

THE HIGH COURT

Record No.: 2011 399 Ext.

IN THE MATTER OF THE EUROPEAN ARREST WARRANT ACT 2003

Between/

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

Applicant

-AND-

M. M.

Respondent

JUDGMENT of Mr Justice Edwards delivered on the 4th day of July, 2013.**Introduction:**

The respondent is the subject of a European arrest warrant issued by Germany on the 20th November, 2008. The warrant was endorsed by the High Court for execution in this jurisdiction on the 16th November, 2011, and it was duly executed on the 28th August, 2012. The respondent was arrested by Sgt Martin O'Neill on that date, following which 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 Germany. 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 Sgt Martin O'Neill sworn on the 5th of June 2013 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 Act of 2003;
- (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 a prosecution type warrant and the respondent is wanted in Germany for trial in respect of the offence particularised in Part E of the warrant which is characterised as the offence of "attempted manslaughter contrary to §§ 212, 22, 23 of the German Criminal Code".
- (f) The underlying domestic decision on which the warrant is based is an Arrest Warrant issued on the 2nd June, 1994, by the "Landgericht (Regional Court) Osnabrück " in respect of the offence of attempted manslaughter on the 29th of August, 1993.
- (g) The issuing judicial authority has invoked paragraph 2 of Article 2 of Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, (2002/584/J.H.A.)O.J. L190/1 18.7.2002 (hereinafter referred to as "the Framework Decision") in respect of the offence listed in Part E, by the ticking of the box in Part E.I of the warrant relating to "murder, grievous bodily injuries". 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;
- (h) 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 offence set out within Part E that the offence carries a potential penalty of 15 years. Accordingly, the minimum gravity threshold is comfortably met;
- (i) The description of the circumstances in which the offence in question was committed as set out in the warrant is as follows:

"On 29.08.1993 on Augustmarkt in Papenburg with the intention to kill the accused stabbed R.E. in the chest with a

flick-knife. In doing so he shouted that he wanted to kill R.E. R.E. sustained a stab wound to the left side of the chest with a puncture channel length of 5-6 centimeters (*sic.*).".
There is no reason, upon a consideration of the underlying facts as set out above, to believe that the ticking of the box relating to "murder, grievous bodily injuries" was in error;

(j) No issue as to trial *in absentia* arises in the circumstances of this case and so no undertaking is required under s. 45 of the Act of 2003;

(k) 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. 6) Order 2004 (S.I. No. 532 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, "Germany" (or more correctly the Republic of Germany) 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.

Points of Objection

The respondent relies upon just one substantive point of objection. He argues that the Court should regard his surrender as being prohibited under s. 37(1) of the Act of 2003 because 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 to family life of his children, guaranteed under Article 8 of the European Convention on Human Rights and Fundamental Freedoms (hereinafter "the ECHR"). That objection was pleaded in the following terms:

"4. The Respondent's surrender is prohibited by s.37 of the *European Arrest Warrant Act 2003* as the passage of time from the date of the alleged offences has resulted in the impossibility of a fair trial, and that any such surrender would breach the Respondent's constitutional and Convention right to a trial with reasonable expedition."

It is further pleaded that

"5. The surrender of the Respondent is prohibited by s.37 of the *European Arrest Warrant Act 2003* in that to surrender the Respondent would breach his constitutional right to fair procedures and the enjoyment of his family life (under Article 41 of the Constitution and/or Article 8 of the European Convention on Human Rights). In the circumstances, the surrender of the Respondent would be an unjust and disproportionate interference in his family life and is contrary to fair procedures in all the circumstances".

While the Court is asked to take account of the full circumstances of the case, specific attention has been called to the respondent's own state of health; the health and welfare needs (physical, mental and emotional) of his wife and six children (particularly those of his son H.M. who is said to have special needs by virtue of the genetic disorder characterised as 22q11 microdeletion, also known as DiGeorge syndrome); the extent to which the respondent and his family have established roots in Ireland and have integrated into the community here, and the degree to which there has been alleged delay in the case

Relevant Evidence

The respondent relies on two affidavits in support of his objection, namely, an affidavit sworn by him on the 4th December, 2012, and a supplemental affidavit also sworn by him on the 31st May, 2013. Various documents were exhibited to those affidavits.

In circumstances described later in this judgment on the 3rd July, 2013, the Court also heard short additional oral evidence from a witness called on behalf of the applicant, i.e Detective Sergeant Martin O'Neill of An Garda Síochána's Extradition Unit. Moreover, the respondent was in turn afforded an opportunity of giving oral evidence himself in response to Detective Sergeant O'Neill's evidence, and did so.

In addition, since the main s.16 hearing in this matter on the 5th June, 2013, at the end of which the Court reserved judgment, the respondent has asked the Court to receive, and take account in its deliberations of, two Psychological Reports on his son H.M. prepared by a clinical psychologist. The first of these is dated the 18th June, 2013, and the second is undated, but was received by the respondent from the report's author by fax dated the 24th June, 2013, and is headed "Further to Psychology Report dated 18th June 2013". These reports have neither been verified by affidavit, nor exhibited with any affidavit and so, strictly speaking, do not constitute admissible evidence in these proceedings. However, as the author of these reports is known to the Court as a reputable psychologist, and as it was urged by counsel for the respondent that available time did not permit of the preparation of affidavits to be sworn by the psychologist, the Court agreed to receive these reports *de bene esse*, in circumstances where counsel for the applicant was not objecting to it doing so, and to take account of their contents attaching such weight to them as was appropriate in the interests of justice.

The Respondent's Affidavit of the 4th December, 2012.

The respondent deposes to the following matters in his affidavit dated the 4th December, 2012:

"3. As appears from the warrant, my arrest and surrender is being sought by the German authorities in relation to an attempted manslaughter that allegedly occurred on the 29th day of August 1993, an offence contrary to §§ 212, 22, 23 of the German Code.

4. I say that because of the passing of time since the date of the alleged offence my memory of specifics has faded and my ability to get a fair trial has been hampered.

5. I say that at the time of the offence the subject matter of the arrest warrant I was living in Germany awaiting the determination of my asylum application. I say I had left Lebanon because of the war that was ongoing at the time and applied for asylum in Germany on that basis.

6. I say that the German immigration authorities provided me with accommodation while my asylum application was being

determined. Initially I lived at an address in [Germany] with other asylum seekers, the majority of which were Albanian and Lebanese. I lived at this address for approximately eighteen months up until the date of the offence.

7. I say that on the night of the offence the subject matter of the arrest warrant the German police came to my address [...] and brought me to the local police station. I was detained in the police station and questioned about the offence over a couple of hours, and was subsequently released without charge. I say that I was not given the benefit of an interpreter but was able to converse with the Police in the limited German I had picked up during my time in Germany.

8. I say that approximately two to three months later I received a letter at [my] residence [...] provided to me by the German immigration authorities. I say that the letter requested my attendance in court [...] in relation to the offence the subject matter of the arrest warrant. I do not recall having any legal representation and there was no interpreter in court. I say that I have a limited recollection of what happened in court on the day. I say that I brought two people to court with me who had witnessed the offence the subject matter of the arrest warrant and they were able to confirm my version of events. These people were A.B. and the second was called RB. I cannot remember what R.B.'s surname was due to the passing of time. One of the few details I remember is that the judge was female, but I do not remember the judge's name. I say that I understood from the court proceedings that the judge decided that there was insufficient evidence to charge me. I left the court without being charged and was not informed that I had to return on another date.

