



THE SUPREME COURT

S:AP:IE:2020:000085

High Court 2018/136 EXT

Clarke C.J.

MacMenamin J.

Dunne J.

O'Malley J.

Baker J.

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

THE MINISTER FOR JUSTICE AND EQUALITY

APPLICANT/RESPONDENT

AND

IVO SMITS

RESPONDENT/APPELLANT

Judgment of Ms. Justice Iseult O'Malley delivered the 15th of April 2021

Introduction

1. This appeal is brought against the decision of the High Court (Paul Burns J., hereafter "Burns J."), ordering the surrender of the appellant on foot of a European Arrest

Warrant (“EAW”) pursuant to the provisions of the European Arrest Warrant Act 2003 as amended (see *Minister for Justice and Equality v. Smits* [2020] IEHC 389). The EAW was issued in the Republic of Latvia in 2015 but was not transmitted to this State until 2018. The central issue in the appeal is whether the potential impact on the appellant’s rights caused by a lapse of time between the issuing and execution of the warrant is a matter that requires judicial oversight, and therefore a judicial process in the issuing State.

2. The appellant does not suggest that it is for the courts of the executing State to conduct a proportionality assessment of the application for surrender. Rather, he argues that, where there has been a substantial lapse of time, any express or implicit assessment of proportionality by the courts of the issuing State at the time the EAW was issued may have become superseded or have been rendered void. It is contended that, where this may have occurred, the Framework Decision and the concept of effective judicial protection require that there be a procedure in the courts of the issuing State for the reassessment of proportionality and the assessment of the impact of surrender on fundamental rights. It is further argued that this, in turn, means that the courts of the executing State must be satisfied that such a court procedure is available in the issuing State.
3. On the facts of this case, it is common case that there is no mechanism under the criminal justice system of Latvia pursuant to which the appellant can seek such a reassessment of his sentence by a court if returned. The appellant says that in these circumstances his rights under Articles 8, 6 and 13 of the European Convention on Human Rights will not receive effective protection.
4. The respondent contends that the Framework Decision does not require or provide for a refusal to surrender based on a lapse of time between the issuing and transmission of a warrant.

Background

5. In May 2008 the appellant appeared in court and admitted guilt in respect of charges concerning the theft and misuse of his former girlfriend’s credit card. He was sentenced

to two years imprisonment. The sentence was suspended, but the matter was re-entered on the 20th October 2008 on the basis that the appellant had failed to comply with the conditions attached to it. In particular, he had not registered with the probation service or notified it of a proposed change of address (as required by statute) and had not paid compensation to the victim of the crime (as ordered by the sentencing court). The court accordingly activated the sentence in full.

6. The appellant has said on affidavit that he had become homeless as a result of his conviction, did not receive correspondence from the probation service and was unaware of the re-entry. (However, no argument is raised about the applicability of the rules relating to *in absentia* hearings in the issuing State.) When he became aware that the sentence had been activated, he lodged an appeal. Meanwhile he travelled to Ireland to take up employment, and has been here since November 2008.
7. The case then came before the appellate court. The appellant did not appear – he says that he was not notified of the date, but, again, no argument is raised on this aspect – and there was no explanation proffered to the court for his non-compliance with the conditions of his sentence. It was ordered that he be imprisoned for two years, less two days already served. This decision became enforceable on the 17th December 2008, and was forwarded to the police. It is accepted that this process involved, or was equivalent to, the issue of a national arrest warrant.
8. In November 2014 the court in Latvia received information from the International Cooperation Bureau of the Latvian police indicating that the appellant was residing in Ireland. On the 17th April 2015 the court proposed to the Prosecutor General’s office that an EAW should be issued.
9. According to a legal opinion obtained by the appellant, the Prosecutor General is, by law, an independent institution of the judicial branch of government and is not subject to interference by the executive. The opinion also explains that the procedure whereby a court makes a proposal for the issue of an EAW is provided for under the relevant Latvian legislation, which stipulates that a request for extradition may not be submitted if the seriousness or nature of the offence is disproportionate to the expense involved (Chapter 65 Art. 682(3), Criminal Procedure Law (Latvia, Translated)). The

International Cooperation Division within the office of the Prosecutor General refuses approximately 20% of the requests made to it, by reference to the principle of proportionality. The factors taken into account include the seriousness and nature of the offence, the harm caused to third parties, the administrative costs of extradition, the potential penalty to be imposed, and the suitability of alternative mechanisms such as the transfer of a custodial or other sentence to the Member State of residence for execution in that State. The decision of the Prosecutor General to issue an EAW is not thereafter subject to appeal or to review by the courts.

10. The EAW issued on the 8th June 2015. It was transmitted to this State on the 5th April 2018 and was endorsed by the High Court on the 30th April 2018. A subsequent request for information as to the conditions attached to the suspended sentence and the manner in which they had been breached was responded to. However, despite a direct request, no explanation has been offered for the lapse of nearly three years between the issue of the warrant and its transmission.
11. Throughout this period the appellant has resided and, at various times, worked, paid tax, claimed social welfare and studied in Ireland. Since becoming unable to work in physically demanding jobs due to long term issues with his back (which date back to 2006) he has obtained a Master's degree in Business Studies. In October 2014 he renewed his passport through the Latvian embassy in Ireland. This may have brought about the police communication in November 2014 to the Latvian court, with the information as to his whereabouts. In September 2017 he married an Irish citizen and for that purpose obtained a "freedom to marry" certificate, also from the Latvian embassy. He avers that they hope to have children. He states that he is positively involved in the local community. He has not come to any adverse garda attention and, indeed, has been commended by the gardaí for his assistance in relation to some incidents in the locality.
12. The appellant has adduced certain evidence about his health. He has undergone serious surgery for the removal of a growth and was, as of June 2020, on a waiting list for spinal surgery. He expresses a fear that he will not receive adequate treatment if imprisoned in Latvia. However, there is no evidence in this latter regard.

13. As the appellant was tried in person, and failed to appear at his appeal, he has no right to a retrial, a further appeal, or any other form of judicial remedy within the criminal justice system of Latvia in respect of the sentence imposed upon him.

