

UNAPPROVED



THE COURT OF APPEAL

Record No.: 34/2021

Birmingham P.

Edwards J.

Donnelly J.

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

BETWEEN/

THE MINISTER FOR JUSTICE AND EQUALITY

APPLICANT/RESPONDENT

-and-

D.E.

RESPONDENT/APPELLANT

JUDGMENT of Ms. Justice Donnelly delivered on the 1st day of July, 2021

Introduction

1. The appellant contends that his surrender to the United Kingdom of Great Britain and Northern Ireland (“the UK”) is prohibited because of the impact it would have on his personal and family life by virtue of his role as carer to his wife and son. The Supreme Court has addressed the issue of respect for family and personal life in the context of the duty to surrender pursuant to the European Arrest Warrant Act, 2003, as amended (“the 2003 Act”) on a number of occasions. The appellant maintains however that, because the issue was clouded by other factors raised in those cases, no defining or overarching test has been identified by the Supreme Court as to the circumstances if and when, surrender must be refused under s. 37 of the 2003 Act on the basis that surrender would be incompatible with his constitutional right to family and private life and Article 8 of the European Convention on Human Rights (“ECHR”). This appeal raises those issues directly.

The Certified Questions

2. The High Court certified the following questions for the purpose of an appeal pursuant to s. 16(11) of the 2003 Act:

“In the context of proceedings under the European Arrest Warrant Act 2003 as amended, where a respondent objects to surrender on the basis that same is precluded by s. 37 of the said Act as it would be in breach of the respondent’s rights under art. 8 ECHR and having particular regard to the provisions of art. 8(2) ECHR:

1. *Can personal or family circumstances, in and of themselves, provide a basis upon which surrender might be precluded by s. 37 of the Act of 2003?*
2. *What is the appropriate test to be applied by the Court in determining whether such an objection is sustained and that surrender should be refused?*
3. *In so far as exceptionality may be a relevant factor in determining such an objection, what is the appropriate test to be applied by the Court in determining whether the circumstances found to exist are so exceptional as to justify refusal of surrender”*

Article 8 – Right to respect for private and family life

3. Article 8 ECHR provides as follows:

“1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this 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 well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

Evidence in the High Court

4. The appellant's surrender is sought for the prosecution of three offences of a sexual nature upon a young girl in the UK between the dates of May 1998 and May 2001. One of the offences allegedly comprised multiple incidents of a sexual nature.

5. The appellant's objection to his surrender is raised in what the appellant maintains is a highly unique set of family circumstances - namely the severe disabilities of his son and his wife, his role as sole carer for them and the consequential impact upon them in the event of his surrender.

6. The appellant resides at an address in the west of Ireland with his wife and son. Both his wife and his son have significant physical disabilities. The High Court heard that his son who was 19 has spastic cerebral palsy with diplegia causing a very significant degree of physical disability. His legs and hips are very weak; he cannot walk independently and even then only for short distances. He mobilises with the aid of a walker (which the appellant maintains) and supportive calipers for both legs. He uses the calipers with foot splints and a specialised electrical device called a functional electronic stimulator to help him clear his feet off the ground. Letters from a consultant paediatrician and an orthopaedic surgeon were exhibited confirming that his son has a significant and life-long physical disability and that he requires a high level of continuous care and support.

7. A letter from a senior physiotherapist in Enable Ireland set out in more detail his son's reduced range of movement in his joints and his general difficulties with mobilisation. The letter further sets out that as a result of the severity of his son's cerebral palsy, he is dependent in many of his activities of daily living, dressing, showering, preparing meals and could not have managed in school without a full-time special needs assistant. The appellant gets his son out of bed, helps him get dressed and to go to the toilet. He helps him into his walker and assists him with breakfast. If he falls, the appellant is the only one who can pick him up as his

wife is unable to do so. His wife is also prone to falls and requires the appellant to help to get her up.