9. I say that I continued to live in the house [...], provided by the German immigration authorities, for approximately four to six months after the date of the offence. I was then moved to another address by the German immigration authorities because the house [...] was demolished. I say that the German immigration authorities were at all times aware of where I was living.

10. I say that soon after I was moved to the new address I received a letter from the German immigration authorities notifying me that my asylum application had been refused and directing me to go to the Lebanese embassy to get identity documents so that I could travel back to Lebanon.

11. I say that on or about 1994 I left Germany and travelled to London by boat. I left without any knowledge of any criminal proceedings pending against me and I believed that the proceedings the subject matter of the arrest warrant had been finalised in that the prosecution was not proceeding further.

12. I say and believe that the Germany immigration authorities in refusing my asylum application and advising me to get identity documents so as to travel were in the process of arranging my deportation to Lebanon. I say that I did not return to Lebanon as the war was still ongoing in Lebanon and I was in fear of losing my life.

13. I say that at my port of arrival in Britain I was stopped by the British immigration authorities and immediately applied for asylum in the name of M.M. I say that I had no identity documents on my person at this time.

14. I say that while my asylum application was being processed by the British immigration authorities I was permitted to stay in London. I say that I met my first wife, E.M., soon after my arrival in London and we were married almost one year later, [in...] October 1995 [...] in London.

15. I say that soon after we were married my application for asylum was refused by the British immigration authorities and I was arrested and sent back to Lebanon. My wife is a British citizen and was therefore permitted to stay in London, but she returned with me to Lebanon. I say, that prior to my deportation, I was advised by the British authorities to get my Lebanese passport and apply for a visa to permit me to re-enter Britain. Upon our arrival in Lebanon the war was still ongoing and I immediately applied for a visa at the British embassy in Beirut in Lebanon. I say that there were peace keeping forces based in Lebanon at the time and I understood them to be part of NATO. I say that I requested and was given a letter from an officer in NATO which confirmed that my home town [...] was at that time a war zone. I say that I submitted this letter to the British embassy as part of my visa application.

16. I say that in and around one year after my arrival in Lebanon the British embassy in Lebanon informed me that I had been successful in my application for a visa and I returned to London with my wife. At all stages during my application, I was being processed under the name of M.M. and made no effort and or attempt to conceal my identity in any way. I beg to refer to a copy of my previous British passport which was issued in August, 2001 and which marked with the letter "**A**" I have signed prior to the swearing hereof.

17. I say that when we arrived back in the UK we initially lived with my wife's mother, A.D., in [...] London. We subsequently moved into our own rented accommodation and we had three children together. I say that our three sons were all born in Britain. H.M. was born [in] September 1998, K.M. was born [in] July 2000 and A.M. was born [in] May 2002. The said children are British subjects and their place (*sic.*) of habitual residence is currently Ireland and I beg to refer to the copies of the passports of the said three children and on which marked with the letter "**B**" I have signed my name prior to the signing hereof.

18. I say that I lived in London with my wife, E.M., and my three children, as named in paragraph 15, for a period of approximately seven years. During this period we lived in a number of different addresses. I say that the last address we lived at in London was a house provided by London Borough Council [...].

19. I also say that during the seven years we lived in Britain we travelled to Lebanon on approximately two or three occasions and I travelled under the name of M.M., using the British passport exhibited in paragraph 16.

20. I say that in and around 1999 I started working in a clothing warehouse in London and while working there I paid both PAYE and income tax in the name of M.M. I say that due to the passing of time I do not have any documentation to confirm this.

21. I say that in and around 2001 - 2002 I started working for [a company] in London and remained an employee [there] for approximately four years. During this period of employment [...] I paid both income tax and PAYE to the UK Inland Revenue in the name M.M. and received my P60 end of year certificates confirming my annual income and deductions paid. I beg to refer to copies of said P60's upon which, pinned together and marked with the letter "**C**", I have signed my name prior to the swearing hereof.

22. I say that in and around 2003 my marriage to E.M. broke down irreparably. We subsequently separated and I took custody of our three children. Court proceedings concerning the children were instituted in 2003 in the Principal Registry of the Family Division, England. The case [...] was assigned a hearing date [in] December 2004, on which date a residence order was made in favour of the Deponent, pursuant to Section 8 of the Children Act 1989. A further order was made pursuant to Section 13(1) and 33(7) of the said Act granting to the Deponent liberty to remove the said three children permanently from England, to reside in Ireland. Additionally an order was made on the same date granting contact to E.M., to take place in Ireland not less than once every two months. I beg to refer to copies of the said orders upon which, pinned together and marked with the letter "**D**" I have signed my name prior to the swearing hereof.

23. I say that I brought my three eldest children to reside in Ireland on or about the 21st January 2005 and the children resided with the Deponent [in] Co. Dublin.

24. I say that the learned judge in the proceedings outlined in paragraph 22 directed the Deponent to use best endeavours to ensure the orders were registered in Ireland. I say that on foot of the above direction I commenced an application to have the orders recognised and made enforceable in Ireland. I say and believe that on or about the 2nd day of June 2005 the Central Authority for England and Wales forwarded to the Central Authority in this jurisdiction an Application in the form of a Request for Registration of the aforesaid order under Article 7 of the Luxemburg Convention. I further say and believe that the Central Authority for England and Wales issued a certificate of Enforcement in respect of the above orders, on the same date. I beg to refer to copies of said Application and Certificate upon which, I pinned together and marked with the letter "**E**" I have signed my name prior to the signing hereof.

25. I say that on the 15th day of March 2006 the High Court, Ms Justice Finlay Geoghegan, made an order that the residence and contact orders made by the courts in England were to be recognised in this jurisdiction. I beg to refer to a copy of said Order upon which, marked with the letter "**F**" I have signed my name prior to the signing hereof.

26. I say that on the 27th day of March 2006 a decree was made [...] certifying that the marriage between the Deponent and E.M. was to be dissolved. I now have sole custody of the three children from the marriage and I have received no financial or any other support from E.M. since the date of our arrival in Ireland. I beg to refer to a copy of said decree upon which, marked with the letter "**G**" I have signed my name prior to the signing hereof.

27. I say that in and around 2006 I married Z.M. and we had three daughters together; R.M. was born [in] October 2007, Y.M. was born [in] April 2009 and I.M. was born [in] November 2010. The three children above are Irish citizens and I beg to refer to copies of their passports upon which, pinned together and marked with the letter "**H**", I have signed my name prior to the signing hereof.

28. I say that I am living with my wife, Z.M., and my six children, H.M., K.M., A.M., R.M., Y.M. and I.M., [in] Dublin. I say that we have lived together at this address as tenants since October 2012. I say that prior to living at the above address we lived [in another location in Dublin]. I say that we lived at this address for approximately one year. I say that prior to that we lived at [a different address in Dublin], and we lived at that address for a number of years. I beg to refer to a copy of the tenancy agreement for our current [...] upon which marked with the letter "**I**" I have signed my name prior to the swearing hereof.

29. I say that in and around 2004 my oldest son, H.M. was diagnosed by doctors in Britain with chromosome 22q11, a genetic abnormality. Since returning to Ireland, H.M. has come under the care of the Health Service Executive and regularly attends for treatment. I say that he attends, on a weekly basis, the Health Service Executive's Speech and Language Department in [Dublin]. I beg to refer to a copy of the appointment schedule for H.M.'s speech and language therapy in the above Health Centre, upon which marked with the letter "**J**" I have signed my name prior to the swearing hereof.

