

THE HIGH COURT

[2021] IEHC 846
[2021 No. 007 EXT.]

BETWEEN

MINISTER FOR JUSTICE AND EQUALITY

APPLICANT

AND

BASHKIM OSAJ

RESPONDENT

(No. 1)

JUDGMENT of Mr. Justice Paul Burns delivered on the 6th day of December, 2021

1. By this application, the applicant seeks an order for the surrender of the respondent to the Republic of Austria ("Austria") pursuant to a European arrest warrant dated 8th January, 2021 ("the EAW"). The EAW was issued by Dr. Petra Stranzinger, First Deputy Prosecutor of the Prosecution Office of Ried im Innkreis, as the issuing judicial authority.
2. The EAW seeks the surrender of the respondent in order to prosecute him in respect of 2 alleged offences.
3. The EAW was endorsed by the High Court on 21st January, 2021 and the respondent was arrested and brought before the High Court on the same day on foot of same.
4. I am satisfied that the person before the Court, the respondent, is the person in respect of whom the EAW was issued. No issue was raised in that regard.
5. I am satisfied that none of the matters referred to in ss. 22, 23 and 24 of the European Arrest Warrant Act, 2003, as amended ("the Act of 2003"), arise for consideration in this application and surrender of the respondent is not precluded for any of the reasons set forth in any of those sections. I deal with s. 21A of the Act of 2003 later in this judgment.
6. I am satisfied that the minimum gravity requirements of the Act of 2003 have been met. It is indicated in the EAW that the offences carry a maximum penalty of 1 to 15 years' imprisonment. No issue was taken in respect of minimum gravity.
7. At part E of the EAW, a description of the circumstances in which the 2 offences were committed is set out. It alleged that the respondent, acting in concert with others, was involved in breaking into and entering a family home, threatening the occupants with a pistol and a knife, locking them in the toilet and extorting cash and other valuables to a total value of €775,280.
8. By virtue of s. 38(1)(b) of the Act of 2003, it is not necessary for the applicant to establish correspondence between the offences to which the EAW relates and offences under the law of the State where the offences referred to in the EAW are offences to which Article 2.2. of the European Council Framework Decision dated 13th June, 2002 on the European Arrest Warrant and the Surrender Procedures Between Member States, as amended ("the Framework Decision"), applies and carry a maximum penalty in the issuing state of at least 3 years' imprisonment. In this instance, the issuing judicial authority has certified that the offences to which the EAW relates are offences to which

Article 2.2. of the Framework Decision applies, that same are punishable by a maximum penalty of at least 3 years' imprisonment and has ticked the appropriate box for "*organised or armed robbery*". It is noted that at part C of the EAW, it is indicated that the maximum penalties applicable to the offences are between 1 and 15 years' imprisonment. By additional information dated 28th August, 2020, it is clarified that the offences in respect of which surrender is sought carry a maximum penalty of 15 years' imprisonment for aggravated robbery and 3 years' imprisonment for unlawful deprivation of liberty. I am satisfied that the tick-box procedure has been appropriately utilised in respect of both offences. There is no manifest error or ambiguity concerning the certification by the issuing judicial authority such as would justify this Court in looking beyond same. In any event, leaving aside the tick-box procedure, I am satisfied that correspondence can be established between the offences to which the EAW relates and offences under the law of this State, viz. as regards the first offence: burglary and/or aggravated burglary and/or robbery contrary to ss. 12, 13 and 14 of the Criminal Justice (Theft and Fraud Offences) Act, 2001, respectively; as regards the second offence, false imprisonment contrary to s. 15 of the Non-Fatal Offences Against the Person Act, 1997.

9. As the EAW seeks the surrender of the respondent for the purposes of prosecution, no issue arises in respect of s. 45 of the Act of 2003.
10. At hearing, the respondent pursued the following objections to surrender:-
 - (i) Surrender is precluded as Dr. Petra Stranzinger, First Deputy Prosecutor of the Prosecution Office of Ried im Innkreis, is not an issuing judicial authority for the purposes of the Framework Decision;
 - (ii) Surrender is precluded by virtue of s. 37 of Act of 2003 as, in the absence of a procedure before the courts of the issuing state for challenging the EAW, surrender would be incompatible with the State's obligations under the European Convention on Human Rights ("the ECHR");
 - (iii) Surrender is precluded by virtue of s. 21A of the Act of 2003 as surrender is not sought for the purposes of prosecution;
 - (iv) Surrender is precluded by virtue of s. 37 of the Act of 2003 due to lapse of time and the impact surrender would have upon the respondent's private and family life, such that surrender would be incompatible with the State's obligations under the ECHR, and/or the application herein amounts to an abuse of process; and
 - (v) Surrender is precluded due to an unacceptable level of ambiguity in the contents of the EAW.
11. It should be noted that there were 2 earlier European arrest warrants issued in respect of the respondent for the same alleged offences. A warrant was issued in 2013 ("the first warrant") seeking the respondent's surrender in relation to the same matters. The

respondent was arrested in this jurisdiction on foot of the first warrant which was later withdrawn on 28th April, 2015.

