THE SUPREME COURT

[Appeal No. 108/19]

MacMenamin J.
Dunne J.
Charleton J.
O'Malley J.
Irvine J.

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

BETWEEN:

THE MINISTER FOR JUSTICE AND EQUALITY

APPELLANT

V.

MANTAS VESTARTAS

RESPONDENT

Judgment of Mr. Justice John MacMenamin dated the 2nd day of April, 2020

Introduction

1. In a judgment dated the 29th March 2019, the High Court (Hunt J.), refused an application brought by the Minister for Justice and Equality for the respondent's surrender to the Republic of Lithuania where, as a young person, he had committed a substantial number of offences, and had partly served a sentence subsequently imposed on him. He was later released on parole. In contravention of his parole conditions, he left Lithuania and moved to Ireland. Later, whilst in this State, he formed a relationship with his partner. The couple have two children. The elder child was born before the respondent moved to Ireland, but he is now in *loco parentis* to that girl, who is aged twelve. The couple's younger daughter is now aged four years.

2. Bearing in mind these and other features of the case, including delay, the High Court judge held that, to make an order for the return of the respondent to Lithuania would infringe the private and family rights of the respondent, his partner and the children under Article 8 of the European Convention on Human Rights ("the ECHR"; "the Convention"). He therefore refused to make the order sought. He held that these exceptional features were such that the public interest, which would normally compel surrender, was heavily and unusually compromised having regard to the adverse effects of making such an order. He held that, during the time the respondent was in Ireland, he had formed relationships which constituted a *de facto* family, giving rise to rights under Article 8 of the ECHR. He concluded that these features were sufficiently weighty to render a proposed surrender an unwarranted and disproportionate interference with such rights.

3. Subsequently, the Minister applied to the High Court to certify that grounds existed for an appeal to the Court of Appeal. It was contended that the judgment raised issues of exceptional public importance concerning the interpretation of provisions of the European Arrest Warrant Act, 2003, as amended ("the 2003 Act").

4. In the course of that application, the Minister submitted that the High Court judge had taken into account a number of features which should not have formed part of the assessment. These included findings that the respondent had part-served his sentence; observations on the gravity, or otherwise, of the breach of the parole conditions imposed on him; a finding that the respondent had shown signs of rehabilitation whilst in this jurisdiction; and a conclusion that there had not been a satisfactory or full explanation of the delays which had taken place prior to the issuing

of the European Arrest Warrant ("the EAW") on the 21st December, 2016, which was transmitted to Ireland more than one year later.

5. In an addendum judgment delivered on the 27th May, 2019, Hunt J. rejected the Minister's application and declined to grant a certificate for an appeal to the Court of Appeal. He held that he had applied the balancing exercise required under s.16 of the 2003 Act as identified by this Court in *Minister for Justice and Equality v. Ostrowski* [2013] IESC 24; [2013] 4 I.R. 206 (paras. 5–6). He observed that the question of delay, considered in detail in the substantive judgment, fell to be considered in the context of the effects and consequences of the particular period of delay on the facts of the individual case before him (para. 9). He expressed the view that, if the relevance of delay as a consideration in such applications had been in doubt, the judgments of this Court in *Finnegan v. Superintendent of Tallaght Garda Station and Anor.* [2019] IESC 31 had put the materiality of that feature beyond doubt (para. 9). Citing the judgment of this Court in *Minister for Justice and Equality v. J.A.T. (No. 2)* [2016] IESC 17; [2016] 2 I.L.R.M. 262, Hunt J. held that the Article 8 factors in this case, when weighed cumulatively, were powerful, such as would warrant a refusal to surrender. Both judgments were consolidated in a composite judgment dated the 2nd July, 2019.

Application for Leave

6. The Minister then applied for leave to appeal directly to this Court. In the application for leave, it was contended that the High Court judgment raised issues of general public importance and would have a wide-ranging impact on other EAW proceedings. This was because the analysis was potentially applicable to all proceedings where surrender was requested for the purpose of serving the balance of part-served sentences. The Minister observed that, anecdotally, approximately one half of all conviction, as opposed to prosecution, warrants that came before the High Court related to part-served sentences, particularly so in relation to warrants emanating from the Baltic States. Moreover, it was submitted that the judgment gave rise to basic questions regarding the role of the High Court and the status of the statutory limitations on the role of that Court contained in the 2003 Act.

7. More specifically, it was argued that the High Court judgment raised the question as to whether, in determining an application for surrender, that Court might properly have regard to issues such as whether the objectives of parole or rehabilitation had been met under the Act, where these were, in fact, properly matters

for the Lithuanian courts. It was contended that the High Court had trespassed into areas where it was not permitted to go under the legislation, and that this judgment was at variance from other High Court judgments (see, *Minister for Justice and Equality v. Duffy* [2019] IEHC 127 and *Minister for Justice, Equality and Law Reform v. Dunkova* [2011] IEHC 36, where Irish courts had refused to have regard to such matters, deeming them questions to be considered by the courts of the issuing state).

8. The respondent submitted that the case involved no more than an application of principles previously outlined by this Court in *Ostrowski*, and that if, as in this case, there were matters such as delay to which a respondent could refer, such features might give rise to an inference that the public interest in pursuing an extradition was at the lower end of the scale. He contended that, where there were also other factors present, these, cumulatively, could properly fall to be assessed by the High Court judge, and, in an appropriate case, lead to a refusal to surrender. In short, the respondent's case was that the judge correctly took these features into account and applied the correct legal principles in his decision.

9. This Court determined that the issues raised in the judgment were of general public importance. Specifically, the question arose as to whether the High Court had correctly interpreted and applied the Act and the principles enunciated in the jurisprudence.

10. Prior to addressing the judgment under appeal, it is necessary to first consider the 2003 Act, and then two decisions of this Court referred to earlier: *Ostrowski* and *J.A.T.*

The Legislative Framework

11. The legislative intent behind the 2003 Act was to give effect to the European Council Framework Decision of the 13th June, 2002, on the European Arrest Warrant and the surrender procedures between Member States (2002/584/JHA) ("the Framework Decision"). The philosophy behind the original Framework Decision was to introduce a new and simplified system for the surrender of sentenced or suspected persons for the purpose of execution or prosecution of criminal sentences. This system would remove the complexity and potential for delay inherent in previous extant extradition procedures (*Aranyosi* and *Căldăraru* (Joined Cases C-404/15 and C-659/15 PPU) at paras. 75–76).

12. Thus, systems of extradition which hitherto on occasions had a significant governmental or political input, were replaced by a new regime of what was identified in the Framework Decision and subsequent jurisprudence, as a free movement of *judicial decisions* in criminal matters, covering both pre-sentence and final decisions. At the outset, the process was seen as being located within the area of freedom, security and justice recognised in European Union ("EU") treaties. The project involved the introduction of a system of "judicialisation" of the process of returning offenders to Member States, where they were to face prosecution or completion of sentence.

