

THE HIGH COURT

[2019 No. 60 EXT]

BETWEEN

MINISTER FOR JUSTICE & EQUALITY

APPLICANT

AND

ARTUR LIBERA

RESPONDENT

JUDGMENT of Mr. Justice Binchy delivered on the 10th day of July, 2020

1. By this application the applicant seeks an order for the surrender of the respondent to the Republic of Poland pursuant to a European arrest warrant dated 19th December, 2016 ("the EAW"). The EAW was issued by Regional Court in Poznan, as issuing judicial authority ("IJA").
2. The EAW was endorsed by the High Court on 11th February, 2019. The respondent was arrested and brought before the Court on 6th December, 2019. The application opened before the Court on 22nd January, 2020, and was then adjourned until 17th February, 2020, following upon a direction by this Court pursuant to s. 20 of the European Arrest Warrant Act 2003 (as amended) (hereinafter "the Act of 2003"). The matter was further adjourned to 24th February, 2020, to afford the respondent an opportunity to obtain an affidavit from his Polish lawyer, and also pending the judgment of the Supreme Court in *Minister for Justice & Equality v. Vestartas* [2020] IESC 12, which decision I address below.
3. At the opening of the application, I was satisfied that the person before the Court is the person in respect of whom the EAW is issued.
4. I was further satisfied that none of the matters referred to in ss. 21A, 22, 23 and 24 of the Act of 2003 arise, and that the surrender of the respondent is not prohibited for any of the reasons set forth in any of those sections.
5. At para. B of the EAW, it is stated that the decision on which it is based is that of the 3rd Criminal Department of the District Court Poznan-Stare Miasto in Poznan, dated 20th December, 2013 which became final on 28th December, 2013.
6. At para. C of the EAW it is stated that a sentence of 1 year and 2 months was imposed upon the respondent, and that the remaining term of imprisonment to be served is 10 months and 29 days. Accordingly, minimum gravity is established.
7. At para. D of the EAW, it is stated that the respondent was present in person at the trial resulting in the decision.
8. At para. E of the EAW, it is stated that the warrant relates to two offences and details of these offences are then set out. Essentially the offences are stated as being two instances of the use of forged documents to defraud a named bank, within five years of serving at least six months' imprisonment for a similar offence, in each case between 17th and 20th

December, 2004. Also at para. E the category and legal classification of the offence is set out by reference to the relevant articles of the Polish criminal code.

9. At para. E.1 the boxes for "forgery of administrative documents and trafficking therein" and "fraud" are ticked.
10. The respondent was previously surrendered to Poland in connection with the same offences, pursuant to a European arrest warrant dated 9th July, 2012. On that occasion, his surrender was for the purpose of prosecution. In an affidavit sworn in opposition to this application dated 20th January, 2020, the respondent avers that he entered a guilty plea to the charges on 20th December, 2013. He avers that he was released from custody and informed that he could return to Ireland, and he further avers that he understood his sentence to be suspended pending further review by the court. He refers to court proceedings during the period between January 2015 and January 2016 regarding the suspension of the sentence. He concludes this part of his evidence by saying that following a court sitting in January 2016, his lawyer advised him that he would not be required to return to Poland.
11. Subsequent enquiries made by his Irish solicitors of the lawyer who represented the respondent in Poland in those proceedings, established that while applications were made to the courts in Poland for a pardon, and while such applications may at one point or another have had the effect of suspending the sentence while the application for a pardon proceeded, ultimately the latter application was unsuccessful. His lawyer avers that on 11th April, 2016, a motion to postpone execution of the sentence and to suspend the execution of the order to bring the respondent to the penal facility was filed. She then avers that the application was "not processed", and further avers that enforcement proceedings against the respondent are being conducted. She avers that on 10th October, 2016, the District Court sent an application to the Regional Court in Poznan for the issue of a European arrest warrant. In short, while execution of the respondent's sentence was postponed for a period of six months by the District Court in Poznan, this decision was overturned subsequently, and a subsequent application for a pardon was also unsuccessful. It is clear from the information provided that there are no obstacles to the surrender of the respondent by reason of a suspension of his sentence.
12. As I mentioned above, the within application was heard over three days, 22nd January, 2020, 17th February, 2020 and 24th February, 2020. At the conclusion of the hearing on 22nd January, I directed that further information should be sought of the IJA pursuant to s. 20 of the Act of 2003, and this information was provided by letter of 14th February, 2020. On 17th February, 2020, I further adjourned the application to allow the respondent's lawyer in Poland to comment on the additional information received. On 24th February, 2020, I adjourned the proceedings further, pending the decision of the Supreme Court in *Minister for Justice and Equality v. Vestartas*, because the respondent was placing significant reliance upon the decision of the High Court in that case. The decision of the Supreme Court issued on 2nd April, 2020, and I directed the parties to file submissions, if they wished to do so, arising out of that decision. Following upon this,