8. The appellant's wife was born with right hemiplegia due to cerebral palsy, which was exacerbated by a road traffic accident in 2004. The impact of the accident was such that her mobility difficulties and care needs require the substantial involvement of the appellant. The appellant avers that the family moved to Ireland from the UK in 2013 for the purposes of finding appropriate accommodation for the family's needs. A house was purchased and converted to take account of the care needs of his son and wife and which includes the provision of certain therapeutic facilities for his son and wife, which the appellant maintains.

9. The appellant avers that he has been the sole carer for his wife and son for the previous 18 years and is solely responsible for all aspects of their care. There is no other professional support available or additional care in the house, save for the various professional appointments which his wife and son attend to include their physiotherapy and occupational therapy. His son is limited to less than 100 yards with his walker and his wife is limited to less than 50 yards with her walking stick, so the appellant is responsible for driving them to appointments. The appellant does the shopping and owing to wife's incontinence, she has always to make sure she is near a toilet. His wife also swore an affidavit supporting the above.

10. A nursing consultant, Ms. Noreen Roche provided a report dated the 16th October, 2020. She set out the needs of the appellant's wife and son. She said "it is clearly evident that [his son] requires full assistance with all activities of daily living" and that "the [appellant's] wife is physically unable to care for the couple's son except for overseeing his activities". She concludes that if the appellant is removed as the family carer, there is an onus on the Health Service Executive ("the HSE") to fund the future care and assistance of both his son and wife. This will require 24-hour care, plus a second carer for the appellant's son and two hours domestic assistance per day, plus four hours weekly heavy domestic assistance for the

appellant's wife. They will both require the assistance of a driver, which should be incorporated into the care package.

11. Both the appellant's wife and son are on a waitlist for personal assistance which will be "processed by means of assessment in the first instance and allocated according to need and the resources available." Ms. Roche expressed the opinion on this response from the HSE, that it concurs with her experience that the disability services are grossly underfunded and as a result minimal services are provided. She says that families are devoid of adequate disability services. She concludes that if the appellant is removed as a carer the family will be unable to cope.

12. The Minister submitted that the evidence did not establish that the appellant would be the *only* person in a position to provide care assistance to his son and his wife in the event of his surrender. The Minister also pointed to a passage in the report of Ms. Roche that the appellant had not been actively pursuing HSE case assistance for his son *i.e.* he had not replied to certain communications from the HSE.

Judgment in the High Court

13. The High Court judge (Burns (P) J. accepted that there was clear and cogent medical evidence of the significant physical disabilities and care needs of the appellant's family. The judge found that as matters currently stand, there is little in the way of support from the HSE although, he noted that in fairness to the HSE, it had engaged with the appellant's family but it must operate within finite resources.

14. Burns (P) J. found there was an absence of other factors such as were present in *Minister for Justice and Equality v. JAT (No.2)* [2016] 2 I.L.R.M. 262 (hereinafter, "*JAT (No. 2)*") such as repeat application, delay and knowledge on the part of the issuing and executing authorities as to the impact the combined proceedings were having on the family. He held that there was no basis for any suggestion of abuse of process. He found that the High Court must determine

whether the appellant's family circumstances were such as would render an order for surrender "incompatible" with the State's obligations under Article 8 of the European Convention on Human Rights. He noted that there was a lengthy passage of time between the date of the alleged offending and the commencement of criminal proceedings but that in cases of alleged sexual abuse of children this was not unusual. Burns (P) J. concluded that the public interest in surrender was a strong one and that surrender would not be incompatible with the State's obligations under Article 8. He noted that significant disruption to family life is almost an inevitable consequence of criminal or surrender proceedings.

15. Following the s. 16 hearing, and before delivering judgment, Burns (P) J. invited submissions on whether the appellant would make an application under s. 18 of the 2003 Act for a postponement on humanitarian grounds in the event of an order for surrender being made. The appellant made such an application, without prejudice to his objection to surrender. When judgment was delivered, Burns (P) J. also gave judgment on the s. 18 application. He found that the 2003 Act must be read in its "entirety" and that there was cogent evidence of the disabilities and care needs of the appellant's family. Surrender was postponed for a period of six months to afford time for reasonable alternative care arrangements for the appellant's wife and son to be put in place.

