

THE HIGH COURT

[2019 No. 295 EXT]

BETWEEN

MINISTER FOR JUSTICE & EQUALITY

APPLICANT

AND

PIOTR JANUSZ POLAK

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 13th September, 2016 ("the EAW"). The EAW was issued by a Regional Court Judge of the Regional Court in Opole as issuing judicial authority ("IJA").
2. The EAW was endorsed by the High Court on 18th September, 2019. The respondent was arrested and brought before this Court on 1st November, 2019 and this application proceeded before the Court on 10th December, 2019. The matter was then adjourned from time to time awaiting the judgment of the Supreme Court in *Minister for Justice & Equality v. Vestartas* [2020] IESC 12, to which I refer below, and also due to the Covid-19 pandemic.
3. At the opening of this application, I was satisfied that the person before the Court is the person in respect of whom the EAW was issued, and no objection was raised to this application on the basis that the person before the Court is not the person to whom the EAW refers.
4. No issue was raised by either of the parties that the matters referred to in ss.21A, 22, 23 and 24 of the European Arrest Warrant Act 2003 (as amended) (hereinafter "the Act of 2003") are applicable and this Court is not aware of any reason as to why the surrender of the respondent might be prohibited for any of the reasons set forth in any of those sections.
5. The basis for the issue of the EAW is stated at para. B of the same to be a binding sentence of the District Court in Opole dated 15th April, 2004. At para. C of the EAW it is stated that the maximum length of the custodial sentence or detention order which may be imposed for the offences is eight years under article 286 § 1 of the Penal Code and five years under article 270 § 1 of the Penal Code. The EAW states that the length of custodial sentence or detention order imposed was two years and six months, with one year, six months and 15 days remaining to be served. Accordingly, minimum gravity in respect of the offences with which the EAW is concerned is established.
6. I pause here to mention that the respondent obtained a letter from a Polish lawyer whom he had engaged to assist him in an application for a pardon in respect of his conviction. That application was unsuccessful, but in her letter, his Polish lawyer advises that the respondent appealed the decision of the District Court of Opole, and on 7th January, 2005, the Circuit Court in Opole handed down its decision in the matter, whereby it

reduced the sentence handed down by the District Court, from three years and two months to two years and six months. While therefore the EAW records the correct sentence, it does not accurately reflect the court that handed down the sentence for which his surrender is sought. This was not disputed by the applicant, and nor did the respondent raise any objection under this heading. In those circumstances, and where the EAW records the correct and undisputed balance of the sentence remaining to be served by the respondent, I do not consider that I should refuse this application, on my own motion, on account of the inaccuracy in the EAW. Nor do I think it necessary to make a request under s.20 of the Act of 2003 to clarify the EAW, since the parties themselves are not in disagreement on the issue.

7. At para. D of the EAW, the IJA has highlighted that the respondent appeared in person at the trial which led to the judgment.
8. At para. E of the EAW it is stated that it relates to 12 offences, which are set out in detail thereafter. The classification of these offences are declared as "*offence against property*" under article 286 § 1 of the Penal Code and "*offence against reliability of documents*" under article 270 § 1 of the Penal Code. At para. E.1 of the EAW the boxes of "*forgery of documents and trafficking in them*" and "*fraud*" are ticked. In general terms, the offences described appear to involve obtaining goods under false pretences. The goods involved are stated to have a total value of 214,740 Polish zloty, equating to approximately €48,000 today.
9. Particulars of the provisions of Polish law whereby these actions constitute an offence are set out comprehensively in para. F of the EAW. The EAW also sets out article 103 of the Penal Code relating to the "*extinguishment of a sentence by limitation*" and it is stated that the sentence on which the EAW is based is due to expire on 7th January, 2020. The Court subsequently sought clarification of this from the IJA, and was informed that this date had been extended to January 7th, 2030, on account of the fact that the respondent was evading the execution of his sentence.
10. An unusual feature to the background to this application is that although he was living here at the time, the surrender of the respondent for the same offences was previously the subject of an application before a court in France. The respondent was arrested, pursuant to the EAW, while travelling in France. He contested the application. In his affidavit in response to this application, the respondent avers that he was arrested while travelling in France with his family on 20th September, 2018, later being granted bail and returning to France on a number of occasions for court to oppose the application for his surrender from France to Poland. These proceedings made their way to the Court of Appeal of Paris, concluding there on 30th January, 2019 with an order for the surrender of the respondent. However, the respondent was released and claims that he was told (by the French court) to return to Ireland and await contact from the Polish authorities. It is averred by the respondent that he provided his correct address to the French authorities and this was forwarded to the Polish authorities. The respondent also says that at this