13. The entire edifice of the Framework Decision is founded on a system of mutual recognition of judicial decisions on criminal matters between each EU Member State. The role of central authorities, as emanations of the executive of each Member State, whilst highly important, is limited to the provision of practical and administrative decisions (Recital 9 of the Preamble to the Framework Directive). Under the EAW system, the function of ordering or refusing surrender is now exclusively reserved to the judiciaries of Member States, to be determined on legal grounds.

14. This allocation of responsibility rendered it necessary that EAW *procedures also* be subject to *legal* controls and rights protections. This was in order that judicial authorities might make determinations within law, and on defined and uniform legal criteria. The system is predicated on the existence of the special relationship which exists between Member States of the EU, which, in turn, is recognised by the treaties themselves, reflecting the maintenance and continuation of a high level of trust between all Member States.

15. The duty to act in accordance with the highest fundamental principles of the EU, includes the maintenance of trust and the protection of the rule of law, peace, freedom and democracy. This framework is grounded upon the existence of the common foundation of human rights protections to be found in the ECHR and the Charter of Fundamental Rights of the EU ("the Charter"). It is self-evident that the maintenance of these values hinges on the continued existence of the rule of law and an independent judiciary in each Member State (see Recitals 9 and 10 of the Framework Decision, and the judgments of this Court in *Minister for Justice and Equality v. Balmer* [2016] IESC 25; [2017] 3 I.R. 562).

16. The Framework Decision contains not only an outline of duties, but of rights protections. All Member States of the EU are obliged to enforce ECHR, and now Charter, rights (regarding the ECHR, see *Minister for Justice, Equality and Law Reform v. Stapleton* [2007] IESC 30; [2008] 1 I.R. 669). The fact that rights protection may come under the supervision of a supranational court which can definitively rule on the compliance of a particular system with basic human rights is, therefore, itself an essential component of the system. This does not preclude a recognition of differences between the legal systems of each contracting state.

Fundamental Rights

17. Surrender may be refused if it is established on cogent evidence that to make such an order would involve exposing a person to a situation where there is a real risk that he or she might be exposed to a denial of fundamental rights. Ireland will not refuse to surrender a person to another country with whom it has a bilateral or multilateral agreement merely on the basis that he or she might be treated differently, or under a different regime, than in this State. Delivering judgment in *Minister for Justice, Equality and Law Reform v. Brennan* [2007] IESC 21; [2007] 3 I.R. 732, Murray C.J. rejected the proposition that an order under the Act of 2003, or indeed any order for extradition, might be refused if the manner in which a trial in the requesting state, including the manner which a penal sanction was imposed, did not conform to the exigencies of our Constitution if such a trial or sentence had taken place in this country (para. 37). He observed that such an argument could hardly have been the intention of the Oireachtas in adopting s.37(1) of the 2003 Act - which addresses constitutional and ECHR protections—since it inevitably would have had the effect of ensuring that most requests for surrender or extradition must be refused.

18. It is self-evident that the manner, procedure and mechanisms by which fundamental rights will be protected in different Member States may vary according to national laws and constitutional traditions. Checks and balances in each national system may, too, vary, even though they might have the same objective, such as ensuring a fair trial. As Murray C.J. observed in *Brennan*, few legal systems would wholly comply with the precise requirements of our Constitution (para. 39).

19. Nonetheless, Murray C.J. was of the view that, in considering an application for surrender of this type, an Irish court must have the jurisdiction to consider circumstances where it might be established that surrender would lead to an egregious or flagrant denial of fundamental or human rights (para. 40). An instance of this

would be if it were clearly demonstrated that there was so fundamental a defect in the system of justice in an issuing state as to give rise to a situation where the grant of an application to surrender might actually violate such fundamental rights.

20. For an order of surrender to be refused on such grounds, the question is not whether the legal regime in an issuing state is at variance from that under the Constitution. Rather, it is whether it can be established, on cogent, clear evidence, that the circumstances are so egregious, or the undermining of the rule of law so flagrant, so as to create a real risk that to grant an order to surrender would lead to a denial of fundamental human rights. Such a denial could arise from circumstances in Ireland or in the issuing state.

21. It follows from this consideration, that the Framework Decision and the Act will operate on the premise that, in general, it is not the duty of Irish courts to apply principles or considerations which would be applicable to a trial or other criminal proceeding in Ireland, to proceedings which, properly, would be dealt with in an issuing state in the event of a surrender being ordered.

Article 8 ECHR

22. What is in issue in this appeal falls into a somewhat distinct category. The main question which arises is whether an order for surrender would be "incompatible" with the State's obligations under the ECHR and its protocols (s.37(1) of the 2003 Act). This is subject to a rather different, and at times more complex test, by virtue of the nature of the ECHR protection.

23. Article 8(1) ECHR guarantees the right to respect for an individual's private and family life, home and correspondence. But that guarantee is subject to the proviso that public authorities shall not interfere with the exercise of that right, except such as in accordance with law, and is necessary in a democratic society in the interests of national security, public safety, the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others (Article 8(2)). The terms of Article 8(2) are, therefore, sufficiently broad to encompass orders for extradition, or in this case, surrender. But as will be seen, these Article 8 considerations arise within a statutory framework which it is now necessary to consider.

24. The judgment under consideration must be assessed in the light of the provisions of the 2003 Act, subsequently amended on a number of occasions, and

relevant decisions of this court. It must be considered under various headings, addressing first the test as actually.

The Test Applied in the High Court Judgment

25. The High Court judgment was delivered by a highly experienced judge. It contains a full description of the circumstances of the case. It is carefully reasoned. As already described, the Court was asked to address whether surrender should be ordered where it was claimed such an order would violate private and family rights under Article 8 which, as set out at para. 23 above, is subject to qualifications. On its own terms, therefore, the protection contained in Article 8 is less than, for instance, the absolute prohibition on torture and inhuman or degrading treatment to be found in Article 3 of the ECHR.

26. In an important passage, Hunt J. directly set out the test he proposed to apply in the case before him. He described the duty of the Court, where resistance is offered "to surrender" by virtue of a constitutional or ECHR right, as being to conduct a "fact-specific enquiry" into all relevant matters, so that a "fair balance" could be struck between the rights of the public and those of the person in question. The judgment continued:

> *"Such an exercise is not governed by any pre-determined approach or pre-set formula. Each of the competing interests must be measured and balanced. In this context, the interests of the public, underpinned by weighty considerations such as freedom and security, will virtually always merit significant value; the weight of individual interests will have greater variability. Consequences inherent in the surrender process, without more, attract a much lower value than consequences with a real and substantial effect on the individual concerned"* (para. 23).

