THE HIGH COURT

2014 No. 122 EXT

IN THE MATTER OF THE EUROPEAN ARREST WARRANT ACT 2003

BETWEEN

MINISTER FOR JUSTICE AND EQUALITY

APPLICANT

AND

E. P.

RESPONDENT

JUDGMENT of Ms. Justice Donnelly delivered on the 6th day of October, 2015.

1. The surrender of the respondent is sought by the Republic of Poland pursuant to a European Arrest Warrant ("EAW") dated 5th March, 2014. A number of substantive points of objection have been raised in this case, concerning s. 38, s. 21A and s. 37 of the European Arrest Warrant Act, 2003, as amended ("the Act of 2003"). The respondent has also raised the provisions of EU Directive 2012/13/EU of 22nd May, 2012 on the right to information in criminal proceedings and he claims a right to be provided with the material evidence against him from the Polish criminal proceedings where he is a suspect.

The Background

2. The EAW states that it is issued by a competent judicial authority and requests that the person be arrested and surrendered "for the purposes of conducting a criminal prosecution." At part (b) of the EAW, under the heading "Decision on which the warrant is based", the EAW lists (i) a decision made by the District Court in Nowy S'cz on 18th November, 2009 which became enforceable on 26th November, 2009 and (ii) the decision made by the District Court in Nowy S'cz on 18th July, 2013 which became enforceable on 26th July, 2013.

3. The EAW recites at part (e) that the warrant relates to five offences in total. Under the description of the circumstances in which the offences were committed, set out at E.2 of the EAW, it is stated that E.P. "is suspected of committing the following crimes". The first two allegations relate to the sale of amphetamine to a named individual [R.P.] for a specific amount knowing that the substances would be further sold. The third alleges that he sold amphetamine and cocaine for a specific amount to the same named person knowing that the substances would be further sold. The fourth alleges that he "provided MM with support in participating in trafficking intoxicating substances as he passed on the order he received from R.P. (passed on to him by M.P.) to M.M., who then sold intoxicating substances, namely 5 grams of cocaine for the amount of PLN 1,000 to R.P., knowing that the substances will be further sold".

4. The final alleged offence is that "on the unknown date in 2005, before 5th May 2006, in Nowy S'cz, in order to obtain material gain, having first referred to his connection in a state institution, namely the organ granting driving licences – Malopolska Center of Road Traffic in Nowy S'cz – and undertaking to act as an intermediary, in return for material benefits, he tried to obtain under false pretences the amount of PLN 600 from [S.T.], promising she would obtain a driving licence. However, he did not achieve his intended goal, as [S.T.] failed the driving test."

5. It is not overstating matters to comment that the drafting of the EAW left a lot to be desired. Prior to presenting the EAW to the High Court for endorsement, quite properly the central authority sought further information in relation to it. Those matters will be referred to later in this judgment.

6. The EAW was endorsed for execution in this jurisdiction on 24th June, 2014. The respondent was arrested on 15th August, 2014, he was released on bail and his case was remanded from time to time and duly came on for hearing on 25th June, 2015 and was adjourned for further hearing to 29th July, 2015.

A Member State that has given effect to the 2002 Framework Decision

7. The surrender provisions of the Act of 2003 applied to those Member States of the European Union that the Minister for Foreign Affairs has designated as having, under their national law, given affect to the Framework Decision of 13th June, 2002 on the European Arrest Warrant and surrender procedures between Member States ("the 2002 Framework Decision"). By the European Arrest Warrant Act 2003 (Designated Member States) (No. 3) Order, 2004 (S.I. 206 of 2004), the Minister for Foreign Affairs has designated Poland as a Member State for the purposes of the Act of 2003 (more correctly referred to as the Republic of Poland).

Section 16 (1) of the Act of 2003

8. Under the provisions of s. 16 (1) of the Act of 2003 is amended, the High Court, may make an order directing that the person be surrendered to the issuing state provided that:

a) the High Court is satisfied that the person before it is the person in respect of whom the EAW is issued,

b) the EAW, or a true copy thereof, has been endorsed in accordance with s. 13 for execution,

c) the EAW states, where appropriate, the matters required by s. 45,

d) the High Court is not required, under s. 21A, 22, 23 or 24 of the Act of 2003 is amended to refuse surrender,

e) the surrender of the person is not prohibited by Part 3 of the Act of 2003 as amended.

Identity
9. I am quite satisfied on the basis of the affidavit of Garda John Butler, the affidavit of the respondent, and the details set out in the EAW that E.P., who appears before me, is the person in respect of whom the EAW has issued.

Endorsement
10. I am satisfied having examined the EAW, that the EAW has been endorsed for execution in accordance with s. 13 of the Act of 2003.

Sections 22, 23 and 24
11. I am quite satisfied having read the warrant, the additional information and all other documentation placed before me, that surrender is not prohibited by any of the above sections of the Act of 2003 as amended.

Part 3 of the Act of 2003 as amended
12. Part 3 of the Act of 2003 comprises s. 37 - 46 inclusive. As stated above, the respondent raised issues under s. 37 and s. 38 in his points of objection. I have scrutinised the EAW, the additional information, the points of objection and verifying affidavits and exhibits in carrying out my role as executing judicial authority in ensuring that the requirements of the Act of 2003 are fulfilled. Subject to further consideration of s. 37, s. 38 and s. 45, I am quite satisfied on the basis of my scrutiny that I am not required to refuse the surrender of the respondent under any other section contained in Part 3 of the said Act as amended.

Section 45
13. Pursuant to the provisions of s. 16 (1) of the Act of 2003, before the court may make an order of surrender, the court must be satisfied that the EAW states the matters required by s. 45 "where appropriate". In the EAW under consideration, the issuing judicial authority completed certain aspects of part (d). The issuing judicial authority did not complete the new part (d) set out in the 2009 Framework Decision 2009/299/JHA of 26th February, 2009 on the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial ("the 2009 Framework Decision"). Instead, the issuing judicial authority stated, in answer to a question as to whether the person has been summoned in person to the hearing, that "[n]o, the person concerned has not appeared in person at the hearing which led to the decisions rendered, that is the decisions in case file number II Kp 323/09 and case file Number II Kp 11/13." Part (d) in the form provided in the 2009 Framework Decision refers to "a person [who] did not appear *at the trial* resulting in the decision." (emphasis added).

14. Clarification was sought by the central authority on 2nd December, 2014 as to whether the EAW was issued for the purposes for prosecution or conviction. That request queried why part (d) of the warrant was completed if he was wanted for prosecution. Furthermore, as the EAW referred on one occasion to the respondent as "convict", clarification was sought as to why. The issuing judicial authority replied on 3rd December, 2014 that the EAW had been issued for the purposes of prosecution. The issuing judicial authority thereafter stated "[h]owever, during the procedure [the District Court] decided to accept the prosecutor's motions and order the pre-trial detention of [the respondent], due to this section (d) of the warrant has been completed." The issuing judicial authority stated that the use of the word "convict" was a mistake and apologised for it.

15. According to s. 16 (1), it is only in an appropriate case that the matters required in point (d) of the EAW must be indicated in the EAW. The provisions of s. 45 provide the basis for understanding where it is appropriate.

16. Section 45 provides that the matters must be indicated where the requested person did not appear in person at "the proceedings resulting in the sentence or detention order in respect of which the European Arrest Warrant was issued." In *Minister for Justice, Equality and Law Reform v. Michael Murphy* [2010] 3 I.R. 77, the Supreme Court held that a detention order under s. 10 (d) of the Act of 2003 was "*any order involving deprivation of liberty which has been made by a criminal court after conviction in addition to or instead of a prison sentence...*" In light of the scheme of the Act of 2003, implementing as it does the Framework Decision, there is no doubt but that the phrase "sentence and detention order" in s. 45 is to be given the same interpretation as the equivalent phrase in s. 10 (d) of the Act of 2003. This establishes that s. 45 refers to a post-conviction sentence or detention order. Therefore, the provisions of s. 45 are not engaged where a person has not been tried and is being sought for the purposes of prosecution.

17. From both the EAW itself and the additional information, it is apparent that the issuing judicial authority completed the form because of the decision on the temporary detention of the respondent. This decision to detain is, in effect, the arrest warrant. This decision to detain was not a trial. The respondent is wanted for the purpose of conducting a criminal prosecution. There has been no sentence or detention order imposed in respect of which the EAW has issued for execution. Whatever view the issuing judicial authority may take as to the requirement to complete part (d) of the EAW where pre-trial detention has been ordered, this court is not obliged to consider if the matters provided for in part (d) have been completed. It is simply not "appropriate" to do so within the meaning of both s. 45 and s. 16 (1) (c) of the Act of 2003.

18. In those circumstances, his surrender is not prohibited by s. 45 of the Act of 2003.

Section 38
19. Under s. 38 of the Act of 2003, a person cannot be surrendered for an offence unless the offence meets specific requirements of minimum gravity and either corresponds to an offence under the law of the State, or, is an offence to which para. 2 of Article 2 of the Framework Decision applies, *i.e.* it is a list offence.

20. The EAW relates to five alleged offences, four relating to drugs offences and one in relation to false pretences. In part (c) 1, the EAW indicated that the first three alleged offences carried a maximum of 12 years of a custodial penalty. The EAW stated that the fourth offence carried a maximum custodial sentence of 8 years.