16. The appellant and the Minister disagreed on the correct construction of the High Court judgment. The appellant submitted that it can only be understood on the basis that the High Court judge held that surrender could not be refused solely on the basis of personal or family rights. He submitted that was evident from the question posed. The Minister on the other hand submitted that the High Court judge was reaching his conclusions when he referred to the absence of other factors.

The development of jurisprudence on personal and family rights

17. At the outset it is important to state that although the certified questions deal with family

and personal rights under Article 8, the prohibition in s. 37 extends to surrender that “would constitute a contravention of any provisions of the Constitution...”. Some of the relevant judgments in this area refer solely to “Article 8 rights”; others have also mentioned constitutional rights particularly in relation to the family. No distinction based upon the origin of family and personal rights has been urged upon the Court in this appeal. It is not necessary therefore to make any such distinction in this judgment. As the questions certified refer particularly to Article 8 rights, this judgment will refer to those rights.

18. The appellant made an initial overarching submission that the case law in the area of Article 8 rights has developed as a result of the facts of these cases before it and the legal arguments made. There was no defining case in which the issue could be said to be determined; the main decisions of the Supreme Court were given where the issue was something other than Article 8 rights *e.g.* abuse of process or “stand alone” proportionality. Furthermore, it was important to distinguish between extradition and domestic prosecutions. Extradition incorporated a factor that was absent from the other; the international dimension.

19. I make two observations on the appellant’s first overarching submission. First, development of the understanding of the law usually occurs incrementally and is based upon the facts of the case requiring decision. That incremental development does not always restrict a court from setting out the principles upon which it makes its decision. It is not *of itself* a limitation on the use of precedent to say that the facts of earlier cases were different. Moreover, while legal arguments may have been different, it is only where, *inter alia*, there was an absence of review of significant relevant authority would a court be permitted not to follow an earlier decision of a superior court (or even a court of concomitant jurisdiction).

20. Second, it is not correct to say that issues of Article 8 were not squarely before the Supreme Court in all the relevant authorities. The most recent authority from the Supreme Court is the case of *Minister for Justice and Equality v. Vestartas* [2020] IESC 12 (hereinafter,

“*Vestartas*”). The appellant submits that what was at issue in that case was the application by the High Court of a general proportionality test as regards surrender rather than an Article 8 specific examination of the facts. It is of significance however, that in granting leave to appeal directly from the High Court the Supreme Court noted: “*As appears from the notice of application for leave to appeal, the respondent’s notice and the judgment of the High Court sought to be appealed, the central question which potentially would arise on an appeal from the High Court to this Court would concern the proper assessment of the effect of rights guaranteed by Article 8 of the European Convention on Human Rights on an application for surrender under the European Arrest Warrant procedure.*” ([2019] IESCDET 193). If there was any doubt about the issue before the Supreme Court in *Vestartas*, that is put to rest by the clear statement of MacMenamin J. (giving the judgment of the Supreme Court) when he said at para. 22 thereof:

“The main question which arises is whether an order for surrender would be “incompatible” with the State’s obligations under the ECHR and its protocols (s. 37(1) of the 2003 Act).”

21. Furthermore, MacMenamin J. had regard to the then existing jurisprudence on fundamental rights when he stated: “[*t*]he analysis which follows must be seen with the full recognition that there is already a considerable body of jurisprudence on the application of Article 8 of the ECHR in an EAW context.” He stated that what was found in the jurisprudence had to be seen in its legislative context.

22. In written submissions before this Court, the appellant identified the history of early cases in which the courts applied an exceptionality test, (a test with which the appellant does not agree). In the context of the subsequent development of case-law, I do not consider it necessary to examine those in any depth. Suffice to say that the appellant identified early High Court cases where an exceptionality test was applied and reached in refusing surrender.