The High Court judgment

14. In the High Court, the appellant argued that there was a lack of effective judicial involvement or protection in respect of the issuing of the warrant by the Prosecutor General's office, and that surrender would breach his rights under Articles 6 and 8 of the European Convention on Human Rights.
15. Burns J. noted that the original proposal for the issue of an EAW had come from the Latvian court, in April 2015, and that the court had responded to a request from the Prosecutor General for further information in May 2015. In those circumstances he held that there had been sufficient judicial input into the issuing of the warrant, including an assessment of the proportionality of issuing it.
16. The decision of the Court of Justice of the European Union in *Openbaar Ministerie v. ZB* (Case C-627/19 PPU) ("*ZB*") was discussed in this regard. In that case it was determined that the Framework Decision did not preclude the conferral of jurisdiction to issue an EAW for the execution of a penalty on an authority which, while participating in the administration of justice, was not itself a court and, further, that there was no requirement for the existence of a separate judicial remedy against the decision of such an authority to issue a warrant. In other words, where a body such as the Prosecutor General's office is empowered to decide to issue a warrant in respect of a sentenced person, there is no requirement to provide for an appeal to a court against that decision. The CJEU considered that the courts of an executing State could presume that the decision to issue a warrant met the requirements of the Framework decision, because the requested person had already benefited from all of the guarantees specific to the imposition of a sentence. The question of proportionality in such circumstances was answered by reference to the minimum gravity requirement that the sentence be at least four months imprisonment.

17. Counsel for the appellant had relied upon the opinion of the Advocate General in *ZB* for the proposition that a lapse of time between the imposition of the sentence and the issue of the warrant might mean that the proportionality assessment was out of date. However, Burns J. considered that the reasoning in the opinion had not been adopted by the CJEU in its decision. In any event, even if such reasoning were to be applied, he did not accept that the appellant's personal circumstances and history in this State were of such weight or significance as could require a reversal of the decision to issue the warrant. They did not raise any risk that surrender would represent such an interference with the appellant's family life as to constitute a breach of his rights under Article 8 of the Convention.
18. Counsel for the appellant also relied upon Article 8 in the context of a separate submission that there would be a breach of his rights under Article 6, because he would not have access to any court procedure for the purpose of arguing the issue of proportionality. It was contended that the decision of this Court in *Minister for Justice and Equality v. Vestartas* [2020] IESC 12 ("*Vestartas*") supported the proposition that surrender could be refused if the requested person would not have an opportunity to raise a proportionality argument in the courts of the issuing State. The judgment in *Vestartas* had referred to the evidence in that case that the requested person could apply for a retrial or appeal, allowing the merits of the decision to activate a sentence to be re-examined, and had suggested the possibility that the position might have been different if he were to be entirely shut out.
19. Burns J. noted that it had been made clear in paragraph 94 of the *Vestartas* judgment that Article 8 rights could justify a refusal to surrender only on the basis of cogent evidence in a truly exceptional case. He found that the Article 8 factors relied upon by the appellant in this case fell far short of this standard. He also considered that this Court, in *Vestartas*, had not gone so far as to hold that surrender would have been refused in the absence of a mechanism for appeal to or review by a court, since there could be other satisfactory procedures available such as review by a parole board.
20. As far as the Article 6 argument was concerned, Burns J. found that in all of the circumstances of the case, the surrender of the appellant, in the absence of an automatic right to apply to a court to review the proportionality of the sentence at this stage, would

not give rise to an egregious or flagrant denial of his fundamental rights or amount to a flagrant undermining of the rule of law.

Further evidence of Latvian law

21. During the case management of this appeal, and with the consent of the respondent, the appellant obtained and put before the Court further evidence of the Latvian law relevant to his position. This was received on a provisional basis but has in any event proved to be uncontroversial.

22. The new opinion confirmed that the appellant would be sent to prison to serve his sentence if returned, and that there would be no method by which he could apply to a court to mitigate his sentence on grounds of delay, family rights or rehabilitation. It would not be possible to judicially review the decision to impose the two-year sentence on the grounds of delay. In practical terms, the only basis upon which he would have access to a court, in order to have the sentence reduced or overturned, would be if his health were to deteriorate to such an extent that it would prevent him from serving it. A similar application to court can in theory be made in other defined circumstances that appear to be unlikely to arise in the appellant's case – where a sentenced person has assisted in the investigation of a more serious crime, or if there are newly discovered facts pertaining to his case.

23. While serving his sentence the appellant would be entitled to apply for parole. Such an application would be based only on good behaviour in prison, and not on any consideration of delay in enforcing the sentence of imprisonment.

Submissions in the appeal

The appellant

24. At this stage the appellant accepts that there was sufficient judicial protection involved in the decision to issue the EAW and does not maintain his earlier arguments in that respect. It is also accepted that delay in itself cannot normally be seen as a bar to surrender. The main argument made on his behalf is that in this case the delay between the issuing of the warrant and its transmission has affected his rights, and in particular

his rights under Article 8 of the Convention. It is submitted that an assessment of proportionality (whether express or implied) made at the time of the issue of an EAW is capable of becoming superseded or rendered void by the elapse of time, and that there must as a result be a court process in the issuing State capable of reassessing proportionality with a view to a decision that the sentence should not be enforced.

25. It is submitted that *ZB* should be distinguished, on the basis that its rationale cannot be applied to the facts of the instant case. In *ZB*, the EAW was issued and executed within a matter of weeks of the original sentence. In the instant case, the facts upon which the appellant places most reliance – his marriage and his declining state of health – arose after the issue of the warrant and could not, therefore, have been taken into account by the court that made the proposal to the Prosecutor General’s office. Accordingly, while it is now accepted that there was a degree of judicial protection at the preliminary stage of the EAW process in Latvia, it is argued that there was none thereafter and that the assessment made in 2015 has become out-of-date due to an (unexplained) elapse of time.

26. On the question whether there must be a court remedy by which the impact of the lapse of time on fundamental rights can be assessed, the appellant submits that there has been an emerging recognition by the European Parliament of the need to protect fundamental rights in the EAW process. It is further submitted that the judgment of the CJEU in the cases of *Aranyosi* and *Căldăraru* (Joined cases C-404/15 and C-659/15 PPU) envisages the refusal of surrender on grounds of fundamental rights in exceptional cases, even in the absence of any express provision in the Framework Decision. It is suggested that, while those cases were concerned with prison conditions, the principle has since been expanded to other alleged violations of fundamental rights and the rule of law.