21. The EAW, as initially drafted, was silent as to the maximum sentence on the offence alleging false pretences. A request was sent by the central authority on 2nd December, 2014 seeking that information. By reply of 3rd December, 2014, the maximum length of the custodial sentence which may be imposed for that alleged offence was indicated as 8 years. I am satisfied that in respect of minimum gravity, each offence in the EAW meets the requirement under s. 38 no matter whether the offence is viewed as an Article 2 para. 2 offence or as an offence requiring correspondence.

22. Under part (e) of the EAW, at a heading entitled E.1. (corresponding with (e) I in the form in the Annex), which purports to list the offences set out in Article 2 para. 2 of the Framework Decision, a box referring to "illicit production, processing, smuggling of narcotic drugs, precursors, substitution substances and psychotropic substances, or trafficking in them;" has been ticked. That particular designation is not to be found in the Framework Decision or Annex thereto. Article 2 para. 2 of the Framework Decision permits Member States to seek surrender without verification of the double criminality of the act for offences as defined by the law of the issuing Member State for *inter alia*¸ "illicit trafficking in narcotic drugs and psychotropic substances", subject to minimum gravity

terms of imprisonment of at least a maximum of 3 years.

23. In their request for further information dated 4th June, 2014, sent prior to the application to endorse the EAW, the central authority sought clarification as to whether the issuing judicial authority intended "to rely upon the offence box of *illicit trafficking in narcotic drugs and psychotropic substances* as set out in the fourth offence (sic – it is the fifth offence) in the list of 32 offences at Article 2.2 of the Framework Decision 2002." The issuing judicial authority was also asked to specify exactly which of the offences described at section (e) 2 "are deemed not to be covered by the ticked offence box". That later question was a reference to the fact that, under the heading "Detailed description of the crime(s) not covered by point E.1:", the issuing judicial authority had stated "[d]escription included in point E 2". It seems that the central authority inferred that this recital meant that the issuing judicial authority did not intend to include all of the offences in the ticked box offence. Not surprisingly, this view appears to have been taken in light of the fact that no box relating to fraud had been ticked and clearly the fifth allegation was not a drugs offence.

24. In their reply of 10th June, 2004, the issuing judicial authority stated that the Polish lawmakers, when implementing the 2002 Framework Decision including Article 2 para. 2 therein, "did not preserve the order of the offences listed in the said Article and specified some imprecise and general terms contained therein." The issuing judicial authority stated that the offence listed as item 4 in Article 2 para. 2 of the Framework Decision referring to "illicit trafficking in narcotic drugs and psychotropic substances" corresponds to the offence classified in Article 607 s. 5 of the Polish Code of Criminal Procedure which reads "illicit manufacturing, processing, smuggling and trafficking in narcotic drugs and psychotropic substances, their precursors and substitutes". The issuing judicial authority also stated that they would like to confirm that the four drug offences listed in section E.2 (I) and (II) of the EAW "are covered by the offence set forth in the Framework Decision 2002 as 'illicit trafficking in narcotic drugs and psychotropic substances.'" The reference to section E. 2 (I) and (II) of the EAW is a reference to the numbering system used by the issuing judicial authority under Part (e) in which they have given the paragraph number "2" to that section which deals with the description of the circumstances in which the offence(s) was (were) committed. This is completely understandable given that the form in the Annex does not provide paragraph numbers for the provision of that particular information.

25. Quite separately, the issuing judicial authority said that the offence listed in section E. 2 (III) of the EAW, namely the allegation of false pretences, "was not ticked as one of the offences listed in Section E.1 of the warrant". This was confirmation by the issuing judicial authority that the fifth offence was not a drugs offence and not therefore indicated as a list offence in the EAW. However, the issuing judicial authority then went on to say that "…this position of the Court issuing the said European Arrest Warrant was a mistake. The offence [the respondent] was charged with and which was described in item E.2 was an attempted fraud to the detriment of [S.T.]." The issuing judicial authority finally stated "[t]herefore, this offence should be ticked in the offence box in Section E.1 as 'fraud.'"

26. Counsel for the minister submitted that the totality of the information provided by the issuing judicial authority was sufficient for the court to accept that the provisions of s. 38.1(b) were complied with. It was submitted that each offence was an offence to which Article 2 para. 2 of the Framework Decision applies and under the law of issuing state, the offences were punishable by imprisonment for a maximum period of not less than 3 years.

27. Counsel for the respondent relied on a number of cases, but in particular the case of *Minister for Justice and Equality v. Plecaniuc* [2015] IEHC 224 at para. 2 to say that once paragraph E.II is filled in, "*it is necessary to establish correspondence between the offence described and an offence contrary to Irish law."* McDermott J. had relied upon the decision of Peart J. in *Minister for Justice, Equality and Law Reform v. Paulauskus* [2009] IEHC 32 in reaching this conclusion. It is not clear in either of those cases whether further information had been obtained from the issuing judicial authority confirming that reliance was in fact being placed upon the list offence. In the instant case, there are further statements from the issuing judicial authority concerning their reliance on the designation as a list offence.

28. With reference to the drugs offences, counsel for the respondent raised the unclear designation of the drugs offences and the reference to Polish law. He relied on the case of *Minister for Justice and Equality v. Leskiewicz* [2014] IEHC 584 in which Murphy J. stated at para. 7: *"[t]he ticked offence is stated to be illicit production of narcotic drugs. In fact this is not one of the offences set out in para. 2 of article 2 of the Framework Decision. The relevant offence in para. 2 of article 2, is that of 'Illicit trafficking in narcotic drugs and psychotropic substances'. No objection has been raised in respect of this aspect of the warrant and the Court is in any event satisfied that the offence set out corresponds with a number of offences under the Misuse of Drugs Act and in particular the cultivation for sale and supply of cannabis prohibited by s. 17 of the Misuse Drugs Act 1977, as amended."*

29. In *Leskiewicz* therefore, this issue was neither argued by counsel nor clarified by the issuing judicial authority. Murphy J. pointed out that the box which had been ticked was not an offence as listed in Article 2 para. 2 of the 2002 Framework Decision. Article 2 para. 2 provides that the listed offences "as they are defined by the law of the issuing Member State, shall…" without verification of double criminality give rise to surrender under the Framework Decision. As Denham J., as she then was, stated in *Minister for Justice, Law Reform and Equality v. Desjatnikovs* [2009] 1 I.R. 618 at para. 22: *"[t]hus in this option the Framework Decision clearly and plainly refers to offences in the issuing member state, as they are defined by the law of the issuing state, not requiring verification of double criminality, but giving rise to surrender."* The Court of Justice of the European Union ("CJEU") had previously also confirmed that the actual definition of the offence and the penalties applicable are those which follow from the law of the "issuing Member State." (See *Advocaten voor de Wereld VZW v. Leden van de Ministerraad* (Case C 303/05 [2007] ECR I-3633)).

30. Poland is entitled to define "illicit trafficking in narcotic drugs and psychotropic substances" in its own law. The information provided by the issuing judicial authority in this case (as distinct from the manner in which clarification may have been provided by the Polish authorities in other cases) throws a particular light on the reason why the EAW is phrased in the manner it is. This is because the Polish authorities decided to specify "the imprecise and general terms", as they viewed them, set out in Article 2 para. 2 of the Framework Decision. The information provided in this case by the issuing judicial authority gives the distinct impression that the form of their EAWs must now state this particular form of words, *i.e.* "illicit production, processing, smuggling of narcotic drugs, precursors, substitution substances and psychotropic substances, or trafficking in them".

31. As a result, the issuing judicial authority has sent an EAW that is not "in the form set out in the Annex to the Framework Decision" as per s. 11 (1) of the Act of 2003. Section 11 (1) also provides that the requirement that the EAW be in the said form is a requirement "in so far as is practicable". It may not be practicable to have a warrant from Poland set out in the precise form of the said Annex, given the manner in which it has now been stated that Poland implemented the Framework Decision. No argument was addressed to this point in these proceedings. It is unnecessary to reach a final conclusion on this matter because it is possible to deal with the question of compliance with s. 38 by means of correspondence.

32. In both cases of *Paulauskus* and *Plecanciuc*, the High Court conducted an exercise to establish whether there was correspondence set out for each of the offences in circumstances where E. II was also filled in. In the EAW with which this Court is

concerned, E. II was also filled in and it is appropriate for the Court to consider correspondence. In those circumstances, it is also not necessary to determine whether it is possible for an issuing judicial authority to clarify that it intends to rely upon the list designation as set out in E. I despite also filling in E. II.

Correspondence of the alleged drugs offences
33. It is abundantly clear that the first three alleged offences correspond with an offence under s. 15 of the Misuse of Drugs Act, 1977. No argument was made to the contrary.

34. In relation to the fourth offence, counsel for the respondent submitted that correspondence had not been made out. It is correct to say that this jurisdiction does not have an offence entitled "participating in trafficking intoxicating substances" or "participation in trafficking controlled drugs". That is not the test, however. The test is as set out in s. 5 of the Act of 2003. The approach in *Attorney General v. Dyer* [2004] 1 I.R. 40 has been adopted as correct for establishing correspondence under the Act of 2003. As MacMenamin J. said in *Minister for Justice, Equality and Law Reform v. Altaravicius (No. 2)* [2007] 2 I.R. 265 at para. 44: *"in considering whether correspondence has been established, the court looks to the facts alleged against the subject of their quest, as opposed to the name of the offence for which he or she is sought in the requesting state, and considers whether these facts or this conduct would amount in this State to a crime…".*

35. As can be seen from the factual allegations set out above concerning the fourth allegation, the respondent is alleged to have participated in a transaction which had, to his knowledge, the object of obtaining the controlled drug cocaine for R.P. for the purpose of R.P. selling it to others. That object was actually accomplished. In those circumstances, these facts amount to aiding and abetting the possession *simpliciter* by R.P. of cocaine, a controlled drug, and also aiding and abetting the possession of the said controlled drug with intent to sell or supply it to another. Furthermore, it is clear that it would correspond to an offence of conspiracy to possess controlled drugs with intent to supply. In light of the foregoing, correspondence with an offence in this jurisdiction has been established.