30. I further say that as a result of suffering from chromosome 22q11 my son, H.M., requires extra assistance on a daily basis. I say that H.M. can suffer from hyperactivity and can become aggressive as a result of the [disorder]. I say that H.M. requires extra assistance in doing tasks that other children could do independently and I am the person who provides H.M. with the help and assistance that he requires. I say that H.M. also suffers from asthma and has to take two inhalers on a daily basis. I say that H.M. is fully dependent on me, to a greater extent than my other children.

31. I say that five of my six children attend local schools and are well integrated into same. My wife is not able to drive and my children are wholly dependent upon me to travel to and from school every day. H.M. attends [a] Community College and has done so for a period of time; K.M. attends [the same] Community College and has done so for one year; A.M. attends [a] primary school [...] and has done so for a period of four years; R.M. attends [a] junior national school in [Dublin] and has done so since September 2012; Y.M. attends [a] crèche; I.M. is too young to attend school and she remains at home. I beg to refer to documentation confirming the fact that my children attend school in Ireland upon which, pinned together and marked with the letter "**L**", I have my name prior to the swearing hereof.

32. I say that my family is well integrated into the local community and significant roots have been put down during our time here in Ireland. I say that we have the support of family and friends living in the area. I say that my two brothers J.M. and L.M. have both lived in the Dublin area with their families for twenty years. Both my brothers have Irish passports, are married and are raising their children in Ireland.

33. I say that my two brothers have their own business [...] selling car parts and car tyres and have run this business for a period of approximately twenty years. I say that my brothers and both their families are well integrated into the local community and significant roots have been put down during their time in Ireland.

34. I say that my family has offered me essential support during the lifespan of the herein proceedings and without such I would have been severely hampered in my preparation. I say that I am not a fluent English speaker and that both my brothers and my nephews have assisted me in communicating with my legal team when I needed urgent advice on an issue related to the herein proceedings. I say that I have also required my family's assistance in arranging for the compilation of documents which are exhibited in the herein affidavit.

35. I say that I am currently unemployed and in receipt of job seekers allowance. I say that I also receive child (*sic.*) from social welfare and the total mount (*sic.*) both my my (*sic.*) wife and I receive per week is €209.53. I say that I have been in receipt of social welfare payments of €511.60. I have been in receipt of social welfare payments since in and around

2005 – 2006. I beg to refer to a copy of a letter from the Department of Social Protection which confirms my weekly payment of €511.60, upon which marked with the letter "**M**", I have signed prior to swearing hereof.

36. I say that neither the Deponent nor any member of his family speak German. I say that the Deponent has no support network in Germany. I say that the Deponent is fluent in Arabic and has a good understanding of English. I beg to refer to paragraph (a) of the arrest warrant which lists Arabic under the heading of languages which the requested person understands.

[...]

39. I say that my own health has deteriorated over the last number of years and I now suffer from diabetes, high blood pressure, high cholesterol and heart problems. I beg to refer to a copy of a report prepared by my local general practitioner, upon which marked with the letter "**O**", I have signed my name prior to the swearing hereof.

The Court has considered and has taken due account of the contents of each of the documents marked A, B, C, D, E, F, G, H, I, J, K, L, M, N, and O, respectively, exhibited with this affidavit. It is fair to say that they have been accurately characterised and described by the respondent in his said affidavit. It is not, therefore, considered necessary to specifically review them in this judgment.

The Respondent's Supplemental Affidavit of the 31st May, 2013.

As previously referred to, the Court has also been furnished with a supplemental affidavit sworn by the respondent on the 31st May, 2013. This affidavit, to the extent that it is relevant to the personal circumstances of the respondent and his family here in Ireland, states:

"13. I say that I am not working and am in receipt of €491.60 per week from the Department of Social Welfare. This payment is the total payment received by me on behalf of my family.

14. I say that on the advice of my solicitor I requested letters from persons in the community who can give evidence of the relationship I have with my children, the role I play in their lives and the possible effects on them if I was extradited.

15. I say that on or about 12 May 2013 I received a letter from the Principal of [the school of A.M.]. In this letter [the principal] states that he has known me since 2008 when I enrolled my eldest son H.M.. The letter confirms that H.M. is a "*special needs pupil*" and that I played an active part in ensuring that all the correct procedures were in place during his schooling at [the school]. [The principal] states that K.M. attended [this school] and that A.M. will be leaving [this school] in June 2014. [The principal] also states that I bring the boys to school and pick them up every day, and that I have a very good relationship with the boys. I beg to refer to a copy of said letter, upon which marked with the letter "**MMC**", I have signed my name prior to the swearing hereof.

16. I say that on or about 13 May 2013 I received a letter from [a teacher in my daughter's] Junior National School. [This teacher] teaches my daughter R.M.. I beg to refer to a copy of said letter, upon which marked with the letter "**MMD**", I have signed my name prior to the swearing hereof.

17. I say that on or about 17 May 2013 I received a letter from [my sons' football club]. In the letter, [it] confirms that I have played an active role in ensuring that my sons participate fully and that I both support and encourage my sons in their football. It also states that the boys are developing well and have integrated well. I beg to refer to a copy of said letter, upon which marked with the letter "**MME**", I have signed my name prior to the swearing hereof.

18. I say that on or about 23 May 2013 I received a letter from [...] the principal of my sons' Community College. She confirms that both H.M. and K.M. are currently students in the college and that I have "*played an active and supportive role*" in my sons education. [The principal] refers to the fact that H.M. has special educational needs and how I have been "*particularly active*" in his education. I beg to refer to a copy of said letter, upon which marked with the letter "**MMF**", I have signed my name prior to the swearing hereof.

19. At paragraphs 29 and 30 of my original affidavit I averred that my eldest son, H.M., suffered from [a genetic abnormality] and asthma and I set out some of the consequences of same. Further to that, I say that H.M. is under the care of Our Lady's Children's Hospital Crumlin and was previously referred to The Adelaide & Meath Hospital in Tallaght.

20. I say that H.M. was referred to The Adelaide & Meath Hospital by our general practitioner[...]. I beg to refer to a copy of a letter from [the] consultant paediatrician in The Adelaide & Meath Hospital, upon which marked with the letter "**MMG**", I have signed my name prior to the swearing hereof.

21. I say that H.M. came under the care of Our Lady's Children's Hospital soon after his arrival in Ireland and he has been treated for a variety of different issues, both physical and mental. I beg to refer to two different letters sent by Our Lady's Children's Hospital which confirm that H.M. has been treated by the hospital for different medical issues, upon which marked with the letter "**MMH**", I have signed my name prior to the swearing hereof.

22. I say that on or about 20 May 2013 I received a letter from [a professor] of Our Lady's Children's Hospital. [The professor] confirms that H.M. suffers from an "*underline genetic condition 22q 11 deletion syndrome*" and as a result requires "*significant additional medical educational support*" and has "*a great deal more dependence*" on his family. It is for that reason that the professor states that he "*would strongly support the application for H.M.'s father to remain in Ireland in support of H.M.*". I beg to refer to a copy of said letter, upon which marked with the letter "**MMI**", I have signed my name prior to the swearing hereof.

23. I say that on or about 23 May 2013 I received a letter from [a doctor of a clinic in Dublin]. [He] confirms that I have been a patient of the clinic since 2008 and that I attend along with my family. [He] states that I attend to my "*six children with great attention*" and they would benefit from my continued support. [He] states that the children "*would be negatively affected*" by my absence. I beg to refer to a copy of said letter, upon which marked with the letter "**MMJ**", I have signed my name prior to the swearing hereof.