27. It is submitted that the concept of “an effective remedy before a national authority”, as set out in Article 13 of the Convention, must in a case of this nature involve a judicial authority if there is to be a re-evaluation of proportionality and the possible setting aside of an EAW after it has become “stale”. With reference to the case of *Ramirez Sanchez v. France* (Grand Chamber, app. No. 59450/00, Strasbourg, 4 July 2006) (“*Ramirez Sanchez*”), it is argued that this follows from the Convention requirement that the

authority in question must be able both to deal with the substance of an “arguable” complaint and to grant appropriate relief. The appellant says that his rights under Article 8 are engaged, and that he has an “arguable” case, based on the evidence, that they will be violated. For this purpose, he says that he does not have to meet the threshold standard set out in *Minister for Justice and Equality v. J.A.T. (No.2)* [2016] 2 ILRM 262, [2016] IESC 17 (“*J.A.T. (No.2)*”).

28. The appellant refers to the decision of this Court in *Minister for Justice, Equality and Law Reform v. Stapleton* [2008] 1 I.R. 669 and to the discussion there of the fact that, in that case, there was a judicial review procedure available in the issuing State that could provide a remedy in cases where there had been a very long lapse of time. In the circumstances, it was found that that procedure, carried out in the State where the evidence and witnesses were located, would be demonstrably more efficient and convenient than a hearing in the Irish courts. The argument here is that the decision was based, at least in part, on the fact that the law of the issuing State provided a process to ensure that fair trial rights would not be violated.

29. Finally, the appellant submits that, if the court of the executing State intends to dismiss a claim that an asserted violation of Article 8 rights should bar surrender, it must first satisfy itself that a remedy is available in the issuing State in respect of the alleged violation. It is argued that the jurisprudence indicating that surrender should not be refused on the basis of an Article 8 claim is predicated on the assumption that rights can be protected in the issuing State. As an example, the appellant cites the reference in *Vestartas* to the statutory presumption provided for in s. 4A of the European Arrest Warrant Act 2003 (as amended) that an issuing State will comply with the requirements of the Framework Decision unless the contrary is shown, with “cogent evidence” being required to rebut the presumption. The appellant submits that the presumption is rebutted where it is shown that a remedy for a violation will not be available in the issuing State. In this case, he says that it is rebutted because there will be no judicial forum in Latvia in which he can ventilate his complaint that enforcement of the sentence now would be disproportionate having regard to his rights under Article 8, whether that is by way of a rehearing of the sentence, a judicial review, or a procedure by which the EAW could be set aside.

The respondent

30. The respondent argues that the Framework Decision does not provide scope for refusal of surrender on the ground of elapse of time in the issuing or transmission of an EAW. She starts with the proposition that the proportionality of invoking the EAW process is a matter for the issuing State, to be assessed by reference to the minimum gravity requirement. Where the requested person has been convicted and sentenced, the fact that the sentence is over four months in duration demonstrates that the proportionality requirement has been met and should not be further examined.

31. It is submitted that the appellant's emphasis on the absence of any facility in Latvia to appeal or review the decision to issue the warrant in this case is misplaced, since he is sought for the purpose of serving his sentence and not for prosecution. This was the core issue in *ZB*, where the CJEU stressed that in a sentence case the executing court can assume that the issue of the warrant resulted from national proceedings in which the person concerned had enjoyed all relevant protections. This appellant had exercised his right to appeal, but had effectively abandoned that process and left Latvia in the knowledge that he was obliged to serve a sentence. The right to an appeal (under the 7th Protocol to the Convention) is not inexhaustible. The Framework Decision does not confer a right to a further appeal simply on the basis that the person concerned absconded for a significant length of time.

32. The respondent submits that the argument made by the appellant, to the effect that there has been no judicial scrutiny of the effects of the delay between 2015 and 2018, is based upon the reasoning of the Advocate General in *ZB* which was not adopted by the CJEU and must be taken to have been rejected by it. The delay in this case is said to have been sufficiently explained, and in any event it could not be described as egregious and does not require that the appellant be given an extra layer of protection.

33. It is submitted that the absence of a court procedure for a reassessment of proportionality does not rule out the possibility of other, non-curial, forms of relief, and that the appellant has adduced insufficient evidence in relation to, for example, remission of sentence and parole in Latvia.

34. The respondent stands over the finding by the trial judge that there were no exceptional Article 8 factors taking the case outside of the norm. The facts are contrasted with those in *J.A.T. (No. 2)*, and the analysis of the public interest considerations set out in the judgment of O'Donnell J. is relied upon. The absence of a potential remedy in the issuing State, in a case where Article 8 rights are engaged at a high level, might be relevant if there were cogent evidence of a real risk of violation. However, it is contended that this cannot be equated with the proposition that, unless there is such a remedy, the legal system of the issuing State must be regarded as fundamentally defective.

Possible reference to the Court of Justice of the European Union

35. The application for leave to appeal to this Court did not suggest that any issue might be referred to the CJEU for preliminary ruling under Article 267 TFEU. However, in the joint document submitted by the parties pursuant to Practice Direction SC21, the appellant indicated that the question of a reference may arise insofar as the interpretation of the concept of “effective judicial protection” for which he contends is not based on clear precedent.

Discussion

36. The parties have referred to several CJEU judgments and judgments of this Court dealing with the role of the concepts of proportionality and delay in the EAW process. The first question here, then, is whether the principles to be derived from the case law can resolve the dispute in the instant case or whether it raises a new issue requiring a ruling from the CJEU.

37. However, while the appellant does not base his submissions on any argument about his constitutional rights, it may be appropriate to start with consideration of the judgment in *Finnegan v Superintendent of Tallaght Garda Station* [2019] IESC 31 (“*Finnegan*”). This case has, of course, nothing to do with European Arrest Warrants but is relevant in terms of setting out the domestic constitutional context. The appellant had walked out of the open prison in which he was serving a sentence, and had gone to live openly in the area of his original home. Through human error on the part of the gardaí he was

not located for several years, and he was finally arrested some five years after he had absconded.