Attempt to obtain by false pretences
36. The position with regard to the allegation of the offence of false pretences is somewhat different. There was no box ticked for this offence in the EAW. The additional information of 10th June, 2004 says that the position of the court was a mistake. It goes on to say that therefore, "this offence should be ticked in the offence box in Section E.1 as 'fraud'". In my view, that is ambiguous. It is not a clear and direct statement that the issuing judicial authority is relying upon the ticking of the box but instead says the box should have been ticked. For that reason alone, I would not be satisfied to treat this as an offence to which para. 2 of Article 2 of the Framework Decision applies.

37. In *Desjatnikovs*, the Supreme Court stated at para. 61 with respect to the list offences: *"A decision is required of the issuing state. The requirement of a decision by the issuing state is a matter of common sense. If the issuing state wishes to use this new system it is required to make a decision on this option, on the list. Once made this decision must be communicated. The method of communicating the decision for using this list system is on the list provided, in the boxes provided. This is not just a technicality. This is a matter of law. The issuing state, if it wishes to use the list system, must make the choice and tick any relevant box."*

38. Moreover, the Court must have regard to the dicta of Peart J. in *Minister for Justice, Equality and Law Reform v. Laks* [2009] IEHC 3. In that case, no offence under Article 2 para. 2 had been indicated in the EAW. Peart J. stated:

> *"This letter concludes by stating in effect that even though the "fraud" box has not been marked as such in the warrant, the offence comes within that category of offence and that therefore correspondence need not be verified under the Framework Decision.*
>
> *Just taking this last assertion first, I am of the view that this Court must deal with the European arrest warrant on the basis of what it actually contains, and not on the basis of what it might have contained if it had been prepared differently. Fraud has not been marked. No offence has been marked, and accordingly correspondence must be made out, otherwise the respondent's surrender is prohibited under the terms of s. 37 of the Act, and no order may be made under s. 16 of the Act for his surrender."*

39. In light of the foregoing, it is necessary to establish correspondence as otherwise surrender will be prohibited. Counsel for the minister proposed as a corresponding offence, the offence of attempting to commit an offence under s. 6 of the Criminal Justice (Theft and Fraud Offences) Act, 2001 ("the Act of 2001"). Section 6 provides that "[a] person who dishonestly, with the intention of making a gain for himself or herself or another, or of causing loss to another, by any deception induces another to do or refrain from doing an act is guilty of an offence." Dishonesty is defined under s. 2 of the Act of 2001 as "without a claim of right made in good faith". Under s. 2 ss. 2 of the Act of 2001, "a person deceives if he or she - a) creates or reinforces a false impression, including a false impression as to law, value or intention or other state of mind, b) prevents another person from acquiring information which would affect that person's judgement of a transaction, or c) fails to correct a false impression which the deceiver previously created or reinforced or which the deceiver knows to be influencing another to whom he or she stands in a fiduciary or confidential relationship, and references to deception shall be construed accordingly."

40. The respondent is alleged to have carried this out in order to make a material gain. The element of making a gain is therefore established in this alleged offence. The question of deception and dishonesty are less clear cut. The allegation in the EAW makes reference to "false pretences". I am satisfied that the phrase "false pretence" must be given its ordinary meaning unless it is clear from the warrant that it is to have another meaning. False pretence ordinarily means to misrepresent facts and indeed to do so in order to obtain money or property. It is necessary that the false pretence be set out in the EAW so that s. 11 ss. 1A(f) will be complied with, as that subsection requires the circumstances of the alleged offence to be set out in the EAW.

41. On reading the EAW, the false pretence is that the respondent could provide S.T. with a driving licence when he could not in fact do so. That is to be inferred from the entirety of what is contained in the EAW. The respondent referred to his connections in the official body which grants driving licences and promised S.T. she would obtain a driving licence but she did not obtain one as she failed her driving test.

42. The next issue is whether the facts alleged amount to an allegation of dishonesty, namely whether this was done without a claim of right made in good faith. This is perhaps an issue because of the reference in the final sentence to the respondent not achieving his intended goal as S.T. failed her driving test. However, the intended goal here must be his goal of obtaining the material gain. If S.T. had passed her driving test, he would allegedly have obtained from her the money as he had made a false pretence that he was the person providing the driving licence. Furthermore, I am required to read the warrant as a whole (see *Minister for Justice, Equality and Law Reform v. Dolny* [2009] IESC 48) and in my view that includes reading the additional information provided by the issuing

judicial authority. In this case, the issuing judicial authority has stated that this was "an attempted fraud" on S.T.. In its ordinary meaning, fraud connotes deliberate trickery and, in common parlance, a dishonesty. An act carried out fraudulently is the very opposite of an act carried out with a claim of right made in good faith.

43. Furthermore, from the EAW and the information provided, the acts alleged amount, in totality, to allegations of sufficient proximity going beyond mere preparation for the crime. This is sufficient to amount to an alleged attempt to make a gain by deception. Therefore, the allegations set out in the EAW and additional information correspond with an attempt to make a gain by deception.

Section 21A
44. Section 21A provides:

> "(1) Where a European arrest warrant is issued in the issuing state in respect of a person who is not been convicted of an offence specified therein, the High Court shall refuse to surrender the person if is satisfied that a decision has not been made to charge the person with, and try him or her for, that offence in the issuing state.
>
> (2) Where a European Arrest Warrant is issued in respect of a person who has not been convicted of an offence specified therein, it shall be presumed that a decision has been made to charge the person with, and try him or her for, that offence in the issuing state, unless the contrary is proved."

45. In his points of objection, the respondent asserted that his surrender would be in breach of s. 21A "as no decision to charge [him] with, or try him for, the offences contained in the European Arrest Warrant has been made." The point of objection continues: "[i]t is stated in the European Arrest Warrant that the Respondent is "*suspected*" of certain offences. When the evidence grounding this suspicion is examined, i[t] transpires that it consists merely of assertions which could not reasonably be seen as grounding a criminal prosecution."

46. Counsel for the respondent submitted that, from the information contained in the EAW and the additional information provided by the issuing judicial authority, the presumption in s. 21A has been rebutted. Counsel submitted that the court could not be satisfied that a decision has been made to both charge and try the respondent for an offence in the issuing state.

47. Counsel for the respondent relied on the fact that the respondent is described as "suspected" of the offences in the warrant. He also pointed to the reference in the additional information dated 10th December, 2014 wherein it is stated that the EAW issued against the respondent "in order to conduct the preparatory proceedings against him." This information also states that the respondent "has not been questioned as a suspect yet."

48. As varying portions of this additional information from the issuing judicial authority is relied upon by both counsel for the minister and counsel for the respondent, it is appropriate to quote extensively from it. Having confirmed that the Regional Prosecutor's Office in Nowy S[l]cz is conducting two investigations against the respondent, namely into the drug trafficking matters and also into the alleged offence of false pretences, it goes on to say that the respondent has, according to Polish law, the status of a suspect but he has not been formally charged with the offences. The issuing judicial authority then states:

> "According to Polish law, a suspect is a person against whom a decision to present charges has being issued. Such a decision is made in a situation when the data available at the moment of starting the investigation or collected during its course, justify sufficiently the suspicion that a given person committed an act. The decision to present charges contains the indication of a suspect, detailed definition of the imputed act and its legal qualification".

The additional information then provides that such decisions were taken in the case of the respondent and certified copies of those decisions were attached to the additional information.

49. The issuing judicial authority further state:

> "The Polish criminal procedure requires that charges should be immediately announced to the suspect and that he should be questioned in this role, unless it is impossible due to the fact that the suspect is hiding and absent in his home country.
>
> In spite of issuing the above-mentioned decisions, [E.P.] has not been questioned as a suspect yet, as he has been hiding form the prosecution authorities and has not stayed in the territory of Poland, which led to initiating the search for him, first in Poland, and then abroad.
>
> The final formal document confirming the will to prosecute a particular person is an indictment sent by the prosecutor to the court that is competent as to the territory and the subject matter to examine a given case.
>
> The indictment is made at the end of preparatory proceedings – in this case – the investigation, and when the indictment is lodged with the Court, the status of the person included in the indictment changes from a suspect to an accused person.
>
> It should be emphasised that the investigations cannot be completed without announcing the decisions to present charges to [E.P.], then questioning him as a suspect by the prosecutor and checking the line of defense provided by the suspect.
>
> After completing the proceedings, the prosecutor will make a decision on whether an indictment against [E.P.] should be lodged with the Court or not".