submissions were filed on behalf of the respondent on 11th June, 2020 and on behalf of the applicant on 15th June, 2020

13. The further information sought by the Court by letter of 22nd January related to two matters. Firstly, the IJA was asked to provide a response to the claim by the respondent that the sentence imposed upon him had been suspended, and if it had been suspended, to provide additional information specified in the letter. Secondly, the IJA was asked to comment on the apparent delay on the part of the authorities in Poland, in bringing and pursuing this application, between 28th December, 2013 and 16th January, 2019, when the EAW was sent here for execution.
14. In its reply, the IJA stated that the respondent was present in court on 20th December, 2013 and that he brought a motion requesting an immediate custodial sentence of 1 year and 2 months. Without stating the outcome of this motion, it then goes on to say that on 11th May, 2015 a search was ordered for the respondent as he failed to present to serve his sentence. It is stated that the search in Poland failed and it was discovered that the respondent had travelled to Ireland. The EAW was then issued on 19th December, 2016. No information at all was provided as regards the delay.
15. Points of objection were delivered on 20th January, 2020. Three points were raised, and pursued, in varying degrees at the hearing of the application. These are:-
 1. The surrender of the respondent would contravene Article 6 of the European Convention on Human Rights and Fundamental Freedoms (the "Convention"), and is prohibited by s. 37 of the Act of 2003, as the recent legislative changes and proposed legislative changes in the Republic of Poland create a real risk of a flagrant denial of justice. It is not unfair to say that this point was only mentioned in passing, and certainly was not advanced in anything like the kind of detail that would be required to establish it even on a prima facie basis never mind in any substantive degree. In any case, it is very difficult to see the relevance of the point in circumstances where the respondent is wanted to serve a sentence, and not for the purposes of prosecution.
 2. The surrender of the respondent is prohibited by s. 11(1)(f) of the Act of 2003 as it contains insufficient detail as to the respondent's alleged degree of involvement in the offences alleged. Para. E of the EAW is unclear as to the respondent's particular participation in the offences such that proper analysis pursuant to s. 5 of the EAW is impossible. This, it is claimed, is compounded by the failure to particularise the time of the alleged offences as per s. 11(1)(f) of the Act of 2003. Again, this point was not argued meaningfully at the hearing of the application. It was put forward on the basis that it might serve to buttress the next point of objection, in the context of the proportionality to the respondent's surrender. However, it is appropriate to observe that in the case of this point also its relevance is difficult to discern in circumstances where the respondent has been convicted of the offences to which the EAW relates, following a plea of guilty to those offences.