38. It is relevant to point out that Mr. Finnegan's case came before the courts by way of judicial review, seeking declaratory relief, rather than within the criminal justice process. He argued that his arrest breached his constitutional right to fair procedures by reason of the delay and that it would be unfair, oppressive or unjust to return him to prison. There is no suggestion in the judgments that he could, or should, have applied for an extension of time to bring a late appeal against his original sentence. Any such appeal, even if admitted, would have to have been based on an argument that the sentence resulted from an error in principle on the part of the sentencing court, and his current circumstances would have been irrelevant unless such an error was first established.

39. While the three members of this Court who heard the appeal agreed that in the circumstances it would be oppressive and unjust to return the appellant to prison, certain remarks in the judgments should be noted. Firstly, none of the judgments are based on the question of fair procedures (where delay is often relevant for practical reasons), since there was no procedure to be adopted prior to the execution of a committal warrant. Clarke J. observed that there were no earlier cases directly on point, and that insofar as a general principle could be determined it was that there might be circumstances in which it was not constitutionally proper to enforce an otherwise valid warrant or order for the committal of a person to prison. He and O'Donnell J. agreed that the source of this principle lay in the fact that the constitutional requirement that persons only be imprisoned "in due course of law" went beyond compliance with formal legal provisions, so as to incorporate overriding obligations of constitutional fairness. Similarly, McKechnie J. considered that circumstances could arise in which the exercise of the statutory power to execute a committal warrant could be unjust, oppressive or invidious.

40. It was therefore possible that very limited, specific circumstances, which would have to be very weighty indeed, might outweigh the imperative that a sentence imposed by a court should be served. Such cases would be exceptional since a person who escapes from lawful custody can normally have no other expectation but that he or she may be

arrested and required to serve the balance (as well as perhaps facing prosecution in respect of the escape). As O'Donnell J. pointed out, the primary reason for the fact that a warrant issued by the court has not been fully executed, and the sentence therefore not served, will be the wrongful act of the person who absconds, and who does not thereafter surrender.

41. The decision in *Finnegan*, therefore, establishes that the jurisdiction to relieve a person who has absconded from the obligation to serve a sentence in this State is rooted in constitutional principles and, moreover, to be exercised only in very exceptional cases. It is also worth noting that McKechnie J. made specific reference to the fact that the appellant was not relying upon Article 8, and expressed his own view that the case law relating to EAWs demonstrated that this provision had very little, if any, application in the context under consideration.
42. Returning to the context of the EAW system, it is clear that the fact that the individual concerned may be subjected to a process that would not be permitted under the terms of the Constitution will not, in itself, be a ground for refusal of surrender. That much is established by *Minister for Justice, Equality and Law Reform v. Brennan* [2007] 3 I.R. 732 ("*Brennan*") and the judgments following it.
43. The respondent in *Brennan* had absconded from the United Kingdom while serving a number of sentences. His surrender was sought on foot of an EAW that stated that, in addition to being required to serve the balance of the sentences, it was intended to prosecute him for the offence of escaping from lawful custody. The principal argument made on his behalf in the appeal was that this offence carried a mandatory sentence that would not take into account the particular circumstances of his case. This, it was argued, would be a breach of his right under the Constitution to a sentence which was proportionate to those circumstances.
44. This Court found that there was no basis for the assertion that a trial judge would be obliged to impose such a sentence. However, the judgment (delivered by Murray C.J.) went on to make it clear that such an argument – to the effect that a person could not be surrendered if the sentencing provisions of the issuing State did not accord with the principles of Irish law, as constitutionally guaranteed – did not reflect the intention of

the Oireachtas as provided for in s. 37(1) of the Act of 2003, or the intent of the Framework Decision, and could not succeed. It was observed that there was no authority for the proposition that surrender, or extradition, would contravene the Constitution simply because the legal system of the requesting State differed from that in this jurisdiction.

45. The concluding substantive paragraphs of the judgment, albeit *obiter*, have been of significant importance in subsequent cases:-

“39. The manner, procedure and mechanisms according to which fundamental rights are protected in different countries will vary according to national laws and constitutional traditions. The checks and balances in national systems may vary even though they may have the same objective, such as ensuring a fair trial. There may be few, if any, legal systems which wholly comply with the precise exigencies of our Constitution with regard to these matters. Not all for example will provide a right to trial by jury in exactly the same circumstances as our Constitution does in respect of a trial for a non-minor offence...

40. That is not by any means to say that a court, in considering an application for surrender, has no jurisdiction to consider the circumstances where it is established that surrender would lead to a denial of fundamental or human rights. There may well be egregious circumstances, such as a clearly established and fundamental defect in the system of justice of a requesting state, where a refusal of an application for surrender may be necessary to protect such rights. It would not be appropriate in this case to examine further possible or hypothetical situations where this might arise. The sole matter which I wish to make clear here is that the mere fact that a trial or sentence may take place in a requesting state according to procedures or principles which differ from those which apply, even if constitutionally guaranteed, in relation to a criminal trial in this country does not of itself mean that an application for surrender should be refused pursuant to s.37(2) of the Act.”

46. In *Minister for Justice, Equality and Law Reform v. Stapleton* [2008] 1 I.R. 669, this Court considered the impact of a lapse of time in the context of fair trial rights in the requesting State. In that case, the respondent and his family had lived in Ireland for some nine years prior to 2005, when an EAW was issued by the United Kingdom seeking his surrender for the purpose of prosecuting fraud offences alleged to have been committed in the 1970s and early 1980s. An unexecuted bench warrant had been issued in 1985 on foot of his failure to appear for trial in respect of other charges.
47. The respondent's case was that he could not have a fair trial in the United Kingdom, because much of the evidence upon which he would have relied was no longer available. The High Court refused to order his surrender, finding that the lapse of time was such as to constitute a breach of the respondent's right under the Constitution and the Convention to a trial within a reasonable time. The trial judge did accept that the respondent would be entitled to seek prohibition of his trial in the English courts, but considered that the Irish Courts were in just as good a position as the UK courts to determine the issue. He also found that the English jurisprudence did not show the same regard for the right to an expeditious trial as the Irish case law.
48. The central issue in the Minister's appeal was seen by Fennelly J. (with whom all the other members of the Court agreed) as being the extent to which Irish courts should seek to incorporate Irish case law, relating to lapse of time or delay in criminal proceedings, into the EAW surrender process. The core of the debate on this issue was whether the undisputed delay was something to be considered by the courts of the executing State or was a matter for the courts of the issuing State.
49. Having referred to the principles of mutual confidence and mutual recognition of judicial decisions that underlie the EAW system, Fennelly J. stated that it followed that the courts of an executing State, when dealing with a request for surrender, must proceed on the assumption that the courts of the issuing State will respect human rights and fundamental freedoms as required by Article 6.1 of the Treaty on European Union. He further noted that Article 1.3 of the Framework decision imposed an obligation on issuing States to respect fundamental rights as guaranteed by the Convention "*and as*

they result from the constitutional traditions common to the member states, as general principles of community law”.