50. Counsel also pointed to the affidavit evidence of the Polish lawyer, Marcin Lewczak, who has examined the files in Poland on behalf of the respondent. In this affidavit, he says that the primary evidence in both cases against the respondent consists of a number of statements made by the witness R.P.. The files do not contain any information on seizing, securing or testing of controlled substances that the respondent had allegedly been selling. He also says that the file contains a psychiatric and psychological report of the witness R.P. and, while this concludes that he is of sound mind and intelligence and has no ability to confabulate, it confirms that the witness has certain personality disorders and that he has a tendency to present himself in a favourable light and to manipulate others and is excessively critical of others and aggressive.

51. In his own affidavit, the respondent blames R.P. for setting him up. He describes a course of dealing with R.P., which includes a

request by R.P. to supply him with amphetamines, but the respondent says he did not help him. The respondent says he did help R.P. bring benzylpiperazine into Poland, an amphetamine-like substance, which he says was legal in both Poland and Ireland at that time. The respondent has exhibited a psychological report on R.P. It is not made entirely clear if this is the same report to which the Polish lawyer has referred although it may be so as some of the conclusions appear to be the same. The exhibited report refers to a court report on the witness which did not appear to raise any substantive concerns about the witness. The respondent says that he obtained the report from a friend who was similarly accused by R.P.. He says the report was commissioned by that friend's lawyer in his defence. Interestingly, in light of the argument the respondent makes, he does not say whether his friend was convicted or acquitted of the offence. As would be seen in the course of this judgment, the respondent has sought further information from the files in Poland. I would comment that the respondent's view, that the said report set out that R.P. "decided to make statements against other people in order to try and reduce his sentence and to get back at people who he felt had wronged him," does not appear to me to reflect the findings of the report. The first sentence of the concluding paragraph reads: "The interest of the subject in the proceedings as regards applying extraordinary mitigation of penalty to his case as well as obtaining protection of his person in the face of possible vengeance and of the death sentence issued for his person by criminal groups should be considered the mainmotives for providing explanations regarding the crimes perpetrated by himself and by others." (emphasis in original). There is nothing there about getting back at others, on the contrary the report says that the witness is also seeking to protect himself from the vengeance of others.

Submissions on Section 21A

52. Counsel for the respondent submitted that the reference to "suspected" and the evidence he has produced from the Polish lawyer, shows that "there is no conceivable basis upon which the respondent could be convicted of any of the offences referred in the European arrest warrant." In those circumstances, he submitted it was established that there was no decision to charge him with and try him for the offences and therefore, the presumption had been rebutted.

53. Both parties accepted that the law is set out in the decision of *Minister for Justice, Equality and Law Reform v. Olsson* [2011] 1 I.R. 384. In that case, O'Donnell J. gave a detailed exposition of the law between paras. 26 and 36. Excerpts from those paragraphs have been cited with approval by the Supreme Court in the case of *Minister for Justice, Equality and Law Reform v. Bailey* [2012] 4 I.R. 1. Furthermore, the case generally has been cited with approval by the Supreme Court in *Attorney General v. Pocevicius* [2015] IESC 59 delivered on 24th June, 2015, which concerned extradition pursuant to the Extradition Act, 1965, as amended ("the Act of 1965").

54. In *Pocevicius*, McKechnie J. cited with approval two passages from the decision of Murray J. in *Minister for Justice Equality and Law Reform v. Bailey*. In *Bailey*, Murray J. stated at para. 141 that *"[i]t is a long established principle of extradition law that persons are not extradited for the purposes of questioning them as suspects but for the purpose of charging and prosecuting them with a criminal offence so that they may be brought to trial in a court of law. That principle is also reflected in the system of surrender established by the Framework Decision"*. Murray J. also stated at para. 143 *"[t]hus a person cannot be surrendered pursuant to the Act of 2003 solely because he or she is suspected of having committed an offence and the relevant authorities wish to question the person concerned or have him or her assist them in one form or another in their inquiries or investigations. This is so irrespective of whether the authorities concerned are judicial or police".*

55. At para. 48 of his judgment in Pocevicius, McKechnie J. set out a number of matters which he stated can be deduced from the authorities. I will give a synopsis of those matters which in my view are of most relevance to the present case. A person should be surrendered where the purpose of the request is to prosecute and put him or her on trial for the subject offence. A person should not be surrendered purely on suspicion of having committed an offence. A person will not be surrendered if the purpose is to only continue the investigation. There is no requirement that the investigation must be irreversibly concluded. What is required is that the decision to prosecute is not contingent or otherwise dependent on any such further investigation producing sufficient evidence to justify putting the person on trial. The fact that an arrest warrant has been issued will not of itself be determinative of the point that the investigation has reached a level that it can be said that there is a decision to charge and try. Depending on the investigative and prosecution process in each country, such a warrant might be consistent either with the purpose of putting the individual on trial or with the continuation of the investigative part of the process.

56. As s. 21A provides a presumption that is not available in the Act of 1965, the Court must in the first place presume that there has been a decision made to charge and try the respondent.

57. Counsel for the respondent referred to the judgment of O'Donnell J. in Olsson, in submitting that what is impermissible is that a decision to prosecute should be dependant on such further investigation producing sufficient evidence to put a person on trial. In those circumstances, counsel submitted, that there was no present decision to prosecute and no present intention to bring proceedings. Counsel also relied on the decision of *Minister for Justice and Equality v. Czajkowski* [2014] IEHC 649, a decision of Murphy J. In *Czajkowski,* Murphy J. stated that there was sufficient evidence to indict the respondent therein as the Polish authorities had so confirmed and she concluded at para. 24 that *"[o]n the information presented as a whole, not merely has the presumption of a decision to charge and try not been rebutted, there is positive information of an intention to try subject only to the holding of an interview required by Polish law".*

58. Counsel for the respondent submitted it was of the utmost significance that in the present case, not only was no indication given by the Polish authorities that they already have sufficient evidence to lay an indictment, but there was a positive indication to the effect that sufficient evidence is not yet present. Counsel referred to the statement of the issuing judicial authority that after completing the proceedings, the prosecutor will make a decision on whether an indictment should be lodged with the court or not. As stated above, counsel also relied upon the affidavit of the Polish lawyer in showing that there is insufficient evidence "on any reasonable view" to indict the respondent.

59. Counsel laid particular emphasis on the case of *Minister for Justice and Equality v. Jociene* [2013] IEHC 290 in which Edwards J. refused surrender on the basis that a decision had not been made to try the respondent. In that case, the Lithuanian authorities had replied that if she was surrendered and "there was sufficient information gathered in evidence of her committing the crime specified in Section e) of the EAW, then she would be put on trial (for the first offence) and recognised as an accused." In those circumstances, the response was highly contingent and strongly indicative that a decision had not been taken to try the respondent.

60. Further reliance was placed upon *Minister for Justice and Equality v. Leskiewicz* [2014] IEHC 584. Murphy J. referred to the wording "announced wanted" and stated at para. 25 *"[i]n ordinary parlance, if a person is stated to be wanted in connection with a crime that normally denotes that he is sought for the purposes of the investigation of that crime."* Murphy J., having considered the reply of the Polish authorities, found that a decision to charge and try the respondent had not been made. In that case, Murphy J. had specific regard to the fact that a question had been posed to the issuing judicial authority on two occasions on the issue of charging and trying and that the court was forced to conclude that a decision to charge him had not been made.

61. In the instant case, the central authority had asked the issuing judicial authority whether a decision had been made to charge (indict) the requested person and, if so, whether a decision had been made to put him on trial. It was stated that it would be helpful if each of the steps which must take place before the respondent is put on trial were identified. Having received the reply set out above, no further requests were made.

62. Counsel for the respondent sought to distinguish *Pocevicius* on its facts by reference to the statement that if the case was being taken today, there would be a recommendation that an indictment be brought. On that basis, it was said that there was a clear intention there to bring the case against that respondent should he be extradited to Norway.

63. Counsel for the minister relied upon the principles of mutual trust and mutual recognition set out in the Framework Decision. He also relied upon the presumption set out in s. 21A and said it was not rebutted. He relied upon the case of *Minister for Justice and Equality v. Holden* [2013] IEHC 62 and also *Olsson*. He said the High Court is not obliged to look behind the presumption unless the respondent has succeeded in demonstrating the existence of cogent evidence tending to rebut the presumption. He also relied upon para. 33 of *Olsson* to the effect that the issuing state does not have to demonstrate a decision to charge and try. It is only where the court is satisfied that no decision has been made to charge or try that person that the court is to refuse surrender.

The Court's analysis and determination

64. In *Pocevicius*, the Supreme Court observed that the implementing provisions of each contracting party of the Council of Europe's European Convention on Extradition, 1957 (Paris, 13.XII.1957) had to accommodate the diversity of the many different police, judicial, legal and administrative systems. This applies to the Act of 1965 as well as to the Act of 2003. It is self-evident that the meaning of terms, so commonly understood in this jurisdiction, may have an unrelated or quite distinct meaning elsewhere. At para. 41 of *Pocevicius*, McKechnie J observed: *"Consequently, one must be very careful not to approach terms solely or perhaps even predominantly, through the lens of domestic jurisprudence. Whilst foreign law is a question of fact to be determined by the court of the requested state, the same must be decided on the adduced evidence and should not be inappropriately influenced by internal or indigenous considerations. Accordingly, terms such as "investigation", "suspect", "accused", "charge", "indictment", "prosecute" and "proceedings" to name but some, may have, and may have to be given, a particular meaning for the purpose of extradition/surrender cases, which is quite distinct from that which might normally apply in a purely national context…."*.