27. Thereafter, the judgment outlined the features which were identified as indicating the public interest in ordering surrender (para. 25). These included the actions or inactions of the requesting state, the purpose of the request for surrender, the nature of the sentence originally imposed, the extent of the sentence served, the young age of the respondent at the time of the many offences of which he was convicted, the nature of his breach of parole, and the purpose of the parole itself (paras. 25–29). The judgment concluded that certain features in the case, such as delay, indicated that the public interest in surrender was at the lower end of the scale (para. 40).

28. The judgment having outlined the respondent's "private interests" in the form of his private and family rights under Article 8 of the ECHR, concluded that these, with the other factors mentioned, were such as would indicate that an order of surrender should not be made (para. 43).

29. It is undoubtedly true that these "private interest" circumstances as described, did reflect the facts of the respondent's own individual situation. The first aspect of the question here is one of statutory limitation; that is, the extent to which any, or all, of these features are appropriate for an Irish court to consider in reaching a determination under the 2003 Act and, if so, how they should be weighed? The nature of the legal test - and any limitations thereof - are therefore central questions to this appeal, and indeed many other such applications. It is necessary first to consider the precise terms of the 2003 Act. How the balance is weighed is fundamental; in what circumstances can private interests to outweigh public interests?

The Act of 2003

30. The analysis which follows must be seen with the full recognition that there is already a considerable body of jurisprudence on the application of Article 8 of the ECHR in an EAW context. But what is to be found there must be assessed within the legislative framework. The 2003 Act sets out clear pointers to the approach which should be adopted. These include s.4A, which was inserted into the 2003 Act by s.69 of the Criminal Justice (Terrorist Offences) Act, 2005. This came into effect on the 8th March, 2005. Section 4A provides:

> *"It shall be* ***presumed*** *that an issuing state* ***will*** *comply with the requirements of the Framework Decision, unless the contrary is shown."* (Emphasis added)

31. At one level, seen alone, this provision constitutes a simple evidential presumption of future compliance by the issuing state with the Framework Decision. It deals with the duties and obligations of such states concerning the manner in which they *will* deal with the person if surrendered and after such surrender has taken place. If there is cogent evidence of non-compliance, then issues may arise which an Irish court might have to address. However, a mere assertion of non-compliance, or the possibility of non-compliance, will not be sufficient to dislodge the presumption (see, the judgment of Murray C.J. in *Minister for Justice, Equality and Law Reform v. Altaravicius* [2006] IESC 23; [2006] 3 I.R. 148 at pp. 158–160). The presumption applies to all applications, whether the form of defence arises under the Constitution or the ECHR.

32. But, on another level, the section speaks specifically to the task facing the High Court. This is not to say that the section imposes a legal, as opposed to an evidential, burden on the respondent; but, as will now be explained, it cannot be said that the balance is, in the words of the High Court judgment, "fair", in the sense of being entirely equal between public and private rights.

33. While the judgment of the High Court is indeed detailed, it does not refer to s.4A, the effect of which permeates any discussion of the duties of the Court in considering the application in question.

34. Section 5 of the 2003 Act places a duty on the High Court judge to consider whether or not the offences specified in the warrant correspond to those under the law of this State. That issue does not arise in this case. Hunt J. found that the offences in question did correspond with offences under Irish law, and no appeal is brought against that finding.

35. Section 10 of the Act also contains significant words. Under the heading "Obligation to Surrender", it provides:

> *"Where a judicial authority in an issuing state issues a European arrest warrant in respect of a person –*
>
> ...
>
> > *(d) on whom a sentence of imprisonment or detention has been imposed in that state in respect of an offence to which the European Arrest Warrant relates,*
>
> *that person* ***shall****, subject to and in accordance with the provisions of this Act and the Framework Decision, be arrested and surrendered to the issuing state."* (Emphasis added)

Subject to the provisions contained in s.37, which outlines defences, these terms, too, suggest a duty of compliance.

36. Section 16 also speaks to the balance. It provides that, where a person does not consent to surrender, the High Court may, upon such date as is fixed under the Act, make an order directing that the person be surrendered to such other person as is duly authorised by the issuing state to receive him or her, subject to compliance with certain conditions regarding identity and other proofs. But this duty is subject to an essential proviso, to the effect that surrender will only take place provided such surrender is not prohibited by Part 3 of the Act.

37. Part 3 concerns rights protections. It includes s.37 which, insofar as material, provides that a person "shall not be surrendered" under the Act if his or her surrender would be "incompatible" with the State's obligations under the ECHR or its protocols, or would constitute a contravention of any provision of the Constitution other than for the reason that the offence specified in the warrant is one to which s.38(1)(b) applies (s.37(1)(a)–(b)). The respondent and his partner are a *de facto* family (see, para. 2 above). The argument before this Court has therefore been framed entirely within "private and family rights", as protected in Article 8 of the ECHR, rather than the Constitution. Two points arise. First, and as already mentioned at paras. 23 and 25 above, Article 8 protects significantly qualified rights. Second, there is little European Court of Human Rights ("ECtHR") case law on surrender/extradition procedures in the context of infringement of Article 8.

38. Section 38 of the Act contains certain limitations, which may be characterised as coming within the description of 'proportionality'. It is the only provision in the Act which now contains such limitations. Briefly, it provides that a person shall not be surrendered in respect of certain offences falling below a certain minimum threshold of seriousness. The offences here fall above that minimum threshold. The provision also contains other limitations, to the effect that surrender will not take place unless the offence corresponds to an offence under the law of this State. The offence must be punishable by a maximum period of not less than 12 months imprisonment. Alternatively, a term of imprisonment or detention of not less than 4 months must have been imposed on the person in respect of the offence in the issuing state, and the person requested must be required under the law of that state to serve all or part of that term of imprisonment. Both of these conditions apply.

39. But, even seen by themselves, and without consideration of the case law, these statutory provisions set out substantial limitations on the role of the High Court in carrying out an assessment under the Act.

40. To summarise the position thus far; the Act contains a *presumption* of compliance with the Framework Decision: when a court is satisfied that the relevant proofs are complied with, the Act stipulates that a person *shall* be arrested and surrendered to the issuing state (see, ss. 4A and 10). But a court must also carry out an assessment of private and family circumstances under s.37 of the Act in order to ascertain whether or not an order to surrender is compatible with the State's obligations under, in this case, Article 8 of the ECHR.

41. But the test involves a significant weighting process which now must be described in the context of the decided case law

Ostrowski

42. In one sense, interpreting the statute is a simple matter. A more complex question, but equally critical, is how, precisely, the *public and private interests should be weighed* in the court's assessment? These questions were considered by this Court in the cases now analysed. It is necessary not only to consider what principles were applied, but how this Court described the balancing process, and how the public and private interest features were actually to be weighed.