12. Another European arrest warrant was issued in respect of this matter dated 6th July, 2020 ("the second warrant") which was issued by a senior prosecutor in the Prosecution Office of Ried im Innkreis. The second warrant was withdrawn following a request for additional information and, in particular, confirmation that it had been endorsed by a court prior to transmission. It was replaced with the current EAW. It was agreed between the parties that, insofar as relevant, documentation relating to the second warrant could be referred to in the current proceedings without formal proof thereof.
13. The respondent swore an affidavit dated 9th April, 2021 in which he avers that he first learned of the allegations contained in the EAW following his arrest on 29th April, 2014 on foot of the first warrant. He denies any wrongdoing or involvement in the said offences. He avers that the first warrant was withdrawn on 28th April, 2015 and the proceedings struck out. He avers that in April 2020, he received a witness summons dated 22nd April, 2020 requiring him to give evidence as a witness in proceedings against two other persons alleged to be involved in the commission of the offences. By way of a request for mutual assistance from the Austrian authorities, the Irish State was to facilitate the taking of that evidence by video-link. The respondent avers that he gave his evidence by video-link on 9th November, 2020. He avers that it appears that, during the course of those mutual assistance proceedings, the second warrant had been issued by the Public Prosecutor in Ried im Innkreis on 6th July, 2020, which was endorsed by the High Court on 14th July, 2020. He avers that he was arrested on foot of that warrant and spent 10 days in custody before securing bail on 24th July, 2020. He avers that the relevant prosecutor had issued the second warrant without obtaining the necessary authorisation from an Austrian court. The second warrant was subsequently withdrawn and the proceedings struck out in early 2021. He avers that the Austrian authorities had replaced the second warrant with the current EAW. The respondent indicates that he is originally from Kosovo; came to Ireland in 1997; married in 1999; has three children and was granted Irish citizenship in 2004. He is separated from his wife but plays an active role in relation to the children who are aged 7, 18 and 20 years old, respectively. Prior to the onset of the Covid-19 pandemic, he was working in the construction industry and he avers that his income is necessary to help support his children.

Issuing Judicial Authority

14. Counsel on behalf of the respondent initially submitted that the Austrian Public Prosecutor is not an issuing judicial authority for the purposes of the Framework Decision. As regards the second warrant issued on 6th July, 2020, a number of requests for additional information were made. From the replies received, it appears that the system in Austria for the issuing of European arrest warrants has been approved by the Court of Justice of the European Union ("the CJEU") in *NJ* (Case C-489/19 PPU). In essence, the CJEU approved the Austrian system whereby the European arrest warrant is issued by the Public Prosecutor and then approved or authorised by a court prior to transmission. As the second warrant did not indicate on its face that it had been endorsed or authorised by a

judge prior to transmission, the Court sought confirmation that this had been done. This appears to have resulted in the issuing of the current EAW. Accompanying the EAW is a copy of the ruling of a judge at the Provincial Court of Ried im Innkreis, authorising the EAW. This ruling refers to an earlier judicial authorisation ruling for a domestic order of apprehension issued on 15th February, 2019 and extended until 1st June, 2021. The ruling refers to the EAW issued on 8th January, 2021 and is expressly stated to be authorised by the Court "according to art. 29 par. 1 EU-JZG [law on the judicial cooperation in criminal matters with the member States of the European Union]".

15. As stated earlier, the procedure adopted by the Austrian authorities in respect of the issuing of this EAW has been approved by the CJEU in *NJ*, where it ruled as follows:-

"The concept of a 'European arrest warrant' referred to in Article 1(1) of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, as amended by Council Framework Decision 2009/299/JHA of 26 February 2009, must be interpreted as meaning that European arrest warrants issued by the public prosecutor's offices of a Member State fall within that concept, despite the fact that those public prosecutor's offices are exposed to the risk of being subject, directly or indirectly, to directions or instructions in a specific case from the executive, such as a Minister for Justice, in the context of the issue of those arrest warrants, provided that those arrest warrants are subject, in order to be transmitted by those public prosecutor's offices, to endorsement by a court which reviews independently and objectively, having access to the entire criminal file to which any specific directions or instructions from the executive are added, the conditions of issue and the proportionality of those arrest warrants, thus adopting an autonomous decision which gives them their final form."