65. The Court must bear in mind that Polish law may have a different meaning to words that are common in this jurisdiction. In particular, the use of the words 'suspect', 'charge', 'indict' and 'investigation' may have and may have to be given a particular meaning for the purpose of this application for surrender and not given the meaning they may have in Irish law.

66. In deducing the principles of law from previous case law in *Pocevicius*, the Supreme Court clarified the approach the court must take on issues regarding the true intention of the prosecuting authorities. In particular, the judgment illustrates that the interpretive approach to s. 8 and s. 9 of the Act of 1965, with obvious modification to the Act of 2003, must never lose sight of the desired effect sought to be achieved, *i.e.* the extradition of those persons that the requesting state has already prosecuted or intends to prosecute on the one hand and post conviction individuals on the other (para. 42 of the judgment). While the Supreme Court cautioned against over reliance on the commonality between the Act of 1965 and the Act of 2003, it was acknowledged that the legislative provisions and case-law thereby generated could be instructive.

67. In so far as the Act of 1965 refers to a person wanted for prosecution or who is being proceeded against, it is instructive that the 2002 Framework Decision at Article 1 (1) refers to the surrender of a requested person "for the purpose of conducting a criminal prosecution or executing a custodial sentence or detention order." Section 10 of the Act of 2003 also refers to an EAW being issued in respect of a person "against whom that state intends to bring proceedings…". As O'Donnell J. stated in Olsson at para. 32 *"[t]hus the concept of the 'decision' in s. 21A should be understood in the light of the 'intention' referred to in s. 10 of the Act of 2003 and the 'purpose' referred to in art. 1 of the Framework Decision."* From this, it can seen that this broad understanding of the meaning of "wanted for prosecution" (as per s. 8 of the Act of 1965) and "being proceeded against" (as per s. 9 of the Act of 1965) also apply to the provisions of s. 21A of the Act of 2003. The creation of the presumption in s. 21A adds further to the burden placed upon a respondent who seeks to have his surrender prohibited under the sub-section.

68. In the present case, it is particularly notable that the respondent's Polish lawyer, Marcin Lewczak, did not state that no decision had been taken to charge and try the respondent. Furthermore, this lawyer did not give any information as to Polish law that would require or indeed enable this Court to make a decision as to the contents of Polish law. His statement referred to seeing the "investigation files" which were made available to him by the Prosecutor's Office. The respondent himself exhibited certain notes taken by Mr. Lewczak when he examined the files. These referred to the "charges against [E.P.]". Again, those notes did not refer to the issue of a decision to charge and try.

69. It was on the basis of the points of objection and the above affidavits that the central authority decided to ask for clarification in respect of the word "convict" and for confirmation that the appropriate authority "has decided to charge the respondent with, and try him for, the offences detailed in the warrant." After receiving a response stating the use of "convict" was a mistake and confirming that the respondent "is not charged with and was not tried for the offences detailed in the warrant due to the fact that he is a fugitive from justice", the central authority sent the further detailed request set out above. The response of the Polish authorities that followed forms a major component of the respondent's submissions on a breach of section 21A.

70. In seeking this further information from the issuing judicial authority, the central authority went beyond what was necessary. The decisions in *Olsson* and *Holden* emphasise that s. 21A requires cogent evidence that a decision has not been made to charge the person with and try him or her for the offence before the Court is required to refuse to surrender him or her. In the context of the manner in which part (d) in the EAW had been completed together with the reference to "convict", it was perhaps understandable that the central authority queried whether the respondent was sought for the purposes of prosecution or conviction. On the other hand, nothing in the points of objection or in the evidence grounding same could have constituted cogent grounds for satisfying the Court that a decision had not been made to charge him with and try him for the offences set out in the EAW.

71. The use of the word "suspected" must be recognised as having the potential for a different meaning in other jurisdictions. Indeed, there appears to be nothing sinister about the use of the word "suspected" in the context of an EAW. Recital 5 of the Framework Decision refers to the new simplified system of surrender "of sentenced or suspected persons." Recital 1 refers to extradition procedures being speeded up in respect of persons suspected of having committed an offence. A suspected person may be sought for the purpose of criminal prosecution. Furthermore, in the present case, there is nothing in the warrant or indeed in the evidence of the Polish lawyer to suggest that the word "suspect" has a particular meaning that would amount to cogent evidence that no decision had been taken to charge the respondent with and try him for the offence.

72. In so far as the respondent placed reliance upon the evidence, or lack of evidence, contained in the Polish files, this can and must

be rejected. On a pragmatic level, to rely upon it would be to ignore the fact that in this jurisdiction, the uncorroborated evidence of an accomplice, even with tendencies to blame others and reduce his own responsibility, could amount to sufficient evidence to convict a person beyond reasonable doubt. In this jurisdiction, what is required is that the jury be warned of the dangers of convicting on the uncorroborated evidence of an accomplice but that they be told that they may still convict. The proof of the existence of a controlled drug may come from evidence other than forensic analysis (See *DPP v. Buckley* [2007] 3 I.R. 745). Much more importantly, however, at a level of principle, it is not for this Court to test the evidence in Poland. That is a matter for Polish law. It is only within the domestic jurisdiction that the trial can take place. The Polish court has the ability to assess all of the evidence and to assess its credibility and reliability.

73. Of relevance is that the Supreme Court in *Pocevicius*, having noted a conflict between the Norwegian authorities and the respondent regarding a particular aspect of the evidence, stated at para. 10: *"[a] resolution of this factual conflict is not a matter for this Court..."* I therefore reject under this heading any reference to the strength of the *evidence against the respondent* in the Polish files as forming a basis for a determination that the provisions of s. 21A have not been complied with. It is perhaps worth observing, although it is immaterial to the point of principle, that the Polish lawyer does not state that there is not enough evidence to convict his client.

74. There was no basis, therefore, for the central authority to ask for confirmation that the appropriate authority in Poland had decided to charge the respondent with, and try him for, the offences detailed in the warrant. There was no cogent evidence to rebut the presumption and establish that no such decision had been made. A s. 20 request should not have been made. Furthermore, when the letter was sent, there was a reference to "charge" and then in brackets the word "indict" is inserted. It is not entirely clear why this word was specifically mentioned as it may only serve to confuse matters. Indeed, the best approach where information is required may be to a) ask for a response to specific points put by a respondent, b) clarification of the relevant Polish procedure and c) explain the meaning in Irish law of the concepts of charge and trial and the nature of the decision/intention required and to request confirmation that such a decision has been made in the case.

75. Notwithstanding the observations of the previous paragraphs, it is now a fact that the s. 20 request was made and duly answered. This additional information now forms part of the information before the Court and it must therefore be considered as part of the evidence from which the Court must be satisfied that surrender is not prohibited.

76. The reference by the issuing judicial authority to the respondent not being charged with or tried for the offence is simply a statement of the obvious. He was not charged as he was a fugitive. Even in this jurisdiction, a person will not be charged until after his or her arrest but that does not affect the fact that a decision or intention to prosecute has been made. The decision to prosecute in this jurisdiction amounts to an intention by the prosecution that the person be charged and put on trial for the offence.

77. The reference to the respondent in the EAW and additional information as a suspect and to not being formally charged with the offences does not establish that the presumption has been set aside. There has clearly been a decision to present charges to him. It is clear, therefore, that there has been a decision to charge him with the offences. The reference to preparatory proceedings is meaningless without further amplification as to its precise meaning in Polish law. Indeed, under the system that operated prior to the Criminal Justice Act, 1999, Part III of which amended the Criminal Procedure Act, 1967, the District Court conducted a preliminary hearing before sending a person forward for trial. This situation was discussed in detail and at length by Murray J. in *Bailey*. His judgment illustrates that there can be a decision to prosecute even though the proceedings may be terminated at a stage before the trial is reached. In these circumstances, the reference to preparatory proceedings does not establish that no decision has been made to charge him and put him on trial.

78. The respondent relied upon the statement of the issuing judicial authority which says "the indictment is made at the end of the preparatory proceedings – in this case – the investigation", to argue that the preparatory proceedings are therefore investigative and fall within the prohibited zone. However, that statement is then clarified by the issuing judicial authority who say that the investigations cannot be completed without announcing the decision to present charges to the respondent, then questioning him as a suspect and checking the line of defence provided by the suspect. That is simply an outline of Polish criminal procedure and in fact refers to a requirement to question him and check his line of defence. As O'Donnell J. said at para. 35 in *Olsson*:

> "[i]t would be entirely within the Framework Decision and the Act of 2003 if, after further investigation, the prosecution authorities decided not to prosecute because, for example, they had become convinced of the requested person's innocence. There would still have been an "intention" to prosecute, and a decision to do so at the time the warrant was issued and executed. Accordingly, the warrant would have been issued for the purposes of conducting a criminal prosecution. What is impermissible is that a decision to prosecute should be dependent on such further investigation producing sufficient evidence to put a person on trial. In such a situation there is in truth no present "decision" to prosecute, and no present "intention" to bring proceedings…"

79. In the present case, there is nothing to suggest that the preliminary proceedings are "investigative" in the prohibited sense of that word. On the contrary, there is a statement in the EAW that the respondent was wanted for the purposes of conducting a criminal prosecution. There is also a clear indication that Poland intends to bring proceedings against him as a decision to present charges has been made. To apply what O'Donnell J. said in *Olsson*, where it is clear that a person is wanted for the purposes of conducting a criminal prosecution (in the words of the Framework Decision) and that the issuing state intends to bring proceedings against him or her (in the words of s. 10 of the Act of 2003), that intention is virtually coterminous with a decision to bring proceedings sufficient for the purposes of section 21A. In this case, it is clear that those conditions have been met.

