligations under—

(i) the Convention,"

S.37(2) defines "Convention" as follows:

"In this section—

"Convention" means the Convention for the Protection of Human Rights and Fundamental Freedoms done at Rome on the 4th day of November, 1950, as amended by Protocol No. 11 done at Strasbourg on the 11th day of May, 1994"

Article 8 of the ECHR provides:

"1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

The evidence relied upon by the respondent

The respondent relies in the first instance upon his own affidavit sworn in these proceedings on the 15th of October 2012, and, secondly, upon a upon a psychological report dated 4th February 2013, and also an addendum thereto dated 18th February 2013, prepared jointly by a Dr. Davina Walsh and a Dr Patrick Randall, Clinical Psychologists.

The respondent's affidavit sworn on 15th October 2012

To the extent that this affidavit contains averments relevant to this ground of objection, the respondent states:

> "4. I say that I have lived in Ireland since August 2006.1 say that I came here to work as I had found it difficult to obtain work in Poland. I say that since I came to Ireland I have worked for J.H. on his dairy farm in [XX, Co. XXX.] I say that I am very happy in Ireland and consider it to be my home. I say that I live with my partner [E.S.] and we have two daughters, [X.G.], aged 4, and [Y.G.], aged 3, who were both born here. I say that [X] has recently commenced school and [Y] attends playschool. I say that I do not wish to be surrendered to Poland as it will destroy my family and the life that we have together in Ireland. I say that I will lose my job and will be unable to support my family.
>
> 5. I say that prior to my arrest I was not aware that I was wanted to serve terms of imprisonment in Poland or to face prosecution for any offences.
>
> **The Decision to seek surrender to face Prosecution of Offences**
> 6. I say that Part B.1 of the warrant refers to a decision of the District Court in Bielsko-Biala of the 19th April 2007 with a reference **III K 523/05**.1 say that it appears that my surrender is sought to afford the Polish authorities an opportunity to prosecute me for sixteen alleged offences. I say that I was arrested by the police in Poland and questioned in relation to a number of offences. I say that I was brought before the Court in Poland and my case was adjourned on a number of occasions. I say that I was never provided with legal representation at any stage as I could not afford to pay for a lawyer.
>
> 7. I say that if the offences as listed in the warrant are the same offences that I was before the court for before I say that there has been considerable delay in prosecuting these offences. I say that the offences are alleged to have occurred between the 8th January 2003 and the 16th July 2003, some nine years ago. I say that I remained in Poland until August 2006 and lived openly in Poland until I came to Ireland. I say that as can be seen from the warrant I was present in Court for three separate hearings in relation to the 'convictions' imposed on me on the 27th April 2005, 20th January 2006 and the 3rd March 2006. I say that if the Polish authorities wished to prosecute the alleged offences for which my surrender is now sought they could have done so while I was in Poland and could have notified me on any of the above dates that I was required to attend court for the prosecution of these offences. I say that I was available to the authorities in Poland until I came to Ireland in August 2006.1 say that the Polish authorities failed to prosecute these alleged offences in a timely manner and due to the lapse in time from the alleged offences to the time of the issuing of the warrant and to the time of my arrest it is now unfair and disproportionate to seek my surrender to face prosecution for these alleged offences.
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> **The Enforceable Judgments seeking surrender to serve a term of imprisonment.**
> 8. I say that as can be seen from the warrant my surrender is also sought to serve terms of imprisonment in relation to four separate Judgments. These Judgments are listed in the warrant under court file references: **III K 994/02, III K 1076/04, IIK 387/04 and VII Ka 1373/06.**
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> 9. I say that I was present in Court when the first three of these Judgments were given by the Court i.e. ID K 994/02,10 K 1076/04, II K 387/04.1 say that I was not legally represented at any time and was not provided with a lawyer for any of these court cases. I say that as can be seen from the warrant I was given a sentence of 1 year and 6 months in each case and the sentence was suspended for a period of between three and five years.
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> 10. I say that it appears from the warrant that a Judgment was also entered on the 6th October 2006 which is listed under court reference VII Ka 1373/06.1 say that as can be seen from the warrant this Judgment was entered at a time when I was living in Ireland. I say that as appears from the warrant I was sentenced to six months imprisonment. I say that I was not notified of this case and was not aware that I was required to attend Court in relation to the offence listed under this court reference. I say that in relation to this Judgment I was tried in my absence.
>
> **The Decision to travel to Ireland**
> 11. I say that during 2006 I was trying to find work but had difficulty getting work in Poland. I say that in May 2006 I travelled to Norway and worked on a construction project for two months. I say that I then returned to Poland in July 2006 and worked in a factory for approximately one month. I say that during this time a friend contacted me with from [sic] Ireland and told me that work was available in Ireland. I say that I travelled to Ireland on the August 2006 to find work. I say that I have been working in Ireland since shortly after my arrival here. I say that I was free to travel to Ireland and I did not flee from Poland.
>
> **Breach of Family Rights**
> 12. I say that I have settled in Ireland since August 2006 and have made my home here in the belief that I was free to settle and remain in Ireland. I say that I was unaware that I was the subject of any prosecution or investigations in Poland into offences. I say that I was not aware that I was required to serve any terms of imprisonment in Poland until I was served with a copy of the European Arrest Warrant following my arrest in May 2012. I say that it is unfair and in breach of my rights and my family's rights under the Irish Constitution and the European Convention on Human Rights to seek my surrender to Poland. I say that any decision to order my surrender to Poland will have a very serious impact on our family. I say that my partner and daughters depend on me for support I say that my daughters are very young and are in need of the support of their father. I say that my surrender to Poland would result in the destruction of our family and will greatly damage the lives of my young daughters. I say that my surrender to Poland, if ordered by this Honourable Court, will be disproportionate to the harm it will cause to my family and in view of the considerable delay in issuing and executing the warrant would be unjust and oppressive."

Objection to the psychological report, and the addendum thereto

As stated earlier, the respondent further relies upon a psychological report dated 4th February, 2013, and also an addendum thereto

dated 18th February, 2013, prepared jointly by a Dr. Davina Walsh and a Dr. Patrick Randall, Clinical Psychologists. Both Dr Walsh and Dr Randall have sworn affidavits exhibiting these documents, confirming their joint authorship of them, and stating that the opinions expressed therein are within their field of expertise.

Counsel for the applicant has not sought to challenge their expertise, or to call evidence in rebuttal of their opinions and conclusions, but rather has stated that "*I make the somewhat technical point that I am instructed to make that the affidavits do not actually formally verify the reports*" (DAR 18.04.2013 - 11:13:05).

The objection, albeit technical, is one that is open to the applicant to make. It has potentially serious implications for the respondent's case and requires to be addressed at this point. If the objection is required to be upheld the Court will be precluded from taking account of the contents of the said report and the addendum thereto in the course of its deliberations.

At the outset, it should be stated that it is well established that while proceedings such as the present are *sui generis*, and are neither wholly adversarial nor wholly inquisitorial, they are predominantly inquisitorial. That said, the rules of evidence do apply, though self evidently particular rules that have as their *raison d'etre* the maintenance of balance and fairness in an adversarial contest may have less relevance in a process that is predominantly inquisitorial. Moreover, the Supreme Court has stated in *Minister for Justice, Equality and Law Reform v Sliczynski* [2008] IESC 73 (unreported, Supreme Court, 19th December, 2008) that (where there is a difference between the rules of evidence applicable to criminal cases and the rules of evidence applicable to civil cases) it is the civil rules of evidence that apply in proceedings such the present.

In *Sliczynski*, Murray C.J., as he then was, stated:

> "…Counsel for the appellant properly acknowledged that extradition proceedings are neither strictly criminal nor civil in nature but the ordinary rules of evidence apply. It was submitted, citing *Minister for Justice, Equality & Law Reform –v- Abimbola* [2006 IEHC 325] which in turn relied on *R (Levin) -v- Governor of Brixton Prison* 1997 AC 741 that while not strictly criminal proceedings, in extradition matters criminal procedure and rules of evidence should apply. Suffice it to say that the latter case, the United Kingdom case, referred to a particular form of extradition proceedings in the context of arrangements for extradition between the United Kingdom and the United States which involved a wholly different procedure for extradition than that which arises under the system of surrender provided for in the Act of 2003 as amended. Section 10 of the Act of 2003 provides "Where a Judicial Authority in an issuing State duly issues a European Arrest Warrant in respect of a person …that person shall, subject to and in accordance with the provisions of this Act and the Framework Decision be arrested and surrendered to the issuing State." For the purpose of making an Order pursuant to s. 10 the trial Judge has to be satisfied that the requirements of the Act, and where specified, the Framework Decision, have been complied with. Once so satisfied he or she is bound to make the Order for surrender.
>
> As I pointed out in *Attorney General –v- Park* (Unreported) Supreme Court 6th December 2004 which concerned extradition under the Act of 1965, as amended, "The burden of proof of facts which may rest on the applicant in these proceedings is not that of a criminal trial. I hasten to add that the learned High Court Judge did not approach this matter on such a basis and it is just that I consider it appropriate at this point to distinguish between extradition proceedings and other forms of proceedings, criminal and civil. An extradition proceeding pursuant to the relevant Acts has its own special features which in a certain sense makes it sui generis." Later in the judgment it was stated "The role of the requested State, indeed its duty, is to give effect to a lawful request from a requesting State once it is determined that the request fulfils the criteria laid down by the relevant legislation …. The responsibility for bringing a person named in a warrant before the High Court clearly rests with authorities in the State. Once that is done the task in determining whether all legal requirements for the making of an Order pursuant to s. 47 are fulfilled rests with the High Court Judge. That is an inherently inquisitorial function." It seems to me that the same considerations apply to applications for surrender pursuant to the Act of 2003 and indeed s. 20 of the Act, as cited above, highlights the inquisitorial dimension of the proceedings. The rules of evidence which apply are not those of a criminal trial."

In *The Leopardstown Club Limited v Templeville Developments Limited* [2010] IEHC 152 (unreported, High Court, Edwards J., 29th January, 2010) I had cause to explore in considerable detail the civil rules of evidence relating to how, and to what end, documents may be introduced and relied upon by a party to civil litigation.

The first thing to be said is that a document is not capable of being received in evidence at all unless it has first been proven both in terms of due execution and authorship of its contents. No issue as to any of that arises in the circumstances of this case. Whatever else they do, the affidavits of Dr. Walsh and Dr. Randall respectively prove due execution and authorship of the contents of the report of the 4th February, 2013, and the addendum dated 18th February, 2013.

However, there may also be a need for "verification" of a document's contents depending on the means by which, and the purpose for which, a party seeks to introduce and rely upon that document. In that regard it must be appreciated that a document can constitute either real evidence, original evidence or testimonial evidence. Verification is necessary where the contents of a document are being relied upon as constituting testimonial evidence, not least because when the contents of the document are controversial it allows for the possibility of cross-examination of the author.

I said the following in the *Leopardstown Club* case:

> "Use of a Document as Real Evidence.
>
> 5.12 In general, real evidence is evidence that the Court or other tribunal of fact can scrutinise or examine for itself. If a document is tendered in evidence as a material object, regardless of the words contained in it, for instance to show the bare fact of its existence, the substance of which it is made (whether parchment or paper) or the condition that it is in (whether crumpled or torn or perhaps in the case of stolen banknotes stained with dye), it constitutes real evidence. It is an exhibit in the case and, as stated, generally speaks for itself. It can be, and is intended to be, examined by the Court or tribunal of fact which will sometimes have the assistance of testimony from a properly credentialed expert as to how the physical features of the particular exhibit may be interpreted.
>
> Use of a Document as Original Evidence
>
> 5.13 Where a document is produced by a party who proposes to rely upon the statements it contains, not as evidence of their truth by way of an exception to the hearsay rule, but to show for some legitimate purpose that the statements (whether or not they be true) were in fact made, then the document is properly to be characterised as non-hearsay

original evidence (otherwise original evidence). The circumstances in which a document may be produced as original evidence are many. Some important examples are: (a) where the making of a statement contained in the document is a fact in issue. A clear example of this would be in the case of an alleged libel. The plaintiff in such a case will want to rely upon the defamatory document, e.g. a newspaper, not just as a physical thing but also upon its contents. However, he will certainly not be relying upon the truth of the contents because his whole case is that they are false and misleading. (b) To establish the literacy of the author of the document. (c) To establish the state of mind of the recipient of a statement contained in the document. (d) Where the document contains a statement using words said to have a particular legal effect. (e) To establish the falsity of a statement contained in the document. (f) Where a statement contained in the document provides circumstantial evidence. (See in particular *Evidence* by Declan McGrath (Thomson Round Hall, 2005) paras 5-17 to 5-28 inclusive under the heading "Non-Hearsay Statements")

Use of a Document as Testimonial Evidence

5.14 Where a document is produced by a party who proposes to rely upon the statements it contains as evidence of their truth by way of an exception to the hearsay rule, then the document is properly to be characterised as admissible hearsay testimonial evidence (otherwise testimonial evidence).

5.15 Documents introduced as testimonial evidence are subject to the general rules of admissibility, and particularly the hearsay rule and the opinion evidence rule. In this regard:

(i) the hearsay rule serves to exclude any document which it is sought to rely on as evidence of the truth of its contents unless those contents come within one of the exceptions to the hearsay rule;

(ii) if the document contains an expression of opinion by a non-expert it will not be admissible.

5.16 Counsel is correct in suggesting that the hearsay rule prevents many documents from being relied upon in evidence in their own right, because in most instances the party introducing a document will be seeking to rely upon the truth of its contents, in other words to use the document as testimonial evidence. There are of course exceptions to the hearsay rule, such as when a document constitutes a declaration against interest, and in certain other situations, which may allow a document containing hearsay to be used as testimonial evidence, but the general rule is as stated by counsel. However, the situation is entirely different where the document is being introduced not as testimonial evidence but as original evidence because the hearsay rule has no application to original evidence."