16. Notwithstanding the decision in *NJ* and the furnishing of the court authorisation for the transmission of the EAW, counsel for the respondent submits that the current EAW failed to comply with the requirements of the decision in *NJ* as neither the warrant nor the court ruling authorising the transmission of same expressly referred to the court having assessed the proportionality of issuing the EAW. He refers to a report from an Austrian legal expert, Mag. Dr. Roland Kier, dated 5th March, 2021. Counsel for the respondent submits that the report of Dr. Kier indicates that no adequate assessment of proportionality had been carried out by the Austrian court prior to approving the transmission of the EAW. At para. 4.4 of his report, Dr. Kier states:-

"I say and believe that the procedure of the court during the decision on the approval of the EAW cannot be determined in concrete terms. It must be assumed, that the court is of course moving within the legal framework and that all requirements have also been checked based on the complete file, which was transmitted to the court by the prosecution with the issued EAW."

17. Dr. Kier went on to state in the same para. 4.4. as follows:-

"I say and believe that the court must also check compliance with the requirements for the domestic arrest warrant. The principle of proportionality must also be observed. Effects on private and family life (Art 8 ECHR) are not to be examined by the issuing state, but at most by the executing state. In the present case, the decision on the approval of the EAW therefore related to the domestic arrest warrant (ON 80).

I say and believe that concerns about the social environment of Mr. OSAJ were normally not taken into account when the EAW was approved by the court. According to Austrian law, this would have to be taken into account if Austria is the executing state, e.g. if Austria has to check the transfer to another state on the basis of an EAW (§ 19 (2) EU-JZG). It can therefore be assumed that the examination of concerns within the meaning of Art 8 ECHR is to be carried out by the Irish High Court."

18. I find the aforesaid contents of the report from Dr. Kier to be somewhat confusing and apparently contradictory. He states that the principle of proportionality must be observed but then states that effects on private and family life are matters for the executing state as opposed to the issuing state. It is noteworthy that he does not express any opinion that the EAW was issued contrary to the requirements of Austrian or European Union law.
19. I am not satisfied that the Austrian authorities, including the Austrian judiciary, failed to issue the EAW in accordance with the mechanism approved by the CJEU in NJ. As Dr. Kier states in his report :-

"It must be assumed, that the court is of course moving within the legal framework and that all requirements have also been checked based on the complete file, which was transmitted to the court by the prosecution with the issued EAW."

20. The form which a European arrest warrant is to take is laid down in an Annex to the Framework Decision which has been amended and consolidated from time to time. This is the only form which an EAW may take. This form makes no provision for the issuing judicial authority to expressly state that it has considered the proportionality of the issue of the European arrest warrant. Given the principle of mutual trust and confidence upon which the European arrest warrant system is predicated, it is to be assumed that the EAW has been issued in accordance with the national law of the issuing state and that it has been validly issued, particularly where the national system for the issue of the European arrest warrant has been expressly approved by the CJEU. This includes any necessary consideration of the proportionality of the issue of the EAW.
21. The surrender of the respondent is sought in respect of serious criminal offences alleged to have been carried out in 2013 in which a family home was invaded, family members were threatened with a knife and a firearm, family members were locked in a toilet and approximately €775,000 worth of valuables were stolen. It is difficult to envisage what family circumstances of a requested person could be relevant so as to lead a court to decline the issue of a European arrest warrant in such circumstances. Even assuming that

there might be some truly exceptional feature of the requested person's private or family life, which might possibly have such an effect, it is difficult to envisage how the court asked to approve or authorise the transmission of a EAW would conduct an enquiry into such matters. Counsel for the respondent suggests that, in this instance, information could have been requested from the respondent or he could have been interviewed via video-link in a similar fashion to the interview which had been conducted with him on foot of the request for mutual legal assistance. I do not believe that the European arrest warrant system requires that any such procedure be carried out. Indeed, in the vast majority of cases, such a procedure would not be practical and could defeat the purposes of the European arrest warrant system by providing the requested person with notice that the state where he is sought knows of his whereabouts and is actively seeking his surrender. Leaving those matters aside, I reiterate that I am not satisfied that there was any irregularity or lack of legal compliance in respect of the issuing of the EAW such that this Court should refuse to give effect to same.