50. In those circumstances, the trial judge had erred in holding that the respondent was entitled to argue the issue in this jurisdiction, and in seeking parity of criminal procedures between the two States. As had been held in *Brennan*, surrender under the Act of 2003 could not be refused simply because the manner in which a trial in the requesting State, including the manner in which a penal sanction was imposed, would not conform with the exigencies of the Irish Constitution. It was again stated that this did not mean that the court would not have jurisdiction to consider circumstances where it was established that surrender would lead to a denial of fundamental or human rights. However, the differences discerned by the trial judge between the exercise here and in England of the right to seek prohibition could not amount to the establishment of an infringement of the right to a fair trial, or to fair procedures, whether by reference to the Convention or to the Constitution. They certainly did not amount to “a clearly established and fundamental defect in the system of justice of [the] requesting State”, as envisaged by Murray C.J. in *Brennan*.
51. Fennelly J. concluded that the respondent would have available to him a procedure in the issuing State that would enable him to seek a remedy based on the lapse of time. On the facts of the case, it would be demonstrably more efficient and more convenient to debate the matter in the courts of that country, given that the witnesses and documentary evidence would be more readily available.
52. It is also relevant to note that the Court considered, without ruling on the effect, that the respondent was responsible for a very substantial part of the time that had elapsed. A person could not be heard to claim that delay in the prosecution of extradition proceedings was unfair or oppressive, where he himself had been the author of the delay. Again, I bear in mind that the appellant in the instant case does not make that argument as such.
53. The debate in many subsequent cases seems to have been more focussed on the question whether Convention rights would be violated by surrender. One example is *Minister for Justice, Equality and Law Reform v. Rettinger* [2010] 3 I.R. 783, where this Court

refused to surrender a person to Poland because of the existence of a real risk that he would be subjected to prison conditions that violated the Article 3 prohibition against torture or inhuman and degrading treatment.

54. Many more recent cases have been based, in particular, on claimed violations of Article 8 rights with reference to the principle of proportionality. The role of this principle may require to be clarified, in the context of the instant case, in that the concern here is with the decision to issue an EAW and not with the sentence applicable to the actual offence. It is true that the issuing judicial authority is obliged to act proportionally in making a decision whether or not to issue a warrant. However, it is not for the courts of the executing State to subject a *sentence*, whether already imposed or sought to be imposed, to a review for proportionality. Thus, in *Minister for Justice and Equality v. Ostrowski* [2013] 4 I.R. 206 (“*Ostrowski*”) this Court held that the High Court had erred in conducting an assessment of proportionality by reference to what the trial judge considered to be the trivial nature of the offence concerned and the likelihood that a custodial sentence would not be imposed in the issuing State. Subject to s.37 of the Act of 2003, a court is required to order surrender if the provisions of the Act are otherwise complied with.

55. However, there may be exceptional cases where the courts of executing States can take the view that the particular facts establish a real risk that surrender would indeed violate the rights of the individual. The leading Irish authority here is *J.A.T. (No.2)*, which involved another United Kingdom EAW in respect of a proposed prosecution for financial crimes, allegedly committed between 1997 and 2005. An EAW issued in 2008 was held to be deficient by this Court, in 2010. The appellant was arrested on foot of a second warrant about eighteen months later. The High Court judge considered that although, in his view, there had been an abuse of process in the manner in which the appellant’s rendition had been sought, surrender should nonetheless be ordered.

56. On appeal, Denham C.J. satisfied that there was an evidential basis for the finding of abuse of process. However, O’Donnell J., who delivered the leading judgment, stressed the necessity to distinguish between lapse of time and delay. Such delays as there had been were factors in the Court’s assessment but fell far short, whether by themselves or in conjunction with the fact that this was the second warrant issued in respect of the

appellant, of establishing any abuse of process or grounds for refusal of surrender. If in a particular case a proper finding of abuse of process was made, the appropriate response would be to stay the proceedings.

57. The members of the Court were agreed that the relevant factors in the case included the considerable (unexplained) lapse of time since the offences and since the first arrest of the appellant, his personal health vulnerabilities and his family circumstances. These latter circumstances included the particularly serious health issues and needs of his son, for whom the appellant was the primary carer.
58. O'Donnell J. emphasised that the case must be seen as one of the rare and indeed exceptional cases where it could be said that surrender would offend due process and interfere with the rights of the appellant to such an extent that it must be refused. In relation to Article 8 of the Convention, he noted the appellant's medical issues but stressed that it would almost always be the case that such considerations could not in themselves be a ground for refusal of surrender, any more than they could be grounds for prohibition of a trial in this jurisdiction. The potential impact of surrender on the appellant's son was an important consideration. Again, however, these considerations would not in themselves have been a ground for refusal if the first warrant had been in proper form. However, it was relevant that this was a second application and that there had been avoidable delay on the part of the authorities in both jurisdictions. The cumulative effect was sufficiently powerful to justify refusal, although O'Donnell J. made it clear that in his view the case was nonetheless close to the margin. He observed that in any future case it would not be necessary to carry out any elaborate factual analysis or weighing of matters unless it was clear that the facts came at least close to a case which could be described as truly exceptional in its features.
59. The judgment in *Vestartas* must be read in this context. The appellant in that case had committed a large number of offences in Lithuania when he was fourteen or fifteen years old. Having served part of a custodial sentence he was released on parole in 2009. His release was revoked in 2011. He came to Ireland at or around that time. The Lithuanian authorities became aware of his whereabouts in 2013, but an EAW was not transmitted to Ireland until 2018. By that stage he was almost thirty years old, had been in a relationship for seven years and was part of a family unit with two young daughters,

both born in Ireland. The trial judge, considering that he was mandated to do so by the judgment of McKechnie J. in *Ostrowski*, conducted a “fact-specific enquiry”, for the purpose of striking a “fair balance” between the rights of the individual and the public interest. He refused surrender on the basis of his findings that the respondent had served part of his sentence, that the breach of his parole conditions in Lithuania was not serious, that he had shown evidence of rehabilitation while residing in this jurisdiction and that there had not been a satisfactory explanation for the delay prior to the issuing of the EAW.