It is clear that in the present case the respondent seeks to rely upon the said psychological report, and the addendum thereto, partly as containing original evidence and partly as containing testimonial evidence. In recounting the history that was given to them by the respondent, and by others they interviewed in the course of their assessment, the psychologists are not asserting the truth of that history, merely that that is the history that they received. Therefore to the extent that the report and its addendum contain history, the history can be regarded as original evidence. Moreover, recital of the history received in such circumstances does not offend the hearsay rule. However, to the extent that the psychologists describe the assessment process including their methodology, and proffer an opinion or opinions based upon their assessment, it is clear that it is intended that the Court should rely upon the contents of their report as testimonial evidence. The Court has carefully scrutinised the affidavits of Dr. Walsh and Dr. Randall, respectively, and is satisfied that it is implicit therein that they warrant the testimonial parts of their reports as being true and capable of being relied upon. True enough, they do not expressly state that the assessment described in their report and addendum was in fact carried out by them or that it is accurately described therein. Neither do they expressly state that the opinions that they offer are their true opinions. It would, of course, have been better if they had stated these matters in explicit terms. However, the Court believes that in all the circumstances of the case it is clearly to be inferred from that which is in fact stated in the affidavits of Drs. Walsh and Randall (in the absence of any basis for believing the deponents are being economical with the truth or strategic in the specificity, or lack thereof, of their averments), that the assessment described in the report and addendum of which they claim authorship was indeed carried out by them, that it is accurately described, and that the opinions expressed are their own genuinely held opinions. It follows that if counsel for the applicant had wished to cross-examine either or both of the psychologists about the contents of their report, and/or addendum, there would have been no inhibition to her doing so. However, no application was made by counsel for the applicant to be allowed to cross-examine the psychologists, or either of them, nor was a possibility of cross examination even mooted.

In an ideal world, and upon a strict application of what used to be known as "the best evidence rule", the psychologists ought perhaps to have recast the entirety of their report and addendum in affidavit form. However, in regard to that it must also be acknowledged that it is extremely common for medical, psychological and other expert reports to be merely exhibited within a short affidavit that verifies their contents. It is also occurs quite frequently that such reports, where they are accepted as having a legitimate *provenance*, are simply "handed in" either on a consent basis, alternatively without objection, without any verifying affidavit being provided, or insisted upon by the other side.

That being the case, the Court is left wondering why it is, in circumstances where there is no reason on the face of it to believe that the psychologists in this case have approached their brief other than with total professionalism, that the Central Authority felt it necessary to specifically instruct his counsel to raise the particular objection that was raised in this case. It can hardly be for reasons of consistency, or out of concern that failure to do so might create an undesirable precedent, because, as the Court has pointed out, its experience has been that in routine European arrest warrant cases the verification rule is frequently more honoured in its breach than in its observance. Moreover, while counsel for the applicant made it plain that the applicant was not accepting the correctness of the opinions offered by the respondent's experts, there was neither a request to cross-examine the psychologists as to the basis for their opinions, nor an application to be allowed to call evidence in rebuttal. Of course, the Court has no entitlement to require the applicant to explain his stance. An interested party is within his rights in any particular case to insist on proper "verification" of a report put forward by the other side's expert, and that has been the applicant's quite legitimate position in the present case. That said, the Court is concerned to reassure the respondent that the mere fact that the applicant has opted to insist upon verification in this case will not be taken by the Court as implying, in and of itself, and without more, that the Court requires to be concerned about either the reliability or professionalism of the experts in question.

Ultimately the Court has been able to resolve the controversy arising from the applicant's said objection on the basis that it is satisfied that an adequate, albeit not ideal, level of verification of the psychologists' report and addendum has in fact been provided in the present case. It is not therefore disposed to uphold the applicant's objection and it is prepared to permit the respondent to rely upon the contents of the said report and addendum, as original evidence in so far as it contains the histories taken by Dr. Walsh and

Dr. Randall, and as testimonial evidence to the extent that it describes their assessment process including methodology, and the opinions they formed based upon that assessment.

The contents of the psychological report and the addendum thereto

The report of the 4th of February, 2013 describes the background to referral, and the history received in the course of an interview with the respondent and his partner. It further describes how the psychologists observed the interaction of the respondent and his partner with their two daughters aged 4.5 years and 3.5 years, respectively, at the time. The report records (*inter alia*):

> "In respect of [Mr. G.], the children were tactile and affectionate with him and took directions from him easily. He is clearly a key figure in the children's lives and it was apparent that although he works long hours, he is actively involved with [Y and X] and is responsive to their needs. It was evident through the ease of interactions that [Mr. G.] spends a substantial amount of time caring for his children. [Mr. G.]'s relationship with his partner, [Ms. S] appeared warm and comfortable. They naturally divided parenting activities between themselves and maintained communication despite their involvement with each of the children separately."

The report goes on to describe further histories received in the course of telephone interviews with relevant parties, including one of the members of An Garda Siochána concerned in the arrest of the respondent, the respondent's employer, the family's G.P., the oldest child's school teacher, and the Principal of the pre-school attended by the younger child and previously attended by the older child. The psychologist's then proceed to give their assessment of how the surrender of the respondent would impact upon the children. In that regard the report states (*inter alia*):

> "…[Mr. G.] plays an active and crucial role in raising his children. It is further evident that he takes his responsibility to his family and children seriously, and that he is concerned for their well-being. He has taken to fatherhood in a natural, easy manner and is genuinely interested in his children's activities and development. They turn to him for guidance, support, and direction as often as to their mother.
>
> [X and Y] are aged 4.5 and 3.5 respectively. [Mr. G.] and [Ms. S.] are expecting a child in July 2013.
>
> Should [Mr. G.] be removed from the family it will have potentially devastating consequences for his children. [Mr. G.] provides [X and Y] with security, predictability, and reassurance which are particularly important during [Ms. S.]'s pregnancy and becomes vital for them when their new sibling is born and introduced into the family. Given [X and Y]'s age they are unlikely to have a full understanding of why their father is no longer with them should he be returned to Poland to serve a prison sentence. From their perspective he will simply have disappeared from their lives. The likelihood of the children experiencing a grief reaction to his removal in these circumstances is very high.
>
> Children this age who are subject to sudden or traumatic loss of a parent experience the world as uncertain and unsafe and have anxieties and fears for their own safety and that of the remaining parent. This in turn leads to emotional distress and separation anxiety, which become particularly acute when children have to separate from their mother for periods of time such as attendance at school or extracurricular activities. Children of [X and Y]'s age also have a tendency to attribute the parent's disappearance to themselves or their own behaviour and often engage in activities designed to elicit the return of the absent parent. When this proves ineffective the children are likely to evidence states of protracted anxiety, depression and despondency.
>
> Such levels of distress and hopelessness have a highly damaging effect on personal, social and academic functioning in both the immediate and longer-term. This in turn places an additional burden upon their mother, the school and pre-school systems as they endeavour to attend appropriately to the suffering of the children.
>
> [X and Y] have a strong and positive relationship with their father. Should he be removed from them he will miss significant periods of their lives and development and the relationship will be irreversibly damaged. Once such a connection is severed, it is extremely difficult to re-kindle as the children's trust and security is shattered. Further, their capacity to form close and intimate relationships as they move through adolescence and into adulthood will be significantly hampered as a result of a broken critical attachment.
>
> Another significant factor to be considered is the loss of [Mr. G.] to [Ms. S.], especially during her pregnancy and confinement. Removal of her Partner from her life at such a critical time will prove extremely stressful and traumatic and will impede her in being fully available to [X, Y] and her new baby. It will also increase her risk for postnatal depression, which will further compound an already difficult situation.
>
> [Mr. G.] is also the breadwinner and the loss of his support would significantly destabilise the family. It would likely result in [Ms. S.] having to find work which would deprive the children not only of their father, but also of their mother as she spends more time earning a living. The couple does not have well-resourced families upon who they can rely for either financial or emotional support."

The conclusion jointly reached by Dr. Walsh and Dr. Randall was that *"[Mr. G.]'s removal from the family in this way would have a devastating and irreversible effect on his children's lives and development both presently and into the future."*

The addendum was produced in circumstances where the mother of the respondent's employer was interviewed by the psychologists some ten days after the report of the 4th of February, 2013 was issued. This came about because the solicitor for the respondent requested it, in circumstances where the lady in question had provided accommodation and support to the respondent when he first came to Ireland and had maintained regular contact with him and his family. It was believed by the solicitor that she could be in a position to provide further insight into the respondent's role in the family. The history received suggested to the psychologists that the respondent is intimately involved in and committed to the care of his children, and that he may have acted as the primary carer to his children when his partner was said to have been ill. This lady suggested that the respondent's partner has health difficulties which need to be medically monitored on an on going basis and also have resulted in her being hospitalised for periods of time. (There is, however, no corroboration of this in the respondent's own affidavit, nor has any medical report concerning the respondent's partner been put in evidence.) It was further reported that the respondent assumed this role naturally. He was able to provide a stable home for the children and give his partner reassurance that he was there to care for the children so she could devote her energies to her recovery. On the basis of the history received, the psychologists further opined that "[*i*]*t is likely, given [Ms. S.]'s health condition that Mr. G. will need to assume the role of primary carer in the future when [Ms. S.] requires hospitalisation. In light*

of this, [Mr. G.] must be viewed as a joint primary carer for his children."

Submissions

At the invitation of the Court, both sides filed helpful written legal submissions and these were later developed and amplified in oral argument.

The position of the respondent was straightforward. He suggested that this court should depart from the exceptionality test that it had previously applied in *Minister for Justice, Equality and Law Reform v Bednarczyk* [2011] IEHC 136 (unreported, High Court, Edwards J., 5th April, 2011) and other cases, and adopt instead the recently refined approach of the U.K. Supreme Court as exemplified in that Court's judgments in the conjoined cases of *R.(H.H.) & (P.H.) v. the Deputy Prosecutor of the Italian Republic, Genoa*; also *R.(F-K) v. Polish Judicial Authority*, [2013] 1 A.C. 338, (hereinafter referred to for convenience as *R.(H.H.) v. Genoa).* He commended to the Court in particular the analysis of Lady Hale who gave the leading judgment.

The position of the applicant was that this Court's approach to objections to surrender based on s.37 of the Act of 2003 and article 8 ECHR as illustrated in *Bednarczyk* and subsequent cases was basically correct and consistent with the jurisprudence of the European Court of Human Rights (hereinafter E.Ct.H.R). It was urged that this Court should not follow *R. (H.H.) v. Genoa* as in various respects it was the artefact of peculiarities of UK law that were not applicable in Ireland. While some aspects of it might be regarded as being helpful and of persuasive value, there were other aspects that ought be rejected as inconsistent with current Irish law.

Before engaging with these submissions in more detail, it requires to be stated that they have somewhat been overtaken by events. This case is just one of a number of recent cases in which this Court was asked to review the approach it had previously taken in the light of recent UK jurisprudence, and in particular *R. (H.H.) v. Genoa* . Since the arguments in the present case concluded the Court has delivered its judgment in *Minister for Justice and Equality v T.E*. [2013] IEHC 323 (unreported, High Court, Edwards J, 19th June, 2013), subsequently applied in *Minister for Justice and Equality v. N.M.* [2013] IEHC 322 (unreported, High Court, Edwards J, 25th June, 2013) and *Minister for Justice and Equality v. M.M*. (unreported, High Court, Edwards J, 4th July, 2013).

In its recent judgment in *Minister for Justice and Equality v. T.E* the Court conducted an extensive review of relevant Irish, English and E.Ct.H.R case law and sought to distill from that jurisprudence a series of principles for application both in that case and in future cases.

Among the cases reviewed were *Minister for Justice, Equality and Law Reform v. Gorman* [2010] 3 I.R. 583, *Minister for Justice, Equality and Law Reform v. Gheorghe* [2009] IESC 76 (unreported, Supreme Court, Fennelly J., 18th November, 2009); *Minister for Justice, Equality and Law Reform v. Bednarczyk* [2011] IEHC 136 (unreported, High Court, Edwards J., 5th April, 2011) ; *Launder v. United Kingdom* (1997) 25 EHRR CD67 ; *King v. United Kingdom* (Application no. 9742/07, 26th January, 2010); *Babar Ahmad and Others v. United Kingdom*, (Application no 24027/07, 10th April 2012) [2012] ECHR 609 ; *Huang v. Secretary of State for the Home Department* [2007] A.C. 167 ; *Zigor Ruiz Jaso v. Central Court of Criminal Proceedings (No 5) Madrid* [2007] EWHC 2983 ; *Norris v. Government of United States of America (No 2)*, [2010] 2 A.C. 487 ; *Z.H. (Tanzania) v. Secretary of State for the Home Department* [2011] 2 A.C. 166 ; *R.(H.H.) & (P.H.) v. the Deputy Prosecutor of the Italian Republic, Genoa*, *also R.(F-K) v. Polish Judicial Authority*, [2012] 1 A.C. 338 and *Minister for Justice and Equality v. Ostrowski* [2013] IESC 24 (unreported, Supreme Court, 15th May, 2013 – in particular the judgment of McKechnie J.) This represents an indicative, but by no means exhaustive, list of the cases and judgments reviewed.