Lack of Adequate Appeal in the Issuing State

22. Counsel for the respondent submits that, while the documents before the Court indicated that it was possible to appeal the issue of the national arrest warrant and the issue of the EAW, such appeals were, according to the report from Dr. Kier, subject to a period of 14 days within which to bring same and, thus, could not give any effective appeal remedy.
23. For the purposes of clarity, the Court sought additional information from the issuing judicial authority in relation to the relevant appeal mechanism. By reply dated 4th May, 2021, it is indicated that the only way to challenge the issue of the EAW is to challenge or appeal the validity of the domestic arrest order. It is indicated that there is no time limit to such challenge or appeal and if successful, the EAW will automatically cease to have effect. By way of a supplemental report from Dr. Kier dated 7th July, 2021, the respondent challenged the information provided by the issuing judicial authority regarding rights of appeal and time limits in relation to same. The Court reverted to the issuing judicial authority asking it to indicate whether the report of Dr. Kier was correct in terms of the time limits and to confirm whether or not the time limit for bringing an appeal had expired.
24. By way of a preliminary email dated 23rd July, 2021, it is indicated that regarding the time limits and expiry periods referred to by Dr. Kier, these would be correct if the respondent had been arrested in Austria but, as he was not, then the answers were not so easy. If the Austrian national apprehension order and the EAW had been formally delivered to the respondent, then the time limits for appeal would have expired. If surrendered, the pre-trial judge will have to reconsider the case and decide whether to impose pre-trial detention, the respondent would have the right to make an appeal and usually the court also checks if the issuing was correct. At any time of the pre-trial stage, it is possible to make an appeal against pre-trial detention.
25. In a formal reply dated 22nd September, 2021, the issuing judicial authority states:-

"In subsequence to a surrender, the suspect will be handed out the documents concerned (national arrest warrant and European Arrest Warrant) and given legal instructions - the time limit to lodge an appeal (14 days) will commence as from that moment."

The reply also states:-

"Please note that - in consultation with the custodial judge / judge responsible for legal protection - the time limits to lodge an appeal against the national arrest order do not commence before the surrender to the Austrian authorities (time limit: 14 days from the day of announcement/notification). A separate legal remedy against the European Arrest Warrant is not provided for. The competent Higher Regional Court Linz decides on the complaint against the decision granting the (national) arrest warrant.

In case the custodial / judge responsible for legal protection should impose a pre-trial detention after having heard the person surrendered, a separate legal remedy against the imposition of pre-trial custody is possible too and shall be filed with the Higher Regional Court."

26. On the basis of the formal reply received dated 22nd September, 2021, I am satisfied that the respondent will have a period of 14 days following his surrender to lodge an appeal against the issue of the national arrest order. In the event that such an appeal is successful, then the EAW will fall away. Furthermore, if the respondent is subjected to pre-trial detention following surrender, it is open to him at any time thereafter to challenge such pre-trial detention.
27. I am not satisfied that the procedures for the issuing of the EAW herein and the challenging thereof are incompatible with the Framework Decision so that this Court should refuse to order surrender on foot thereof.
28. In the present instance, the issue of the EAW was subject to judicial scrutiny and authorisation before its transmission. This means that there was effective judicial oversight in relation to the issue and transmission of the EAW. In *XD* (Case C-625/19 PPU), the CJEU held at paras. 43-44:-

"43. Accordingly, it is for for the Member States to ensure that their legal orders effectively safeguard the level of judicial protection required by Framework Decision 2002/584, as interpreted by the Court's case-law, by means of the remedies which they provide for and which may vary from one system to another.

44. In particular, introducing a separate right of appeal against the decision to issue a European arrest warrant taken by a judicial authority other than a court is only one possibility in that regard."

It is clear from the above quote that the existence of an appeal against the decision by an authority other than a court to issue a European arrest warrant is only one possibility in

terms of ensuring a level of judicial protection required by the Framework Decision. Therefore, the right to appeal the issue of a European arrest warrant is not a prerequisite to the validity of a European arrest warrant and the lack thereof does not automatically invalidate the European arrest warrant. Adequate judicial protection can be provided by other means such as the European arrest warrant being issued by a judge, as in this jurisdiction, or the European arrest warrant being subject to judicial endorsement or authorisation prior to transmission, as in Austria. The Austrian model for the issue of a European arrest warrant was approved by the CJEU in NJ, as dealt with earlier herein. It is also worth noting that the appeal mechanism in Austria in respect of the endorsement decision was expressly noted to be subject to an appeal before the courts. The CJEU did not consider the appeal mechanism to be ineffective or inadequate. The CJEU held at para. 39:-

"39. In the present case, it appears from the information in the file before the Court that, in circumstances such as those at issue in the main proceedings, Austrian law provides that, both in the context of the decision to issue a national arrest warrant and in the context of the decision to issue a European arrest warrant, the Public Prosecutor's Offices of the Republic of Austria are to order an arrest by means of an arrest warrant, which must be endorsed, in order that it may be transmitted by a court which is to carry out, in that regard, a review of the conditions of the issue and its proportionality. The endorsement decision is subject to appeal before the courts."