60. In allowing the Minister’s appeal, MacMenamin J. (speaking for the Court) stressed again that it was not the duty of an Irish judge to apply, to proceedings that had been or were to be conducted within the requesting State, the principles or considerations that would be applicable to trials or other criminal proceedings in Ireland.
61. Moving on to consideration of the Article 8 issues, MacMenamin J. noted the presumption, set out in s.4A of the Act, that the issuing State will comply with the Framework Decision. McKechnie J. had not suggested in *Ostrowski* that the High Court should in general apply a proportionality test and had indeed stated that such would not be possible. The outcome of *Ostrowski* was clear – to be successful, an Article 8 claim must cross a high threshold. If there is cogent evidence of non-compliance, then the Irish court may have to address the issues arising and apply a proportionality test in that context. In so doing the court must commence on the basis of a presumption that the issuing State will comply with the Framework Decision and, thus, that the rights of the individual are appropriately protected. It must also have regard to the limitation contained in Article 8(2) of the Convention and to the public interest considerations inherent in the Framework Decision and the Act. The judgment also refers in some detail to the “almost unique” personal circumstances of the appellant in *J.A.T. (No. 2)* and to the particular and specific factors that led to the Court’s conclusion in that case.
62. Dealing with the issue of the elapse of time, MacMenamin J. noted indications that the trial judge might have thought this could in itself suffice to defeat an EAW application, by reference to the decision of this Court in *Finnegan*. However, the decision in *Finnegan* had clearly been limited to the unusual facts of that case. Delay could not alter the public interest considerations unless it reached a point where it was so lengthy

and unexplained as to amount to an abuse of process, or to raise other constitutional or ECHR issues. On the facts in *Vestartas*, delay was a matter of legitimate concern but was to be viewed against the background of private and family circumstances that fell very far short of those in *J.A.T. (No.2)*.

63. For the purposes of the instant appeal, it is necessary to emphasise that the decision to revoke the release of the respondent in *Vestartas* had been made in his absence, and that the warrant recited that he would be entitled to a rehearing. At paragraph 96 of the judgment, MacMenamin J. stated that “*Were it to be the situation that, on surrender, the respondent would be entirely shut out from raising [his changed personal circumstances], this might be a different case. Arguably, such a preclusion would be a denial of fundamental rights.*” That comment must be read in the context of a case about a decision made *in absentia*, which was to be subject to a rehearing in compliance with the Framework Decision.
64. *Vestartas* is, therefore, primarily a case in which the general principle, that the system of surrender under the Framework decision is intended to operate directly between judicial authorities, in order to ensure the free circulation of court decisions in criminal matters, was given full application. It confirms that the courts of this State are not to act as appellate courts scrutinising the appropriateness of either a conviction or sentence grounding an EAW, since it is presumed that the judicial process in the issuing State will have been attended by the necessary guarantees of fundamental human rights and legal principles.
65. Turning to the CJEU jurisprudence, certain principles relating to judicial involvement in the process are relevant and may require to be put into context. In some Member States the “issuing judicial authority” is not a court. Where that is so, the persons or bodies in question must be able to assure the judicial authority of the executing State that, as regards the legal order of the issuing State, they act independently in the execution of the duties inherent in the issuing of an EAW. If they cannot give that assurance (because, for example, they may be subject to directions from the executive), they should not be regarded as “issuing judicial authorities” for the purposes of the Framework Decision.

66. The reason for that is explained in *OG and PI (Public Prosecutors of Lübeck and of Zwickau)* (Joined cases C-508/18 and C-82/19 PPU) (“*OG and PI*”). The legal basis for the Framework Decision was Article 31 TEU (now replaced by Article 82(1)(d) TFEU), which refers to cooperation between judicial authorities in relation to proceedings and the enforcement of decisions. The word “proceedings” encompasses the entirety of criminal proceedings “*namely the pre-trial phase, the trial itself and the enforcement of a final judgment delivered by a criminal court in respect of a person found guilty of a criminal offence*”. Where an EAW is issued for the purpose of conducting a prosecution, an authority which is, under national law, capable of making the decision to prosecute is capable of being regarded as falling within the scope of the Framework Decision.
67. However, the protection of fundamental rights requires that there be effective judicial protection in at least one of the two decisions involved in the issuing of a national arrest warrant and the subsequent issuing of an EAW. The necessity for this protection is in part explained by the fact that the individual concerned will, by definition, not be involved in the process and indeed may be unaware of it. When the decision to issue an EAW is being made, it is necessary for the decision-maker to review whether the relevant conditions have been met and, in particular, to examine whether or not it is proportionate to issue that warrant in the light of the circumstances of the case. This examination is necessary even where the process is based on a decision delivered by a national judge or a court. For that reason, the “issuing judicial authority” must be capable of exercising its responsibilities objectively and without the risk that its decisions will be subject to external directions or instructions.
68. It is necessary to refer again here to the opinion of the Advocate General and the judgment in *ZB*. The central issue in that case concerned the issue of an EAW by the prosecution authority of Belgium in respect of a sentenced person. The evidence was that the prosecutor participated in the administration of justice in Belgium and acted independently in the execution of his responsibilities concerning the issue of warrants. The referring court asked whether it was necessary that the individual should have the possibility of challenging the decision to issue the warrant in a court.