time he was in direct correspondence with the Polish authorities in an attempt to resolve matters, while remaining in Ireland.

11. Points of objection, which are undated, were delivered on behalf of the respondent. Four points were raised, two of which were pursued at the hearing of this application, as follows: -

- 1) The surrender of the respondent is prohibited by the provisions of Part 3 of the Act of 2003 by reason of the lapse of time since the commission of the offences specified in the EAW.
- 2) The surrender of the respondent is prohibited by Article 8 of the European Convention on Human Rights (the "Convention") on the grounds that it would amount to a gross interference with the respondent's family life.

Other points of objection, one grounded in s. 37 of the Act of 2003 and arising by reason of prison conditions in Poland, and another based upon alleged deficiencies in the EAW, were not pursued.

12. The respondent swore an affidavit dated 27th November, 2019, in support of his opposition to this application. In this affidavit, the respondent states that he has been residing in Ireland since February 2005, when he moved here from Poland with his family in search of an improved financial future to support his "now wife" and infant child, as well as his elderly parents who remained in Poland. Although he was aware of the prison sentence imposed upon him, the respondent avers that at the time he left Poland he believed that he was free to do so, having informed his probation officer of his intention to do so. The respondent also states that he travelled back to Poland around July 2005, residing at his previous address which was known to the Polish authorities. The respondent avers that the sentence, the subject of the EAW, was under appeal at the time he left Poland.

13. The respondent further avers that he has lived openly and under his own name while in Ireland, having been at all times employed and registered with the authorities. The respondent states that since approximately 2014 he has been self-employed, running a "renovation" service. It is stated that the respondent applied to the Polish Consulate in Ireland for a passport which was granted, having provided accurate details.

14. It is averred that the respondent and his family have been drastically prejudiced by the inexplicable delay in the issuance and execution of the EAW. It is averred that the respondent is the sole earner for his wife and two children. The respondent states in his affidavit that he and his wife purchased a family home as part of an incremental purchase scheme, and his family would not be able to maintain the payments due under the scheme should he be surrendered to Poland. The respondent states that he and his wife have recently entered into a hire purchase agreement for two vehicles, in respect of which the respondent also fears his wife will be unable to make due payments if he were to be

surrendered. He exhibits a bank statement, stating that he is not a man of means and has little savings.

15. The respondent goes on to outline his concerns in relation to the mental health of his children should his surrender be ordered. It is averred that his older daughter has been referred to a clinical psychologist. This averment is based on a referral for psychological assessment, which he exhibits, and which is dated October 2016. The respondent also avers that he and his wife were due to begin counselling with their younger daughter. He does not, however, explain what this relates to, although he exhibits a medical report prepared for the purpose of an injury claim being advanced on behalf of his daughter through the injuries board. The respondent states that he is concerned that his surrender would negatively impact the mental health of his daughters.

### **Submissions of the parties**

#### ***Submissions of the respondent***

16. Counsel for the respondent submits that having regard to the long delay since the conviction of the respondent in Poland, and the likely impact of the surrender on him and on his family, the public interest in his surrender does not outweigh the private interests of the respondent. It is submitted that there has been a significant delay, not only from the time of the commission of the offences, but from the time that the offences were dealt with by the Polish courts. The EAW issued as recently as 2016, but the respondent has been living in this country since February 2005. It is submitted that the respondent has not come to the attention of the authorities in this jurisdiction, has lived openly and in his own name, and has travelled to other jurisdictions using his own passport.
17. 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 fourteen and fifteen years. He came to this country and obtained employment, and eventually set up 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 five year and eight months' sentence 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.
18. Hunt J. found that Mr. Vestartas had worked peaceably and led a settled life as a responsible and 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. This 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.