29. I am not satisfied that the EAW before the Court is invalid by reason of the domestic mechanism for appealing or challenging same in the issuing state. I am satisfied that a sufficient level of judicial protection as required by the Framework Decision is provided under the Austrian system for the issue of a European arrest warrant. I dismiss the respondent's objection to surrender based on grounds of a lack of an adequate appeal mechanism in the issuing state.

Section 21A of the Act of 2003

30. Section 21A of the Act of 2003 provides as follows:-

"21A. — (1) Where a European arrest warrant is issued in the issuing state in respect of a person who has not been convicted of an offence specified therein, the High Court shall refuse to surrender the person if it is satisfied that a decision has not been made to charge the person with, and try him or her for, that offence in the issuing state.

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

31. Counsel for the respondent relies on the report from Dr. Kier which sets out a brief description of criminal procedure in Austria. Dr. Kier explains that this is divided into the

investigation phase, the main procedure and the appeal procedure. The prosecutor conducts the investigation and is entitled to raise an indictment. The prosecutor is solely responsible for the decision on whether to raise a public indictment or not. After the indictment has been raised, the investigation phase moves onto the main procedure. Dr. Kier states at point 2.9. of his report:-

"At this time, it cannot be said whether the prosecution will raise an indictment or not."

However, at point 4.1., Dr. Kier states:-

"The only thing that is certain is that the questioning of Mr. OSAJ is planned before a decision is made as to whether an indictment will be raised or the proceedings will be suspended."

At point 4.2., he goes on to state:-

"I say and believe that – as already stated above – it can be assumed that the prosecution would still like to indict Mr. OSAJ. Otherwise, issuing the EAW would not make sense. To date, however, there is still no indictment against Mr. OSAJ."

Dr. Kier goes on to explain that before raising the indictment, the accused must be given the possibility to exercise his right to be heard and that while there is a possibility of proceedings *in absentia* under strict conditions, it is essential that the accused has been formally questioned on all charges.

32. In additional information dated 10th August, 2020, the Austrian authorities state:-

"Once Mr. Osaj will be surrendered to Austria, there will also be a trial."

In my view, that is sufficient to dispose of this ground of objection. However, for the sake of completeness, I will address the issue further.

33. By additional information dated 28th August, 2020, at point 3 thereof, the issuing judicial authority indicates:-

"After the extradition of the accused the same is interrogated by the criminal police concerning the charges and evidence. His responsibility is verified and, as soon as all results are available, charge will be brought with the Provincial Court of Ried im Innkreis on the basis of evidence. In a main proceeding to be carried out the court then will decide on these accusations."

The same letter indicates that two other persons named in the EAW were tried and acquitted of the charges and this led to the withdrawal of the first warrant in 2015. However, following an appeal, a re-opening of the proceedings was authorised by the Supreme Court, due to new evidence, and so the proceedings against those two individuals was continued and the charges against the respondent became relevant again.

The letter states that due to the current results of evidence, the respondent is assumed to be a joint perpetrator.

34. By additional information dated 27th November, 2020, the issuing judicial authority states:-

"1. The surrendering of the Mr. Osaj is not only for the purpose of questioning. Under Austrian law however the respondent has to be questioned and informed about his rights before charging and try him. If the respondent is surrendered, the first thing will be to question him and inform him about his rights, after that decision will be made to charge him."

35. I am satisfied that the respondent is not simply sought for questioning or to assist with the investigation but, rather, is sought for the purpose of completing the pre-trial procedures necessary to lead to his charge and trial. It appears to be the case that a formal or final decision to charge him must await his surrender so that he may be afforded an opportunity to respond to the allegations made against him. Section 21A of the Act of 2003 does not require that an irrevocable decision be made to charge a requested person prior to seeking his or her surrender. That would be absurd. An intention or decision to charge and try someone must be open to revocation in light of new evidence which might emerge, including any evidence or information furnished by the requested person. As pointed out by O'Donnell J. in *Minister for Justice v. Olsson* [2011] 1 I.R. 384, what is not permitted is surrender simply for the purposes of questioning or investigation. The issuing judicial authority has expressly indicated that such is not the purpose for which the respondent here is being sought.