3. The surrender of the respondent is prohibited by s. 37 of the Act of 2003 on account of the unwarranted and unexplained delays of the issuing State. This was the main point of objection advanced on behalf of the respondent. In this regard:
 - a. The offences of which the respondent was convicted were committed between 17th and 20th December, 2004.
 - b. A related accusation European arrest warrant for the same offences did not issue until 9th July, 2012. The respondent was arrested on foot of that warrant on 1st May, 2013 and an order for his surrender was made 21st October, 2013. The respondent was subsequently convicted of the offences and sentenced on 20th December, 2013.
 - c. Para. F of the EAW indicates that the domestic warrant for the arrest of the respondent (to serve the sentence imposed on him) issued on 11th May, 2015. The EAW did not issue until 19th December, 2016.
 - d. The EAW was not transmitted by the IJA until 16th January, 2019, by cover of a letter which erroneously indicated the EAW was issued in 2018.
 - e. The respondent has lived in Ireland since around 2006, at the same address for around nine years. This address was expressly stated on the cover letter enclosing the warrant sent by the IJA on 16th January, 2019, so the authorities in Poland were aware not just that he was residing in Ireland, but they were aware of the respondent's actual address. The respondent resided at this address at the time of the proceedings relating to the previous and related warrant.
 - f. The respondent has established deep family, employment and personal roots in his community. His surrender on foot of the EAW would constitute a disproportionate interference with his family and personal rights under Article 8 ECHR.
16. In his affidavit of 20th January, 2020, the respondent deposes that he has lived in County Kerry with his wife since 2006, at the same address for nine years. His 12 year old son was born in Ireland and has lived here all his life while his 20 year old daughter has lived in this jurisdiction since 2007. The respondent avers that he and his wife are both employed in the area and that his family is financially dependent on him and his wife for their education and welfare. He avers that his surrender would severely interfere with his personal and family life and would be disproportionate considering the passage of time and all circumstances.
17. In the same affidavit, the respondent outlines his participation in the offences the subject of the EAW. He avers that on 17th December, 2004 he received a phone call from a friend who asked for help transporting equipment he had purchased. The respondent states that he helped this friend load the equipment into his car and drove to the friend's house and unloaded the equipment. The respondent avers that he was not aware the items had been obtained fraudulently and upon being informed of this he reported the incident to the police and was arrested, spending the next three and a half months in prison.

18. The respondent swore a second affidavit dated 11th May, 2020, in which he avers to having had a history of psychological and psychiatric difficulties. These commenced following a road traffic accident in Poland in 1995, which left him unconscious for four days. He exhibits reports from psychiatrists whom he has attended here in 2016/17, and which demonstrate that he has received treatment for depression. He avers however, that he was not comfortable in attending for such treatment, and that he discharged himself in April 2017. This is borne out by the reports. The respondent says he now regrets doing so, and that his mental health has since deteriorated badly, as he does not know what the future holds. He avers that his symptoms have been significantly exacerbated by the “unexpected” issue of this second EAW.

Submissions of the parties

Submissions on behalf of the respondent

19. In relation to the objection based on delay counsel for the respondent refers to the evidence of the respondent that he has been living at the same address in Kerry for the last nine years. This was the address the respondent resided in when the previous European arrest warrant was executed, and was the address he lived at upon his return to Ireland, following his conviction. The EAW was issued in December 2016 and was not sent to the Central Authority in this jurisdiction until January 2019. Against the background where his address was known by the authorities, counsel for the respondent submits that the delay is completely unexplained. This delay, coupled with the impact on the respondent’s family, and the respondent himself (having regard to his mental health), renders the surrender of the respondent a disproportionate interference with his rights as guaranteed by Article 8(1) of the Convention, and his surrender is therefore prohibited by s. 37 of the Act of 2003.
20. In support of this argument, counsel for the respondent placed considerable reliance on the decision of this Court (Hunt J.) in *Minister for Justice and Equality v. Vestartas* [2019] IEHC 481, a case in which the Court refused to order surrender of the requested person on the grounds that it would give rise to a violation of his rights under Article 8 of the Convention. It is helpful to summarise the facts in that case. Mr. Vestartas had engaged in what the Court described as a “spree of offending” in Lithuania between 2003 and 2005, when he was aged between 14 and 15 years. He came to this country and obtained employment, and eventually set up a home with a partner with whom he had two young children. At the time of leaving Lithuania, Mr. Vestartas had served more than three years of a sentence of five years and eight months imposed on him by the courts in Lithuania, but because he had violated parole conditions he was required to serve the balance of the sentence imposed upon him.
21. Hunt J. found that Mr. Vestartas had worked peaceably and led a settled life as a responsible adult member of society since his arrival in this country, and he considered that there was very limited remaining public interest in his surrender to Lithuania to serve out the remainder of his sentence. In considering the rights of Mr. Vestartas under Article 8 of the Convention, he also took into account the very significant delay on the part of the Lithuanian authorities in applying for the surrender of Mr. Vestartas, which delay

remained unexplained notwithstanding a request for an explanation. He also took into account the likely adverse impact of his surrender on his children, and in particular his youngest child. Ultimately, Hunt J. concluded that, having regard to what he described as the exceptional factual features of the case, the surrender of Mr. Vestartas would constitute a disproportionate interference with the Article 8 rights of Mr. Vestartas and his family.