As a result of its review the Court was satisfied to set forth and adopt the following principles of law for application in the European Arrest Warrant context in cases where article 8 is engaged:

1. The test imposed by article 8(2) is not whether extradition is on balance desirable but whether it is necessary in a democratic society;

2. There is no presumption against the application of article 8 in extradition cases and no requirement that exceptional circumstances must be demonstrated before article 8 grounds can succeed;

3. The test is one of proportionality, not exceptionality;

4. Where the family rights that are in issue are rights enjoyed in this country, the issue of proportionality involves weighing the proposed interference with those rights against the relevant public interest;

5 In conducting the required proportionality test, it is incorrect to seek to balance the general desirability of international cooperation in enforcing the criminal law and in bringing fugitives to justice, against the level of respect to be afforded generally to the private and family life of persons;

6 Rather, the assessment must be individual and particular to the requested person and family concerned. The correct approach is to balance the public interest in the extradition of the particular requested person against the damage which would be done to the private life of that person and his or her family in the event of the requested person being surrendered;

7. In the required balancing exercise the public interest must be properly recognized and duly rated;

8. The public interest is a constant factor in the horizontal sense, i.e., it is a factor of which due account must be taken in every case;

9. However, the public interest is a variable factor in the vertical sense, i.e., the weight to be attached to it, though never insignificant, may vary depending on the circumstances of the case;

10. No fixed or specific attribution should be assigned to the importance of the public interest in extradition and it is unwise to approach any evaluation of the degree of weight to be attached to it on the basis of assumptions. The precise degree of weight to be attached to the public interest in extradition in any particular case requires a careful and case specific assessment. That said, the public interest in extradition will in most cases be afforded significant weight.

11. The gravity of the crime is relevant to the assessment of the weight to be attached to the public interest. The graver

the crime, the greater the public interest. However, the opposite effect, namely 'the lesser the crime the lesser the interest' may not follow in corresponding proportion. Where on the spectrum the subject offence may sit, is an aspect of each case which must also be explored as part of the process.

12. The public interest in extraditing a person to be tried for an alleged crime is of a different order from the public interest in deporting or removing an alien who has been convicted of a crime and who has served his sentence for it, or whose presence in the country is for some other reason not acceptable. This does not mean, however, that the Court is required to adopt a different approach to article 8 rights depending on whether a case is an extradition case or an expulsion case. The approach should be the same, but the weight to be afforded to the public interest will not necessarily be the same in each case.

13. Delay may be taken into account in assessing the weight to be attached to the public interest in extradition;

14. In so far as it is necessary to weigh in the balance the rights of potentially affected individuals on the one hand, with the public interest in the extradition of the requested person, on the other hand, the question for consideration is whether, to the extent that the proposed extradition may interfere with the family life of the requested person and other members of his family, such interference would constitute a proportionate measure both in terms of the legitimate aim or objective being pursued and the pressing social need which it is suggested renders such interference necessary.

15. It is self evident that a proposed surrender on foot of an extradition request will, if carried into effect, result in the requested person being arrested, being possibly detained in custody in this State for a period pending transfer to the requesting state, and being forcibly expelled from the State. In addition, he/she may have to face a trial (and may possibly be further detained pending such trial) and/or may have to serve a sentence in the requesting State. Such factors, in and of themselves, will rarely be regarded as sufficient to outweigh the public interest in extradition. Accordingly, reliance on matters which could be said to typically flow from arrest, detention or surrender, without more, will little avail the affected person.

16. Article 8 does not guarantee the right to a private or family life. Rather it guarantees the right to respect for one's private or family life. That right can only be breached if a proposed measure would operate to so as to disrespect an individual's private or family life. A proposed measure giving rise to exceptionally injurious and harmful consequences for an affected individual, disproportionate to both legitimate aim or objective being pursued and the stated pressing social need proffered in justification of the measure, would operate in that way and breach of the affected individual's rights under Article 8.

17. It will be necessary for any Court concerned with the proportionality of a proposed extradition measure to examine with great care in a fact specific enquiry how the requested person, and relevant members of that person's family, would be affected by it, and in particular to assess the extent to which such person or persons might be subjected to particularly injurious, prejudicial or harmful consequences, and then weigh those considerations in the balance against the public interest in the extradition of the requested person.

18. Such an exercise ought not to be governed by any predetermined approach or by pre-set formula: it is for the Court seized of the issue to decide how to proceed. Once all of the circumstances are properly considered, the end result should accurately reflect the exercise.

19. The demonstration of exceptional circumstances is not required to sustain an article 8 type objection because in some cases the existence of commonplace or unexceptional circumstances might, in the event of the proposed measure being implemented, still result in potentially affected persons suffering injury, prejudice or harm. The focus of the court's enquiry should therefore be on assessing the severity of the consequences of the proposed extradition measure for the potentially affected persons or persons, rather than on the circumstances giving rise to those consequences.

20. Where the article 8 rights of a child or children are engaged by a proposed extradition measure the best interests of the child or children concerned must be a primary consideration. They may be outweighed by countervailing factors, but they are of primary importance.

21. If children's interests are to be properly taken into account by an extradition court, it will require to have detailed information about them, and about the family as a whole, covering all considerations material to or bearing upon their welfare, both present and future. Primary responsibility for the adduction of the necessary evidence rests upon the party raising article 8 rights in support of an objection to their surrender.

22. In an appropriate case, where it is satisfied that there are special features requiring further investigation to establish how the welfare of a child or children might be affected by a proposed extradition measure, and/or as to what the best interests of the child or children in question might require, an extradition court can, of its own motion, seek further evidence.

In setting forth these principles I have not sought to uncritically adopt the approach of any single court or jurisdiction, but rather to take what seems to me to be the best features of each approach, learning and benefiting from the experience of others. As the judgment in *T.E.* demonstrates, I have indeed been conscious of the differences in approach evident in the jurisprudence emanating from Strasbourg on the one hand, and that recently emanating from the Courts in the U.K. on the other hand. I have also been conscious of the fact that, in so far as the rights of children are concerned, the UN Convention on the Rights of the Child is directly effective in UK law, and has been incorporated into relevant statutes in that jurisdiction. As was pointed out in *T.E.*, and indeed also in this Court's earlier judgment in *Minister for Justice, Equality & Law Reform v D.L.* [2012] 1 I.L.R.M 270, the same is not true in Ireland. All of that having been said, some of the issues raised by counsel for the applicant in the present case are not in fact dealt with in the judgment in *T.E.,* while others are not dealt with in sufficient detail. It is necessary in the circumstances to examine counsel for the applicant's specific arguments concerning where, and why, this Court should depart from the approach of the U.K. Supreme Court in *R. (H.H.) v. Genoa* and refuse to follow it. It is also necessary to consider to what extent, if any, the principles recently expounded in *T.E.* may require yet further refinement or modification.

The case made by the applicant

Counsel for the applicant relies in the first instance on the provisions of the Framework Decision itself, including the recitals thereto. To put matters in context, it is desirable that I should set forth the relevant provisions.

Recital (10) provides:-

> *"The mechanism of the European arrest warrant is based on a high level of confidence between Member States. Its implementation may be suspended only in the event of a serious and persistent breach by one of the Member States of the principles set out in Article 6(1) of the Treaty on European Union, determined by the Council pursuant to Article 7(1) of the said Treaty with the consequences set out in Article 7(2) thereof."*

As Counsel points out, Article 6(1) of the TEU stated that the Union was founded of the principles of liberty, democracy, or respect for human rights and fundamental freedoms, and the rule of law, principles which were common to the Member States. Article 7 provides for a particular procedure, which has never been invoked in relation to Poland, for the determination by the Council of the European Union of the existence of a serious and persistent breach by Member State of the principles mentioned in Article 6(1).

Recital (12) then provides:-

> *"This Framework Decision respects fundamental rights and observes the principles recognised by Article 6 of the Treaty on European Union and reflected in the Charter of Fundamental Rights of the European Union, in particular Chapter VI thereof. Nothing in this Framework Decision may be interpreted as prohibiting refusal to surrender a person for whom a European arrest warrant has been issued when there are reasons to believe, on the basis of objective elements, that the said arrest warrant has been issued for the purpose of prosecuting or punishing a person on the grounds of his or her sex, race, religion, ethnic origin, nationality, language, political opinions or sexual orientation, or that that person's position may be prejudiced for any of those reasons.*
>
> *This Framework Decision does not prevent a Member State from applying its constitutional roles relating to due process, freedom of association, freedom of the press and freedom of expression in other media."*

Recital (13) provides:-

> *"No person should be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment."*

Article 1(2) of the Framework Decision provides for a mandatory obligation on Member States:-

> *"Member States shall execute any European arrest warrant on the basis of the principle of mutual recognition and in accordance with the provisions of this Framework Decision."*

Article 1(3) then provides:-

> *"This Framework Decision shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union."*

Counsel for the applicant points out that in the recent decision of the Court of Justice of the European Union (hereinafter "the CJEU") in *In re Ciprian Radu* (Case 396/11) (judgment of the Grand Chamber, 29th January, 2013) it was alleged that the failure to afford a hearing to a requested person before the issue of a European Arrest Warrant was a breach of the right to a fair hearing within the meaning of article 6 of the European Convention on Human Rights, and the CJEU made certain comments on the subject of the relationship between fundamental rights and the obligation to surrender requested persons in accordance with the principle of mutual recognition. As a preliminary point, the Court confirmed that the right to be heard, which is guaranteed by article 6 of the European Convention on Human Rights, and which had been mentioned in the question referred to the CJEU, was laid down in Articles 47 and 48 of the Charter of Fundamental Rights of the European Union, and it was therefore necessary to refer to those provisions of the Charter. As a result, the relevant provision of Union law which is relevant to the proceedings is Article 7 of the Charter, which is based on article 8 of the European Convention on Human Rights.

Although counsel for the applicant did not specifically refer to it, it might be added that in this Court's view Article 24 of the Charter could potentially be relevant in cases involving the article 8 rights of children, depending on whether the obligation to have regard to the best interests of a child is to be properly regarded as a right or a principle. See the discussion in relation to Article 24 of the Charter in this Court's judgment in *Minister for Justice, Equality & Law Reform v D.L.* cited above.

At any rate, counsel for the applicant has sought to stress that in considering whether the provisions of Article 7 of the Charter might prohibit the surrender of the respondent to Poland, it is important to note the emphasis placed by the CJEU in *Radu* on the mandatory obligation created in Article 1.2 of the Framework Decision. The Court stated:-

> "33. It should also be recalled that, as is apparent in particular from article 1(1) and (2) of Framework Decision 2002/584 and from recitals 5 and 7 in the preamble thereto, the purpose of that decision is to replace the multilateral system of extradition between Member States with a system of surrender, as between judicial authorities of convicted persons or suspects for the purpose of enforcing judgments or of conducting prosecutions, that system of surrender being based on the principle of mutual recognition […] .
>
> 34. Framework Decision 2002/584 thus seeks, by the establishment of a new simplified and more effective system for the surrender of persons convicted or suspected of having infringed criminal law, to facilitate and accelerate judicial cooperation with a view to contributing to the objective set for the European Union to become an area of freedom, security and justice by basing itself on the high degree of confidence which should exist between the Member States […] .
>
> 35. Under Article 1(2) of the Framework Decision 2002/584, the Member States are in principle obliged to act upon a European arrest warrant.
>
> 36. As the Court has already held, according to the provisions of Framework Decision 2002/584, the Member States may refuse to execute such a warrant only in the cases of mandatory non-execution provided for in Article 3 thereof and in the cases of optional non-execution listed in Articles 4 and 4a (see, to that effect, Case C-388/08 PPU *Leyman and Pustovarov* [2008] ECR I-8993, paragraph 51, and Case C-261/09 *Mantello* [2010] ECR I-11477, paragraph 37). Furthermore, the executing judicial authority may make the execution of a European arrest warrant subject solely to the conditions set out in Article 5 of that framework decision."

The Court went on to state that an obligation for an issuing judicial authority to hear a requested person before a European arrest warrant was issued would inevitably lead to the failure of the very system of surrender provided for by the Framework Decision and, consequently, prevent the achievement of the area of freedom, security and justice, insofar as such an arrest warrant may have a certain element of surprise, in particular in order to stop the person concerned from taking flight.

That judgment therefore stressed the high degree of trust and confidence that exists between Member States as to their respective procedures, but also stressed the necessity of the system of surrender provided for in the Framework Decision as an aspect of the judicial cooperation which was required to achieve the objective set for the European Union, which has to become an area of freedom, security and justice.

In so far as this Court is concerned the decision of the CJEU in *Radu* is a curious one, not least because the Court, for reasons that are not readily apparent, seems to have largely disregarded the much more rights focussed approach commended to them by Advocate General Sharpston in her opinion delivered on the 18th of October, 2012. The Advocate General, having considered in detail the place of fundamental rights within European Union law, made it clear that in her view human rights principles may be considered by an executing State when considering whether to surrender on foot of a European arrest warrant. She stated:

> "41. While the record of the Member States in complying with their human rights obligations may be commendable, it is also not pristine. There can be no assumption that, simply because the transfer of the requested person is requested by another Member State, that person's human rights will automatically be guaranteed on his arrival there. There can, however, be a presumption of compliance which is rebuttable only on the clearest possible evidence. Such evidence must be specific; propositions of a general nature, however well supported, will not suffice."

Accordingly, a Member State could refuse to execute a warrant on the basis of non-compliance with fundamental rights. AG Sharpston recognised that such considerations fell outside of the list of grounds for refusing a warrant laid out in Articles 3 and 4, and as such it might be thought that human rights were not a valid ground for refusing a warrant. Addressing such concerns she stated:

> "69. However, I do not believe that a narrow approach – which would exclude human rights considerations altogether – is supported either by the wording of the Framework Decision or by the case-law.
>
> 70. Article 1(3) of the Framework Decision makes it clear that the decision does not affect the obligation to respect fundamental rights and fundamental principles as enshrined in Article 6 EU (now, after amendment, Article 6 TEU). It follows, in my view, that the duty to respect those rights and principles permeates the Framework Decision. It is implicit that those rights may be taken into account in founding a decision not to execute a warrant. To interpret Article 1(3) otherwise would risk its having no meaning – otherwise, possibly, than as an elegant platitude."