80. A further matter relied upon by the respondent is that because the prosecutor will make a decision on whether an indictment against the respondent should be lodged with the court after the completion of the preparatory proceedings, the issuing judicial authority have rebutted the presumption and have indicated that no decision has been made to try him with the offence. That sentence has to be read in the context of what preceded it and in light of the principles outlined in *Olsson* and *Pocevicius*. The necessity for the future laying of the indictment is not confirmation that no decision has been made at present not to try him with the offences. It must be seen as part of the procedural steps that must be undertaken and in particular it must be viewed in light of the reference to checking the line of defence provided by the suspect. It stands to reason that an indictment should not be lodged if the line of defence turns out to be a true defence. The entire scheme and purpose of s. 21A as set out in *Olsson* and confirmed more generally in *Pocevicius,* does not permit this court to assume that the requirement for an indictment to be lodged equates with a lack of a decision to try the respondent, within the meaning of s. 21A of the Act of 2003. On the contrary, as has been set out in *Olsson*, the existence of the intention to bring proceedings against him is virtually coterminous with a decision to bring proceedings sufficient for the purposes of section 21A.

81. The final issue that arises is whether the "failure" of the issuing judicial authority to respond to the question asked about a

decision to charge the respondent with and try him for the offences for which he is sought, means that the Court should conclude that a decision to charge or try him has not been made. In making this submission, counsel for the respondent relied on *Leskiewicz*. In my view, the *dicta* in *Pocevicius* to the effect that a person should be surrendered where the purpose of the request is to prosecute and put him on trial for the subject offence, coupled with the presumption in s. 21A, requires the executing judicial authority carefully to construe all replies before reaching a conclusion that surrender is prohibited. The Court must also bear in mind the different terminology used in the differing legal systems of the individual Member States.

82. Taking into account all those circumstances, it may not be possible for any issuing state to reply directly to the question posed in this case without further context as to the meaning in Irish law of the concepts of charge and try. Furthermore, in *Leskiewicz*, it was not simply the failure to reply, but the consideration of the information in its totality, that led to the decision of the court to prohibit surrender. In light of the analysis of the responses of the issuing judicial authority in this case, I come to the conclusion that the issuing judicial authority was motivated by a desire to put before the Irish court all the relevant information about the Polish criminal justice system and its application in the present case. It would be wrong, therefore, in these circumstances to draw an adverse inference from the "failure" to respond directly to the question posed.

83. Having considered all of the evidence placed before me, I am satisfied that the presumption in s. 21A has not been rebutted. There is no proof that a decision has not been made to charge the respondent with, and to try him for, the offences set out in the European arrest warrant.

Directive 2012/13/EU

84. The respondent claimed that his surrender would contravene his right to a fair trial under the European Convention on Human Rights ("ECHR"), the Constitution and the Charter of Fundamental Right of the European Union and is thus prohibited. Counsel makes this submission in circumstances where the respondent's requests, pursuant to the provision of Directive 2012/13/EU of 22nd May, 2012 on the right to information in criminal proceedings ("the Directive"), to be provided with the material evidence against him in the proceedings where he is a suspect, have been refused by the relevant authorities in the executing and issuing states.

85. The respondent has also brought a motion seeking an Order pursuant to s. 20 (1) of the Act of 2003, that the High Court request the Polish Prosecutor's Office to provide him with the evidence against him. The issuing judicial authority has sent a letter to the respondent's solicitors stating that a defending solicitor can formally access criminal proceedings having submitted a power of attorney. Foreign lawyers may provide legal services once registered in Poland. The respondent's solicitors are not so registered and the issuing judicial authority has stated that it would be sufficient to make an appropriate application to the Irish Court dealing with the extradition proceedings and on receipt of the appropriate court order, the materials would be immediately handed over.

86. The Directive is headed "on the right to information in criminal proceedings." The respondent relies in particular on the scope of the Directive set out in Article 2. Article 2 provides: "This Directive applies from the time persons are made aware by the competent authorities of a Member State that they are suspected or accused of having committed a criminal offence until the conclusion of the proceedings, which is understood to mean the final determination of the question whether the suspect or accused person has committed the criminal offence, including, where applicable, sentencing and the resolution of any appeal."

87. The respondent based his claim on Article 7(1) which provides: "Where a person is arrested and detained at any stage of the criminal proceedings, Member States shall ensure that documents related to the specific case in the possession of the competent authorities which are essential to challenging effectively, in accordance with national law, the lawfulness of the arrest or detention, are made available to arrested persons or to their lawyers." He also relied upon Article 7(2) which provides: "Member States shall ensure that access is granted at least to all material evidence in the possession of the competent authorities, whether for or against suspects or accused persons, to those persons or their lawyers in order to safeguard the fairness of the proceedings and to prepare the defence."

88. Counsel submitted that the Directive is directly effective. He submitted that there is no geographical limitation on Article 7 and that there is no temporal limitation as it is at any stage of the criminal proceedings.

89. Counsel for the respondent stated that he raised the point under the Directive as a general point as to his entitlement, but he also raised it in the particular circumstances where he has asked the court to accept the paucity of evidence against him. As stated above, this latter point is simply misconceived. It is not a matter for this court, as executing judicial authority, to consider the strength of the evidence against him. That is not to say that there may never be a case where information on a file may be relevant but that is for another day. One envisages that such a situation could only arise in wholly exceptional circumstances. No such circumstances arise here and I reject the respondent's contention that he is particularly prejudiced by his inability to access his file in this case.

90. Counsel for the minister submitted that there is no general or particular right to access materials in the domestic criminal case during the course of extradition proceedings in the requested state. He identified various distinctions set out in the Directive between EAW proceedings and criminal proceedings and not that the letter makes reference to "national law." He referred to the different letter of rights which apply to criminal proceedings and the EAW proceedings. He submitted that the EAW proceedings are *sui generis*. He relied in particular on Article 1 of the Directive.

91. As counsel for the minister correctly pointed out, Article 1, entitled "Subject matter", treats criminal proceedings and the EAW system differently. It provides: "This Directive lays down rules concerning the right to information of suspects or accused persons, relating to their rights in criminal proceedings and to the accusation against them. It *also* lays down rules concerning the right to information of persons subject to a European Arrest Warrant relating to their rights." (emphasis added).

92. The Directive must be read in light of the recitals thereto which set out its objectives. The recitals refer to the principle of mutual recognition of decisions in criminal matters presupposing trust in each other's criminal justice system and provide that common minimum rules should lead to increased confidence in the criminal justice systems of all Member States, which in turn should lead to more efficient judicial cooperation. The first 30 recitals are clearly directed to the situation regarding the criminal procedures applicable within Member States. At recital 31 it is then stated: "For the purpose of this Directive, access to the material evidence, *as defined in national law*, whether for or against the suspect or accused person, which is in the possession of the competent authorities in relation to the *specific criminal case*, should include access to materials such as ….." (emphasis added). From recital 32 to 36 inclusive, there is further clear reference to criminal cases. Recital 37 and 38 deal with training issues.

93. Recital 39 provides: "The right to written information about rights on arrest provided for in this Directive should also apply, *mutatis mutandis*, to persons arrested for the purpose of the execution of a European Arrest Warrant under Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States. To

help Member States draw up a Letter of Rights for such persons, a model is provided in Annex II. That model is indicative and may be subject to review in the context of the Commission's report on implementation of this Directive and also once all the Roadmap measures have come into force."

94. A Letter of Rights in EAW proceedings is provided for in Article 5 of the Directive and a model letter set out in Annex II. By contrast in Article 4, a Letter of Rights in relation to suspects or accused who are arrested or detained is provided for and the model is set out in Annex I. Counsel for the minister has again correctly highlighted the most important difference between the two letters. The heading at "E" in the Letter of Rights on arrest and detention is titled "Access to Documents" and provides that an arrested and detained person or his or her lawyer has the right to access essential documents needed to challenge arrest or detention. If the case goes to court, the person or lawyer has the right to access the material evidence for or against him or her. In Annex II, the letter of rights for arrest on an EAW makes no such provision for access to documents. What is provided is that the person has the right to be informed about the content of the EAW on the basis of which the person has been arrested.

95. From the foregoing, it is manifestly clear that the provisions of Article 7 relating to access to documents do not apply to a person who has been arrested on an EAW. Article 7(1) applies to a person arrested and detained as a suspect or an accused in the course of domestic criminal proceedings for the purpose of challenging the lawfulness of the arrest or detention. Article 7(2) applies in the course of the domestic criminal proceedings and is for the purpose of guaranteeing a fair trial. A person arrested on foot of an EAW is entitled to information about the content of the warrant as per the Directive. This is provided for in this jurisdiction by s. 13(3) of the Act of 2003 which requires a copy of the EAW to be served on the requested person. The provision of this information permits a challenge to the lawfulness of the arrest or detention. Moreover, it would be entirely contrary to an important objective of the Framework Decision - namely a new simplified system of surrender - if further information was required to be provided over and above that specified in the warrant. Without a clear indication to the contrary, the provisions of the Directive could not override the provisions of the Framework Decision. Not only is there no clear indication to the contrary but the Directive positively distinguishes between the EAW situation and that of a person being proceeded against in domestic criminal proceedings.