36. In *Olssen*, O'Donnell J. stated at para. 33:-

"[33] When s. 21A speaks of 'a decision' it does not describe such decision as final or irrevocable, nor can it be so interpreted in the light of the Framework Decision. The fact that a further decision might be made eventually not to proceed, would not therefore mean that the statute had not been complied with, once the relevant intention to do so existed at the time the warrant was issued. The Act of 2003 does not require any particular formality as to the decision; in fact, s. 21 focuses on (and requires proof of) the absence of one. The issuing state does not have to demonstrate a decision. A court is only to refuse to surrender a requested person when it is satisfied that no decision has been made to charge or try that person. This would be so where there is no intention to try the requested person on the charges at the time the warrant is issued. In such circumstances, the warrant could not be for the purpose of conducting a criminal prosecution."

37. O'Donnell J. further stated in *Olssen* at para. 36:-

"[36] Certainly even without the presumption contained in s. 21A(2), the section requires clear proof. Once a court finds the European arrest warrant to be in order (and therefore on its face a request made for the purpose of prosecution or trial),

then before a court can refuse to surrender a person requested under such a warrant, it must be satisfied by cogent evidence to the contrary that a decision has not been made to charge the particular person with, and try him or her for, the offence."

38. In *The Minister for Justice and Equality v. Campbell* [2020] IEHC 344, Donnelly J. considered a similar point to that raised by the respondent herein, as regards an application to surrender Mr. Campbell to Lithuania. In that case, the issuing judicial authority furnished additional information, outlined at para. 34, confirming there was sufficient evidence allowing for a suspicion that Mr. Campbell had committed the offences and that the entirety of the data obtained in the context of the case allowed a conclusion that *"in case of his surrender there is a high probability that a Bill of Indictment would be drawn up against Liam Campbell, that is, charges would be brought against this person and the case referred to the court"*. Counsel for Mr. Campbell argued that there was a tension between the Supreme Court decisions in *Olsson* and *Minister for Justice, Equality & Law Reform v. Bailey* [2012] IESC 16. Donnelly J. rejected this submission. She emphasised at para. 46 that s. 21A of the Act of 2003 contained a presumption that a decision has been made to charge the person with, and try him for, the offence in the issuing state unless the contrary is proved:-

"46. Therefore, this Court must approach the matter that it is for the respondent to prove that no decision has been made to charge or try him in Lithuania."

She emphasised that, as indicated by O'Donnell J. in *Olsson*, words such as "charge" and "prosecution" are not only to be understood as meaning a charge or prosecution as in the Irish criminal justice system. Thus, the use of the word "suspect" of itself does not overturn the presumption that a decision has been made to charge and try this respondent.

39. Donnelly J. indicated the manner in which a Court should approach the issue as follows at para. 50:-

*"50. In my view, the most appropriate manner in which this Court should assess whether s. 21A prohibits surrender is to proceed as follows: in the first place the Court must accept the presumption contained in s. 21A that a decision to charge and try this respondent has already been made. Then the court must proceed to assess whether there is cogent evidence to the contrary (see *Minister for Justice v. McArdle* [2014] IEHC 132). If the Court is satisfied that the presumption that a decision has been made to charge him has not been rebutted, the Court should proceed to assess whether the presumption that a decision has been made to try him has been rebutted. The Court must bear in mind that the issue in respect of whether no such decision either express or implied to put the appellant on trial (or to charge him) has been made is 'a fairly net issue of fact' (as per Murray J. in *Bailey* when dealing with the question of decision to try)."*

40. Donnelly J. continued at para. 51:-

"51. In this case, there is a statement that the proceedings were issued for the purposes of conducting a criminal prosecution. It is also clear that a district judge in Vilnius has given a decision that he should be arrested in respect of these matters. Nothing Ms. Botyriene has submitted amounts to cogent evidence that no decision has been made to charge this respondent."

41. Donnelly J. emphasised that the issuing judicial authority had indicated that it had sufficient evidence to allow it to suspect the respondent of having committed the alleged offences and that this had led to the Vilnius Court imposing a constraint measure of arrest upon him. In addition, the issuing judicial authority had stated there was a high probability that a bill of indictment would be drawn up against the respondent, that charges would be brought against him and the case referred to the court. It was noted that this was stated in the context of the law concerning pre-trial investigation in Lithuania. She emphasised that this was not a situation where the issuance of the EAW had been for the prohibited step of only carrying out an investigation. She concluded the EAW had been issued with a view to putting him on trial for the matters but that Lithuania law required that he have an opportunity to present his case during the investigative stage and that the prosecution also have an entitlement to present evidence at that point. Donnelly J. rejected the respondent's submissions.
42. The decision of Donnelly J. in Campbell was appealed to the Court of Appeal. In *The Minister for Justice and Equality v. Campbell* [2021] IECA 219, the Court of Appeal upheld the decision of Donnelly J. in the High Court. The Court of Appeal rejected any suggestion that there was a tension between the Supreme Court decisions in *Olsson* and *Bailey*, and that there was no reason to doubt the correctness of the analysis O'Donnell J in *Olsson*.
43. Edwards J., in the Court of Appeal, stated at paras. 41 and 42 of his judgment:-