69. Advocate General Campos Sánchez-Bordona considered that the question should be answered in the affirmative, on the basis of his interpretation of *OG and PI*. He took the view that the requirement that the issue of the warrant should not be disproportionate was a matter for examination by a court. In this context, the time elapsed between the sentence and the issue of the EAW could be relevant, because any implied or express assessment of proportionality at the time of issuing it could have been superseded. Apart from anything else, he felt that one matter to be taken into account was the possibility that the person requested might have established a sufficient link with the executing State to make it appropriate that he or she serve any sentence in that State.
70. The CJEU, however, concluded that it was not necessary to provide for a separate judicial remedy. Referring to its earlier judgment in *OG and PI*, the Court noted that in *ZB* the warrant was issued for the enforcement of a sentence. In such a case, the need to ensure effective judicial protection has already been met by the fact that the person was tried in a legal process that met the requirements of Article 47 of the Charter of Fundamental Rights. The proportionality of the sentence, for the purposes of the Framework Decision, was met by the fact that it was of at least four months. In those circumstances, there was no requirement for the existence of a separate judicial appeal.
71. The jurisprudence does, however, allow for the possibility that in exceptional cases an executing judicial authority may refuse to make an order of surrender on the basis that there is a real risk of violation of the fundamental rights of the individual. The clearest example is the judgment in *Aranyosi and Căldăraru*. In both cases, the referring court was concerned about evidence relating to the prison conditions in the issuing State, considered in the light of Article 1(3) of the Framework Decision. That sub-Article makes it clear that the EAW process is subject to the respect for fundamental rights and fundamental legal principles. Article 4 of the Charter of Fundamental Rights, like Article 3 of the Convention, prohibits inhuman or degrading treatment or punishment.
72. The CJEU observed that the principle of mutual recognition upon which the EAW system is based is founded on the mutual confidence between Member States that their national legal systems are capable of providing equivalent and effective protection of the fundamental rights recognised at EU level, particularly in the Charter. Further, the

principle requires States, save in exceptional circumstances, to consider all the other States to be complying with those fundamental rights. However, there was recognition that in exceptional circumstances there were limits to the principles of mutual recognition and mutual trust. The Framework Decision does not have the effect of modifying the obligation to respect fundamental rights. The Court concluded that if reliable evidence before the court of the executing State demonstrated deficiencies in detention conditions prevailing in the issuing State, that court would have to determine whether the individual before it ran a real, personal risk of being subjected to inhuman or degrading treatment.

Discussion

73. The case for the appellant has been argued in a very careful and nuanced way. He does not seek to rely upon the delay *per se* as giving rise to rights on his part; he does not rely upon the fact that the Constitution of this State might enable him to invoke a *Finnegan*-type jurisdiction in the context of a domestic prosecution; he does not allege any unlawfulness in the Latvian process that ended with the affirmation of his sentence; he does not (now) allege any absence of judicial protection or other legal infirmity in the decision to issue the EAW; and he does not claim that in the intervening period his private and family life has developed in such a way as to require assessment by the Irish courts in accordance with the principles discussed in *J.A.T. (No.2)*. The narrow ground on which he makes his stand is that he has a right to a judicial process in Latvia for the purpose of reassessing his case, with a view to arguing that such developments as took place in his private and family life between the issuing of the warrant and its transmission to Ireland have rendered enforcement of the sentence, and thus the decision to issue the warrant, disproportionate and a breach of his rights under Article 8 of the Convention. The Framework Decision preserves and protects the equivalent rights.

74. I think it necessary to observe that a lawfully issued EAW in respect of a sentence does not somehow become legally invalidated by subsequent delay. The presumption that guides the courts of the executing State is that a sentenced person has enjoyed all

necessary guarantees in the process leading to the imposition of the sentence and that the decision to issue the warrant involved an assessment of proportionality, with appropriate judicial protection. If that presumption is not rebutted, the decision to issue the warrant must be seen as valid. A valid order does not, by passage of time, “become” either incorrect, unlawful or void. Use of the word “stale” does not assist with the legal analysis. It is well established that delay is not, in itself, a ground for refusal of surrender unless it is so egregious that the application for surrender amounts to an abuse of process.

75. Therefore, the only real question that can arise in this appeal is whether the delay has brought about circumstances that necessitate a refusal to surrender on foot of what must otherwise be acknowledged as a lawful EAW. Such a refusal could only be based on a finding that, despite the legitimacy of the warrant, the elapse of time has involved the occurrence of events that create a real risk that the rights of the appellant would be violated by his imprisonment. Thus, the result in *J.A.T. (No.2)* did not involve a finding either that the warrant had been unlawfully issued or that it had somehow “become” invalid. The situation is similar in terms of domestic law – the decision in *Finnegan* did not involve a finding either that the sentence was imposed unlawfully or that it had become unlawful. There was, in fact, no examination of the sentence itself by this Court, such as would be carried out by an appellate court dealing with a sentence appeal. The question raised in the proceedings was whether it was, in the circumstances of the case, unjust to enforce the sentence.

76. It seems to me to be clear that the judgment of the CJEU in *ZB* disposes of the proposition that the Framework Decision might require a further formal judicial assessment of the proportionality of the decision to issue an EAW in the case of a person who has been sentenced but has remained at large for a significant period of time. The reasoning of the Court cannot, in my view, be seen as allowing scope for such an argument to succeed in this case, simply because there is a greater elapse of time than there was on the facts of *ZB* – the logic of the Court’s conclusion is that proportionality for the purposes of the Framework Decision is satisfied by the fact that a sentence of more than four months resulted from a lawful trial process.