24. I say that my three eldest children are from a previous marriage and their mother, E.M., is not in a position to look after them. I say that one of the reasons that our marriage ended and I was granted full custody was because her health

deteriorated due to the fact that she also suffers from chromosome 22q11. I beg to refer to paragraphs 22 through to 26 of my original affidavit. I say that my ex-wife, E.M., has a good relationship with our children, H.M., K.M. and A.M. and regularly travels to Ireland to see them.

25. I say that my wife, Z.M., is the mother of my three youngest children and helps to care for my three eldest boys from my earlier marriage. My wife acts as *locus parentis* but is not a guardian to my three eldest boys and if I am extradited to Germany then my three eldest boys will be left without a guardian”.

The Court has considered and has taken due account of the contents of each of the documents marked MMC, MMD, MME, MMF, MMG, MMH, MMI & MMJ exhibited with this supplemental affidavit. Once again, it is fair to say that they have been accurately characterised and described by the respondent in his said supplemental affidavit. It is not, therefore, considered necessary to specifically review them in this judgment.

Additional information, and the response thereto

In light of the contents of the respondent’s principal affidavit sworn on the 4th December, 2012, the Irish Central Authority wrote to the issuing judicial authority by letter dated the 22nd January, 2013, raising the following queries:

- “(i) Please comment on whether the respondent left Germany in 1994 not only to avoid deportation but also to avoid prosecution and if possible to explain the delay in issuing the warrant.
- (ii) It would be informative if you could comment on the alleged court appearance of the respondent and his questioning by the Lebanese police. Any information whatsoever which suggests that the respondent was evading justice at all or any stage between the issue of the warrant and the commission of the offence would be in aid of the Irish court in determining whether to order surrender. It would be helpful if an explanation could be provided as to why the warrant was received here in 2011 having been issued in 2008.
- (iii) You are also asked to confirm that there are procedures in the requesting state whereby the Respondent can raise any issue he wishes to raise in respect of delay and his right to a fair trial and any other basic rights protected by German law and/or the ECHR Convention.
- (iv) Any information that establishes that after the court appearance in Germany (or indeed any time thereafter) the Respondent was aware that he was to be prosecuted would be particularly relevant and should be provided.”

The issuing judicial authority replied by letter dated the 7th February, 2013, and stated:

“Re I.

The documents do not show the reasons why the accused left the Federal Republic of Germany at that time. However, there is a note made by the police of 30th August 1993, which it received from the competent employee of the Aliens' Department saying that the accused could not be deported because he had filed a second asylum application and he had (*sic.*) not have a passport. Therefore, the Aliens' Department did not make an alert for the purposes of communicating the place of residence of the accused first, after his residence had become unknown. Therefore, it seems rather unlikely that the accused had left the Federal Republic of Germany because of being afraid of an impending deportation.

Further, a witness stated during the course of the preliminary proceedings that the accused had wanted to abscond in order to escape from the criminal prosecution. This was communicated personally by the injured party's father to the police department in [Germany] on 30th August 1993. In addition, witnesses stated that the accused and/or unknown fellow (sic.) citizens had tried to make him withdraw the charge or rather make a false statement before court. The injured party communicated this to the police department [...] on 3rd September 1993. The injured party's lawyer communicated to the Public Prosecutor's office [...] three similar incidents concerning the injured party's parents in his letter dated 22nd October 1993. In the same letter, he also wrote that the accused had called the injured party directly and had threatened the injured party to set fire to his parents' home.

After the main hearing before the district court [...], the injured party made a statement to the police that the witness C.D. had admitted to have consciously made a false statement before court because of being afraid of the accused.

A search in the SIS has remained undone since 1994 on the grounds that there have been obstacles precluding extradition to one or several contracting states. There is no further reason in the file why an international search has remained undone.

Re II.

The file does not show that the accused was heard by the Lebanese police in connection with the preliminary proceedings conducted in Germany.

The German police heard the accused [...] on 30th August 1993, however, he did not provide any information on the matter. On the very same day, he communicated via his lawyer that the witness had injured himself.

The accused was also heard in the scope of the main hearing before the local court [...] on 9th March 1994. At that time, the accused did not have a defence lawyer, as his lawyer had resigned. Before court, the accused availed his right to silence.

The local court [...] transferred proceedings to the district court [...], as during the main hearing the court and the public prosecutor classified the crime not as grievous bodily harm but attempted homicide. However, for sentencing an attempted homicide, the penal power of the local court was not enough, so that the proceedings had to be transferred to the district court.

The main hearing before the district court could not take place anymore as the accused had absconded in the meantime. Only after, as the accused had fled, the district court issued an arrest warrant on 2nd June 1994.

Before the issue of the arrest warrant, the district court had made the police to find out the accused person's residence. For this purpose, the accused person's former cohabitant had been heard, who stated that the accused had already packed his things mid-March 1994 and had left the joint apartment with unknown destination. He had not submitted his address despite requests. The police also found out that the accused has not collected any social welfare payments from the Social welfare office [...] since then.

Re III

German criminal proceedings grant the accused the comprehensive protection of his rights on the base of the German Basic Law as well as the European Convention for the Protection of Human Rights. Specific information is not possible, as the letter of 22nd January 2013 does not show which objections the accused would like to raise.

Re IV.

At the latest since the hearing at the police department [...] on 30th August 1993, which has already been mentioned in Section 2, the accused knew that he was a person charged with a crime in preliminary proceedings. The accused also made it clear by appearing in the main hearing before the local court [...] on 9th March 1994 that he would have to be held (*sic.*) responsible for the crime. A sworn interpreter for the accused also attended the main hearing who had translated for him the entire hearing. Thus, the accused knew that after the transfer of the proceedings to the district court he would have had to face another main hearing there."

This letter of the 7th February, 2013, was duly forwarded to the respondent's solicitors, and a portion of the respondent's supplemental affidavit sworn on the 31st May, 2013, seeks to engage with some of the issues contained therein. The relevant paragraphs were not quoted above as they required to be placed in context. The respondent stated the following at paragraphs 4 to 9 inclusive of his said supplemental affidavit:

"4. I say that the letter from the Public Prosecutor's Office claims that I and/or unknown fellow citizens tried to make the injured party to withdraw the charge or to make a false statement before the German court. The letter makes references to threats made to the injured party and the injured party's parents in order to persuade the injured party to withdraw the charge. I say that I never threatened either the injured party or his parents and I never request (*sic.*) anyone to make such threats on my behalf.

5. I say that the claims made by the Public Prosecutor's Office, as set out in paragraph 4, are wholly untrue and no evidence has been provided to prove that these threats were made.

6. I say that the only time I saw the injured party after the incident, the subject matter of the herein proceedings, was approximately one week later in a night club [...] [in Shopping Centre behind Cinema] and the injured party was dancing. I did not say anything to him or make any threatening gestures towards him.

7. I say and believe that in the document disclosed to my solicitor which is headed "*Attorney General [...]*", it states that German Immigration questioned a Y.Z. and that he stated that I stayed with him for some time after March 1994. I say that I did stay with a person called I.Z., not Y.Z., for a period in 1994 but I am unable to say the exact period due to the passing of time.