19. There are some similarities in the factual backgrounds to this case and that in *Vestartas*. These are:
  - 1) Each respondent has served a significant portion of his sentence;
  - 2) Each respondent has a dependent young family;
  - 3) Each respondent has engaged in gainful employment and for all intents and purposes has rehabilitated into society;
  - 4) In each case there has been a substantial delay on the part of the requesting state.
20. 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). I then afforded the parties an opportunity to make submissions arising out of that decision. I address below the decision of the Supreme Court in *Vestartas*, and the submissions of the parties arising out of that decision.
21. Returning then to the submissions at the hearing of this application, counsel for the respondent submitted that when an argument is raised that surrender is contrary to Article 8 of the Convention, it is necessary for the Court to consider whether the surrender of the respondent will result in a gross interference with his family rights. Counsel relied also on the decision of Edwards J. in *Minister for Justice, Equality & Law Reform v. T.E.* [2013] IEHC 323 and the following principles set out therein at pp. 110 and 113: -
  - "4. *Where the family rights that are in issue are rights enjoyed in this country, the issue of proportionality involves weighing the proposed interference with those rights against the relevant public interest;*
  5. *In conducting the required proportionality test, it is incorrect to seek to balance the general desirability of international cooperation in enforcing the criminal law and in bringing fugitives to justice, against the level of respect to be afforded generally to the private and family life of persons;*
  - ...
16. *Article 8 does not guarantee the right to a private or family life. Rather it guarantees the right to respect for one's private or family life. That right can only*

*be breached if a proposed measure would operate to do so as to disrespect an individual's private or family life. A proposed measure giving rise to exceptionally injurious and harmful consequences for an affected individual, disproportionate to both a legitimate aim or objective being pursued and the stated pressing social need proffered in justification of the measure, would operate in that way and breach the affected individual's rights under Article 8."*

22. It was submitted on behalf of the respondent that the delay in this matter, coupled with the harmful consequences of his surrender in his family life as viewed in the light of the principles set forth in *T.E.*, render the surrender of the respondent disproportionate to the public interest in his surrender. The respondent argues that there has been a very significant delay on the part of the requesting state in this matter, and that delay, taken together with the personal circumstances of the respondent, would give rise to a violation of his rights under Article 8 of the Convention if the respondent were now surrendered to serve out the remainder of his sentence. The respondent has come to this country, established his family here and set up his own business. He is the sole breadwinner in the family, and his family will suffer very significant adverse consequences if he is surrendered. He has fully rehabilitated and at this stage the public interest in his surrender to serve out the remainder of his sentence is outweighed by the respondent's family rights as protected by Article 8 of the Convention.
23. Counsel for the respondent also submitted that the fact that the respondent has served a large part of the sentence imposed on him (almost a year) adds further to the disproportionality that would flow from his surrender, and the resulting impact on the respondent's life as well as that of his family, in circumstances where they have engaged with and integrated into the community in the State.

***Submissions of the applicant***

24. Counsel for the applicant submitted that delay in and of itself cannot operate as a bar to surrender, although it may do so taken together with other factors, as occurred in *Minister for Justice and Equality v. J.A.T. (No. 2)* [2016] IESC 17. It is submitted that in this case there was no prosecutorial delay on the part of the Polish authorities, with the offences ending in 2001 and the District Court conviction being imposed in 2004. It is also submitted that the respondent left Poland in the knowledge of the outstanding balance of his sentence. Counsel for the applicant submits that this is clear from the respondent's affidavit and was accepted in evidence at the respondent's bail hearing in this matter. In his affidavit grounding his objections, the respondent deposes that he left Poland for Ireland in February 2005 and that the correspondence from the respondent's Polish lawyer states that his appeal against conviction in Poland was determined in January 2005. The applicant submits that the respondent, in coming to this country at that time, has contributed to any delay that has resulted in this matter, and that the issuing state is the appropriate forum to ventilate any delay issues.
25. Counsel for the applicant submits that there is a high public interest in the surrender of the respondent due to the fact that the respondent is sought to serve a sentence. The applicant also referred to *Minister for Justice, Equality & Law Reform v. T.E.* [2013] IEHC

323, and submits that there is no evidence that surrender of the respondent would be disproportionate in the respondent's particular circumstances.