"41. It seems to me that what Olsson establishes, amongst other things, is that where the High Court, acting in its capacity as an executing judicial authority for the purpose of the EAW system, has received evidence in the course of an application for the surrender of a requested person on foot of which it is contended the s. 21A(2) presumption is rebutted, that court is obliged to submit any such contention, and the evidence relied on in support of it, to a rigorous examination and analysis; all with a view to determining the reality of the claim that no decision has been made to charge and/or try the requested person. It follows that characterisations used concerning, or labels attached to, actions or procedures described in evidence may not necessarily be determinative of what will ultimately questions of fact, i.e., whether a decision or decisions has/have been taken to both charge and try the requested person for the offence concerned in the issuing state.

42. O'Donnell J stresses in Olsson [at paragraph 33] that:

"[33] When s. 21A speaks of 'a decision' it does not describe such decision as final or irrevocable, nor can it be so interpreted in the light of the Framework Decision. The fact that a further decision might be made eventually not to

proceed, would not therefore mean that the statute had not been complied with, once the relevant intention to do so existed at the time the warrant was issued. The Act of 2003 does not require any particular formality as to the decision; in fact, s. 21 focuses on (and requires proof of) the absence of one. The issuing state does not have to demonstrate a decision. A court is only to refuse to surrender a requested person when it is satisfied that no decision has been made to charge or try that person. This would be so where there is no intention to try the requested person on the charges at the time the warrant is issued. In such circumstances, the warrant could not be for the purposes of conducting a criminal prosecution.”

44. Edwards J. endorsed the approach taken by Donnelly J. in the High Court. He noted the issuing judicial authority’s reference to sufficient evidence to allow the suspicion that the respondent had committed the offences and that there was a high probability that a bill of indictment would be drawn up against him. Ultimately, it was a question of fact for the Court to determine. He emphasised at para. 49:-

“49. All the indicators are that sufficient evidence exists at present to allow him to be charged and placed on trial. There is a theoretical possibility that this effective decision could be reversed, but that does not mean that there has not been such a decision.”

45. Edwards J. also placed some emphasis on the fact that the European arrest warrant stated that it had been issued for the purposes of conducting a criminal prosecution. He reiterated the presumption contained in s. 21A(2) of the Act of 2003:-

“51. Finally, the point must again be made that by virtue of s. 21A (2) of the Act of 2003 as amended, the issuing state is presumed to have decided to both charge and try the requested person, and the onus is on the person concerned to rebut that which is presumed to do so by adducing, or pointing to, cogent evidence suggesting the contrary. I do not consider that the respondent has succeeded in doing that, and like the trial judge in this case I am not satisfied that the statutory presumption has been rebutted.”

46. Having considered all of the documentation before the Court, I am not satisfied that the presumption provided for at s. 21A(2) of the Act of 2003 has been rebutted. I am satisfied that there is currently an intention and decision on the part of the Austrian authorities to prosecute, including to charge and try, the respondent for the offences to which the EAW relates, albeit that this is subject to a further decision whether to continue the prosecution after the respondent has been questioned and informed as to his rights, as required under Austrian law. I therefore dismiss the respondent’s objection to surrender based upon s. 21A of the Act of 2003.

Section 37 of the Act of 2003/Abuse of Process

47. Counsel for the respondent submits that the personal circumstances of the respondent, together with the repeated European arrest warrants and lapse of time, were so

exceptional as to justify this Court in refusing to surrender the respondent. Alternatively, Counsel submits that the proceedings amounted to an abuse of process and the Court should refuse surrender on that basis.