96. On the basis of the foregoing, the respondent's claim to an entitlement to access to the case materials is entirely misconceived. His surrender is not prohibited on the ground pleaded. There is also no basis under the Framework Decision or the Act of 2003 for this Court to request such materials unless the Court considers that the documentation provided is not sufficient to enable the Court to perform its functions under the Act of 2003. In this case, the documentation is not required for the purpose of enabling the Court to carry out those functions. Therefore, the relief sought in the motion is refused.

Section 37 of the Act of 2003
97. Under this heading, the respondent makes a number of objections to his surrender. He makes a complaint regarding "the futility and disproportionality of surrender" especially in the context of his personal and family rights and a claim that he will suffer a flagrant denial of justice.

Futility and Disproportionality of Surrender
98. While the respondent accepted that a *prima facie* case need not have been shown on the EAW, he submitted that in this case, cogent evidence has been presented to the court which establishes that no reasonable judicial authority could convict the respondent of any of the offences in respect of which surrender is sought. He submitted that, in those circumstances, surrender would be futile and amount to a disproportionate interference with the respondent's constitutional and ECHR rights. He submitted that his surrender was therefore prohibited under s. 37(1) of the Act of 2003.

99. In oral submissions, the respondent clarified that he was arguing both that it was disproportionate for Poland to have issued the EAW and that it was a disproportionate interference with his personal rights for this Court to surrender him. He accepted that the decision in *Minister for Justice and Equality v. Ostrowski* [2013] IESC 24 was authority against him. From the argument made to the Court, it appears that the lack of a proportionality test within Poland was the main complaint of the respondent under this heading. He referred to the criticisms that had been made of Poland by the Council of Europe in 2007. He could not point to any evidence, or current report, as to the present situation in Poland. He submitted that the prejudice of facing the surrender process in this jurisdiction was disproportionate to any interest Poland could have in surrendering the respondent for these particular alleged offences.

100. Counsel for the respondent's entire argument under this heading is premised upon the contention that no reasonable issuing judicial authority could convict the respondent on the evidence and that it is disproportionate and indeed, futile, for the Polish judicial authority to seek his surrender. In light of the Polish decision to seek his surrender despite the lack of evidence, it was now incumbent on this Court to refuse to surrender him. At a factual level, and leaving aside the decision in *Ostrowski*, this argument is entirely untenable. There is a witness who has implicated the respondent. The respondent himself admits a course of dealing with the witness but denies involvement with illegal drugs. The credibility of both the witness and the respondent are matters to be determined in the context of the criminal proceedings. No court, at least in this jurisdiction, could dismiss out of hand a statement by an accomplice merely because the witness is an accomplice. To do so would remove from any consideration by a court of what may often be the only available source of evidence in the prosecution of those alleged to have committed serious crimes. The motivation of a witness for testifying is obviously a matter to be tested at trial. The possession of controlled drugs with intent to sell or supply is recognised throughout Europe as a serious offence. The respondent's point about the lack of evidence regarding the drugs is also not well founded. He has provided no evidence that this is required for a successful conviction in Poland. Indeed, as referred to above, the respondent's expert witness is entirely silent as to the prospects for conviction in the case. In this jurisdiction, in certain circumstances, it is possible to have convictions in relation to possession of controlled substances without formal forensic proof relating to the nature of the controlled substance.

101. The resolution of the disputed evidence is quintessentially a matter for the trial in Poland. This Court cannot engage in a trial of the evidence and therefore no issue of a proportionality test arises as to whether in light of the state of the evidence this Court should refuse surrender. Finally, the decision in *Ostrowski* clarifies that it is not for the High Court to exercise a proportionality test as to whether the EAW should have been issued.

Family and personal rights
102. In relation to the Article 8/constitutional rights submission regarding family rights, the respondent also partially relied upon what counsel submitted was the disproportionality concerning the lack of evidence against him. For the reasons set out above, that argument is fundamentally misconceived.

103. The respondent primarily relied upon the tests set out in *Minister for Justice and Equality v. T.E.* [2013] IEHC 323. In particular, counsel pointed to principle no. 6 therein, which states that the correct approach is to balance the public interest in the extradition of the respondent against the damage which would be done to his private life and his family life in the event that he is surrendered.

Counsel referred to principle no. 12 which states that 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.

104. The respondent took principle no. 12 to mean that there is a different consideration to be applied between a person who has been convicted and one who is merely accused. The correct view is that principle no. 12 deals with the difference between the measurement of the public interest in extradition and the public interest in expulsion cases. That is clarified by the final two sentences of principle no. 12 to the effect that the approach to Article 8 rights is the same regardless of whether the case is an extradition case or an expulsion one but the weight to be afforded to the public interest will not necessarily be the same in each case. That is apparent from that part of the judgment in which Edwards J. discusses the judgment of Lord Phillips in the U.K. Supreme Court's decision in *Norris v. Government of United States of America (No. 2)* [2010] 2 A.C. 487. Edwards J. said of Lord Phillips at para. 87 of the judgment in T.E.: *"However, he stated, the public interest in extradition nonetheless weighs very heavily indeed. In his view it was certainly not right to equate extradition with expulsion or deportation in this context."* Edwards J. then went on to clarify, through his careful exposition of the development of the U.K. jurisprudence, that Article 8 rights were as important a calculation in extradition as in expulsion cases, but that in extradition the public interest element will carry greater weight.

105. Counsel for the respondent also referred to the statement of broad principle set out in principle no. 14 in *T.E..* Counsel submitted that the court had to assess whether the interference with family life 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.

106. Reliance was placed upon the fact that delay may be taken into account in assessing the weight to be attached to the public interest. Counsel pointed to the delay since 2005 and 2006 relating to the offences. He also relied upon the decisions in *Minister for Justice and Equality v. M.J.B.* [2015] IEHC 170 and *Ciecko* (unreported, 18th December, 2013, High Court, Edwards J.) and pointed to periods of delay which counsel said were of a lesser period than the period at issue here.

107. The case law establishes that while there are general points of principle, the consideration of an Article 8 point is fact specific to each case. The conclusion a court reached in an earlier case as to where the balance lay is not a precedent which can bind another court assessing individual and particular facts of the case at hand. While there is a strong public interest in general in the extradition of a person who is wanted for criminal prosecution or to serve a sentence, the actual level of public interest may vary depending on such factors as the nature of the alleged or committed crime and the delay in seeking extradition. There are also all manner of variables that may arise in a requested person's private and family life.

108. In this case, there is a very high public interest in seeking the extradition of someone who is wanted for a series of alleged drug trafficking offences, even if the particular amounts are relatively small. It is not simply alleged that the respondent supplied the drugs to R.P. but that he supplied them knowing that the drugs would then be further sold. As against that, the question is whether the delay in seeking the extradition has diluted the public interest in his extradition. The EAW stated that the respondent was not staying at his permanent address in Poland. It recites that the police officers found out he was in the territory of Ireland staying in Kildare. The covering letter implies that this information may have come through the office of Interpol in Dublin, because of a prosecution being brought against him in this jurisdiction. The EAW recites that the District Court in Nowy S¹cz, by its decision made on 18th November, 2009 (relating to the alleged drugs offences), and its decision on 18th July, 2013 (relating to the false pretences case), applied a preventative measure against the suspect in the form of temporary arrest for 14 days. That could not be enforced as he was not at his permanent address. Moreover, the EAW states that the respondent had been unsuccessfully sought with two Wanted Notices in two specified case numbers.

109. According to the respondent, he moved to Ireland in January 2007 and has lived in a town in Co. Kildare since then, apart from a few months when he resided in another part of Co. Kildare. He says that he has been living in the same house, identified in the EAW, for the past 5 years.

110. The word "delay" implies making something late or slow. It conveys an element of deliberation or of negligence in the process of making something late or slow. It can be contrasted with the phrase "lapse of time" which was to be found in s. 50(2)(bbb) of the Extradition Act, 1965. That was a more neutral term than "delay". I am conscious that "delay" used in a judgment is not to be parsed, analysed and subjected to rules of statutory interpretation. It is necessary, however, for the Court to consider how the sense in which the word "delay" was used by Edwards J. in *T.E..*

111. In that case, it is in the consideration of the public interest that "delay" is identified as a factor to be taken into account. The public interest is in bringing fugitives to justice and ensuring that those accused or convicted of criminal offences are not, by virtue of cross-border circumstances, to be immune from justice. If delay is to reduce or dilute that public interest, it must necessarily relate back to an action or inaction on the part of the requesting state. To hold otherwise would be to place a premium on the ability of a fugitive to lay low for as long as possible. Therefore, the "delay" must be referable to deliberate acts or omissions of the issuing state. This is not to say that a state is being punished for "delay" – it clearly is not. It is simply a factor through which the public interest in an extradition can be assessed.

112. Baroness Hale in *R.(HH) & PH v. the Deputy Prosecutor of the Italian Republic, Genoa* [2012] UKSC 25 [2013] 1 AC 338 used both the term "delay" and the term "lapse of time". This judgment was cited by Edwards J. in T.E. and makes reference to the issue of delay and its affect on both the public interest calculation and the individual's circumstances. It is not without significance, however, that Baroness Hale used "lapse of time" when she referred to the changes that had occurred in the requested person's personal circumstances. On the other hand, earlier in her judgment, when dealing with responsibility for delay, Baroness Hale said at para. 46: *"[w]hatever the reasons, it does not suggest any urgency about bringing the appellant to justice, which is also some indication of the importance attached to her offending."* Therefore, an overall lapse of time between the offence(s) and the request for surrender may, in some cases, be indicative by itself, of a lack of importance attached to the offending.