22. There are some similarities in the factual backgrounds in this case and that in *Vestartas*. These are:-
 1. Each respondent has a dependent young family;
 2. Each respondent has engaged in gainful employment and for all intents and purposes has rehabilitated into society;
 3. The respondent in this case has also served part of his sentence, although not as significant a portion thereof as did Mr. Verstartas;
 4. In each case there has been a substantial delay on the part of the requesting State.
23. So, it is not difficult to see why the respondent placed such heavy reliance on *Vestartas*. However, at the time of the hearing of this matter *Vestartas* was under appeal to the Supreme Court. Since there were certain similarities in the factual background in this case and that in *Vestartas*, at the conclusion of this hearing I deferred the issue of a decision in this matter pending the decision of the Supreme Court in that case. That appeal has since been heard and judgment was delivered on 2nd April, 2020 (*Minister for Justice & Equality v. Vestartas* [2020] IESC 12). The Supreme Court reversed the decision of the High Court, and ordered the surrender of Mr. Vestartas. I then afforded the parties an opportunity to make submissions arising out of that decision.
24. Notwithstanding that the Supreme Court reversed the decision of Hunt J. in *Vestartas*, it remains the respondent's case that his surrender would be incompatible with the State's obligations under Article 8 of the Convention. Counsel submitted that in assessing, on the one hand the public interest in the surrender of a requested person in proceedings brought under the Act of 2003, and Council Framework Decision 2002/584/JHA on the European Arrest warrant and the surrender procedures between member states (as amended by Council Framework Decision 2009/299/JHA) (together the "Framework Decision"), as against the possible violation of the respondent's rights under Article 8 of the Convention on the other, the Court should consider as weighing in favour of refusal of this application the respondent's mental health difficulties, his dependent children's welfare, the delays in issuing and transmitting the warrant and the circumstances of the respondent's previous surrender.
25. Counsel for the respondent places particular reliance on the decision of the Supreme Court in *Minister for Justice & Equality v. J.A.T (No. 2)* [2016] IESC 17, which was referred to and relied upon to a significant degree by MacMenamin J. in *Vestartas*. It is

submitted that, as with the respondent in *J.A.T. (No. 2)*, the respondent in this case is psychologically vulnerable, stressed, not sleeping and suffering from considerable anxiety and depression. It is further submitted that, also as in *J.A.T (No. 2)*, the respondent's children will suffer if he is again surrendered. It is submitted that these factors operate to align this case more with the facts in *J.A.T. (No. 2)* than those in *Vestartas*. The distinction between the background facts in *J.A.T. (No. 2)* and *Vestartas* was, it is submitted, central to the ratio of MacMenamin J. in *Vestartas* wherein he stated, at para. 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."

26. It is submitted that the facts averred to by the respondent in both affidavits sworn by him in opposition to this application, are, when considered cumulatively, such as to make an order for the surrender of the respondent incompatible with the State's obligations under the Convention, and such an order is therefore prohibited by s. 37 of the Act of 2003. In this regard, counsel for the respondent refers to the his first affidavit grounding his points of objection, wherein the respondent avers as to the effect of surrender on his family life. It is submitted that the adverse effect on the respondent's family life is such that it would in itself warrant refusal of surrender (see para. 16 above). However, the Court was also referred to the affidavit of the respondent sworn on 11th May, 2020, in which he avers as to the adverse effect of a second order for surrender on his mental health. It is submitted that such effects of surrender would be disproportionate and serve to distinguish this matter further from the facts in *Vestartas*, for the purposes of Article 8 of the Convention, and make it more comparable to the facts in *J.A.T. (No. 2)*. At para. 5 of this affidavit the respondent avers:-

"A second order for my surrender to Poland would severely and disproportionately interfere with my family life and mental health. I have a history of psychological vulnerability and psychiatric difficulties. I was twice admitted to a psychiatric hospital in Poland on a voluntary basis subsequent to a road traffic accident which resulted in a four day loss of consciousness in 1995. I have suffered from anxiety and depression intermittently since then, the symptoms of which have increased significantly after the execution of the previous European Arrest Warrant for the prosecution of the within charges in 2013. My symptoms have been significantly exacerbated by the unexpected issue of this second European Arrest Warrant and have deteriorated further during the course of these proceedings."