43. In the first case to be considered, the respondent, Mr. Ostrowski, had moved from Poland to Ireland with his siblings and one parent. He went on a brief visit back to Poland where he was found by the police to be in possession of a small quantity of marijuana.

44. Just as here, the High Court judge in that case adopted an "open-ended balancing process" and gave considerable weight to "proportionality factors" (*Minister for Justice and Equality v. Ostrowski* [2012] IEHC 57). He engaged in a hypothetical assessment of what sentence might be imposed in the event of surrender. The judge held that it was it was inherently unlikely that the respondent would receive a custodial sentence; that, if surrendered to Poland, he would likely suffer a further deprivation of liberty; that his prospects of being granted bail in Poland would be reduced; and that the Polish authorities could have written to the respondent in Ireland informing him that the matter was not going to be dropped, and inviting him to return to his home state. The judge observed that there had been a delay in executing the warrant. He had regard to the fact that there had been some elapse of time between the endorsement of the warrant by the High Court in April 2010 and the respondent's arrest in 2011, which the judge concluded had "led to a false sense of security, and then increased stress and anxiety for the respondent" (section 7 of the judgment).

45. Against that background, the judge then turned to the Article 8 features. He took into account the burden on the respondent and his family of his having to be repatriated to Poland in custody in the event of his surrender (section 7). He observed that to make an order surrendering the respondent would disrupt his family life "in a significant way". He held that, whilst interference in family life was only to be expected when a person faced a deprivation of liberty, it was usually a proportionate measure, and not a breach of his or her right to respect for family life (section 7).

46. This last assertion could only be seen as problematic. While a sentence will be "proportionate" in its adherence to the proper principles applicable to that exercise, quite frequently a prison sentence will regrettably have a significant effect on private and family life. But such interference will generally be justified by reference to Article 8(2) of the ECHR, and the limitations contained there as to what is in accordance with law, and necessary in a democratic society and for the prevention of disorder or crime.

47. In *Ostrowski*, the High Court judge held that, taken in conjunction with his family circumstances, the features identified above were "unusual" (section 7). Having weighed them all up in the balance, and having afforded each circumstance what he considered to be its appropriate weight, the judge concluded that he was not satisfied, overall, that it would be *a proportionate measure* to order the surrender of the respondent on foot of the EAW. He concluded, rather, that it would represent a "disproportionate" interference with the respondent's fundamental rights, and particularly his rights to liberty, to enjoy physical and mental health, and respect for family life.

48. That approach could undoubtedly be described as an 'open-ended' balancing process having regard to public interest proportionality factors as against the private interest ECHR factors, in the context of elapse of time. While the facts, of course, differ somewhat from the instant case, the similarities are striking.

49. But the High Court judge's approach in *Ostrowski* was rejected by this Court (Denham C.J.; Murray, O'Donnell, McKechnie and MacMenamin JJ.), which concluded there was a duty to make an order for surrender. The Court delivered three judgments (cited at para. 5 above). Three other members of the Court expressed explicit concurrence with the judgment delivered by Denham C.J. It is important to emphasise that the judgment of McKechnie J. is a concurring judgment which expresses no dissent from that of Denham C.J. In fact, the *ratio* of each judgment is the same. The judgment which I delivered specifically concurred with that of Denham C.J.

50. Denham C.J. considered the wording and policy behind the Framework Directive. Her words not only speak to the principles applicable, but importantly, to the appropriate weight to be attached to public and private interests. She emphasised that the obligation expressed both in the Framework Decision and the Act, was that Member States *should* execute any warrant on the basis of the principle of recognition

(para. 60). She pointed out that it was the *responsibility* of the courts to implement and apply the 2003 Act (para. 23). She stated that the Court was *required* to surrender a person sought to be surrendered under the Act of 2003, as long as the provisions of the Act are complied with (para. 23). But these observations must, as stated by Denham C.J., be seen as subject to the provisions of s.37, to the effect that a court must always have regard to the question as to whether or not the surrender is compatible with the State's obligations under the ECHR, or in contravention of the Constitution.

51. Denham C.J.'s judgment firmly rejects the argument that the triviality of the offence(s) in question should be a bar to a surrender, provided that the offence or offences came within those identified within the ambit of the 2003 Act (para. 25). She observed that, to some degree, the Framework Decision might be said to have addressed a proportionality question by providing for a minimum gravity test with regard to offences which fall within the range of the Framework Decision (para. 27). She stated that this was reflected in s.38 of the Act of 2003.

52. But the Chief Justice then went on to set out in very clear terms the limitations on the role of the High Court, holding that the Court had:

> "*no role to look at possible sentences which might be awarded in an issuing state when a person is surrendered and to consider whether such a sentence is proportionate*" (para. 29).

She added that it would be virtually impossible in the vast majority of cases for the High Court, or any national court, to ascertain the likely sentence to be imposed by a court in the requesting state in all the circumstances of a particular case, even if, in a minority of cases, it might be thought possible (para. 29).

53. On this, she made clear:

> *"Once an EAW meets the minimum gravity test for an offence set out in the Framework Decision and the Act of 2003, it is not for the High Court to create and apply a proportionality test to a potential sentence"* (para. 30).

Such considerations were, rather, a matter for a court of the issuing state - in *Ostrowski*, Poland. Referring to Eurojust, the supervisory forum for the operation of the Framework Decision, Denham C.J. observed that, while the question of triviality was a matter which might be addressed in "another" forum, it was not a question to be considered by the courts of Ireland (para. 31).

54. In *Ostrowski*, the respondent's parent, brother and sister had moved to Ireland some years previously, thereby making a "collective decision to stay in Ireland". The respondent's immediate family were, therefore, in Ireland, and his intention was to stay in this State on a long-term basis. But these private and family circumstances were insufficient to establish an Article 8 defence under the ECHR. This Court held that the High Court had erred in adopting such an approach, and that it was not for that Court to "create" a proportionality test for the potential sentence which a respondent might receive. This was a matter for the courts of the issuing state.

55. Directly addressing Article 8 private and family rights, at para. 36, Denham C.J. quoted with approval from the judgment delivered by Fennelly J. in this Court in *Minister for Justice, Equality and Law Reform v. Gheorghe* [2009] IESC 76. Fennelly J. observed at para. 48 of *Gheorghe* that it was a regrettable, but inescapable incident of extradition in general, and surrender under the EAW system in particular, that persons sought for prosecution in another state will very often suffer disruption of their personal and family life. He went on to point out that Article 1 of the Framework Decision expressly provides that it was based on fundamental rights and fundamental legal principles, then enshrined in Article 6 of the Treaty on European Union. But, he said, no authority had been produced to the Court to support the proposition that surrender should be refused where a person would, as a consequence, suffer disruption, even severe disruption, of family relationships (para. 48).