113. Importantly, attributing delay to a requested person does not deny him or her the opportunity to rely upon a breach of his or her private or family rights to resist surrender. If the responsibility for the lapse of time lies entirely with the requested person, there may be little or no effect on the weight to be attached to the public interest. On the other side of the calculation, the "delay" or "lapse of time" may have resulted in great change in the life of a requested person and his or her family. These must be considered in the assessment of whether the surrender would be a disproportionate interference with the right to respect for those rights.

114. Moreover, it may be a challenge to establish where the responsibility of the requested person ends and the responsibility of the requesting state begins. That will be a matter to be decided in each individual case.

115. In the present case, there is a lapse of time between the alleged offences and the issuing of the first preventive measure. I am entitled to, and must, have regard to all the information now being placed before me. It is the respondent's case that he is being

charged on the basis of the testimony of R.P.. It stands to reason, therefore, that there has to have been some lapse of time between the offences and the respondent being sought for them where the information is coming from an accomplice. Furthermore, even on the report placed before the Court, it is apparent that court expert psychiatrists were appointed to examine R.P.. They gave reports in February 2007 and October 2008. Later reports were provided at the appeal stage in 2010. It appears that in June 2009, the decision to present charges against the respondent was made. The decision to apply the preventative measure was made in November 2009. It is reasonable to infer that time was given for the consideration of whether there was a case against the respondent arising from the evidence obtained during the course of the trial of R.P.. In those circumstances, I do not find in all those circumstances that there has been "delay" up to 2009.

116. There is then a further period of time between November 2009 and March 2014 when the EAW issued. That is a lapse of time of four and a half years. The respondent relied on *Ciecko*, a case in which there was a very substantial period of unexplained delay. In that case, the court held that the issue of delay having been raised, that ought to have been recognised by the applicant and enquiries sought of the issuing judicial authority for an explanation as to the delay.

117. It is notable in *Ciecko* that the High Court held that the case did not concern a a moderate level of delay involving perhaps two, three or four years. Instead the court identified it as a case involving really quite significant delays. In terms of the question of whether an explanation is required from the issuing judicial authority as to "delay", it seems to me that each case has to be considered on its facts. I am satisfied that the court is entitled to draw its own conclusions as to the lapse of time from the evidence available to it.

118. In *Ciecko*, it was clear that the respondent was engaged in a business and complying with all revenue and associated obligations. What is particularly striking in the present case is that the respondent has not placed before the court any information from which it could be inferred that he was living "openly" in the community during the entirety of the period. He says that he has lived here for 9 years. He does not state that he was employed here during that period, he simply says that he works two evenings a week in a local pizza place. His partner is self-employed and he says he usually brings his son, born in 2009, to school. It is also apparent from the evidence of Garda John Butler, and not contested by the respondent, that when a précis of the offences were read to the respondent, when asked "do you know what these are about?", he replied "yes, I remember".

119. The fact that Poland issued two internal Wanted Notices, that the respondent knew about the offences, that he came to Ireland but does not state that he lived openly or give information from which that can be inferred, the fact that the EAW lists his address in Ireland and is accompanied by a statement saying that information was received from Interpol about present proceedings against him in Ireland, all point to the fact that the Polish authorities were seeking him and that the lapse of time is not to be construed as evidence of "delay" on their part which requires any greater explanation than that which has been provided. Perhaps in another case there may be an issue as to the extent of the international search that must be carried out when a person cannot be found within their own borders. Even then, an enquiry with Interpol is unlikely to reveal the presence of someone in another country unless they have come to police attention there. Serious issues of a pragmatic and a principled nature would arise as to whether each EU Member State should be or could be required to search through its Revenue/Social Services databases to find out if another person is in their jurisdiction. None of this arises on the facts of this case as no information has been provided that this respondent has been living openly.

120. I am satisfied that there is a high public interest in his extradition in light of the gravity of the alleged drug offences in this case and the efforts that have been made by Poland to seek him. Even if the "delay" of four and a half years was partially to be attributed to Poland, there would still be a relatively high public interest in his surrender in light of the nature of the particular allegations. Furthermore, if one is to look at the overall lapse of time between the alleged offending and the request for surrender, I am not of the view that this is a case where that is indicative of a low level of importance being attached to his offending. Therefore, in this case there is a relatively high public interest in his surrender.

121. At its height, the respondent's case is that the affect on his relationship with his young son and his partner and the affect on her business amounts to a disproportionate interference with his family life. He relies in particular on the case of *M.J.B.* in so far as it concerns an interference with the relationship between a respondent and his son. That case is entirely different with very specific circumstances involving the nature of the offences and the sentence imposed and the lapse of time since the commission of those offences.

122. Counsel for the minister relied upon principle no. 15 in T.E. which states that factors such as detention in custody pending surrender or on surrender, facing a trial and possibly serving a sentence will, in and of themselves, rarely be regarded as sufficient to outweigh the public interest in extradition. Furthermore, counsel relied upon principle no. 16 to the effect that what is protected is the right to respect for one's private and family life and that it is where there is an exceptionally injurious and harmful consequence disproportionate to the legitimate aim being pursued in the application for surrender, that such surrender is prohibited.

123. As has been stated, a respondent does not have to show exceptional facts but there must be particular injurious or harmful consequences that would make surrender disproportionate. I must have, and I do have, regard to the best interests of his child in considering this matter. However, the inevitable interference with the relationship between parent and child that surrender will entail is not a matter which, of itself, automatically makes a surrender disproportionate.

124. In this case, the evidence before the Court does not show that it would be disproportionate to surrender him. The consequences of which he complains amount to little more than those consequences that will usually flow from the surrender of a person being sought. There are no particularly injurious or harmful consequences to his private and family life (or that of his child or partner) that will occur to his surrender. In particular, in light of the serious drugs offences for which he is sought, the consequences are not disproportionate.

125. Finally, insofar as I have referred to the drug offences, I have also considered the situation with regard to the alleged offence of attempting to obtain by false pretences. On its own, this is not such a serious offence and, indeed, there was a further unexplained lapse of time in issuing the warrant for preventive detention in that case. However, in circumstances where his surrender will be ordered in relation to the drugs offences, any complaint about surrender on this offence affecting his personal and family rights is no longer tenable. Any interference with his personal and family rights will not have been brought about by surrender on this offence but by surrender on the other offences. Therefore, it is not disproportionate to surrender him on this offence also. Moreover, in light of the lack of any particularly harmful or injurious consequences to his family life on surrender, even with a relatively low public interest in his surrender for this offence, it could not be said that surrender would necessarily be a disproportionate interference with his constitutional and Article 8 rights.

126. In conclusion, it will only be exceptionally that the court will refuse surrender for a breach of Article 8 rights or constitutional

rights to family and private life. While there is no necessity to show exceptional facts, the particular factual circumstances in this case do not demonstrate that there would be a disproportionate interference with his personal or family rights or with the family rights of his partner and child. The public interest in his extradition is high. As against that, there are no particularly injurious consequences demonstrated that would make it disproportionate to surrender him to Poland.

127. Finally, the respondent submitted that the court should take into account the fact that he was desirous of attending at the pending prosecution in this jurisdiction. That is not a matter to be weighed in the balance in determining whether surrender should be ordered, the Court has ample powers to postpone a surrender if appropriate due to a pending prosecution.

Flagrant denial of justice
128. Under this heading, the respondent claimed that if the Polish authorities did decide to prosecute him on the basis of an allegation of a supposed accomplice, uncorroborated by any evidence of possession of a controlled substance, it is submitted that this would leave the respondent at risk of suffering a flagrant denial of justice. In written submissions, the respondent stated "any criminal justice system which would prosecute a person for possession or sale of a controlled substance without any such substance ever having been tested, or even detected, would be deeply flawed."

129. This submission is based upon a misconception. In the first place, the submission fails to recognise that in this jurisdiction (and in the U.K.), it is possible, in certain circumstances, to prosecute without forensic testing on a drug (see *DPP v. Buckley* already cited above). Moreover, in this jurisdiction one can be convicted on the uncorroborated testimony of an accomplice, subject to a warning as to the dangers of so doing. Secondly, even if it were not possible to convict in this jurisdiction on these types of evidence, on its own that would not be incompatible with surrender. The respondent would have to show that to do so would amount to an egregious breach of rights. He has not made any substantive attempt to establish such egregious breach other than by mere assertion. He has failed to provide a sound principled basis for his assertion that to convict on this type of evidence, or indeed absence of particular evidence, must be regarded as a flagrant denial of justice. This point of objection is rejected.

130. The respondent also complains that in relation to the allegation concerning false pretences, there was no complaint by the injured party. He submitted that a conviction on this basis would amount to a flagrant denial of justice. Again, there is nothing more than an assertion that this is so, thereby ignoring the possibility of establishing guilt in this jurisdiction for certain offences without a complaint of an injured party. Moreover, there is nothing to show that this would amount to a flagrant denial of justice. This point of objection is rejected.

Conclusion
131. Each of the respondent's points of objection have been addressed in the course of this judgment and rejected. The Court has considered all of the matters it is required to consider under the Act of 2003 and is satisfied that an order directing that the respondent be surrendered to such other person as is duly authorised to receive him in Poland may be made in relation to each offence set out in the European Arrest Warrant.