8. I say in the correspondence received from the Public Prosecutor's Office [...] it states that "the file does not show that the accused was heard by the Lebanese police in connection with the preliminary proceedings conducted in Germany". I say, as I have already stated at paragraph 38 of my original affidavit, that I was asked to attend Said Police station in Lebanon and was questioned about the incident the subject matter of the herein proceedings. After receiving the correspondence from the Public Prosecutor's Office [...], dated 7 February 2013, I requested my sister N.M. to get some documentation from the Lebanese authorities confirming that I was questioned in relation to the incident the subject matter of the herein proceedings. I say and believe that my sister received a letter from C.K. and arranged for said letter to be translated into English. This letter confirms that on or about 9 June 2009 an investigation was opened by the Lebanese authorities into the incident the subject matter of the herein proceedings. The letter confirms that I was in the custody of the Lebanese authorities and was then subsequently released. I beg to refer to a copy of the said letter from the Lebanese authorities upon which marked with the letter "MMA", I have signed my name prior to the swearing hereof.

9. I say that I was mistaken when I stated in paragraph 38 of my original affidavit that I was questioned by Lebanese officials in 2010 about the incident the subject matter of the herein proceedings. I say that after reading the letter exhibit in paragraph 8 above I realised this mistake. I say and believe that I was in fact questioned by the Lebanese police in 2009. I say that I also travelled to Lebanon on 2010 and I was stopped and questioned by Lebanese police at Beirut airport upon arrival. In 2010 the Lebanese police did not question me about anything related to the herein proceedings and it transpired they were looking to question a different person with the same name."

The Court confirms that it has considered and has taken due account of the document exhibited with this portion of the said supplemental affidavit and marked as "MMA."

The psychological report of the 18th June, 2013.

The psychological report [...] dated the 18th June, 2013, has been considered by the Court *de bene esse* to the extent that it is ostensibly relevant. [The psychologist] conducted interviews with the respondent, his wife and with H.M. and detailed them in the report as follows:

"Interview with M.M.

The interview with M.M. was carried out in the presence of an interpreter. However, the skills of the interpreter were needed on only two occasions.

In my discussion with M.M., he demonstrated an intimate knowledge of H.M.'s functioning and needs in relation to such issues as hygiene, dressing himself, self organisation, travel to school, riding a bicycle, peer friendships, behaviour at home and the use of a mobile phone and Facebook.

In each of these areas of H.M.'s daily functioning, a consistent picture emerged. H.M. has many skills in various aspects

of his daily life but has to be supervised closely, in order to maintain his safety. M.M. outlined in detail his daily involvement with H.M. in each of these areas.

The reports from various professionals in the Book of Pleadings refer to M.M.'s role in H.M.'s care.

Interview with Z.M. (H.M.'s Step-Mother)

I interviewed H.M.'s step-mother immediately after his father's session. An interpreter was present throughout but was not referred to as Z.M.'s English was fluent.

Z.M. said that her main concerns regarding H.M. are his intellectual disability and safety issues. She reflected that H.M. is intellectually slow and finds it hard to keep things in his mind.

Z.M. said that her husband is H.M.'s primary carer. She has three small children of her own and she said that she would not be able to care for H.M. and her other two step children as well as her own children in the absence of her husband.

She said that she had difficulty in looking after H.M. when his father was not in the house. She said that H.M. is inclined to become more nervous when his father is absent. She was worried that H.M. would slip out of the house, as he had done before, when his father was absent. H.M. is not safe to be out on his own and is not permitted to be.

Z.M. is not able to drive a car.

Interview with H.M.

H.M. was quite relaxed throughout the interview. He accounted for himself without difficulty. He smiled easily.

His presentation was congruent with the description of a boy with special needs as outlined in the recent professional reports.

We discussed the same issues which I had raised with his father. There was no discrepancy between the accounts he gave about his abilities and about his father's involvement in his daily living and those given by his father. He said that he was able to ride a bicycle but only with his father cycling beside him. He would not go shopping alone. He reckoned that he would be able to stay over-night with friends when he was 21 years old.

He admitted that he found school work very difficult.

He said that he was sad only when the boys in school slagged him. As a pupil with special needs, he is vulnerable in this respect.

The issue of the possibility of his father's being deported to Germany did not emerge during the interview".

[The psychologist] concluded that "H.M. presents as a boy with intellectual disability, developmental delay and consequent special needs, who is socially vulnerable and who has medical problems which are deemed to be, at least in part, induced by stress. Evidence indicates that H.M.'s father is his primary caregiver." In addition, [the psychologist] proffered the following as his professional opinion in the section entitled "Outcomes which can be expected in the event of H.M.'s Father Leaving Home":

"Given the above conclusion one can expect that the loss of his father at this stage in his development could have significant detrimental effects on H.M.

In light of his current functioning one can expect that detrimental consequences could arise

a) in his behaviour at home and in school. At home, his step-mother would not have the authority, with H.M., that his father exercises. At school, without his father's support, he is likely to act out and be less cooperative in the class-room, bringing into doubt the ability of the school to manage him.

b) at a mental health level. The loss of his father, for no reason that H.M. can understand, can be expected to impact negatively on his mental health. Typically this may present as inwardly directed depression or externally directed anger.

c) at a physical level. H.M. has a history of responding to stress psychosomatically, with ulcerative colitis. The loss of his father can be expected to exacerbate this.

In the absence of his father to care for him, I would be concerned that the family may not be able to care for H.M. and that therefore there would be a risk that he would need to be taken into the care of the HSE".

The second and undated psychological report

The second and undated report of [the] Clinical Psychologist, was issued in response to a query raised by this Court on the 21st June, 2013, when the report of the 18th June, 2013, was handed in, and following its initial appraisal by the Court. It is appropriate to quote it in full:

"Further to Psychology Report dated 18th June 2013.

I understand that a question was raised in the High Court on 21st June 2013 as to why I had not mentioned, in my report, the position of M.M.'s extended family in Ireland. Furthermore questioning the possibility of that extended family caring for H.M., in the event of M.M. being surrendered to Germany.

In an effort to facilitate the Court, I interviewed M.M.'s older brother on 24th June 2013.

M.M. has only one brother living in Ireland. His younger brother, F.M.(40), has moved, with his family, from Ireland to Africa. He no longer has a house in Ireland.

I met with J.M.(50), in your offices [...]. He was very willing to talk about the care of H.M., in the event of H.M.s father being surrendered to Germany.

J.M. has been twice married. He has three sons by his first wife, aged 16, 18 and 20 years. He has two daughters by his present wife aged 4 and 8 years.

J.M. has his own business selling car tyres. As a result, his wife has the responsibility for caring for her three step-children and her own two daughters. She is a full-time home-maker.

J.M. and his wife know H.M. from the occasional family visits which M.M. makes, with H.M.. J.M. remarked that H.M. has to be kept under control, continually. When H.M. is in J.M.'s home, H.M. has to be watched at all times. The issues which J.M. raised, with regard to H.M., included the following:

- J.M. was concerned for the safety of his young daughters in H.M.'s presence.
- J.M. noted that H.M. could not be refused things that he desired, without H.M. becoming very angry.
- J.M. noted that H.M. could not regulate his eating, without adult intervention.
- J.M. noted that H.M. is not very bright.
- J.M. referred to the difficulty of having, constantly, to control H.M..
- J.M. said that M.M. was committed to caring for H.M..

J.M. has received no training nor has he any experience working with children with special needs.

He said, clearly that he could not, and would not be in a position to care for H.M, in the event of M.M. being surrendered to Germany.

His strongest statement, in this regard, was that if H.M. was to come to live in J.M.'s home, J.M.'s family would be destroyed. He said that his wife is already looking after three children which are not her own. He knows that she would not be willing or able to care for H.M. He says that he has to go out to work and could not provide what H.M. needs and his father provides, namely, full-time care and support.