Ultimately, the Advocate General had recommended (inter alia):

> "that the Court should give the following answers to the questions referred by the Curtea de Apel Constanþa:
>
> (1) The provisions of the Charter of Fundamental Rights of the European Union, including Articles 6, 48 and 52 thereof, form part of the primary law of the Union. Fundamental rights, as guaranteed by the European Convention for the Protection of Fundamental Rights and Freedoms, including the rights set out in Articles 5(1), (3) and (4) and 6(2) and (3) of the Convention, constitute general principles of Union law.
>
> (2) The deprivation of liberty and forcible surrender of the requested person that the European arrest warrant procedure entails constitutes an interference with that person's right to liberty for the purposes of Article 5 of the Convention and Article 6 of the Charter. That interference will normally be justified as 'necessary in a democratic society' by virtue of Article 5(1)(f) of the Convention. Nevertheless, detention under that provision must not be arbitrary. To avoid being arbitrary, such detention must be carried out in good faith; it must be closely connected to the ground of detention relied on by the executing judicial authority; the place and conditions of detention should be appropriate; and the length of the detention should not exceed that reasonably required for the purpose pursued. Article 6 of the Charter falls to be construed in the same way as Article 5(1) of the Convention.
>
> (3) The competent judicial authority of the Member State executing a European arrest warrant can refuse the request for surrender without being in breach of the obligations authorised by the founding Treaties and the other provisions of European Union law, where it is shown that the human rights of the person whose surrender is requested have been infringed, or will be infringed, as part of or following the surrender process. However, such a refusal will be competent only in exceptional circumstances. In cases involving Articles 5 and 6 of the Convention and/or Articles 6, 47 and 48 of the Charter, the infringement in question must be such as fundamentally to destroy the fairness of the process. The person alleging infringement must persuade the decision-maker that his objections are substantially well founded. Past infringements that are capable of remedy will not found such an objection."

Counsel for the applicant further submitted that as the Framework Decision does not have direct effect in Irish law, the specific provisions of the European Arrest Warrant Act, 2003, must be considered, though they must be interpreted, insofar as is possible, in line with the Framework Decision and in accordance with its objectives. The respondent's case is based upon s.37 of the Act of 2003 in conjunction with article 8 ECHR. Having referred the Court to the familiar terms of s.37 of the Act of 2003, counsel then drew the Courts attention to s.2 of the European Convention on Human Rights Act, 2003 which provides:-

> *"(1) In interpreting and applying any statutory provision or rule of law, a court shall, in so far as is possible, subject to the rule of law relating to such interpretation and application, do so in a manner compatible with the State's obligations under the Convention provisions.*
>
> *(2) This section applies to any statutory provision or rule of law in force immediately before the passing of this Act or any such provision, coming into force thereafter."*

Counsel further pointed out that s. 4 of the same Act provides that judicial notice shall be taken of the provisions of the Convention, and of any declaration, decision, advisory opinion, or judgment of the European Court of Human Rights established under the Convention on any question in respect of which that Court has jurisdiction, and a Court shall, when interpreting and applying the Convention provision, take due account of the principles laid down by those declarations, decisions, advisory opinion, opinions and judgments.

Counsel submitted that in the circumstances the first port of call for interpreting the State's obligations pursuant to article 8 of the Convention, for the purpose of considering whether surrender would be prohibited contrary to section 37, are the judgments of the European Court of Human Rights itself. In this regard, she asks the Court to note that, as stressed by the UK Supreme Court in both *Norris* and *R (H.H.) v Genoa*, that there appears to be no judgment of the European Court of Human Rights which has found the extradition of a person, even outside the territory of the contracting states, to be a breach of the Convention by reason of the provisions of article 8.

The Court's attention was then drawn to the remarks of Feeney J. in *Agbonlahor v Minister for Justice, Equality and Law Reform* [2007] 4 I.R. 309 concerning the correct interpretation of article 8. As this Court has quoted the relevant passages from *Agbonlahor* on many occasions, including in its judgments in *Bednarczyk*, and just recently in *T.E.*, it does not consider it necessary to do so yet again. Counsel's point was to emphasise, if emphasis were needed, that the main focus of article 8 is to prevent arbitrary interference with private and family life.

It was urged that in this case, the State is not arbitrarily interfering with the rights of the family: it is instead executing a European arrest warrant issued by a judicial authority in accordance with the system of mutual trust and confidence established at European Union level. The objective of Union law as a whole is to provide for an area of freedom and justice, as explained by the CJEU in *Radu*. The purpose of this individual warrant is to render the respondent available to the Polish authorities for the purpose of serving sentences lawfully imposed in Poland, and for the purposes of conducting criminal prosecutions, in circumstances where the service of the sentences imposed, and the conduct of the criminal prosecutions are not matters themselves giving rise to any allegation of a breach of fundamental rights. It is the normal operation of the Polish criminal justice system, assisted by the European-wide system of surrender established by the Framework Decision.

Counsel for the applicant submitted that there is no caselaw to suggest that article 8 includes a right to immunity from criminal prosecution or from liability to serve a sentence lawfully imposed so as to continue to enjoy "*family life*", and it is clear that the actions of the Irish State, in this context, are directed not towards the personal or family rights of the respondent as such but towards the assistance which it is obliged to give to the Polish authorities pursuant to the Framework Decision..

The Court agrees with this statement as far as it goes, and considers that its judgments in *Bednarczyk* and other cases are consistent with this. In particular, this Court stressed in *Bednarczyk* that:

> "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.
>
> It is in the nature of imprisonment that many of the personal rights (whether they be constitutional or convention rights) enjoyed by persons at liberty will be suspended or abrogated by the very fact of that person being remanded to or detained in a prison, especially where he or she has been sentenced to a term of imprisonment. Of course, a prisoner will always have certain residual personal rights which are not abrogated or suspended, such as the right to life and the right to be treated humanely and with human dignity. However, it needs to be said that the sending of a person to prison will inevitably severely impinge upon their opportunity to have society with, and to enjoy the company of, their family members including any children they may have. Such society as is permitted is likely to be occasional, limited and restricted in a multitude of ways in the interests of security and good order within the prison system. Moreover, the ability of a prisoner to earn a salary or wage to support his family will be suspended, and his ability to exercise his guardianship rights with respect to his children will also inevitably be severely curtailed. Such interferences with family life are a usual feature of, and are to be expected of, any prison system. Many of the rights or entitlements in that regard that the prisoner would otherwise have, but for the fact that he is in prison, are suspended or abrogated for the duration of his or her sentence or period of remand. Moreover such suspension or abrogation of the prisoner's rights to participation in family life will in most circumstances be considered to be a measure proportionate to legitimate aims and objectives of the imprisoning state.
>
> That this is so is reflected in article 8(2) of the Convention which permits interference by a public authority with the exercise of the right to respect for family life where that is "*in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others*". It would be preposterous to suggest that persons could not, or should not, be sent to prison simply because that would interfere, and indeed significantly interfere, with their enjoyment of family life, or that the sending of persons, particularly any person with a spouse and children, to prison would amount to a failure to respect the right of those affected to family life. That is not to say that there can never be circumstances in which a person's imprisonment could amount to a failure to respect family life but such circumstances would be highly exceptional and are likely to be exceedingly rare."

Indeed, this was ostensibly the view of Fennelly J. giving judgment *per curiam* in *Minister for Justice, Equality and Law Reform v. Gheorghe* [2009] IESC 76, also cited in this Court's judgment in T.E., where he stated:

> "It is a regrettable but inescapable incident of extradition in general and, as in this case, surrender pursuant to the system of the European arrest warrant [EAW], that persons sought for prosecution in another state will very often suffer disruption of their personal and family life. Some states have historically refused to extradite their own nationals, but that is a special case. The Framework Decision expressly provides that, in Article 1, that it does not *'have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union*.' No authority has been produced to support the proposition that surrender is to be refused where a person will, as a consequence, suffer disruption, even severe disruption of family relationships."

The Court should state, however, that in so far as the last sentence of the passage just quoted is concerned, it has never interpreted that sentence as foreclosing on the possibility that an "arbitrary" interference with family life in breach of article 8, particularly where it would be actually harmful and injurious to a party, as opposed to inconvenient or disruptive, could justify non surrender.

Counsel for the applicant submitted that the execution of the European arrest warrant by this State would not constitute an arbitrary interference in the family life of the Respondent, and the State has not breached the primarily negative obligation imposed on the State by article 8.

Moving to specifically consider the jurisprudence of the UK Courts in respect of article 8 ECHR, counsel for the applicant pointed to statements in *R (Razgar) v Secretary of State for the Home Department* [2004] 2 A.C. 368 , and in *Huang v. Secretary of State for the Home Department* [2007] 2 A.C. 167, both immigration cases, as echoing what she characterises as "the repeated caselaw" of the E.Ct.H.R. to the effect that where there are no insurmountable obstacles to reunification in the home State, article 8 will not be breached.

Counsel for the applicant submitted that the UK Supreme Court's decision in *ZH (Tanzania) v. Secretary of State for the Home Department* [2011] 2 A.C. 166 (the judgments of which in turn, and in conjunction with those in *Norris v Government of the United States of America (No 2*) [2010] 2 A.C. 487, heavily influenced the later judgments of that Court in *R. (H.H.) v. Genoa)* is best understood as dealing with the issue of minor British citizens who may in effect be deprived of the benefits of that citizenship if their primary carer were to be removed from the United Kingdom.

ZH (Tanzania), which is reviewed at some length in this Court's judgment in *Minister for Justice and Equality v T.E.*, considered (*inter alia*) the discrete issue as to the weight to be given to the best interests of children who are affected by the decision to remove or deport one or both of their parents from the United Kingdom. As part of this question, the Supreme Court also identified a more specific question: in what circumstances is it permissible to remove or deport a non-citizen parent where the effect will be that a child who is a citizen of the United Kingdom will also have to leave?

In that case, the children, aged 9 and 12 at the date of the decision, were British citizens who had lived with their Tanzanian mother all of their lives. She was separated from their British father, who was HIV positive, survived on social welfare, and had a drink problem. The Supreme Court took the view that it would not be reasonable in the circumstances to expect the children to live with their father, nor would it be reasonable to expect him to follow his family to Tanzania, given his medical history and poor financial situation. Therefore, the primary carer was the mother, the Tanzanian national, who had an "*appalling*" immigration history.

In reviewing the relevant case law, the Supreme Court divided the Strasbourg cases into two types, the first being where long-settled migrants committed criminal offences and were the subject of removal or deportation orders, the second concerning the removal of non-nationals because they had no permission to be in the United Kingdom.

Having noted that the ECHR had been stated by the Strasbourg court to require interpretation in harmony with general principles of international law (*Neulinger v. Switzerland* (2010) ECHR 1053) the Supreme Court went on to note the provisions of various applicable international instruments, including article 3(1) of the United Nations Convention on the Rights of the Child which had been incorporated into national law in the United Kingdom by section 11 of the Children Act, 2004, and applied to immigration decisions by section 55 of the Borders, Citizenship and Immigration Act, 2009.

In applying the case law both of Strasbourg and the previous case law of the House of Lords and English Supreme Court, the UK Supreme Court specifically stated that citizenship was not a trump card, though it was of particular importance, and also distinguished between a situation where both parents had to leave and that where one was staying. It also gave specific emphasis to the rights of citizens other than the right to remain in the State of citizenship, and concluded that there could only be one view such that the Home Secretary had been right to concede that the removal of the mother on the facts of that particular case would be a breach of article 8 as the British citizen children would have to move with their primary carer.

It was urged that the rights of Irish citizen children in such a situation have been considered in this country under the rubric of Irish constitutional law, as family rights are protected by Articles 40 and 41 of the Constitution. However, in the seminal case of *A.O. and D.L. v. Minister for Justice* [2003] 1 I.R. 1, the Supreme Court specifically approved the statement of the Court of Appeal in R. *(Mahmood) v. Secretary of State for the Home Department* [2001] 1 W.L.R. 840 to the effect that there would ordinarily be no breach of article 8 if the family could reunite elsewhere, even if that entailed a degree of hardship for some or all members of the family.

It was submitted that the Irish Courts have not, therefore, had to fall back on provisions for the domestic incorporation of general principles of international law (or indeed article 3(1) of the United Nations Convention on the Rights of the Child, which has not been incorporated into Irish law), because the rights of Irish citizen children are fully protected by Articles 40, 41 and 42 of the Constitution, and these provisions have led to a distinction in the Irish Courts between principles to be applied to the deportation of parents of non-national children, where generally speaking it is accepted that article 8 considerations do not arise, and the parents of Irish citizen children who enjoy the full panoply of constitutional rights afforded to Irish citizens, including the right to education, and the right to be raised with due regard for their welfare, where the article 8 case law has inspired the leading Irish authorities on the constitutional rights of such children. It is also to be noted that the current position of such children is that while certain matters must be carefully considered before any decision to deport their parents is made, there is no Supreme Court authority to the effect that they have a right to the care and custody of their parents in the State.

In relation to the recent UK jurisprudence on article 8 rights raised in the context of a proposed extradition, this Court in its judgment in *Minister for Justice and Equality v T.E.* has dealt at great length with two uncertainties that prevailed for some time in the United Kingdom following the decision in *Norris*. It is not necessary in the circumstances to revisit those controversies in any depth, notwithstanding that a significant portion of the applicant's written submissions are devoted to them.

It is sufficient for the purposes of the present judgment to record that the first uncertainty arose from a belief that had developed in some quarters that Norris had created a "bright line" distinction between the public interest in extradition and the public interest in immigration control, exemplified (*per* Lady Hale at para. 28 of her judgment in *R. (H.H.) v. Genoa)* by :

> " … the observations of Laws LJ in the Italian case at [2011] EWHC 1145 (Admin): 'Expulsion and deportation are matters only of domestic policy' (para 62), in which 'the striking of reasonable balances is an inherent feature of the policy itself' (para 63); whereas 'extradition promotes a universal public benefit' (para 62), which is '*systematically* served by the extradition's being carried into effect' (para 63). An even stronger view was taken by Silber J in *B v District Court in Trutnov and District Court in Liberec* [2011] EWHC 963 (Admin), at para 55, when he stated that 'It is clear that the approach of the courts to article 8 rights has to be *radically different* in extradition cases . . . because of the very important obligation of the state to ensure that those who are to be investigated, prosecuted or imprisoned for criminal offences are returned to those countries' (emphasis supplied)."