27. To all of this is added the objection based on the delay on the part of the issuing State in advancing this application. The respondent refers to the obiter comments of the Supreme Court in *Vestartas* in respect of what the respondent claims is a requirement for an explanation of delay, where it occurs. At para. 103 of *Vestartas*, MacMenamin J. stated that “[i]f 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.” Counsel submits that it is common case that the respondent has lived at that same address that he did when he was arrested on foot of the previous European arrest warrant, and that the awareness of the requesting State of this is apparent from the cover letter sending the EAW to the Central Authority here, which identifies this address. Accordingly, an explanation for the delay was required, and was not forthcoming.
28. It is submitted that these unexplained delays in the issue and transmission of the EAW are relevant to the cumulative impact of these proceedings on the respondent, in particular the impact on his mental health and in the Court’s consideration of whether or not surrender will give rise to a violation of his rights under Article 8 of the Convention.
29. Counsel for the respondent also makes reference to the respondent’s averments in relation to his return to Ireland following his sentence in Poland, submitting that the respondent was under the firm and honestly held impression that having faced trial in Poland, he was free to return to this jurisdiction. It is submitted that this is a further factor to be considered in light of *J.A.T. (No. 2)* which, taken together with the other factors referred to above, ought to result in the refusal of surrender on s. 37/Article 8 grounds.

Submissions of the applicant

30. The applicant relies on the decision of MacMenamin J. in *Vestartas* and refers to para. 68 thereof, wherein he outlines the approach to be taken in conducting an assessment under s. 16 of the Act of 2003, when objection is raised under s. 37 of the Act of 2003, by reason of an alleged violation of rights guaranteed under Article 8 of the Convention:-

“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."

31. Counsel for the applicant submits that the Supreme Court drew a distinction between an objection grounded on Article 3 of the Convention, involving, as it does, an absolute Convention right (per *Minister for Justice, Equality and Law Reform v. Rettinger* [2010] IESC 45) and an objection grounded on Article 8 of the Convention, which involves a qualified right. At para. 71, MacMenamin J. stated:-

"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."

32. The applicant referred to the submissions of the respondent in relation to *J.A.T. (No. 2)* and in response relies upon that part of the judgment in *Vestartas* which addresses the basis for the decision in *J.A.T. (No. 2)* as follows:-

"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)."
33. The applicant concludes this part of their submissions with reference to the following passages in *Vestartas*, regarding the impact of delay on the part of the requesting State in applications of this kind:-
- "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.... 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.”

34. It is submitted that the circumstances of this case do not meet the high threshold that would be required to refuse surrender. The Supreme Court in *Vestartas* distinguished between *Vestartas* and *J.A.T (No. 2)* as follows:-
- “91. ...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....”
35. The remainder of para. 94 is already set out at para. 25 above, as it is also relied upon by the respondent in order to distinguish the circumstances in *Verstatas* from those arising in this case. However, on behalf of the applicant it is submitted that just as in *Vestartas*, in this case there is an absence of the clear facts and cogent evidence, including medical evidence, such as are necessary to ground a successful Article 8 objection.

Decision

36. While the respondent makes the point that the offences with which the EAW is concerned go back to December 2004, that is not the relevant time to consider any question of delay. In my opinion, the only delay that is of relevance to the objection of the respondent is the delay between the date of issue of the EAW i.e. 19th December, 2016, and the date of its endorsement by this Court, i.e. 11th February, 2019, even though the IJA was asked to explain a longer period of delay. I say this firstly because the respondent himself avers that he came to Ireland in 2006. So the requesting State then had to issue an EAW for his prosecution, which was not executed until 2013. While the respondent points out that the prosecution warrant did not issue until 2012, any complaint of delay associated with the issue of that warrant, should have been addressed

at the hearing of the application for surrender made pursuant to that warrant, and not at the hearing of an application advanced pursuant to a later warrant, in this case the EAW.