56. Denham C.J. observed that only in an exceptional case could such rights outweigh the requirement to surrender (para. 37). *Ostrowski* was not such a case. Thus, she held that there was no foundation upon which to find for the respondent on that ground. It followed that to succeed, the private and family rights which arose would have to be genuinely exceptional. The Chief Justice specifically held that the "general principle of proportionality" did not arise in the case (para. 37).

57. In *Ostrowski*, McKechnie J. delivered a very comprehensive and closely reasoned concurring judgment. This traced the origins of the 2003 Act from the Framework Directive, considered the terms of the Act itself and assessed the manner in which ECHR and constitutional protections might arise in a judicial determination.

58. The judgment then turned to the question of balancing rights. There followed a passage which, in many if not all particulars, is strikingly similar to the identification of a test contained in para. 23 of the judgment now, under appeal.

59. But, it must be emphasised, in the passage about to be quoted, McKechnie J. was not referring to the test to be adopted by a court in finally determining whether or not to order surrender, but rather the antecedent proportionality test which might be applied when raising *a rights-based defence*. Thus, it was in *that* specific context, that he stated at para. 104 that:

> *"In summary, where resistance is **offered by virtue of a Convention or Constitution right,** the court must conduct a fact specific enquiry into all relevant matters so that a fair balance can be struck between the rights of the public and those of the person in question."* (Emphasis added)

60. That passage speaks *only* in the context of resistance being offered *by virtue of a Constitution or Convention right*. At para. 23 of the judgment under appeal, quoted at para. 26 earlier, the words "*to surrender*" appear after the word "*resistance*". There is a subtle, but important, difference in meaning and effect. McKechnie J. was not speaking of a defence *to surrender*, but rather the fact-specific enquiry on the antecedent question of resistance being *offered by virtue of a Convention or Constitution* right. It was in that context that a proportionality test would arise. It was in that process the court must strike a "fair balance" between public and private interests and rights.

61. Later in the judgment, McKechnie J. did indeed turn to how the Act should be applied when it came to the ultimate question of whether to order surrender. He considered the interpretative effect of the decision of the Court of Justice of the European Union ("the CJEU") in *Pupino* (Case C-105/03) [2005] E.C.R. I-5285. He also took into account the general principle that, under the common law, there existed a presumption that when enacting domestic legislation such as the Act of 2003, the Oireachtas intended to do so in a manner which would be consistent with its international obligations. He then addressed Article 1.2 of the Framework Decision, which provides that Member States:

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

62. With all these factors in mind, he expressed the following very clear views on the ultimate test under s.16, at para. 148:

> *"The question therefore is whether, with the aid of this interpretive approach, there can be implied into the provisions of the 2003 Act, in particular those*

referable to a surrender hearing, an overall *requirement* ***on the High Court to apply a proportionality test*** *of the scope and breadth as above mentioned.* ***In my view, it is not possible to so do.*** *"* (Emphasis added)

63. He went on:

"This conclusion results from the express wording of article 1.2 of the Framework Decision, which applies in furtherance of the mutuality principles which are the very foundation of the instrument itself, together with the express provisions of the Act in the context of execution, which ***make it clear that unless the mandatory or optional barriers to extradition***... *can be availed of, the High Court* ***must****, if satisfied as to formal matters, make the order as requested. As previously stated, it does not have a residual power of refusal."* (Emphasis added)

64. Just as did Denham C.J. at para. 37 of her judgment, McKechnie J. rejected the possibility of an overall requirement that the High Court should apply a "general proportionality test" of the scope and breadth he described. That is not to say that a court may not have regard to a truly exceptional set of circumstances such as, perhaps, involving egregious delay.

65. While any decision to surrender must, of course, be compatible with the Convention protections afforded, the process *does not* involve a general proportionality test. But no less important are the actual terms of Denham C.J.'s judgment. These convey the constant and strong public interest which a court must weigh in determining whether to make an order.

66. To summarise on this issue, I think the High Court judgment incorrectly elided two separate tests into one overall proportionality assessment which does not correspond with the requirements of the Act.

67. *Ostrowski* makes clear that, to be successful, an Article 8 defence must cross a high threshold. Below that, while Convention or constitutional rights necessitating proportionality assessments will *often arise* for consideration in many cases, these will not be sufficient to defeat a claim for surrender. The test must be seen within the requirements of ss.4A, 10, and 37(1) of the 2003 Act, as explained in *Ostrowski*.

68. In carrying out an assessment in our law for the purposes of s.16 of the Act, therefore, it is not accurate to speak of the task as one which is not governed by any predetermined approach, or pre-set formula, balancing competing public and private interests. In fact, the constant and weighty public interest in ordering surrender is not

only underlined by Article 8(2) considerations such as necessity under law, freedom and security, but the words of ss.4A and 10 of the Act. The test must be seen in light of the clear exposition in the judgments in *Ostrowski*. A court may often have to take private and family rights considerations into account. But it can only do so having regard to the limitation contained in Article 8(2) of the ECHR, and the public interest considerations inherent in the Act and the Framework Decision. To surmount these, in any case, would necessitate that the evidence requirement be high. The assessment does not involve a balance between the rights of the public and those of the individual. It is one, rather, where, as the Act provides, a court shall *presume* that an issuing state will comply with the requirements of the Framework Decision—unless the contrary is shown on the basis of cogent evidence. When faced with an application under the EAW, an Irish court should not carry out a general proportionality test on the merits of the application; but rather, it should apply the specific terms of the Act, albeit subject to a careful consideration of whether, if necessary, applying a proportionality test to an Article 8 Convention right, to order surrender would involve a violation of that ECHR right to the extent of being incompatible with the State's obligations under the Convention.

69. I am, therefore, driven to the conclusion that the High Court judgment under appeal proceeded under a misapprehension regarding the test to be applied in an application for surrender under s.16 of the 2003 Act. But that does not absolve this Court from itself carrying out an assessment in order to determine, applying the correct test, whether an order for surrender should have been made.

70. The principle that Irish courts may refuse an order for surrender under s.37 of the Act, is well established. To take one illustration, in *Minister for Justice, Equality and Law Reform v. Rettinger* [2010] IESC 45; [2010] 3 I.R. 783, this Court (Denham, Fennelly and Finnegan JJ.) refused an order for surrender to Poland on the grounds that there was a real risk of a violation of the absolute prohibition against torture and inhuman or degrading treatment under Article 3 of the ECHR due to the prison conditions in that Member State. But, even there, the Court held that a *possibility* of such treatment would not be sufficient (per Denham J. at para. 31). The evidence had to go further. It established a real risk of violation of what was, in that instance, an absolute protection. In that context, this Court found that s.37(1)(c) of the Act required reasonable grounds for believing that a real risk existed (per Fennelly J., at para. 74).