The second uncertainty concerned whether, and if so to what extent, the principles expounded in *Norris v Government of the United States of America (No 2)* required modification in the light of *ZH (Tanzania)* for extradition cases involving the article 8 rights of children. It was thought by some that as Norris did not, and did not have to, consider the special position of children, the UK Supreme Court would, in the light of its subsequent decision in *ZH (Tanzania)*, seek an early opportunity to modify, or nuance or finesse how

the principles set forth in *Norris* might apply in extradition cases involving the article 8 rights of children.

These uncertainties was resolved in *R. (H.H.) v. Genoa* where it was held (1) that it is not correct that the approach of the court to article 8 rights has to be different as between extradition and expulsion cases. The balancing exercise between the nature and gravity of the interference on the one hand, and the importance of the legitimate aims or aims being pursued on the other hand, is in fact the same in each context: what may differ are the nature and weight of the interests to be put into each side of the scale. It was also held (2) that the Norris principles did not require to be modified in the light of *ZH (Tanzania).* The Supreme Court considered that the approach extolled in Norris, which was to treat the interests to be balanced as the public interest in extradition and the individuals' interest in their private and family life, remained the correct approach. However, Lady Hale in delivering the leading judgment, having also delivered the leading judgment in *ZH (Tanzania),* added the following observations:

> "33. … what more needs to be said about the interests of children? There appears to be some disagreement between us about the order in which the judge should approach the task. I agree entirely that different judges may approach it in different ways. However, it is important always to ask oneself the right questions and in an orderly manner. That is why it is advisable to approach article 8 in the same order in which the Strasbourg court would do so. There is an additional reason to do so in a case involving children. The family rights of children are of a different order from those of adults, for several reasons. In the first place, as *Neulinger* and *ZH (Tanzania)* have explained, article 8 has to be interpreted in such a way that their best interests are a primary consideration, although not always the only primary consideration and not necessarily the paramount consideration. This gives them an importance which the family rights of other people (and in particular the extraditee) may not have. Secondly, children need a family life in a way that adults do not. They have to be fed, clothed, washed, supervised, taught and above all loved if they are to grow up to be the properly functioning members of society which we all need them to be. Their physical and educational needs may be met outside the family, although usually not as well as they are met within it, but their emotional needs can only be fully met within a functioning family. Depriving a child of her family life is altogether more serious than depriving an adult of his. Careful attention will therefore have to be paid to what will happen to the child if her sole or primary carer is extradited. Extradition is different from other forms of expulsion in that it is unlikely that the child will be able to accompany the extraditee. Thirdly, as the Coram Children's Legal Centre point out, although the child has a right to her family life and to all that goes with it, there is also a strong public interest in ensuring that children are properly brought up. This can of course cut both ways: sometimes a parent may do a child more harm than good and it is in the child's best interests to find an alternative home for her. But sometimes the parents' past criminality may say nothing at all about their capacity to bring up their children properly. Fourthly, therefore, as the effect upon the child's interests is always likely to be more severe than the effect upon an adult's, the court may have to consider whether there is any way in which the public interest in extradition can be met without doing such harm to the child.
>
> 34. One thing is clear. It is not enough to dismiss these cases in a simple way – by accepting that the children's interests will always be harmed by separation from their sole or primary carer but also accepting that the public interest in extradition is almost always strong enough to outweigh it. There is no substitute for the careful examination envisaged by Lord Hope in *Norris*."

Counsel for the applicant has submitted that Lady Hale, in reiterating her view in *R. (H.H.) v. Genoa* that in considering article 8 in any case in which the rights of a child are involved, the best interests of the child must be a primary consideration, did not, as she had done in *Z.H. (Tanzania)*, identify the national provision which identified this principle as relevant to European arrest warrant proceedings in the United Kingdom. Rather, counsel suggests, she appears to have assumed that this is a principle which had been effectively incorporated into article 8 by the case law of the European Court of Human Rights. She is prepared to accept that the best interests of the child might be outweighed by countervailing factors, but considers them to be of primary importance.

Counsel for the applicant has submitted that it is in fact very clear from the judgments in *R. (H.H.) v. Genoa* that the Court was heavily influenced by the principle enshrined in article 3(1) of the United Nations Convention on the Rights of the Child. Ultimately, it is suggested, the judgments in *R. (H.H.) v. Genoa* all rest on a balancing by the members of the Court of the seriousness of the offences for which extradition was sought with the potential consequences for the children if their parent or parents were extradited. Counsel for the applicant submitted that this Court should not follow the approach of the UK Supreme Court in *R. (H.H.) v. Genoa*, but rather should be guided by the decisions of the E.Ct.H.R. Before describing and examining the rationale for this submission as put forward by counsel for the applicant, it is appropriate that the Court should review the E.Ct.H.R jurisprudence specifically relied upon.

Counsel for the applicant has drawn various E.Ct.H.R. cases to the attention of the Court, some of which have been reviewed in this Court's judgment in *T.E.*, while there are others with which the Court was previously unfamiliar. The cases cited include cases both from the immigration context and the extradition context. Counsel has made the point that the immigration cases, while they have obviously informed the development of the law in the United Kingdom, necessarily raise separate issues and appear to have developed somewhat separately from the extradition case law in the E.Ct.H.R. It is in the context of immigration that the relevance of article 3(1) of the United Nations Convention on the Rights of the Child has been discussed, but it does not appear to have arisen in the extradition context.

Baroness Hale did refer, in *R. (H.H.) v. Genoa* to the two main types of immigration cases which feature in the Strasbourg jurisprudence. A correct distinction was drawn from a consideration of the E.Ct.H.R cases as between the expulsion of long-settled foreigners who had committed criminal offences on the one hand, and foreigners who had no right to be or remain in the Contracting State in question on the other hand,. While in the former type of case, the "*best interests and well-being of the children*" had been explicitly recognised as a factor by the Grand Chamber in *Üner v. The Netherlands*, (2006) 45 EHRR 421, (at para. 58) it was not explicitly listed as a factor in cases such as *Rodrigues da Silva; Hoogkamer v. The Netherlands* (2006) 44 EHRR 729 which may be regarded as the high-water mark of the rights of illegal immigrants pursuant to article 8. A key factor in that case, however, was that the mother in question had been entitled to a resident permit in the Netherlands, but had simply never applied for it. This very important factor in fact removes the *Rodrigues da Silva; Hoogkamer* case from the category of cases concerning illegal immigrants, and this appears to have subsequently been acknowledged by the European Court of Human Rights in *Nunez v. Norway* (Application No. 55597/09, 28th June, 2011), and therefore the reference to this principle appears to relate to long-settled lawful migrants, where considerations of the States' rights to regulate and control immigration are not in play (or at least, are much weaker).

It was submitted that in *Nunez*, the E.Ct.H.R. made some important statements which, counsel says, appear to constitute a modern re-statement of principle in this area:-

> "68. … [W]hile the essential object of [Article 8] is to protect the individual against arbitrary action by the public authorities, there may in addition be positive obligations inherent in effective 'respect' for family life. However, the boundaries between the State's positive and negative obligations under this provision do not lend themselves to precise

> definition. The applicable principles are, none the less, similar. In both contexts regard must be had to the fair balance that has to be struck between the competing interest of the individual and of the community as a whole; and in both contexts the state enjoys a certain margin of appreciation.[…]
>
> 70. The Court further reiterates that Article 8 does not entail a general obligation for a State to respect immigrants' choice of the country of their residence and to authorise family reunion in its territory. Nevertheless, in a case which concerns family life as well as immigration, the extent of a State's obligations to admit to its territory relatives of persons residing there will vary according to the particular circumstances of the person involved and the general interest … . Factors to be taken into account in this context are the extent to which family life is effectively ruptured, the extent of the ties in the contracting state, whether there are insurmountable obstacles in the way of the family living in the country of origin of one or more of them and whether there are factors of immigration control (for example, a history of breaches of immigration law) or considerations of public order weighing in favour of exclusion… . Another important consideration is whether family life was created at a time when the persons involved were aware that the immigration status of one of them was such that the persistence of that family life within the host State would from the outset be precarious … . Where this is the case the removal of the non-national family member would be incompatible with Article 8 only in exceptional circumstances … ."

In *Nunez*, the E.Ct.H.R found a breach of article 8 in circumstances where the applicant's two daughters (born in 2002 and 2003, respectively, and who had lived in Norway all their lives even though they had never received permission to be there), would suffer stress and disruption if their mother was excluded from Norway. The result was somewhat at odds with the preceding statement of principle, and in a concurring judgment, Judge Jebens explicitly acknowledged that this approach would in fact reduce the States' margin of appreciation in immigration cases. There was also very strong joint dissenting opinion, which referred to the public interest in effective immigration control and to the fact that the implications of the decision was that no contracting state would be able to deport any person in the situation of the mother, even though her situation was not just precarious (a term which generally refers to persons enjoying short term permission to remain in a State), but was based entirely on deliberate deception of the Immigration Authorities in Norway. The dissenting judges felt that this was a matter within the states' margin of appreciation.

Counsel for the applicant has submitted that perhaps as a result of that very strong dissenting Opinion, in *Antwi v. Norway* [2012] ECHR 259 (14th February, 2012), the Court, while reiterating the general principles set out in Nunez, cited above, upheld a five year exclusion order for the father of a Norwegian citizen child who had very limited links to Ghana (country of origin of both parents), and who would find it difficult to relocate there. However, the Court found that there were no insurmountable obstacles to the family settling together in Ghana or at least maintaining regular contact during the period of expulsion. The child did not have any special care needs, and her mother was remaining in Norway and could look after her.

This apparent retreat from the result (if not the statement of principle) in *Nunez* drew a strong joint dissenting opinion, which effectively stated that the result in *Nunez* had to be followed in order to achieve a coherent interpretation and implementation of the principle of the best interests of the child as recognised by the UNCRC.

Counsel for the applicant submitted that the position in the light of those three cases appears to be that while in *Nunez v. Norway* the best interests of the child were found to outweigh the legitimate interests of the contracting state in maintaining an effective system of immigration control, the Court subsequently retreated from that position and applied more traditional concepts, stressing the seriousness of the immigration breaches of the father in *Antwi* and accepting that the family relationship between father and 10 year old daughter could be ruptured to the extent that it might only be maintained by some general contact during the period of expulsion.

Turning to the extradition cases featuring in the jurisprudence of the E.Ct.H.R, counsel submitted that the principle of the best interests of the child do not appear to have figured at all to the same degree. In *Shakurov v. Russia* (Application No 55822/10, 5th June, 2012), the Court reiterated that the expulsion of a settled migrant constitutes interference with his or her right to respect for private or family life. In the case of a settled migrant, therefore, the examination moves to a consideration of the proportionality test set out in article 8(2). This meant, on the facts of *Shakurov*, that the applicant who was a citizen of Uzbekistan, could be extradited there, notwithstanding that his family were living in Russia, and his sixteen year old daughter was in need of medical treatment.

Similarly in the earlier case of *King v. United Kingdom* (Application No. 9742/07, 26th January, 2010), the applicant failed to show that his removal to Australia from the United Kingdom would breach article 8, notwithstanding that he had a wife, two young children and a mother in the United Kingdom, whose ill-health would not allow her to travel to Australia. There was no question but that the long distance between the two countries would mean that the family would have little or no contact if the applicant were extradited, convicted and sentenced to a term of imprisonment, but given the seriousness of the charges (the allegation that the applicant was a member of an international gang engaged in the conspiracy to import large quantities of ecstasy into Australia), no breach of article 8 had been shown.

It is notable, counsel submitted, that neither in the *Shakurov* nor in the *King* case was the principle in article 3(1) of the United Nations Convention on the Rights of the Child relied upon or considered at all.

At this point, having reviewed the Strasbourg jurisprudence, it is appropriate to set the reasons put forward by counsel for the applicant as to why the approach in *H.H.* should not be followed. The first is that domestic English law relating to the consideration to be given to the rights of the child materially differs from Irish law. The Irish State has not incorporated the United Nations Convention on the Rights of the Child into Irish law. The proposed new Article 42A of the Constitution, (passed in a referendum which is now the subject of certain legal challenges which have yet to be detemined), has not yet passed into law. However, even if it does become law its application would be restricted to "*all proceedings … brought by the State, as guardian of the common good, for the purpose of preventing the safely and welfare of any child from being prejudicially affected, or concerning the adoption, guardianship or custody of, or access to, any child*." The pending provision provides that in those cases the best interests of the child shall "*be a paramount consideration*". However, this provision clearly would not apply to an application for surrender pursuant to the European Arrest Warrant Act, 2003, as amended.

It was further submitted that, in any event, the judgments of the United Kingdom Supreme Court in *R(H.H.) v Genoa* should not be followed in this jurisdiction as it does appear to be in accordance with the recent case law of the Strasbourg Court in relation to extradition.

It was submitted that the jurisprudence based upon immigration cases, which informed the judgment in *R. (H.H.) v. Genoa*, has developed along different lines in the E.Ct.H.R from extradition cases. Extradition cases appear to have routinely stressed the importance of allowing contracting states to fulfil their treaty obligations, and it is only in exceptional cases that the primarily

negative obligation in article 8(1) would prevent a State from extraditing an individual on foot of those treaty obligations.

Moreover, counsel submitted, even the immigration cases appear to have retreated from a full embrace of the principle that the best interests of the child will outweigh the margin of appreciation which the Court confirmed in *Abdulaziz v. United Kingdom* (1985) 7 EHRR 471 would be afforded to contracting states in order to maintain an effective system of immigration control.