37. Secondly, it is clear from the information received from the respondent's lawyer in Poland that, from the date upon which his conviction and sentence became final on 28th December, 2013, the respondent was pursuing lines of redress in the courts in Poland up until at least 11th April, 2016 (see para. 11 above). So that while the respondent complains that the IJA delayed from in or about the time that his conviction was affirmed in December 2013, that complaint really cannot carry any weight up to mid-2016 when (according to his Polish lawyer) he himself was pursuing legal remedies through the courts in Poland.
38. Nonetheless, in the letter seeking additional information of the IJA, which was sent on 22nd January, 2020, the IJA was asked to explain the delay in sending the EAW for execution. It will be recalled that the EAW issued on 19th December, 2016, but was not sent to the Central Authority here until 16th January, 2019. The IJA did not address the enquiry about this delay at all in its reply to the request for additional information, which was dated 14th February, 2020. There is therefore an unexplained period of delay, on the part of the IJA, from, at latest, December 2016 when the EAW issued, up to January 2019 when it was sent here, in progressing the application for surrender of the respondent. It has to be said that this is unsatisfactory, but the comments of MacMenamin J. in *Vestartas* about such a failure to explain fall well short of stating that this must give rise to a refusal to surrender, as the decision in *Vestartas* itself demonstrates. He did say that an explanation will often be necessary, in order for justice to be done (see para. 27 above, and para. 103 in *Verstartas*), but he also said at para. 89 that, unless truly exceptional or egregious, delay will not alter the public interest. A delay from December 2016 to January 2019 does not in my view constitute such a delay. Furthermore, in my opinion the issue does not arise in this case in circumstances where the respondent must have known that he was required to serve his sentence in Poland, having exhausted all his legal remedies there by mid-2016.
39. However, while it is well established that delay does not of itself constitute a ground for refusal of an application for surrender, it may operate as a factor in support of other grounds, in particular an application grounded on Article 8 of the Convention, as the decision in *J.A.T. (No. 2)* shows. The difficulty for the respondent however is that the other grounds relied upon by him could hardly be regarded as exceptional. His surrender will clearly cause disruption to his family life, but no more than inevitably flows from the surrender of a husband and father, whose family are dependent on him. It is well established that such consequences cannot operate as a bar to an order for surrender, no matter what sympathy the Court may feel for the requested person. In *J.A.T. (No. 2)* there was evidence that the surrender of the respondent in that case would have adverse consequences for the health of the respondent's son, for whom the respondent was the primary carer, as well as other adverse consequences for the family. There is no comparable evidence in this case.

40. As regards his mental health issues, in his first affidavit of 20th January, 2020 the respondent makes no mention of mental health issues, but in a further affidavit sworn on 11th May, 2020, the respondent provides information regarding psychological and psychiatric difficulties that he has had in the past, and backs this up with reports from treating psychiatrists. He claims that his surrender is likely to exacerbate his condition.
41. It is clear from the medical reports exhibited by the respondent that he has had treatment for depression, but the evidence falls considerably short of establishing that his condition is such as would justify an order refusing his surrender. In a report dated 26th April, 2017, his treating psychiatrist recorded that his condition had no psychotic element to it, and that "real life stressors" were the cause of his mental health difficulties. There is nothing at all to suggest that the respondent's condition cannot be managed, or that his condition is in any way out of the ordinary, or that it is comparable with the mental state of the respondent in *J.A.T. (No. 2)*. In short, the respondent has failed to advance cogent evidence of facts that are "well outside the norm" or "truly exceptional" such as would render the surrender of the respondent incompatible with the State's obligations under the Convention.
42. It follows from all of the above therefore that I have been satisfied that the requirements of the Act of 2003 as regards applications of this kind have been satisfied, and that the argument that the surrender of the respondent is prohibited by s. 37 of the Act of 2003 must be rejected. Accordingly, I will make an order for the surrender of the respondent in accordance with s. 16 of the Act of 2003.