71. But there are real distinctions between the circumstances in *Rettinger* and the instant case. Here, what is in question is not the absolute right to be found in Article 3 of the ECHR, but rather an alleged risk to the qualified right to private and family life which is subject to the qualifications contained in Article 8(2) of the ECHR. Thus, the evidence of an Article 8 violation would have to be so clear that, in the words of s.37(1), an order for surrender would be *incompatible* with the State's obligations under the Convention or its protocols. The Act of 2003 therefore makes it entirely clear that it is the duty of the courts to have careful regard to constitutional and ECHR guarantees and protections.

Minister for Justice v. J.A.T. (No. 2)

72. In *Minister for Justice v. J.A.T. (No.2)*, cited at para. 5 above, this Court did have to consider a truly exceptional case, where the Article 8 circumstances were entirely outside the norm. The case involved a second EAW, issued in relation to the VAT offences alleged. The fact that a second warrant was issued was due to flaws in the first EAW, which, as this Court held, could have been, but were not, addressed in the application concerning that first warrant. A very considerable time had passed since the alleged offences. Further time had elapsed since the appellant had been arrested on foot of the second EAW.

73. Denham C.J. described the other unusual features of the case. Her judgment had regard to the oppressive effect that the two EAWs had on the appellant, his son and his family; the absence of explanation for the failure to remedy the defects in the first warrant; and the fact that there had been no engagement by the authorities, either on that issue or to explain the delays. She observed that the Court also had to have regard to the duty to protect fair procedures and the principle that a party in litigation should not benefit from proceedings which were, *de facto*, abusive of the court's process.

74. But critically in *J.A.T.*, there was clear, cogent medical evidence concerning the degree of incursion into the appellant's Article 8 private and family rights. The appellant himself was psychologically vulnerable. He was stressed, not sleeping, suffering from considerable anxiety and depression, and worried about the care of his son (per Denham C.J. at para. 67). The appellant reported to his doctor that his whole family was "falling apart" and that his dependent son not only suffered from chronic schizophrenia which would not improve, but would most probably deteriorate as he got older, especially if he continued to abuse alcohol (paras. 67–68). He had a

daughter in England who also had mental health issues, which appeared to have started around the time of the initial proceedings.

75. The uncontroverted medical evidence further established that not only that the appellant was in quite a distressed state, but that his doctor would fear for the appellant's mental health if he was required to go through the full process of court appearances and extradition proceedings for a second time. The appellant's wife was not in a position to be the son's primary carer, and the appellant played a primary role in running the family. This was an almost unique set of circumstances.

76. O'Donnell J.'s judgment concurred with the order proposed by Denham C.J. His judgment, too, forms part of the *ratio*. It laid particular emphasis on the fact that, in EAW proceedings, considerable weight is to be given to the public interest in ensuring that persons charged with offences actually do face trial (para. 4). He referred to the "constant and weighty" interest in surrender under an EAW, as well as under bilateral or multilateral extradition treaties. He pointed out that the fact that people accused of crimes should be brought to trial was not only a fundamental component of the administration of justice in a domestic setting, but also internationally. He further mentioned the important and weighty interest in ensuring that Ireland not be seen as a haven for fugitives and to honour its treaty obligations; if anything, there was a greater interest and value in ensuring performance of those obligations entailed by membership of the EU (para. 4). The judgment identified what are described as the *particular* and *specific* factors in *J.A.T.*: the repeat application, lapse of time, delay, impact on the appellant's son, and knowledge on the part of the requesting and executing authorities of those factors, all weighed cumulatively (para. 10).

77. At para. 2, O'Donnell J. pointed out that when, under United Kingdom ("U.K.") legislation, the courts in the neighbouring jurisdiction had given consideration to Article 8 defences, the consequence had been to give rise to a substantial number of subsequent applications where such defences had been relied upon (see, the judgment of the U.K. Supreme Court in *HH v. Deputy Prosecutor of the Italian Republic, Genoa* [2012] UKSC 25; [2012] 4 All ER 539). The question of the weight to be given to public and private interests was later reviewed in that jurisdiction, when, in a subsequent judgment, *Polish Judicial Authorities v. Celinski and Ors.* [2015] EWHC 1274 (Admin); [2016] 3 All ER 71, a Divisional High Court of England and Wales laid considerable emphasis on the principle that substantial

weight should be given to the public interest in compliance with extradition requests, the undesirability of the United Kingdom being seen as a haven for fugitives from justice, and the fact that the judgment in *HH* had to be seen within its own specific factual context, where there were highly unusual Article 8 features (paras. 8–9). The Divisional Court emphasised that "proportionality" questions, the culpability of the defendant and the integrity of the sentencing regime in each individual state were matters for the issuing state (paras. 12-13). While persuasive judgments from the neighbouring jurisdiction will always be illuminating, it is important to emphasise that the terms of the U.K. Extradition Act, 2003, and the duties of a court in considering such applications, are very different from those contained in the Irish Act of 2003.

Consideration

78. Having analysed the effect of the statute, and the nature of the test as explained, it is then necessary to consider the facts as fully outlined in the High Court judgment. Applying the principles with their correct weighting, the evidence adduced must be evaluated to determine whether an order for surrender should be made. As well as other factors, counsel for the respondent urged the Court to take into account the passage of time which had elapsed. No authority was cited to this Court for the proposition that the elapse of time, *per se*, could give rise to a refusal to surrender. One cannot, of course, preclude the possibility that, in a given situation, very lengthy delay, perhaps giving rise to exceptional Article 8 consequences, could be a significant factor in an EAW application. But the question is whether this is such a case? For the purposes of this appeal, counsel for respondent Minister prepared a chronology of events. The reference to the *Kovalkovas* judgment is explained below this chronology.

79. Chronology:

11th June, 1989: Respondent's date of birth

2nd September, 2003–21st May, 2005: 43 offences committed

17th November, 2004: Respondent convicted of 7 offences

10th February, 2005: Respondent convicted of 2 further offences

4th November, 2005: Respondent convicted of 7 further offences

28th February, 2006: Respondent convicted of 25 further offences

30th June, 2006: Respondent convicted of 1 further offence

1st July, 2006: Respondent convicted of 1 further offence

Composite sentence imposed: 5 years and 8 months

22nd June, 2009: Respondent released on conditional parole

12th September, 2011: Lithuanian court revoked his parole

2nd December, 2013: EAW issued by the Lithuanian Ministry of Justice

10th November, 2016: *Kovalkovas* judgment delivered by the CJEU (see, 477/16 BPU)

9th December, 2016: Notice from Ministry of Justice regarding modification of the EAW

21st December, 2016: New EAW issued by regional court

April, 2018: EAW transmitted to the Central Authority

30th April, 2018: Central Authority in Ireland requests additional information

7th May, 2018: Additional information received (No. 1)