26. In response to the respondent's submissions counsel for the applicant submitted that the surrender of the respondent would not be an unjustified and disproportionate interference with his right to respect for family life. It is submitted that the 12 offences on which the EAW is based are moderately serious, with penalties ranging from five to eight years. The sums of money involved in these offences were stated to total 214,740 Polish zloty. It is submitted that families will always suffer when a family member is incarcerated, and that there are no exceptional circumstances in this case that would justify refusal of the application. The applicant states that there has been no specific evidence adduced in this matter that there would be any damage caused should the respondent be surrendered, and that the onus is on the respondent to present such evidence.
27. Counsel for the applicant further submitted that there has been no expert medical evidence provided to the Court to support the claims of the respondent relating to his children's medical condition or any treatment they are receiving, and the respondent's role, if any, in that treatment. The documentation relied upon by the respondent, comprising a referral form from 2016 in one case, and a PIAB medical assessment form of 2019 in the other, was not adequate to support the respondent's claim that the surrender of the respondent would have a drastic impact on his children.
28. It is submitted that it is inescapable that respondents in extradition cases will suffer disruption to their personal and family lives if surrendered, but that the starting point when considering the proportionality of such an outcome is that the public interest in ensuring that extradition arrangements are honoured is very high. It is also submitted that there is a public interest that persons convicted of offences serve the penalties imposed on them, particularly those who leave that jurisdiction in the knowledge of those penalties. Counsel for the applicant submits that, on the evidence, is what occurred in this case. Counsel for the applicant refers to the correspondence of the respondent's Polish lawyer which states that the respondent appealed the decision of the District Court of Opole, and that a decision on the appeal was given by the Circuit Court in Opole on 7th January, 2015 after which the respondent left Poland in February 2015.
29. Counsel for the applicant submits that there are no exceptional circumstances presented in this case, comparable to those in other cases in which it has been held that surrender would result in a violation of Article 8 of the Convention. It was submitted that if the same circumstances were presented in this jurisdiction the respondent would be required to serve the balance of his sentence.

**The decision of Supreme Court in Minister for Justice & Equality v. Vestartas**

30. As mentioned earlier, at the conclusion of the hearing of this application, I adjourned the matter pending the decision of the Supreme Court in *Vestartas*, because it seemed to me that there were similarities between the factual background in this case, and the background to the application in that case. The decision of the Supreme Court in *Vestartas* was handed down on 2nd April, 2020, and by that decision the Supreme Court

allowed the appeal of the Minister and ordered the surrender of Mr. Vestartas. I have since received written submissions from the parties arising out of that decision.

31. Before addressing those submissions, it is helpful to identify some of the salient points arising out of the judgment of MacMenamin J. in the Supreme Court. Firstly, MacMenamin J. drew a distinction between cases which a breach of Article 3 of the Convention is asserted such as in *Minister for Justice and Equality v. Rettinger* [2010] IESC 45 in which the Convention right is expressed in absolute terms, and Article 8 of the Convention in which the rights conferred by Article 8(1) are qualified by Article 8(2) which states that the guarantee set forth in Article 8(1) of the right to respect for an individual's private and family life is subject to the proviso that public authorities shall not interfere with the exercise of that right:

*"except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms others."*

32. MacMenamin J. noted at para. 23 that:

*"The terms of Article 8(2) are, therefore, sufficiently broad to encompass orders for extradition, or in this case, surrender. But as will be seen, these Article 8 considerations arise within a statutory framework which it is now necessary to consider."*