It was submitted that two further considerations emerge from the immigration cases. One is the possibility of relocation in the home State, in this case Poland. On the facts of this case, all of the family members are Polish, and while there is inevitably a degree of disruption envisaged in relocating to Poland, to do so would reunite the family in their country of origin and place them in the same position as any Polish family where one member has been subjected to criminal prosecution and conviction in the ordinary way.

It was urged that certain commentators (notably, Jacobs & White in their work entitled, *The European Convention on Human Rights*, (Oxford University Press, 2002) at p. 234,have identified the centrality of the possibility of relocation (usually in the country of origin) to be of fundamental importance in the assessment of the rights protected by article 8:-

> "The Court will consider whether the family unit could not be preserved by establishing the family's residence in the country to which the member of the family is to be expelled, or from which he seeks admission. If it could, then the State has not interfered with the right to respect for family life. Such a limitation on the notion of interference is necessary; for otherwise there would be an effective prohibition on expulsion, and on refusal of admission, whenever family life was established."

However, it should be noted that these remarks were made in the context of a consideration of immigration decisions, where reliance on article 8 has on occasion been successful before the E.Ct.H.R.

Counsel for the applicant submitted that this notion also weighs heavily in the judgments of the E.Ct.H.R. upon which she had placed reliance.

It was submitted that the second principle which emerges from the immigration case law as a factor which must be weighed in the balance is the concern that family life cannot be used to evade lawful immigration controls. This is usually stated, as mentioned in *Nunez* in the context of references to family life established at a time where the immigration status is precarious, perhaps by the grant of only a short term permission to remain. By analogy, family life established in this State where there are outstanding criminal proceedings (or even convictions) in the home State, should not be a permissible basis for resisting lawful extradition.

Counsel urged that these principles ought to be applied to the facts of the present case. She submitted that not only is the effect on the children, though obviously serious, not exceptional or to be distinguished from the position of any family where one family member is facing surrender to another Member State, but it has not been shown that the family could not relocate to Poland. Family life was established in this State after the date of the commission of the offences and indeed after the imposition of lawful sentences.

For these reasons counsel for the applicant submits that an Order for surrender would not breach this State's obligations pursuant to article 8, but would in fact respect the State's obligations as a Member State of the European Union.

The case made by the respondent

Before indicating the Court's view at the level of principle, it should be stated that counsel for the respondent's submissions on the law did not seek to engage in any depth with the submissions made on behalf of the applicant. His position was simply that while the decision of the UK Supreme in *R. (H.H.) v. Genoa* is not binding on this Court he nonetheless relies upon it. He urges this Court to regard it as cogent and persuasive in its reasoning, and to regard it as providing sound guidance on the correct approach to be adopted in circumstances where the article 8 rights of children are engaged.

Counsel for the respondent also disputed a number of the factual assertions underpinning aspects of his opponent's submission. As the Court is primarily concerned in this judgment in addressing the legal issues raised it is not proposed to review the submissions with regard to the evidence in any depth. The Court has, however, had full regard to the submissions made by both sides with respect to the evidence. It is sufficient to state by way of very brief summary that counsel for the respondent disputed the suggestion that relocation was a realistic option, that his client had fled and was therefore trying to use article 8 to "evade" extradition (the Court has, of course, since found that as a matter of fact he did flee), and also the suggestion that the situation for this family while serious is unexceptional and that they are in no different position from any other family where a family member is facing extradition to another member State to which they have the possibility of relocating.

The Court's position on the issues of principle

It will be apparent to any reader of my judgment in *Minister for Justice and Equality v T.E.* that the formulation of the twenty two points of principle identified by this Court as relevant for the purpose of guiding its approach to article 8 based challenges to surrender, both in that case and in future cases such as the present, were heavily influenced both by recent UK jurisprudence, particularly the cases of *Norris v. Government of the United States of America (No 2),* and *R. (H.H.) v. Genoa*, and also by the helpful remarks of McKechnie J. in this jurisdiction in his recent judgment as a member of the Supreme Court in *Minister for Justice and Equality v Ostrowski* [2013] IESC 24 (Unreported, Supreme Court, McKechnie J., 15th May, 2013).

Notwithstanding the excellent arguments advanced by counsel for the applicant, the Court remains convinced that the basic approach adopted by the UK Court in *Norris v Government of the United States of America (No 2),* and applied in *R. (H.H.) v. Genoa*, is cogent, logical and, with necessary modifications to take account of the differences between the laws in that country and the law of this State, is the correct one to apply.

Counsel for the applicant placed great emphasis on the fact that in his judgment in *Norris*, speaking of domestic cases that had come before the Court in Strasbourg in which a breach of article 8 rights was advanced as a bar to extradition, Lord Philips had specifically noted (at para.31) that:

> "There is, in fact, no reported case in which such a complaint has succeeded, or even been held admissible where not joined with other allegations of breach."

Without seeking to gainsay that, this Court is hostile to the notion, and simply does not believe it to be the case, that there can never be a refusal to surrender in an extradition case on article 8 grounds. To argue that such a case can never succeed simply because none has succeeded to date is a bit like saying that a system of work is safe simply because no accident has happened. It simply does not follow. In fairness to counsel for the applicant she has not sought to go quite that far, but she does make the case that (a) the jurisprudence of the E.Ct.H.R only contemplates non-surrender on article 8 grounds in extradition cases in "exceptional circumstances", and that (b) that by virtue of s. 4 of the European Convention on Human Rights Act 2003 this Court is constrained to adopt the same approach, and that in the circumstances it ought to disregard the recent English jurisprudence.

The first thing to be said is that, to the best of this Court's knowledge, no one has yet raised before the Court of Human Rights the concern, adverted to in the recent English jurisprudence, and now expressly recognised both by this Court in *T.E.* and also by McKechnie J in *Ostrowski* as being a legitimate one, that to frame an article 8 test in terms of an exceptionality (i.e., in exceptional circumstances) requirement is too restrictive, and could potentially lead to an injustice being done in that small number of cases where the existence of ordinary or at least unexceptional circumstances could, in the event of a proposed surrender going ahead, give rise to consequences so profoundly affecting that person, or members of his or her family, as to render it disproportionate to surrender. It has to be remembered that both in this jurisdiction (e.g., in my judgment in *Bednarczyk*), and also in the UK (e.g., in *R (Bermingham) v. Director of the Serious Fraud Office* [2007] Q.B. 727), the test was also initially framed in terms of a requirement that "exceptional circumstances" or "striking and unusual circumstances" be demonstrated. However, this was, and remains, an area of developing jurisprudence, and the law in the UK, and here, has moved on. The E.Ct.H.R has not yet had an opportunity to express its view, no case providing a convenient vehicle in which to do so having yet come before it. If, hypothetically, the E.Ct.H.R had been expressly asked in some suitable case to consider a submission that the focus of the enquiry in these cases should be on consequences rather than circumstances, and having done so had rejected that submission, this Court would most certainly be constrained to follow and apply the E.Ct.H.R's decision. However, it is not a tenable proposition, in my view, to suggest that this Court is constrained from adopting a position of its own, and from applying it, in circumstances where the precise issue in question has never in fact been considered by the E.Ct.H.R.

In this Court's view the logic underpinning the argument that it is unwise to frame an article 8 test in terms of a requirement for the demonstration of exceptional circumstances, and that, on the contrary, the focus should be on consequences, is unassailable.

Moreover, while not for a moment wishing to suggest that the need for states to be faithful to inter-state agreements such as the Framework Decision, and obligations arising under international treaties, is anything other than a consideration of very great importance, it cannot be the law that an individual's entitlement to assert and claim vindication of a fundamental right, such as that in article 8 ECHR, may vary or be diluted according to the context.

It was, for example, suggested by Laws L.J. in the Divisional High Court in *R. (H.H.) v. Genoa* [2011] EWHC 1145 that "*the striking of reasonable balances is an inherent feature of* [good immigration policy] *itself … . But this is not true of the extradition regime. The public interest in extradition is systematically served by the extradition's being carried into effect, subject to the proper procedures*." Further, in *B v. The District Courts in Trutnov and Liberec (Czech Judicial Authorities)* [2011] EWHC 963 Silber J. had stated "*It is clear that the approach of the courts to article 8 rights has to be radically different in extradition cases from what it is in deportation or immigration cases because of the very important obligation of the State to ensure that those who are to be investigated, prosecuted or imprisoned for criminal offences are returned to those countries*."

This particular canard (the superficial attractiveness of which this Court initially found persuasive in *Minister for Justice, Equality and Law Reform v D.L.,* but about which it has since changed its mind) was, as pointed out earlier in this judgment, expressly confronted by the U.K. Supreme Court in *R. (H.H.) v. Genoa*. That Court rejected the proposition that a different approach to article 8 claims was required in extradition cases from that required in immigration cases, holding that the approach should be the same in all cases, namely that there should be a balancing of the competing public and private interests, attaching to each their due weight and importance in the circumstances of the particular case. However, they also acknowledged that in conducting the necessary balancing exercise in any case in which article 8 is engaged, context was a circumstance that could influence the weight to be afforded to the public interest together with other circumstances of the individual case. This followed from Lord Phillips remarks in *Norris* (at para 15) where he said:

> "In considering such issues it may be of no or little relevance whether the individual in question is facing deportation or extradition. It would, however, be a mistake to assume that this question is of no relevance in a case such as the present. This is a domestic case. The family rights that are in issue are rights enjoyed in this country. The issue of proportionality involves weighing the interference with those rights against the relevant public interest. The public interest in extraditing a person to be tried for an alleged crime is of a different order from the public interest in deporting or removing from this country an alien who has been convicted of a crime and who has served his sentence for it, or whose presence here is for some other reason not acceptable."

It has also been suggested in the recent UK jurisprudence that in extradition cases one can make a categorical assumption about the importance of extradition in general and that the public interest should be afforded very considerable weight in any balancing of competing public and private interests. Lord Phillips in *Norris* (at para 51) while agreeing that there could be no absolute rule that any interference with article 8 rights as a consequence of extradition will be proportionate, was nonetheless of the view that the public interest in extradition will "weigh very heavily indeed."

This Court agrees with the UK Supreme Court that the approach to article 8 objections must be the same in all contexts, namely that there must be a balancing of competing public and private interests, attaching to each their due weight and importance according to the circumstances of the particular case. However, it will also be apparent from *T.E.* that although this Court is satisfied that the approach adopted by the UK Courts is correct in its essentials, it is also sympathetic to the view expressed by McKechnie J. in *Ostrowski* that it is inappropriate to attribute any fixed or specific value to the public interest in extradition. Beyond saying, as McKechnie J does, that it must always have some value due to the fact that it is a constant in the vertical sense, little else can usefully be said because it certainly not a constant in the horizontal sense and the precise degree of weight to be attached to the public interest in extradition in any particular case requires a careful and case specific assessment. To suggest, as Lord Phillips has done, that one can apply a categorical assumption that in an extradition case the public interest will weigh very heavily indeed is perhaps to go too far. The very most that can be said is that in most cases the public interest in extradition is likely to be afforded significant weight.

The really vexed question that arises for consideration in applying the balancing of interests approach concerns what weight ought to be attributed on the private interests side of the equation to the "best interests" of a child who would be affected by a proposed removal measure, whether it be a proposed deportation or expulsion in the immigration context, or a proposed extradition as in the present case. There is little point in looking to our neighbouring jurisdictions for specific guidance because the approach of the UK

Courts has been strongly influenced by legal considerations that simply do not apply at this time in the Irish context.

Counsel for the applicant was correct in pointing out that in the UK article 3(1) of the United Nations Convention on the Rights of the Child has been incorporated into that State's national law by section 11 of the Children Act, 2004, and applied to immigration decisions by section 55 of the Borders Citizenship and Immigration Act, 2009. None of that is true here. Moreover, this distinction has been acknowledged previously by this Court in *Minister for Justice, Equality and Law Reform v. Bednarczyk,(supra.)* and again in *Minister for Justice, Equality and Law Reform v. D.L* [2012] 1 I.L.R.M. 270.

The Court stated in *Bednarczyk*:

> "Counsel for the respondent has cited, and relies upon, article 3.1 of the (United Nations) Convention on the Rights of the Child 1989 ("UNCRC) which states: "*In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."* Ireland is bound by this obligation in international law, having signed the UNCRC and having ratified it without reservation on the 21st of September 1992. However, Ireland has a dualist system under which international agreements, to which Ireland becomes a party, are not automatically incorporated into domestic law. Article 29.3 of the Constitution states that "*Ireland accepts the generally recognised principles of international law as its rule of conduct in its relations with other States*". Further, Article 29.6 of the Constitution states that "*no international agreement shall be part of the domestic law of the State save as may be determined by the Oireachtas*". These provisions have been interpreted as precluding the Irish Courts from giving effect to an international agreement if it is contrary to domestic law or grants rights or imposes obligations additional to those of domestic law – *Re Ó' Laighléis* [1960] I.R. 93. Currently, Irish domestic law does not universally provide that in court actions concerning or affecting children, whether directly or indirectly, the best interests of the child shall be a primary consideration. At most, it can be said that article 3.1 of the UNCRC equates broadly with the so-called "welfare principle" which appears in a number of domestic statutes relating to children. However, it does not appear in all potentially relevant legislation. It certainly does not appear in the European Arrest Warrant Act, 2003 (or in the underlying Framework Decision). Neither does it appear in express form in the Constitution."