J.M. reports that there is no other extended family in Ireland. "

The applicant's request for voluntary discovery and response thereto

Following up on the query raised by the Court on the 21st June, 2013, but before the second undated psychological report had been received by the applicant from the respondent's solicitors, the applicant's solicitors (The Chief State Solicitor's office) wrote by letter dated the 26th June, 2013, addressed to [...] solicitors for the respondent, requesting the following information:

"I now write formally requesting by way of voluntary discovery from your client the following details:

1. Names, addresses and date of birth of any family members residing in this jurisdiction;
2. Names, addresses and date of birth of any in laws residing in this jurisdiction;
3. Details of H.M.'s mother visits i.e., number of visits per year and the length of her stay"

A reply was received [...] dated the 1st July, 2013, stating:

"I refer to the above matter resting with your letter dated the 26th of June 2013 (received on the 27th of June 2013). I include the requested details.

1. M.M. has one family member residing in this jurisdiction, a brother. His name is J.M., [and he lives in Dublin]. [...]
2. M.M. does not have any in laws residing in this jurisdiction.
3. H.M.'s mother has only visited him once in Ireland. This occurred on the 28th of August 2012 for 2 days. She has not visited him in Ireland since."

The oral evidence adduced

This Court, in agreeing at the request of the respondent to receive the psychological reports of the clinical psychologist notwithstanding that their unsworn and unverified character, had also agreed to re-convene the Court before giving judgment, if requested to do so by the applicant, so as to afford the applicant an opportunity to make further submissions in response to the contents of those reports. The applicant duly requested the Court to reconvene for that purpose and the required further hearing took place on the 3rd July, 2013.

At the commencement of the further hearing counsel for the applicant drew the Courts attention to significant discrepancies and contradictions between what the respondent had stated on oath in his two affidavits and what he had said lately to the psychologist,

and to his solicitors.

There is a reference in the second undated psychologist's report to interactions between M.M. and the police in England. This was the first mention of this. However, at the hearing before this Court on the 5th June, 2013, there were detailed submissions from both sides in relation to the alleged delay. It was suggested by the respondent that the German authorities knew well that he was in the United Kingdom while he was resident there and failed, or indeed were dilatory, about pursuing him there. In that context there had been detailed submissions concerning the relevance of the evidence that M.M., who was by then living in Ireland, had travelled to the Lebanon for a family holiday, that while there he was contacted by the Lebanese police (ostensibly at the behest of the German authorities) and requested to attend at a police station for interview, that he was subsequently interviewed, that he was then released but had his passport withheld, and that he was then later allegedly informed that "the investigation would not be proceeding any further" and that he could have his passport back. It had been suggested by the respondent that the German authorities were clearly satisfied with the explanations he had proffered to the Lebanese police and were content to let the matter drop.

Counsel for the respondent suggested that there was no evidence that the German authorities had known that he had gone initially to the United Kingdom, or that he had since moved to Ireland. The most likely explanation for what happened in Lebanon was that he was on some computer database as a wanted person and that his travel to Lebanon in an age where all international travel is closely monitored had triggered a notification to the German authorities who in turn contacted their Lebanese counterparts; alternatively the German authorities, knowing he was Lebanese and might show up in that country at any time, had communicated a standing request to the police in Lebanon to intercept him if he indeed showed up there. One of the points that had been made by counsel for the applicant was "how were the German authorities to know he was in the United Kingdom given that there was apparently no interaction with the legal authorities there other than through the divorce proceedings?"

It has now emerged that the respondent was investigated at some point by the police in the United Kingdom, and indeed spent time in custody there, in relation to allegations of abuse. Although evidence of interaction with the British police might on one view of be seen to possibly strengthen the respondent's case that there was culpable delay by the German authorities, counsel for the applicant says that in fact the new information very much begs the question as to why these important matters were not put before the Court previously. It could hardly have slipped the respondent's mind that he had been in the custody of the police in the United Kingdom and was therefore known at least to them. Given the nature of the case being made by him it is extraordinary that he failed to mention it. Counsel for the applicant asks rhetorically: "how is it that he (counsel for the applicant) could make a submission to the Court pointing to lack of interaction by the respondent with the police authorities in the United Kingdom and then, *mirabile dictu*, the contrary is suggested for the first time in a psychologist's report compiled very late in the day, and, crucially, after the respondent has had the benefit of hearing counsel for the applicant's submissions." No attempt was made by the respondent to file yet another supplementary affidavit to correct the record, or even to cause his solicitors to communicate the new information to the other side by letter. It was merely slipped in quietly at the last minute, without any verification or support, or means by which it can be tested, as part of history provided by the respondent to the psychologist for inclusion in his supplementary report.

Another matter of concern identified by counsel for the applicant concerns the statement by the respondent's solicitors in their letter of the 1st July, 2013, that he has just one family member residing in this jurisdiction, a brother i.e., J.M., and that he has no in-laws residing in this jurisdiction. It was clear from the psychologist's second and undated report that he had also told the psychologist that he had only one brother, J.M., living in the jurisdiction, but had also stated that J.M. has a wife and several young children in the jurisdiction. The Court is prepared to accept that the reference to "no" in-laws in the solicitor's letter might perhaps due to a lack of clarity in the giving of instructions and that the respondent could have intended to mean "no in-laws apart from J.M.'s wife". However, even giving him the benefit of the doubt on the reference to "no in-laws", counsel for applicant pointed out that he had stated upon oath in his affidavit sworn on the 4th December, 2012, at paragraphs 32 to 34, that he had *"the support of family and friends living in the area"*, that two brothers J.M. and L.M. *"have both lived in the Dublin area with their families for twenty years"*. He had further stated that both his said brothers *"have Irish passports, are married and are raising their children in Ireland"* and that *"my two brothers have their own business in Wicklow selling car parts and car tyres and have run this business for a period of approximately twenty years"*. He then again reiterated that *"my brothers and both their families are well integrated into the local community and significant roots have been put down during their time in Ireland."* There is no mention whatever of the brother F.M. referred to in the psychologist's second report. However, he goes on to say *"my family has offered me essential support during the lifespan of the herein proceedings and without such I would have been severely hampered in my preparation. I say that I am not a fluent English speaker and that both my brothers and my nephews have assisted me in communicating with my legal team when I needed urgent advice on an issue related to the herein proceedings."* It also appears from the affidavit evidence that J.M. has an adult son, i.e., a nephew of the respondent, living in the jurisdiction.

Counsel for the applicant also pointed out that although the letter from the respondent's solicitor's dated the 1st July, 2013, states that *"H.M's mother has only visited him once in Ireland. This occurred on the 28th August 2012 for 2 days. She has not visited him in Ireland since"*, the respondent had previously sworn on oath at paragraph 24 of his supplemental affidavit of the 31st May, 2013, that *"my ex-wife, E.M., has a good relationship with our children, H.M., K.M. and A.M. and regularly travels to Ireland to see them"*.

Counsel for the respondent responded by indicating that his client wished to give oral evidence and would say that his brother L.M. had left Ireland "within the last number of weeks" and had gone to South Africa after he had sworn his first affidavit on the 4th December, 2012. Counsel for the applicant then, in turn, indicated that he wished to call evidence from the Detective Sergeant relevant to that issue. The Court then directed that the Detective Sergeant should give evidence first, and that the respondent should then be afforded an opportunity to give any evidence he might wish to give in response to the Detective Sergeant's evidence and the issues raised by counsel for the applicant.