That statutory framework is, of course, the Act of 2003. In this regard, MacMenamin J. placed particular emphasis on s.4A of the Act of 2003 which provides:

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

and s. 10, which provides:

*"Where a judicial authority in an issuing state issues a European arrest warrant in respect of a person-*

*(d) on whom a sentence of imprisonment has been imposed in that state in respect of an offence to which the European arrest warrant relates,*

*That person shall, subject to and in accordance with this Act and the Framework Decision be arrested and surrendered to the issuing state."*

33. MacMenamin J. then referred to the prohibitions as set forth in Part 3 of the Act of 2003, including s. 37 which provides that a person shall not be surrendered if his or her surrender would be incompatible with the State's obligations under the Convention. He then addressed the decision of the Supreme Court in *Minister for Justice and Equality v. Ostrowski* [2013] IESC 24, and at para. 65 of his decision he stated:



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

He continued:

- "66. To summarise on this issue, I think the High Court judgment incorrectly elided two separate tests into one overall proportionality assessment which does not correspond with the requirements of Act.*
- 67. Ostrowski makes clear that, to be successful, an Article 8 defence must cross a high threshold. Below that, while Convention or constitutional rights necessitating proportionality assessments will often arise for consideration in many cases, these will not be sufficient to defeat a claim for surrender. The test must be seen within the requirements of ss. 4A, 10 and 37(1) of the 2003 Act, as explained in Ostrowski.*
- 68. In carrying out an assessment in our law for the purposes of s. 16 of the Act, therefore, it is not accurate to speak of the task as one which is not governed by any predetermined approach, or pre-set formula, balancing competing public and private interests. In fact, the constant and weighty public interest in ordering surrender is not only underlined by Article 8(2) considerations such as necessity under law, freedom and security, but the words of ss. 4A and 10 of the Act. The test must be seen in light of the clear exposition in the judgments in Ostrowski. A court may often have to take private and family rights considerations into account. But it can only do so having regard to the limitation contained in Article 8(2) of the ECHR, and the public interest considerations inherent in the Act and the Framework Decision. To surmount these, in any case, would necessitate that the evidence requirement be high. The assessment does not involve a balance between the rights of the public and to 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."*
34. MacMenamin J. then went on to refer to the decision of the Supreme Court in the case of *Minister for Justice and Equality v. J.A.T. (No.2)* [2016] IESC 17 and noted that in that case there was clear, cogent medical evidence concerning the degree of incursion into the appellant's Article 8 private and family rights. He summarised the various factors which the Supreme Court considered in that case would have resulted in a violation of the

respondent's Article 8 rights, if surrender were ordered. These included the fact that the respondent in that case was the primary carer for his son, who suffered from chronic schizophrenia, and that the appellant himself was psychologically vulnerable (and there was clear medical evidence that this was so). He noted that the circumstances were almost unique.

35. MacMenamin J. then compared the circumstances of the respondent in *Vestartas* with those of the respondent in *J.A.T. (No.2)* and concluded that the evidence in the case of *Vestartas* fell very far short of that described in *J.A.T. (No.2)*. At para. 92 he stated that it cannot be said therefore that there are "exceptional" Article 8 factors. At para. 94 he stated:

*"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... 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."*

36. Finally, MacMenamin J. also addressed the question of delay as a possible ground upon which to oppose an application for surrender. At para. 89, he stated:

*"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."*

37. I turn now to address the arguments made by the parties arising out of the decision of the Supreme Court in *Vestartas*.

#### ***Submissions of the respondent***

38. Counsel for the respondent submitted that while the Supreme Court had ordered the surrender of Mr. *Vestartas*, nonetheless, the court affirmed that there may be cases in which refusal of surrender is appropriate when having regard to their truly exceptional circumstances, such as those that gave rise to a refusal of surrender in *J.A.T. (No. 2)*. It is the contention of the respondent in this case that the circumstances of this case are sufficiently similar to those in *J.A.T. (No. 2)* as to warrant a refusal of this application. Counsel for the respondent points to the delay in making this application and the fact that the offences were committed as far back as 2004. He also points to what he describes as the health issues of the respondent's daughters, and the financial dependence of the respondent's wife and daughters on him, and the hardship that will be caused by his

surrender. On the basis of *J.A.T. (No. 2)*, it is submitted that the surrender of the respondent would constitute a violation of his rights under Article 8(1) of the Convention, notwithstanding the limitations on those rights as provided for in Article 8(2) of the Convention.