Arguably, there is scope for some residual doubt as to whether the Court is in fact obliged to disregard article 3(1) of the UNCRC having regard to the terms of Article 24 of the Charter of Fundamental Rights of the European Union. This possibility was raised previously in *Minister for Justice, Equality and Law Reform v D.L.*, but the Court found it unnecessary in the circumstances of that case to express a firm view on it. The essence of the argument that was made is apparent in the following quotations from my judgment in *D.L.*:

> "Counsel for the respondent seeks to rely in particular on Article 24 of the Charter which deals with the rights of the child and provides:-
>
> > *'1. Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity.*
> >
> > *2. In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration.*
> >
> > *3. Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests.'*
>
> Counsel for the respondent argues that since Article 24 of the Charter, and in particular sub-article 2 thereof, is directly applicable, the requirement that "*in all actions relating to children … the child's best interests must be a primary consideration*" must be regarded as part of our domestic law for purposes of the application of the European Arrest Warrant Act 2003.
>
> The respondent's basis for contending that the Charter is directly applicable and can be relied upon before this Court is based upon a particular interpretation of the provisions of Articles 51 and 52 respectively of the Charter, having regard to an explanatory memorandum prepared under the authority of the Praesidium of the Convention which drafted the Charter and promulgated in connection therewith. This explanatory memorandum is entitled *Explanations Relating to the Charter of Fundamental Rights* (O.J. 14.12.2007 – 2007/C303/02 [EN C303/17]) (hereinafter referred to for convenience as the "explanations document"). Both sides in this case accept that the said explanations document is a legal instrument to which regard may be had. […]
>
> Counsel for the respondent has submitted that the Charter makes a clear distinction between rights and principles. He argues that the Charter, interpreted in accordance with the explanations document, envisages that "rights" must at all times be respected whenever Member States authorities are acting in the scope of European Union law, and may indeed give rise to direct claims for positive action by the relevant authorities. Conversely, principles are not required to be respected but rather to be observed by implementation through legislative or executive acts. Accordingly, unlike rights which must always be respected when Member States authorities are acting in the scope of European Union law, principles become significant for the Courts only when legislative or executive acts are interpreted or reviewed, and they cannot give rise to direct claims for positive action.
>
> Counsel for the respondent submits that in the present case this Court is a relevant Member State authority and, further, that in seeking to operate and implement the Act of 2003, which in turn was enacted to transpose and give effect to the Framework Decision, this Court is acting in the scope of European Union law. He argues that on that basis, and because in the respondent's submission Article 24 of the Charter creates rights, this Court is bound in considering the respondent's postponement application under s. 18 (1) and (2) of the Act of 2003 to regard the best interests of the respondent's daughter, N., as being a primary consideration.
>
> In support of his contention that Article 24 creates rights as opposed to establishing principles, counsel for the respondent again calls in aid the explanations document which states with respect to Article 24:-

> *'Explanation on Article 24 — The rights of the child*
>
> This article is based on the New York Convention on the Rights of the Child signed on 20 November 1989 and ratified by all the Member States, particularly articles 3, 9, 12 and 13 thereof.
>
> Paragraph 3 takes account of the fact that, as part of the establishment of an area of freedom, security and justice, the legislation of the Union on civil matters having cross-border implications, for which Article 81 of the Treaty on the Functioning of the European Union confers power, may include notably visiting rights ensuring that children can maintain on a regular basis a personal and direct contact with both of their parents.'

> Reliance is placed on the fact that article 3.1 of the United Nations Convention on the Rights of the Child (hereinafter the UNCRC) requires that "*[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration*." This Court has previously stated in *Minister for Justice Equality & Law Reform v Bednarczyk* [2011] IEHC 136 (Unreported, High Court, Edwards J., 5th April, 2011), that article 3.1 cannot be relied upon directly before the Irish Courts (unlike how it was successfully relied upon before the UK Supreme Court in *ZH (Tanzania) v Secretary of State for the Home Department* [2011] 2 W.L.R. 148) because it must be regarded as imposing an obligation greater than that imposed by domestic law. However, the Charter was not relied upon, and this Court was not referred to it, by the respondent in *Bednarczyk*. Accordingly, if Article 24 of the Charter, which is based, *inter alia*, on article 3 of the UNCRC, and in particular Article 24(2) thereof, creates rights which this Court is bound to respect, and is to be regarded as directly applicable and as part of our domestic law, then the net effect of this is that Article 3.1 of the UNCRC has in fact been incorporated into Irish domestic law. The Court is urged to so hold."

The issue did not ultimately require to be addressed definitively in the circumstances of that case, and I merely expressed a provisional view that that Article 24(2) of the Charter contains an expression of principle rather than the enumeration of a right that can be relied upon directly. I see no reason at the present time to alter or deviate from that provisional view. Moreover, I am conscious that neither side has sought to raise the possible application of Article 24(2) of the Charter in the context of the present case.

It follows from the above that in weighing the interests of an affected child in the course of balancing competing public and private interests in an extradition case where an article 8 based objection to surrender has been raised, the Court is not expressly obliged by Irish law to have regard to the best interests of an affected child, and if it does so it is certainly not obliged to regard the best interests of a child as a primary consideration (within the meaning of that term as it appears in article 3(1) UNCRC.).

However, the Court would ask rhetorically: could it seriously be suggested that in a consideration of the article 8 rights of a child who is potentially going to be affected by an extradition (or any other expulsion) measure that the Court should not at least be entitled, whatever about obliged, to take into consideration the best interests of the child in question? Once again, in fairness to the applicant, it has not been suggested that the best interests of the potentially affected child ought not to be considered.

The main controversy, such as it is, concerns whether the best interests of the child ought to be imbued with a default level of importance or attributed with a pre-determined weighting or significance. It is suggested that if an Irish Court were to approach an article 8 balancing exercise on the basis that it was required to regard the best interests of an affected child as "a primary consideration", it would be to do exactly that. In many ways this throws up the same problem on the private interest side, as was identified earlier in this judgment as arising on the public interest side where it is proposed that a Court could rely upon a "categorical assumption" with respect to the public interest in extradition.

However, the objection raised by the applicant goes further. It is argued, in effect, that to approach matters on the basis that the best interests of an affected child are "a primary consideration" would be contrary to domestic law, alternatively it would grant to the child rights, or impose obligations on the state with respect to the child's interests, additional to those provided for in domestic law.

The Court considers that the correctness, or otherwise, of these objections must depend on what exactly is meant by "a primary consideration." All that is in fact inhibited by the dualist system arising under Article 29 of the Constitution, and the decision in *Re Ó' Laighléis* [1960] I.R. 93, is the giving of effect to an international agreement that is contrary to domestic law or that grants rights or imposes obligations additional to those of domestic law (this Court's emphasis). The main effect of non-incorporation of the UNCRC into Irish law is that individual children cannot themselves seek remedies based on its provisions in our courts. It does not automatically mean, however, that where a Court has been requested to exercise an already existing power to vindicate a right arising under another instrument, e.g., the right to respect for family life under article 8 of the ECHR, and is required in the course of balancing competing public and private interests, to determine the weight to be attached to the best interests of an affected child, that it is prohibited from taking guidance from, and adopting as sensible, an approach adopted in another jurisdiction simply because it reflects a provision of the UNCRC. It is only prohibited from doing so where to do so would expressly contravene Irish domestic law, or grant substantive rights or impose substantive obligations additional to those granted or imposed by domestic law.

The UK Courts have determined that in an article 8 balancing exercise the best interests of a child must be regarded as primary consideration, reflecting article 3.1 of the UNCRC which in turn requires that "*In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."*

However, before rushing in to reject the approach of the UK courts as going beyond what Irish law permits, it is importance to ascertain precisely what it is that is now required of a UK court. Although the UK jurisprudence, borrowing as it does from the loose language used in article 3.1 of the UNCRC, states that the best interests of a child must be regarded a "primary" consideration, it is not immediately clear as to what exactly is meant.

Borrowing the concept of a vertical and horizontal constant from McKechnie J.'s judgment in *Ostrowski*, and arguing by analogy, the requirement to regard the best interests of a child as a "primary" consideration could simply be intended to reflect that the best interests of a child represent a constant in the vertical sense, and therefore fall for consideration, in every case involving an affected child where article 8 is engaged; although the exact degree of weight to be attached to the child's best interests would require to be determined in a case specific assessment. If that is all that it means, the adoption or deployment of such an approach in a case in this jurisdiction would be unobjectionable in terms of existing Irish law, notwithstanding the non incorporation of the UNCRC into Irish domestic law.

Alternatively, it could also mean that the best interests of the child should be prioritised and considered first, before looking to see if any countervailing consideration(s) outweigh them. Again, on the face of it, that would be unobjectionable in this Court's view on the basis that it could be regarded as being nothing more than a procedural requirement rather that anything substantive.

In the further alternative, it could also mean that the best interests of a child should be afforded greater weight than other considerations. If the latter were the true meaning it would, I fear, be a step too far and contrary to existing Irish law. It is certainly this Court's view, consistent with its previously indicated sympathy for McKechnie J.'s approach to the rating of the public interest consideration, that wherever a Court is engaged in balancing competing public and private interests, and is considering the best interests of a child in that context, it would not be justified in attributing any predetermined or fixed weight or importance to the best interests of the child.

Looseness of language in international instruments touching on the rights of children is pervasive and a real problem. This was alluded to by Baroness Hale in her judgment in *ZH (Tanzania)* where she stated (at paras 21 & 22):

> "21. It is not difficult to understand why the Strasbourg Court has become more sensitive to the welfare of the children who are innocent victims of their parents' choices. For example, in *Neulinger v Switzerland* (2010) 28 BHRC 706, para 131, the Court observed that 'the Convention cannot be interpreted in a vacuum but must be interpreted in harmony with the general principles of international law. Account should be taken . . . of "any relevant rules of international law applicable in the relations between the parties" and in particular the rules concerning the international protection of human rights'. The Court went on to note, at para 135, that 'there is currently a broad consensus – including in international law – in support of the idea that in all decisions concerning children, their best interests must be paramount'.
>
> 22. The Court had earlier, in paras 49 - 56, collected references in support of this proposition from several international human rights instruments: from the second principle of the United Nations Declaration on the Rights of the Child 1959; from article 3(1) of the Convention on the Rights of the Child 1989 ("UNCRC"); from articles 5(b) and 16.1(d) of the Convention on the Elimination of All Forms of Discrimination against Women 1979; from General Comments 17 and 19 of the Human Rights Committee in relation to the International Covenant on Civil and Political Rights 1966; and from article 24 of the European Union's Charter of Fundamental Rights. All of these refer to the best interests of the child, variously describing these as 'paramount', or 'primordial', or 'a primary consideration'. To a United Kingdom lawyer, however, these do not mean the same thing."

Returning to this theme, Lady Hale went on to state at paragraph 25 of her judgment in *Z.H. (Tanzania):*

> "25 Further, it is clear from the recent jurisprudence that the Strasbourg Court will expect national authorities to apply article 3(1) of UNCRC and treat the best interests of a child as 'a primary consideration'. Of course, despite the looseness with which these terms are sometimes used, 'a primary consideration' is not the same as 'the primary consideration', still less as 'the paramount consideration'. Miss Joanna Dodson QC, to whom we are grateful for representing the separate interests of the children in this case, boldly argued that immigration and removal decisions might be covered by section 1(1) of the Children Act 1989:
>
> > 'When a court determines any question with respect to – (a) the upbringing of a child; or (b) the administration of a child's property or the application of any income arising from it, the child's welfare shall be the court's paramount consideration.'
>
> However, questions with respect to the upbringing of a child must be distinguished from other decisions which may affect them. The UNHCR, in its Guidelines on Determining the Best Interests of the Child (May 2008), explains the matter neatly, at para 1.1:
>
> > 'The term "best interests" broadly describes the well-being of a child. . . . The CRC neither offers a precise definition, nor explicitly outlines common factors of the best interests of the child, but stipulates that: the best interests must be the determining factor for specific actions, notably adoption (article 21) and separation of a child from parents against their will (article 9); the best interests must be a primary (but not the sole) consideration for all other actions affecting children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies (article 3).'
>
> This seems to me accurately to distinguish between decisions which directly affect the child's upbringing, such as the parent or other person with whom she is to live, and decisions which may affect her more indirectly, such as decisions about where one or both of her parents are to live. Article 9 of UNCRC, for example, draws a distinction between the compulsory separation of a child from her parents, which must be necessary in her best interests, and the separation of a parent from his child, for example, by detention, imprisonment, exile, deportation or even death.
>
> 26. Nevertheless, even in those decisions, the best interests of the child must be a primary consideration. As Mason C.J. and Deane J put it in the case of *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 292 in the High Court of Australia:
>
> > 'A decision-maker with an eye to the principle enshrined in the Convention would be looking to the best interests of the children as a primary consideration, asking whether the force of any other consideration outweighed it.'
>
> As the Federal Court of Australia further explained in *Wan v Minister for Immigration and Multi-cultural Affairs* [2001] 107 FCR 133, para 32,
>
> > '[The Tribunal] was required to identify what the best interests of Mr Wan's children required with respect to the exercise of its discretion and then to assess whether the strength of any other consideration, or the cumulative effect of other considerations, outweighed the consideration of the best interests of the children understood as a primary consideration.'
>
> This did not mean (as it would do in other contexts) that identifying their best interests would lead inexorably to a decision in conformity with those interests. Provided that the Tribunal did not treat any other consideration as inherently

> more significant than the best interests of the children, it could conclude that the strength of the other considerations outweighed them. The important thing, therefore, is to consider those best interests first. That seems, with respect, to be the correct approach to these decisions in this country as well as in Australia.

It seems to this Court that the current requirement in UK law to regard the best interests of a child as a primary consideration, in the terms explained by Baroness Hale in *ZH (Tanzania),* if adopted and applied by an Irish court as a sensible guiding principle, rather than as a requirement mandated by any provision of international law, would not offend any principle of Irish domestic law, or have the effect of granting rights or imposing obligations additional to those of domestic law. This would be so notwithstanding that in the UK that particular approach has its genesis in, and reflects, article 3(1) of the UNCRC which to date has not been incorporated into domestic Irish Law.