48. I am satisfied that the personal circumstances of the respondent are not so exceptional as would justify this Court in refusing his surrender. As indicated in the decision of the Supreme Court in *Minister for Justice and Equality v. Vestartas* [2020] IESC 12, it is only in truly exceptional circumstances that Article 8 ECHR rights could justify refusal of surrender on foot of a European arrest warrant. I note the respondent's personal family circumstances as set out in his affidavit already mentioned herein. I accept that his surrender will cause significant disruption to his personal and family life. However, disruption of private and family life is inherent in any system of extradition or criminal process and in many instances, this will amount to a significant disruption. The respondent's personal and family circumstances come nowhere near meeting the threshold set out in *Vestartas*, whereby Article 8 ECHR rights might justify a refusal of surrender, either taken on their own or taken cumulatively with the other facts of this matter, including delay and the issue of a number of warrants.
49. The offences to which the EAW relates are alleged to have occurred in June 2013. The respondent's surrender was first sought by way of the first warrant issued in 2013. From the documentation before the Court, it appears that the first warrant was withdrawn in 2015 by reason of the acquittal of two of the respondent's alleged accomplices in respect of the same offences. That acquittal was appealed and it seems that the Austrian Supreme Court has ordered that the proceedings may continue against those persons on foot of fresh evidence. On that basis, the second warrant was issued on 6th July, 2020 and following the respondent querying whether same had been validly issued, it was withdrawn and replaced with the current EAW. No significant delay was caused by reason of the withdrawal of the second warrant and its replacement with the current EAW. The reason for the withdrawal of the first warrant in 2015 and the subsequent further request for surrender a number of years later has been explained by the Austrian authorities as aforesaid. It is well established law that the withdrawal of a request for surrender, and even in some cases a refusal to surrender, will not act as an automatic bar to surrender on foot of a subsequent application for surrender. I am not satisfied that there has been any culpable delay on the part of the Austrian authorities. I am not satisfied that any abuse of process has been made out before the Court. The facts of this matter do not equate with or come close to the exceptional circumstances of *Minister for Justice and Equality v. J.A.T. No. 2* [2016] IESC 17, where O'Donnell J. indicated in that case the exceptional nature of same and pointed out as follows at para. 10 of his judgment: -

"10. These factors - 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 - when weighed cumulatively, are powerful. Even then, and without undervaluing the offences alleged here, it is open to doubt that these matters would be sufficient to prevent surrender for very serious crimes of violence.

This illustrates that the decision in this case is exceptional, and even then close to the margin."

50. I dismiss the respondent's objections grounded upon s. 37 of the Act of 2003 and/or abuse of process.

Section 11 of the Act of 2003

51. It is submitted on behalf of the respondent that the EAW does not contain sufficient particulars to comply with s. 11 of the Act of 2003 and, in particular, fails to specify with sufficient clarity the criminal acts, omissions or participation alleged against the respondent. Counsel on behalf of the respondent submits that in utilising the procedure provided for by s. 38(1)(b) of the Act of 2003 and the ticking of the box relating to "*organised or armed robbery*", it is not clear whether the tick-box procedure has been invoked in respect of both offences. As stated earlier at para. 8 herein, I am satisfied that it is properly invoked in respect of both offences.
52. It is further submitted that while the EAW refers to 2 offences, the legal classification identifies 3 offences pursuant to the Austrian Criminal Code. It should be noted that this particular ground of objection was not pursued with any great vigour before the Court. I am satisfied that the EAW relates to 2 offences and that the setting out of the legal classification for 3 offences is explicable by reason of the fact that one of the offences to which the EAW relates is aggravated robbery and the legal classification for robbery and aggravated robbery have been set out as regards that offence.
53. I am further satisfied that a sufficient description of the circumstances in which the offences are alleged to have been committed including the time, place and degree of participation in the offence by the respondent has been set out in the EAW. It is clear that the respondent is alleged to have been a member of a criminal gang which carried out an organised and armed robbery at the home of a named family in Ried im Innkreis, in the course of which persons were unlawfully locked up in a toilet. I am satisfied that the EAW contains sufficient details of the alleged offending. Counsel for the respondent did not point to any particular prejudice to the respondent by reason of the lack of further details. I am further satisfied that the absence of any further details has not been prejudicial to the respondent in the context of this application for surrender and will not be prejudicial to him in meeting the charges or in any other way following surrender. I dismiss the respondent's objections to surrender grounded upon s. 11 of the Act of 2003.

Conclusion

54. I am satisfied that surrender of the applicant is not precluded by reason of Part 3 of the Act of 2003 or any other part or provision of that Act.
55. Having dismissed the respondent's objections, it follows that this Court can make an Order pursuant to s. 16 of the Act of 2003 for the surrender of the respondent to Austria. However, as there is a separate request for the surrender of the respondent to serve a prison sentence in Belgium for other offences (proceedings record number 2021/075 EXT.) and as the Court considers that an Order for surrender can also be made in respect

of that matter, the Court will postpone making the surrender order in order to consider which application for surrender should be given effect to first.

[Following further consideration, the Court ordered the surrender of the respondent to Belgium in the other proceedings and declined to make an Order for surrender in these proceedings.]