***Submissions of the applicant***

39. On behalf of the Minister, on the other hand, it is submitted that the circumstances in this case do not meet the level of exceptionality as arose in *J.A.T. (No. 2)*. It is submitted that the respondent is the author of any delay by reason of his own flight from Poland. It is submitted that the financial information provided by the respondent to support arguments based on hardship is incomplete, and that the evidence regarding the psychological disposition of the respondent's daughters is also incomplete and falls far short of being sufficient to refuse surrender. Accordingly, it is submitted, there is nothing that distinguishes this case from any other case in which the surrender of a requested person will cause the hardship that is inevitable in such matters, but which cannot operate as a bar to surrender.

**Conclusion**

40. I consider that the arguments advanced on behalf of the applicant are correct and must be accepted. Counsel for the applicant cited the extract quoted above at para. 35 from the decision of MacMenamin J. in the Supreme Court in *Vestartas*, (para. 94 of that decision).

41. It is difficult to see how the circumstances of the respondent in these proceedings can be described as being in any way truly exceptional, and there certainly is no "cogent evidence" that this is so. The circumstances in this case are common to many applications for surrender. So, therefore, it is not uncommon for a person to have served part of their sentence, very often while in custody pending trial. It is not uncommon for there to be a delay, where the delay has, in very significant measure, arisen because of the fact that the person whose surrender is sought has left the jurisdiction of the requesting state, very often in order to avoid prosecution or a prison sentence, or, at minimum, in the knowledge that he or she is wanted in the requesting state for one, other or both. It is very common for such persons to have settled down, secure employment and to have dependent family members. All of these factors lend towards a significant sympathy on the part of the Court for the persons whose surrender is requested, but it is not open to the Court to decide these applications on the basis of such sympathetic considerations. This is clear from both the decision of MacMenamin J. in *Vestartas* and O'Donnell J. in *J.A.T. (No. 2)*. In *Vestartas*, MacMenamin J. said at para 102:

*"It is natural that there will be human sympathy in a situation like this. But this must take second place to the duties which devolve upon the courts under the Framework Decision and the terms of the Act itself."*

42. In *J.A.T. (No. 2)* the court found that the respondent was effectively the sole care giver for his son, who suffered from a serious psychiatric condition. The court found that the

surrender of the respondent would severely impact on his son. There is no evidence in this case of any such impact on the respondent's children. There were also other factors in *J.A.T. (No. 2)*, that influenced the court. It was the second application for the surrender of the respondent, there was delay, and the court also accepted the finding of the High Court that there had been an abuse of process in the application. Of these factors, only delay is present in this case, and it is clear from *J.A.T. (No. 2)* that it was the cumulative weight of all of the factors that gave rise to the refusal of surrender.

43. Moreover, it has been made clear, repeatedly, that delay on the part of the requesting state cannot in and of itself be a ground to justify surrender, although it might be a factor to be taken into account with other matters, such as in *J.A.T. (No. 2)*. That said, at para. 89 of his decision in *Vestartas*, MacMenamin J. said that: -

*"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 constitutional or ECHR issues."*

However, it is very difficult to see how those issues can ever be raised when it is clearly established that the requested person has at all times been aware that he was wanted in the requesting state, and could have, at any time, chosen to surrender himself to the authorities there. In those circumstances, it is the requested person, much more so than the requesting state, who is responsible for the delay, and it could therefore hardly be regarded as an egregious delay of the kind referred to by MacMenamin J., or a delay of the kind that might alter the public interest in surrender.

44. For these reasons, I consider that the objections of the respondent must be rejected, and the application should be granted.