77. The appellant acknowledges that the evidence presented by him in relation to his private and family rights does not meet the standard required even to trigger an inquiry by the Court and an assessment of the balancing factors of the type discussed in *J.A.T. (No.2)*. That was a case where the requested person had not stood trial and who therefore had the benefit of a presumption of innocence. A person who has been lawfully convicted, sentenced and was afforded a right of appeal which he did not pursue is obviously on much weaker ground to begin with. However, he submits that his rights under Article 13 of the Convention will be violated if he is surrendered, because he will not be able to raise that same evidence in a Latvian court to make the case that he should not now be imprisoned. He says that the only standard he has to meet in this respect is that he has an “arguable” case that imprisonment will violate his rights, and a right under Article 13 to a judicial process for determining that case. *Ramirez Sanchez* and *Maurice v. France* (Grand Chamber, app. No. 11810/03, Strasbourg, 6 October 2005), have been relied upon in this regard. However, I do not consider that they can assist the appellant.
78. The issue on which the applicant in *Ramirez Sanchez* succeeded arose from the fact that while serving a sentence he had been subjected to prolonged periods of solitary confinement. For much of the relevant time, the settled legal principle in France was that decisions by prison authorities to place prisoners in solitary confinement were internal administrative measures in respect of which no appeal lay to the administrative courts. The European Court of Human Rights took the view that the issue was one of such significance that an effective remedy before a judicial body was essential.
79. However, the Court also stated, as it has in many other judgments, that what Article 13 guarantees is the availability at national level of a remedy to enforce the substance of Convention rights in whatever form they may happen to be secured in the domestic legal order. That does not necessarily require a judicial process, provided that the remedy available is effective. Nor does it necessarily require a single remedy, since the aggregate of remedies provided for under domestic law may suffice. The fact that such it may not produce a favourable result does not mean that it is not an effective remedy. It was also open to them to judicially review an unfavourable decision on a petition if it was defective.

80. It seems to me that the evidence adduced by the appellant in respect of Latvian law goes no further than to establish that there is no procedure for re-opening his appeal against sentence for the purpose of reassessment of its proportionality in the light of recent events in his life. The absence of such a procedure is hardly surprising. It does not exist here, as noted above in the discussion of *Finnegan*, and it is difficult to see why it should. It is not obvious that a person who absconds in the knowledge that he or she is subject to a final order of imprisonment should thereby become entitled to a level of court protection not available to those who commence their sentences but might wish to have it reduced after some passage of time. In this jurisdiction, when an appeal has been disposed of, and the final order made, the criminal justice process is complete so far as the criminal courts are concerned. If there is an issue as to the lawfulness of a person's imprisonment, that issue will be dealt with by courts exercising a different jurisdiction. The procedures affecting the rights of the sentenced prisoner in relation to his or her detention will be the responsibility of the executive in the first instance, subject of course to the possibility of invoking court protection against any breach of rights.

81. Thus, in this jurisdiction, matters such as remission, temporary release for compassionate or other reasons, and early release on licence are all administered by the executive. The appellant has not adduced any evidence dealing with these matters other than parole, but if there are some equivalent measures available to prisoners in Latvia they could well suffice as an "effective remedy" in terms of mitigation of sentence, if it were thought that Article 8 required such mitigation to be available. Equally, it seems unlikely (and there is certainly no evidence to this effect) that there is no form of court process in Latvia by which a prisoner can complain of a breach of rights in relation to his sentence. Article 5.4 of the Convention imposes an obligation upon the contracting States to have a process whereby a person in detention can complain to a court that he or she is unlawfully detained.

82. However, perhaps more significantly, it must be pointed out that while Article 8 plays a significant role in the assessment of prison rules and conditions, which are certainly capable of violating rights relating to private and family life, it does not appear to be relevant to the actual sentence imposed in a given case. The ECtHR has consistently stated that, while any detention must by its nature interfere with a prisoner's private and

family life, it would be “fundamentally wrong” to analyse a case of detention following conviction from the standpoint of Article 8 and to consider the “lawfulness” and “proportionality” of the prison sentence as such (see, for example, *Khodorkovskiy and Lebedev v. Russia* (Grand Chamber app. Nos. 11082/06 and 13772/05, Strasbourg, 25 July 2013)). It appears, therefore, that an argument cannot be mounted in Convention terms to the effect that the imposition of a prison sentence, as such, might be a violation of Article 8. Were it otherwise, the ECtHR might find itself in the position of an appellate court hearing appeals against sentence from all of the Member States.

83. The content of Article 13 was also considered in *Maurice*. The applicants had commenced proceedings for damages for medical negligence. A legislative change altered the basis upon which damages could be claimed and, to some extent, barred the progression of the proceedings, while introducing new forms of assistance for persons in their position. The applicants complained about the retrospective nature of the legislation and about its substantive provisions. The ECtHR accepted that they had established a violation of Article 1 of Protocol No. 1, in that they had been deprived of an “asset”, and that this interference with their rights was disproportionate. An examination of the complaint under Article 6 of the Convention was therefore unnecessary.

84. The applicants further complained that they had been deprived of an effective remedy. In this regard, the Court stated that as it had found a violation of Article 1 of Protocol No. 1, there was no doubt that the complaint relating to that provision was “arguable” for the purposes of Article 13 of the Convention. However, the Court went on to point out that its case-law did not go so far as to guarantee a domestic remedy that allows a Contracting State’s laws as such to be challenged before a national authority. The applicants’ complaint fell foul of that principle insofar as they complained of the lack of a domestic remedy after the change in the national law.

85. In the circumstances, there does not appear to be any scope for the proposition that the Convention might require a court process to be made available for the reassessment of sentences, on grounds of proportionality, for persons who have absconded.

86. This is not to say that a person in the appellant's position has no remedy for a genuine complaint in respect of the effects of delay on his private and family life. If there is in fact no process for resolving his complaint in the issuing State, he is entitled to raise it before the executing judicial authority, as he has here. In my view, it does remain at least possible that delay might give rise to circumstances that would make it unjust for an executing judicial authority to surrender a person for the enforcement of a prison sentence either in part or in its entirety, where it might be established in evidence that no form of either court or executive action was available to mitigate the situation. However, the standard is not met by a simple assertion that an arguable case can be made. As discussed in *Aranyosi, Căldăraru* and *J.A.T. (No.2)*, it will arise only in truly exceptional cases where there is cogent evidence of a real risk to the rights of the individual concerned.

Conclusion

87. It is true that there are certain troubling aspects to this case. In particular, the Court cannot but be concerned about the fact that a request for information as to the delay between the issue of the EAW and its transmission to the courts of this State was simply left unaddressed by the issuing judicial authority. However, the facts would not go so far as to support any finding of an abuse of the process.

88. Further, I do not see the facts of the case as presenting a genuine issue concerning a potential violation of the appellant's rights. In the circumstances, I cannot see that there is any question of law that could properly be referred for ruling to the CJEU. I would dismiss the appeal.