14th May, 2018: EAW endorsed by the High Court

28th July, 2018: Respondent arrested

29th July, 2018: Respondent brought before the High Court

30th July, 2018: Respondent was given bail

26th September, 2018: Respondent filed points of objection and affidavit

11th October, 2018: Central Authority requested further information

24th October, 2018: Additional information received (No. 2)

18th January, 2019: Surrender hearing before the High Court

1st March, 2019: High Court judgment delivered

27th May, 2019: High Court refused to grant certificate of leave to appeal

4th June, 2019: Notice of Appeal to the Supreme Court

2nd August, 2019: Determination of the Supreme Court ([2019] IESCDET 193)

22nd August, 2019: Notice of Intention to Proceed (filed late by consent)

80. As the High Court judge correctly concluded in this case, there were indeed significant elapses of time. The respondent served three years out of the five-year and eight-month composite sentence finally imposed on him on the 1st July, 2006. He was granted parole on the 22nd June, 2009. He was released on the 1st July of the same year. The order for release was revoked in September 2011. The High Court judgment infers that the respondent came to Ireland in late 2011 or 2012. At some point, he was placed on the wanted list in Lithuania. But the authorities did not establish his whereabouts until the year 2013.

81. The Central Authority in Ireland requested further information as to the reasons for delay. The Lithuanian Ministry for Justice had previously issued an EAW in 2013. But, in fact, the warrant before the High Court was issued in Lithuania in December 2016 and was not transmitted to Ireland for execution until April 2018.

82. Counsel for the Minister referred this Court to evidence that on the 9th December, 2016, the Siauliai County Court in Lithuania received a notice regarding what is termed "modification" of the earlier warrant for the respondent. Counsel submits that this modification was likely to have related to the judgment of the CJEU issued in the case of *Kovalkovas* a few weeks earlier, which held that the Lithuanian Ministry of Justice was not a "judicial authority" for the purpose of Article 6 of the Framework Decision, and was therefore not entitled to issue the warrant (see, *Kovalkovas* (Case C-477/16 PPU; 10th November, 2016) at para. 48).

83. But the High Court judgment under appeal also expressed the view that other elapses of time were also matters of significant concern. The judge observed that the elapse of time between the grant and revocation of parole had not been addressed by the requesting state, although if this had been the only period of unexplained delay it would not, of itself, be particularly significant. However, he went on to observe that, from the information available, it appeared that during the time between the grant of parole on the 22nd June, 2009, and the revocation of parole on the 12th September, 2011, the respondent was still amenable to the Lithuanian authorities, as they were monitoring his conduct, and were aware then that he had not fulfilled the parole conditions which led to the matter being returned to the relevant court on the 12th September, 2011 (para. 31).

84. The judgment also expressed concern as to the overall elapses of time which occurred, and that there had not been any full explanation for the elapse of time between the revocation of parole and when the earlier EAW was issued on the 2nd December, 2013. Perhaps the difficulty did indeed arise from the pending *Kovalkovas* case before the CJEU, which was not resolved until 2016. This was not explained in evidence. This was unsatisfactory and was not in full accord with the principles underlying the Act of 2003 and the Framework Decision.

85. On the 10th October, 2018, the Central Authority in Ireland asked for a further explanation regarding the elapse of time which had taken place between the issue of the second EAW in December, 2016 and its arrival in Ireland in April 2018. The response from the Lithuanian Central Authority was to the effect that further

information had been sought from the court of first instance and that it would not be possible to provide further information before the 22nd October, 2018, but that as soon as further information was received, it would be forwarded. No further information has emerged. One cannot but have some sympathy for the learned trial judge's concerns, both as to the elapse of time and the absence of information, both then and since.

86. The question of the passage of time from the commission of an offence no longer forms part of the framework of the 2003 Act. Section 40(a)–(b) of the Act, which formerly provided that a person should not be surrendered for a corresponding offence when, by reason of the passage of time, such person could not be proceeded against in this State, was deleted by s.19 of the Criminal Justice (Miscellaneous Provisions) Act, 2009 with effect from the 25th August 25, 2009, by virtue of the Criminal Justice (Miscellaneous Provisions) Act, 2009 (Commencement) (No. 3) Order 2009 (S.I. No. 330/2009). But this was not the only observation on the elapse of time question.

87. There are indications however that the High Court may have considered that elapse of time was sufficient in itself to defeat an EAW application. As indicated at para. 5 above, in the supplemental judgment delivered in response to the Minister's application to certify that points of law of exceptional public importance arose, the High Court judge observed that if the relevance of delay as a consideration had ever been in doubt in this area, the recent judgments of the Supreme Court in *Finnegan* (cited at para. 5 above) "put this point beyond doubt".

88. *Finnegan* dealt with the question of egregious delay in the issuing of a warrant. But the judgment of the majority of this Court was clearly limited to the unusual circumstances of that case. The judgment did not establish any general principle to the effect that delay in processing the warrant in that case could figure as a factor in an EAW assessment. In fact, in *Finnegan*, O'Donnell J. pointed out at para. 13 that, under the EAW regime, elapse of time itself "*cannot be* a ground for refusing surrender". (Emphasis added; see, also, *Minister for Justice, Equality and Law Reform v. Stapleton* [2007] IESC 30; [2008] 1 I.R. 669 and *Minister for Justice, Equality and Law Reform v. SMR* [2007] IESC 54; [2008] 2 I.R. 242). In itself then, delay cannot be a factor.

89. Though a matter of legitimate concern, in this case the delay is to be viewed against the respondent's private and family circumstances. Unless truly exceptional or

egregious, delay will not alter the public interest, although there may come a point where the delay is so lengthy and unexplained as to constitute an abuse of process, or to raise other constitutional or ECHR issues. The High Court judgment holds that there had been a significant dilution of the public interest which would ordinarily apply (para. 37). It posed what was characterised there as a modified and weakened public interest in surrender, evidenced by the elapses of time and other factors. Against this, it posed the private and family factors in the case (para. 38). But for the reasons set out above, there was a misapprehension as to the nature of the assessment. This is not a balancing exercise where public and private interests are placed equally on the scales. It is nonetheless necessary to have regard to the circumstances.

90. The question of weighting again arises in this section of the judgment under appeal. The public interest in making an order is clear, constant and substantial. But in this case, the judge also held that the elapse of time prior to 2011, from 2013 to 2016 and later from 2016 to 2018, did not "signify a pressing social need in Lithuania for the return of [the respondent]" (para. 35). He expressed particular concern regarding the delay from 2016 onwards in light of the previous elapses of time. What then are the family circumstances?