Approaching matters on this basis, in *Minister for Justice and Equality v T.E.* this Court included amongst the 22 points of principle identified by it as appropriate to guide how the Courts in this jurisdiction might in future approach objections to surrender based on article 8 ECHR in the European arrest warrant context the following point, designated number 20:

> "20. Where the article 8 rights of a child or children are engaged by a proposed extradition measure the best interests of the child or children concerned must be a primary consideration. They may be outweighed by countervailing factors, but they are of primary importance."

This mirrors exactly what Lady Hale had stated in *R. (H.H.) v. Genoa* and it must of course be interpreted as only commending such action as does not contravene the Article 29 / *Re Ó' Laighléis* inhibition. With the benefit of hindsight it might have been better if the Court had avoided or eschewed using that exact formulation, because of its potential to create misunderstandings. However, this case provides an opportunity which the Court welcomes to provide more clarity, and to emphasise, for the avoidance of doubt, that although point number 20 is couched in mandatory language it is in fact no more than an indication of this Court's belief that, in any case in which the article 8 rights of a child are engaged, the best interests of a child will fall for consideration and that it is important that due regard be had to them in the balancing exercise that must be conducted. It was not intended to indicate that any specific weight should be attributed to them. On the contrary how the best interests of the child should be rated in terms of weight will only be determinable when the required case specific assessment is performed. It was also not intended to proscribe procedurally how the court should approach its task. That is a matter for the Court seized of the issue. It is, of course, open to a Court to adopt the procedure commended by Baronness Hale and consider the best interests of the child first, and then consider any countervailing considerations. Equally a Court might be inclined not to do so if persuaded, as I personally am, to approach matters as commended by Lord Mance in *R. (H.H.) v. Genoa* (at para 98) who opined succinctly that:

> "[a primary consideration] ….. means, in my view, that such interests must always be at the forefront of any decision-maker's mind, rather than that they need to be mentioned first in any formal chain of reasoning or that they rank higher than any other considerations."

That said, there is also much to be said in favor of the structured approach to the application of article 8 in case cases involving children commended by Lord Kerr in *R. (H.H.) v. Genoa* who stated (at para 144):

> "As a matter of logical progression, therefore, one must first recognise the interference and then consider whether the interference is justified. This calls for a sequencing of, first, consideration of the importance to be attached to the children's rights (by obtaining a clear-sighted understanding of their nature), then an assessment of the degree of interference and finally addressing the question whether extradition justifies the interference. This is not merely a mechanistic or slavishly technical approach to the order in which the various considerations require to be evaluated. It accords proper prominence to the matter of the children's interests. It also ensures a structured approach to the application of article 8. Lord Wilson JSC says (in para 153) that there is no great logic in suggesting that in answering the question, "does A outweigh B", attention must first be given to B rather than to A. At a theoretical level, I do not disagree. But where a child's interests are involved, it seems to me that there is much to be said for considering those interests first, so that the risk that they may be undervalued in a more open-ended inquiry can be avoided."

Ultimately, it is for the Court seized of the issue in any particular case to decide for itself how to proceed, subject only to the constraints imposed by the Article 29 / *Re Ó' Laighléis* inhibition.

Analysis and Decision

The Court has carefully considered the evidence relevant to the article 8 objection in this case.

The offences which are the subject of the warrant are offences of moderate seriousness in the Court's view. They are not minor offences, but equally they are not the most serious in the calendar of criminal offences. The prosecution matters carry up to five years imprisonment, and in relation to the conviction matters the sentences actually imposed range from six months to eighteen months. It is also a matter of some significance that the warrant covers five separate groups of offending conduct, represented by an ongoing prosecution in respect of sixteen alleged offences, and four judgments issued on four different dates, namely the 27th of April, 2005, the 20th of January, 2006, the 3rd of March, 2006 and the 6th of October, 2006, imposing sentences covering another eight offences. This is not therefore a case of a person who had the misfortune to land in trouble on a single occasion. He is clearly a recidivist offender. Moreover, he is a person who was given chances in past by the courts in the issuing state, having initially had a number of his sentences conditionally suspended. However, he breached the conditions of those suspensions by evading probation supervision and/or committing further crime, and has since had the suspensions lifted in consequence of doing so. He has also been found by this Court to be a true fugitive who fled from the issuing state in 2006 to evade justice. In the courts view there is, in all the circumstances, a significant public interest in the respondent's extradition.

There has been some unexplained delay between 2003 and 2006 when the respondent left Poland in bringing the prosecution matters to a conclusion. However, the respondent cannot rely to any great extent on the passage of time since 2006, since that has been almost entirely due to him fleeing from the issuing state to evade justice. Overall, this Court has concluded that the degree of delay in this case, in not such as might operate to reduce the weight otherwise to be afforded to the public interest in the extradition of the respondent for these offences. There remains a pressing social need to give effect to the respondent's extradition in this case.

In so far as the private interests of the respondent and his family are concerned, it is true that he has put down roots in this country, that he and his partner are well settled here, that they have young children who were born in Ireland and who know only Ireland and Irish society, that he and his family have made a home here, that he is well established in a job, that he is well regarded by his employer, and that he has not been in trouble while here. It seems that the respondent and his partner, who is also Polish, met here

in Ireland. The evidence is all one way to the effect that the respondent is a good and caring family man and, quite apart from being the main bread winner, provides valuable support to the other members of the family unit.

It has been suggested that the respondent's proposed extradition, if carried into effect, would sunder this family and that it would be potentially injurious, prejudicial or harmful to all of them, but particularly to the children, at a level over and above the disruption, grief and inconvenience to be expected as a usual and normal consequence of an extradition order.

The couple have two children, one of school-going age, and one in pre-school, and the respondent's partner is pregnant and imminently expecting the arrival of a third child. The two existing children are presumed to be Irish citizens by virtue of having been born here. It is further presumed that the third child, when born, will also be an Irish citizen by virtue of being born here. Be that as it may, the existing children's heritage and ethnicity is Polish, and culturally they are probably influenced both by Polish and Irish culture, with Polish influence in the home but otherwise being predominantly exposed to, and presumably influenced by, Irish society and its culture. The two existing children are well settled in school and pre-school respectively, and there is no suggestion that they are doing other than well.

The respondent complains that it is proposed to extradite him to a country in which his children have never resided, and with which *de facto* they have no real connection. It is suggested that relocation is not a realistic option for this family, and is not one that is being contemplated. The children only know Ireland as their home as they were born here. Their home environment is a stable one where they currently have the benefit of being parented by both of their parents and where their father is the sole income earner and principal breadwinner. The respondent has apparently worked continuously since arriving in Ireland and is a good material provider. It was submitted that any relocation of the family to Poland, far from ameliorating the distress associated with any extradition, would cause yet more distress to the children in that they would be themselves uprooted from the only environment they know and transplanted into an alternative society with which they have only notional and tenuous links.

The point was made, and it does have some validity, that there is difference between relocation in the case of immigration and extradition. In the event of deportation the family, if relocated, continue to enjoy family life in the country to which the family member is expelled. In such a case the family unit is preserved. That is not true in the case of extradition, certainly for so long as the extraditee is required to remain in custody in the requesting state. However, as against that re-location could facilitate easier visitation of the person in prison and the maintenance of at least periodic personal contact between the prisoner and his immediate close family. In some cases it may also facilitate the involvement of extended family members still living in the country of origin in the provision of support for the immediate family of the prisoner. This may be particularly relevant where, prior to the extradition, the prisoner and his immediate family had been living in the executing state as a nuclear family with little in the way of an extended family or social network to fall back on.

In addition, reliance is placed on the expert testimony of the two psychologists who have jointly opined that, in the event of the respondent being surrendered, the likelihood of the children experiencing a grief reaction to his removal is very high. They are said to be particularly vulnerable given their very young ages and to be at risk of developing, *inter alia*, anxieties and fears for their own safety and that of the remaining parent, possibly leading to emotional distress, separation anxiety, depression and despondency. Were those to occur, such levels of distress and hopelessness are said to have a highly damaging effect on personal, social and academic functioning in both the immediate and longer-term. It was also asserted that due to unspecified medical problems attributed to the mother, which are said to have caused her to be hospitalised in the past, it is likely "that Mr. G. will need to assume the role of primary carer in the future when Ms. S. requires hospitalisation" and that, in light of this, the respondent must be viewed as a joint primary carer for his children.

The Court has no doubt but that, in the event of the Court surrendering the respondent, it will be very distressing and difficult for the respondent's partner and children and that their family life will be significantly disrupted. Moreover, although the Court would criticise what it perceives as deficiencies in the psychological evidence, and I will return to this, it does not seek to gainsay the basic proposition put forward by the psychologists which is that the children do face, at one level or another, the risks adverted to. While the risk of a grief reaction is rated as being very high, the other risks are advanced as existing at the level of possibility. In the Court's view it would clearly be in the best interests of these children that their father should remain in their lives, particularly at this stage in their development, and that he should not be surrendered and this is a consideration to which significant weight must be attached on the private interest side of the scales. However, that non-surrender would be in the children's best interests cannot be regarded as dispositive of the matter. The countervailing public interest considerations must weighed against all private interest considerations including the best interests of the children.

One important point that requires to be made at this stage is that although the respondent has indeed put down significant roots in this jurisdiction, he did so having arrived in this jurisdiction as a fugitive and well knowing that his position was precarious. The European arrest warrant system has been in operation since 2003, its existence is well publicised, and it is widely known to be very extensively used by the Polish authorities who, under Polish law, are obliged where possible to pursue all fugitives from the Polish justice and have no discretion in that matter. In the circumstances the respondent had absolutely no reason to suppose that his position in this state was other than perilous.

In so far as the respondent's partner and children are concerned, they are of course blameless. However, although the situation that they are possibly facing into is bleak, in terms of being separated from the respondent while he is incarcerated in Poland for however long that may ultimately be; their situation is by no means unusual, nor is it hopeless.

Such separations are sometimes unavoidable and simply have to be coped as part of the slings and arrows of life and death. Separations can arise due to breakdowns in relationships, death or, as in the present case, imprisonment either locally or further afield. Where they occur life certainly does not go on as normal for those affected, but it does go on. However, adjustments may have to be made to ameliorate, in so far as that can be done, the damaging effects of the separation. Among the adjustments that might need to be considered would be relocation. The Court has encountered nothing in the evidence to convince it that relocation, temporarily or permanently, would be impossible or that it would in fact be potentially damaging to the children in itself. The respondent's personal views about that, unsupported by independent expert testimony, attract little weight. The issue is not addressed by the psychologists. It is accepted that relocation might not be a very attractive option from the family's perspective, but it is one that may require to be considered. The children are certainly young enough to be able to adjust.

In so far as hope is concerned, the position is that the respondent is presumed innocent in respect of the prosecution offences and there must therefore be at least a possibility that he would be acquitted. Even if he is convicted, the maximum potential sentence on each charge is five years. It is not appropriate to speculate as to what he might get but it seems inherently unlikely that these matters would attract the maximum sentence, or that consecutive sentences would be imposed. Moreover, in so far as the existing sentences are concerned these will run concurrently and will expire in eighteen months at the outside. The situation of the

respondent's partner and children is therefore not hopeless. There is light at the end of the tunnel. That having been said, no one can gainsay that months or years can seem like an eternity to a very young child.

While this Court readily accepts that the respondent's children will face significant adversities if he is surrendered, the nucleus of the family will remain intact and the respondent's partner and the children will be a support to each other. Moreover, it would seem unlikely that the respondent's employer and his wife, and the children's teachers, all of whom have thought enough of the respondent and his family to speak up for them, and have done so in an impressive way, would simply cut this family adrift, or allow them to be cut adrift, such that they would have to face their new and difficult situation wholly unsupported and in isolation.

On the question of the partner's ability to cope in the event of a surrender, the evidence does not support the suggestion that the respondent must be regarded as joint primary carer, and that he was imminently to assume the position of, *de facto*, sole primary carer. No medical evidence whatever has been produced before this Court to support the suggestion that the respondent's partner suffers from a significantly disabling medical problem. It is the mere assertion of his employer's wife in the history she gave to the psychologists. It is not mentioned in the respondent's own affidavit. There is no affidavit from the partner herself, nor is there an affidavit, or even an unverified medical report, from a doctor. There is simply no evidence at all to support the suggestion advanced.

Moreover, in so far as possibly ameliorating measures are concerned, and in particular the possibility of relocation, this Court believes that fair criticism can be levelled primarily at the respondent himself, but also to a degree at the psychologists, for not addressing, or addressing in any detail, the issue as to what wider family or social network might be available in Poland to provide support for the respondent's partner and children, either here in Ireland, or in Poland were the family to relocate there. The Court has not been told if either the respondent or his partner have any residual family network in Poland. The Court has simply not been told whether or not there are any parents, grand-parents, siblings, uncles, aunts, nieces, nephews or cousins in Poland who might be able to help out.

The Court has carefully considered the circumstances of the respondent, and also those of his partner and the children concerned, to the extent that they have been disclosed or otherwise ascertained. It has sought to apply the principles which it has indicated it would apply and has subjected the circumstances of this family to a rigorous and careful examination. In weighing the competing considerations in this case the Court has had particular regard to the welfare of the children and has treated their best interests as being a primary consideration. However, and notwithstanding all of that, I have concluded that in the circumstances of this case neither the private interests of the respondent, not those of his partner, nor those of the children concerned, nor those of the whole family considered cumulatively, are sufficient to outweigh the strong public interest in this particular respondent's extradition.

The Court must therefore reject the s. 37 objection in this case, in circumstances where it has not been persuaded that surrendering the respondent would breach his right and/or the rights of his immediate family under article 8 ECHR to respect for private and family life. I do not consider therefore that it would be a disproportionate measure to surrender him, and I will proceed in the circumstances to make the appropriate Order under s. 16(1) of the Act of 2003.