The Detective Sergeant then testified that he had conducted inquiries with the special investigations unit of the Department of Social Welfare and had ascertained that a L.M., with a date of [...] December 1963, and an address [...] Dublin (later accepted by the respondent in his own evidence as being the correct L.M., i.e. the respondent's brother) has a current social welfare claim. This man is married to a lady named M.J.. The Detective Sergeant further stated that his information was that the respondent's brother J.M. is also currently claiming social welfare.

The witness accepted under cross examination that it was possible that if a person had recently left the country without notifying the Department of Social Welfare of his intention of so doing, the Department's record could still show the existence of a current social welfare claim.

The respondent then gave evidence himself. He accepted in examination in chief that the L.M. referred by the Detective Sergeant was indeed his brother. He was then asked if his brother was still in the country or had gone to South Africa as had been suggested. He replied that he had not spoken to him for a year. He was pressed as to whether his brother had gone to South Africa and said: *"He went there to open business"*. He was asked if his brother had emigrated and he said: *"He lived there for a while"* He then added: *"I*

hear that he went to Germany and came back to Ireland, but I don't know anything about it." He was then asked by his own counsel where he believed his brother is at the moment, and he replied: "Maybe he is in Ireland." He was asked "when you last heard about your brother where did you hear that he was?" He replied "Germany". He was then asked when it was that he had last heard he was in South Africa, and he replied "About six months ago". He added: "My family told me, and I don't know if they were telling me the truth or not".

Under cross-examination, he was asked who lives at [the Dublin address that was mentioned]. He answered: "My brother lives close to me but I don't know where exactly. He lives close to my house but I don't know the number". He was asked if he had visited that address and he said "Yea, a year ago". He was asked if his brother's wife still lived at that address. He answered: "Probably". He was asked if he was seriously suggesting that he was unsure whether his brother's wife i.e. his sister in law, lived at that address. He replied: "I don't know, he moves houses." Pressed as to whether his sister in law lives in this jurisdiction or not, he said: "Yes". He was then asked when was the last time he spoke to her, and replied: "We haven't spoken to each other for over a year now". Pressed for clarification by the Court, he added "We don't talk to our sister in law". He further confirmed that he had not spoken to either that brother or his sister in law for over a year. The Court then asked him to explain why, in those circumstances, he had deposed to the matters contained in paragraph 34 of his principal affidavit. He provided no explanation, merely stating "L.M. didn't help me". He was asked who did help him then, and he replied "My other brothers F.M. and G.M.". Asked why they were not mentioned in his affidavits, he replied: "I told my solicitor". Asked if his brother F.M. was living in the state he said that "He goes and comes, he is a businessman. He is the one who helped me with the children." He later stated F.M. lives in Dublin, and has family. He travels often but is in Dublin now. He was asked how come J.M. claims social welfare when you said he has been running a tyre business for over twenty years he failed to answer. He said "My problem is I can't understand all these documents."

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 Applicable Legal Principles

In its recent judgment in *Minister for Justice and Equality v. T.E.* [2013] IEHC 323 (Unreported, High Court, Edwards J., 21st June, 2013) this Court conducted an extensive review of relevant Irish, English and European Court of Human Rights (hereinafter "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. Gheorgie* [2009] IESC 76 (Unreported, Supreme Court, Fennelly J., 9th April, 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* (Application no. 27279/95, 8th December, 1997) [1997] E.C.H.R. 106; *King v. United Kingdom* (Application no. 9742/07, 26th January, 2010) [2010] E.C.H.R. 164 ; *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] 2 A.C. 167 ; *Zigor Ruiz Jaso v. Central Criminal Court (No 2) Madrid* [2007] EWHC 2983 ; *Norris v. Government of United States of America (No. 2)*, [2010] 2 A.C. 487 ; [2010] 2 All ER 267 ; *ZH (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] UKSC 25 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 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.

Analysis

It is necessary to consider the degree to which the proposed extradition measure, i.e. the proposed surrender of the respondent to Germany so that he might face trial for the offence which is the subject of the European arrest warrant, will interfere with, and operate to the prejudice of, the family life of the respondent and his children. Having determined that, it is then necessary to weigh against those private interests the public interest in the respondent's extradition.

If, upon a balancing of those private and public interests, it appears that the proposed measure is disproportionate to the legitimate aims being pursued, and that it is not justified by a pressing social need in the circumstances of the case, then the Court ought to uphold the s.37(1) objection, and not surrender the respondent, as to do so would disrespect, and thereby breach, his rights and/or the rights of his children, to family life contrary to Article 8 E.C.H.R.

Conversely, if, upon a balancing of those interests, it appears that the proposed measure is indeed proportionate to the legitimate aims being pursued, and continues to be justified by a pressing social need, the Court will be at liberty to surrender the respondent and will be obliged not to uphold the s.37(1) objection.

Before examining the private interests of the respondent and his children, it is perhaps more convenient to start with a consideration of the public interest in this respondent's extradition. It is necessary to examine, in the first instance, the gravity of the offence to which the warrant relates. The need to do so arises because while the public interest in extradition is constant in the horizontal sense, it is variable in the vertical sense according to both the gravity of the offence or offences in question and the degree to which there is a pressing social need for the proposed extradition measure to be carried into effect.

The offence in this case involves a stabbing with a flick knife in which the victim sustained a stab wound to the left side of the chest with a puncture channel length of 5-6 centimetres.

It seems to this Court that, upon any view of the matter, the alleged offence is a serious one in respect of which there would in the normal course of events be a strong public interest in the respondent's extradition. It is very much in the public interest that crimes of violence of this sort be detected and punished. The issuing state is entitled to prosecute and try those suspected of such crimes, with a view to the punishment of those found guilty of such crimes following a trial in due course of law, both for reasons of general and specific deterrence and in pursuit of other public policy and penological objectives such as the protection of the public, the protection of private property, and the maintenance of law and order in society. These are all legitimate aims which the issuing state is entitled to pursue. Where, as in the case of this respondent, a suspect is on bail awaiting trial and flees the jurisdiction of the issuing state, it is an entirely legitimate aim for the issuing state to seek to recover the fugitive so that he can be made to stand trial for the offence with which he is charged.

It was contended by counsel on behalf of the respondent that notwithstanding any legitimate aim that the issuing state might have in seeking to recover this respondent on foot of the European arrest warrant in this case, there is no longer a pressing social need for him to be extradited in circumstances where nearly twenty years have elapsed since the crime of which he is suspected occurred. Counsel for the respondent has suggested that because (*inter alia*) of what he characterises as the "delay" in the case his client, who has put down extensive roots in this country, should not now be surrendered to Germany.

The Court accepts that it may be more difficult for the applicant to demonstrate a "pressing social need", where there is significant delay, particularly where that delay is culpable. The Court has carefully considered the circumstances of the respondent's case in so far as they are known. Having regard to the specifics of his case, it does not seem to the Court that delay could operate to dilute what would otherwise be the pressing social need for his extradition, notwithstanding the significant passage of time since the offences are said to have been committed. It would seem that to the extent that there has been delay, it has been due to the respondent's action in fleeing and going to ground. He ought not to benefit from a delay situation that he himself has contrived, indeed created, unless there has been some intervening circumstance to cause him reasonably to believe that he was no longer being pursued, and which further caused him to establish roots and ties that he would not otherwise have done. Moreover, even where there have been intervening circumstances, whether the delay would operate to persuade the Court not to surrender the respondent would depend on the facts of the individual case.