Private and Family Circumstances

91. The respondent lives with his partner and the two children near a provincial town. They signed a further lease for their home for nearly two years in early 2018. Both of their children attend/attended pre-school and primary school in Ireland. Both children are Irish citizens and have always lived in Ireland. The respondent is in *loco parentis* in relation to the older of the two girls and states his intention to continue so to act. His relationship with his partner has now continued for approximately seven years. Since he arrived in Ireland, the respondent has lived openly under his own name. The only two convictions against him are for driving without insurance and depositing grass cuttings in a place not designated for such purpose. The respondent's partner has no convictions. She works in a retail outlet. Both she and he are well-settled in the area. There are undoubtedly factors in the case which would attract sympathy, but beyond that the evidence simply does not go. The evidence falls very far short of that described in *J.A.T.*

92. It cannot be said therefore that there are "exceptional" Article 8 factors. The judge observed that the sole feature of particular interest was the young age of the children for which the respondent was responsible. He made the observation that the

potential effect of the loss of contact with their father for almost three years at their time of life would be obvious, particularly in the case of the child who was born in 2015 (para. 38).

93. He described the evidence on that aspect of the case as "general" and that, on the evidence, it was reasonable to conclude that the children's best interests would be vindicated by the continued provision of care and support by a present father (para. 38). While true, these observations make clear the lack of exceptionality—and the absence of cogent evidence—on the facts which distinguished this case from the highly unusual circumstances of *J.A.T.* These are undoubtedly factors which a Lithuanian court will take into account.

94. The contrast with the exceptional facts in *J.A.T.* is plain. For an Article 8 defence to succeed, it can only be on clear facts based and cogent evidence. The evidence must be sufficient to rebut the presumption contained in s.4A of the Act (see, para. 41 above). The circumstances must be shown to be well outside the norm; that is, truly exceptional. In the words of s.37(1), they must be such as would render an order for surrender "incompatible" with the State's obligations under Article 8 of the ECHR. This would necessitate that the incursion into the private and family rights referred to in Article 8(1) was such as to supervene the limitations on the right contained in Article 8(2), and over the significant public interest thresholds set by the 2003 Act itself.

95. The High Court judgment describes the youth of the offender at the time of his various offences. It can be said that many of the offences were thefts, sometimes significant and sometimes trivial. But the offences also included an assault on a car owner during the course of the theft of a car, where it appears, the respondent, was one of a group of three offenders who engaged in the crime. (para. 9). In the course of the offence, they falsely imprisoned the victim. But this consideration in the High Court judgment, was a type of "proportionality analysis" of the offences sentence and sanction. As this Court held in *Ostrowski*, these are not factors which an Irish court is entitled to take into account under the Act. But none of this precludes these issues being brought to the attention of the Lithuanian courts. However even taken cumulatively, none of these, or the Article 8 factors outlined, are sufficient to place this case in an "exceptional" category.

96. Were it to be the situation that, on surrender, the respondent would be entirely shut out from raising these circumstances, this might be a different case. Arguably,

such a preclusion would be a denial of fundamental rights. The warrant recites at para. 3.4 that the respondent was not personally served with the decision of the 12th September, 2011, but that he would be personally served with the decision without delay after surrender. Importantly, the EAW then goes on to recite that:

> "*When served with the decision, the person will be expressly informed of his or her right to a retrial, or appeal, in which he or she has a right to participate, and which allows the merits of the case, including fresh evidence, to be re-examined, and which may lead to the original decision being reversed; and – the person will be informed of the timeframe within which he or she has to request a retrial or appeal, which will be 7 days.*"

97. Later in the warrant, at box (h), it is stated that:

> "*The legal system of the Issuing Member State allows for a review of the penalty or measure imposed – on request, or at least after 20 years – aiming at a non-execution of such penalty or measure and/or – the legal system of the Issuing Member State allows for the application of measures of clemency to which the person is entitled under the Act, or practice of the Issuing Member State, aiming at non-execution of such penalty or measure.*"

98. These are important considerations regarding future compliance with fundamental rights in the event of the respondent's surrender. There is no evidence that the respondent would be precluded from raising any or all of the features of the case in the courts of the Republic of Lithuania.

Conclusion

99. On the basis of s.4A of the 2003 Act, recited at para. 30 earlier, and in the absence of any contrary evidence, this Court must presume compliance with the Framework Decision and the protections it contains. It must presume that any determination in Lithuania of what part, if any, of the balance of the sentence the respondent will now have to serve after a substantial elapse of time will be a judicial decision, following a proceeding where the respondent will be able to fully exercise his rights of defence, or mitigation, in an effective manner and thereby influence any final decision which could potentially lead to a loss of freedom.

100. No case has been made that, on surrender, a new hearing as to sentence or penalty in the Lithuanian courts will have any predetermined outcome; rather, it will be decided on the basis of the facts then adduced (see, *Tupikas* (Case C-270/17; 10th

August, 2017) at paras. 78–80, and *Ardic* (Case C-571/17 PPU; 22nd December, 2017) at para. 76).

101. For completeness, it may be helpful here briefly to address the questions which formed part of the application to the High Court to certify points of law for an appeal to the Court of Appeal. This judgment holds, therefore, that a court is not entitled to take into account the fact that a requested person is to return to serve the balance of a part-served sentence because of a breach of parole conditions, rather than to serve a sentence *ab initio*; or to assess the gravity of the breach of the parole conditions; or to consider whether the requested person has achieved rehabilitation since being released; or to hold that an omission to fully explain delay was in itself, sufficient, in conjunction with the other factors in this case, to warrant refusal.

102. It is natural that there will be human sympathy in a situation like this. But this must take second place to the duties which devolve upon the courts under the Framework Decision and the terms of the Act itself. The factors so fully outlined in the High Court judgment will doubtless be considered by the Lithuanian court. I would conclude that the High Court judgment misapprehended the test to be applied, and thereafter took into account features which are not permissible in an assessment of this type. While, of course, there were circumstances which differentiate this case from others, none of them were such as to render the facts of this case, truly exceptional, or well beyond the norm, such as would warrant a refusal to surrender.

103. I would wish to add, however, that the EAW system is predicated on mutual trust. If central authorities in an executing state request information about factors such as the elapse of time, a full explanation will not only be helpful to the court in an executing state, but will often be necessary for justice to be done. The information placed before this Court to explain the delay was insufficient. The information provided did not explain that the delay - if there was such - was as a result of the judgment of the CJEU in *Kovalkovas*. While it was suggested that further information would be available to explain the later delay, it was never forthcoming. The absence of proper and necessary information, even in response to direct requests, is not conducive to mutual trust and confidence. Such full exchanges of information, creating mutual trust and confidence, are fundamental to the operation of the scheme. The capacity to verify, as well as proceed on the basis of trust, is fundamental. But while these are unsatisfactory features of this case, they are of insufficient weight to be determinative. For the reasons set out in this judgment, I would nonetheless allow

the appeal and make an order that the respondent may be surrendered on the European Arrest Warrant to the Republic of Lithuania.

2/4/2020.