In this case, there was no delay in the police investigation, or in the preferment of charges. The additional information makes it plain that he was before a local Court [...] on the 9th March, 1994, in connection with the matter. It seems that that Court decided to transfer proceedings to the District Court [...] and that, in the meantime, the respondent who was on bail fled from Germany to England. There is not a scintilla of evidence to suggest that the German authorities had any clue as to his whereabouts until he travelled to the Lebanon in 2010.

The respondent has adduced no evidence whatsoever to suggest that the German authorities knew, or should have known, or indeed had been in a position to discover, his whereabouts sooner, or suggesting that they have been dilatory in any way. On the contrary, the evidence, such as it is, suggests that they have remained interested in him and acted as soon as they discovered his whereabouts.

The European arrest warrant, which was issued on the 20th November, 2008, does not indicate that his precise whereabouts was known at that stage. It was transmitted to the Irish authorities on the 7th November, 2011, and was placed before the High Court for endorsement on the 16th November, 2011. The warrant was then executed on the 28th August, 2012. Following that the case progressed in the normal way through various procedural and case management steps, ultimately coming before this Court for hearing on the 5th June, 2013.

It is not enough for the respondent to simply point to the passage of time in circumstances where he fled the jurisdiction of the issuing state without flagging his intention to do so, or making anyone aware of his intended destination, and where he has adduced no evidence whatsoever to suggest that there was any actual foot-dragging, negligence or ineptitude on the part of the authorities in the issuing state in their efforts to locate and recover him. It would be an entirely different matter if he had adduced evidence, direct or even circumstantial, or could point to material in the warrant, suggestive of the fact that the issuing state knew for some time where he was to be located and had failed to act. However, the Court has received no evidence whatsoever to suggest that

that was the case here.

Extradition has at all times been possible between the Germany and Ireland, and it is believed, between Germany and the United Kingdom. Prior to the 1st January, 2004, the respondent's extradition from this country could have been sought under Part II of the Extradition Act 1965 as amended relying on the European Convention on Extradition 1957 (hereinafter the Convention of 1957).

The Court further notes from a consideration of the Convention of 1957 that the United Kingdom also signed it on the 21st December, 1990, and ratified it on the 13th February, 1991.

Post the 1st January, 2003, he could have been sought, as is now the case, on foot of a European arrest warrant.

However, for the German authorities to have been expected to act under either regime they would have to have known where he was. There is simply no evidence to suggest that they in fact knew the respondent's whereabouts, or that they were negligent, inept or dilatory in their searches for him.

Moreover, although the respondent makes the point that he has put down roots in this country, and that three of his children, by his second wife, were born here and are Irish citizens, he had no reason to believe that his position was other than precarious. He had left Germany as a fugitive, breaching his bail terms while awaiting trial on a serious charge, and had simply no basis for any confidence or belief that he would not be pursued, or that the police and the courts in Germany would lose interest in him. It was not a case of him being lulled into a false sense of security by reason of some default on the part of the German authorities. Apart from his own unsupported assertion that the Lebanese police told him that the investigation would not be proceeding any further, there is no evidence that the German authorities lost interest in him, or were dilatory about pursuing him, or otherwise gave encouragement to a belief that the case could be regarded as being closed and that he was no longer wanted. Accordingly, it can little avail him that he himself has put down roots in Ireland, and has conceived, borne and reared a number of children here, given that his position in this country has at all times been precarious, and that he ought to have recognised it as such. That said, the children who also have rights under Article 8 are blameless, and their rights must also be considered.

Turning then to the private rights of the respondent and his children, it is appropriate in the first instance to examine the respondent's personal circumstances. It seems that he resident in the greater Dublin area for quite a number of years, and currently resides in Dublin with his second wife and six children, three of which children are by his first wife and three of which are by his second wife. The Court accepts that the family has fairly deep roots in Irish society at this stage, and that they are well integrated.

The evidence with respect to the respondent's family network is wholly unsatisfactory, and the Court is satisfied that the respondent was less than candid in the witness box and has sought, without adequate explanation, to resile from a number of important averments that he made earlier on affidavit. The Court does not regard him as having given either truth or reliable evidence concerning his family network, and the availability of alternative care and support for affected members of his family, particularly for his oldest son, H.M., who has special needs.

It is necessary at this point to consider the situation of the respondent's wife and children, whose Article 8 rights are also invoked. It will undoubtedly be hard and distressing for them if the respondent is surrendered. The respondent's present wife, who is already carrying the burden of looking after six children, albeit with support from the respondent, may have to carry some or all of that burden on her own if he is surrendered. The situation with respect to H.M. is particularly difficult. He has special needs, and is perhaps especially vulnerable, but on the other hand the evidence is that he is performing well notwithstanding his disability and is in mainstream education.

However, the Court has been given no reliable indication as to what level of adult family, or community support, there may be for H.M., in particular, in the event of his father being surrendered. Aside from practical considerations to do with his material welfare, which may perhaps be capable of being addressed, it is necessary for the Court to also consider whether H.M., on account of his particular vulnerabilities, is at risk of suffering specific harm, prejudice or injury in the event of the Court surrendering his father. In that regard, the Court has taken due account of the reports of the clinical psychologist. While he predicts that a number of possible detrimental consequences for H.M. "could arise" in the event of his father being extradited, he does not say that they definitely will arise or that the void that would result from the father's extradition is incapable of being filled, or partially filled, by someone else e.g., the respondent's present wife (who admittedly is not a blood relation, but is not to be wholly discounted on that account), by the respondent's first wife who is H.M.'s natural mother (who, although in touch, is out of the country, but again is not to be wholly discounted on that account), by some other relative, or by the employment of addition supports, e.g. family support services provided by an agency such as the H.S.E. There is no evidence before the Court at this time that the proposed surrender would be specifically harmful or injurious to H.M., beyond the apprehensions expressed at the level of mere possibility by the clinical psychologist.

The absence of reliable information concerning the family network is most unsatisfactory. It would have been valuable to know to what extent, if any, the first wife's help can be called upon in respect of her own son H.M., and the other two children that are hers. Moreover, it would be valuable to hear directly from the respondent's siblings within the jurisdiction, and the respondent's present wife, concerning their attitude towards helping out. The Court believes that the respondent has not been candid about the resources available to him in that regard. He must surely have considered the risk that he might be surrendered, and must surely have considered H.M.'s needs in particular. If there is absolutely nobody willing and able to assume responsibility for H.M.'s care the Court would have expected him to say so, but he doesn't say so. He leaves it up to the clinical psychologist to suggest, and only at the last minute, that there might be a problem in that regard. His affidavits are simply silent on the possibility of alternative care arrangements for his children, and H.M. in particular, within the extended family. The Court considers that, hard and distressing though it will be for this family, there is no reason to believe that the children will not be properly looked after or that their welfare will be seriously prejudiced in the event of the respondent being extradited. The Court has no reason to doubt that there is a particularly close bond between H.M. and his father, and that it will be particularly hard for him to adjust to any separation that will ensue from surrender. It will be difficult for him, and the other children to visit their father in prison. Nevertheless, they will not be so profoundly affected as to cause them injury, harm or prejudice at a level that would operate to disrespect their rights to family life and so as to render the proposed extradition a disproportionate measure.

The Court's Decision

The Court considers that the evidence, such as it is, does not establish that the private interests of the respondent and his dependent children outweigh the public interest in his extradition in the circumstances of this case. The proposed surrender does not constitute a disproportionate measure in the circumstances of this case and would not operate to disrespect the rights of the respondent, and his children, in breach of Article 8 of the E.C.H.R. The Court is not disposed therefore to uphold the s.37 objection in this case.