23. The appellant then identified a series of cases in June and July 2013, where the High Court recalibrated its approach “to take account of the then developing jurisprudence in the United Kingdom”. These cases are *Minister for Justice and Equality v. T.E.* [2013] IEHC 323, *Minister for Justice and Equality v. G (R.P.)* [2013] IEHC 54; *Minister for Justice and Equality v. N.M.* [2013] IEHC 322; *Minister for Justice and Equality v. M.M.* [2013] IEHC 330 and *Minister for Justice and Equality v. K.L.* [2013] IEHC 465.

24. In *Minister for Justice and Equality v. T.E.* Edwards J. explained the reasoning for the change in approach at para. 334:

“...the Court has now become aware of a line of jurisprudence that has developed in the United Kingdom suggesting that it is undesirable to frame the article 8 test in terms of an exceptionality requirement as it is too restrictive, and could theoretically lead to an injustice being done in that small number of cases where the existence of ordinary or at least unexceptional circumstances could, in the event of a proposed surrender going ahead, give rise to consequences so profoundly affecting that person, or members of his or her family, as to render it disproportionate to surrender.”

25. Edwards J. provided a detailed analysis of the development of the case law up to and including the judgment of the Supreme Court (UK) in *H.H. v. Deputy Prosecutor of the Italian Republic, Genoa* [2012] U.K.S.C. 25 (hereinafter, “*H.H. v. Genoa*”) in which the test of exceptionality was rejected. Having considered the jurisprudence in detail, Edwards J. then set out 22 principles of law where Article 8 is engaged in European arrest warrant proceedings and made an order for the respondent’s surrender (the facts of the case raising little by way of substantial objection on Article 8 grounds). It is submitted by the appellant that the analysis by Edwards J. in *Minister for Justice and Equality v. T.E.* provides a useful analysis of the law. It is the application of a test of proportionality over a test of exceptionality and the importance

of considering delay as part of the public interest analysis and the import of harm that might arise to family members following an order of surrender.

26. Following the aforementioned judgments, the question of Article 8 objections came before the Supreme Court in *JAT (No. 2)*. The appellant submits that it was of significance that this was under the very different guise of “abuse of process”. The next case considered by the Supreme Court was that of *Vestartas*.

27. *JAT (No. 2)* and *Vestartas* will be considered further below. An aspect of the appellant’s submission was that while it might be said that MacMenamin J. in *Vestartas* sought to distance the Supreme Court from the approach adopted by the UK Supreme Court in *H.H. v. Genoa*, like O’Donnell J. in *JAT (No. 2)*, MacMenamin J. did not go so far as to depart from either *H.H. v. Genoa* or its adoption by the High Court in the judgments set out above and also by the High Court in *JAT (No. 2)*. In fact, in endorsing the approach of McKechnie J. in *Minister for Justice and Equality v. Ostrowski* [2013] 4 I.R. 206 (hereinafter, “*Ostrowski*”) (an earlier Supreme Court decision where the issue of a general proportionality test was the primary issue in the case), MacMenamin J. appears to actually endorse a test of proportionality where rights based defences are raised. As such, insofar as it has been adopted by the High Court in a number of judgments, and has not been overturned by the Court of Appeal or Supreme Court, the appellant submits that the approach adopted by the High Court in the following cases remains the currently established law (*Minister for Justice and Equality v. T.E.*; *Minister for Justice and Equality v. R.P.G.*; *Minister for Justice and Equality v. N.M.*; *Minister for Justice and Equality v. M.M.*; *Minister for Justice and Equality v. K.L.*; and *Minister for Justice and Equality v. JAT* [2014] IEHC 320 at para. 293.)

28. The Minister does not take issue with the history of the legal authorities but places emphasis on the fact that rights under Article 8 could only be assessed taking into account the provisions of paragraph 2 of Article 8 through which a proportionality analysis may arise. She

relies upon *Ostrowski* and *Vestartas* in that regard. The Minister also relies upon the decision of *JAT (No. 2)*.

29. The appellant's submission that there is no guidance from the Supreme Court necessarily entails a more detailed examination of the relevant case law.

Ostrowski

30. This case involved the issue of proportionality of the request for surrender in a case involving a small amount of cannabis as against a long delay in which the respondent had established himself in this jurisdiction. Three judgments were delivered all concluding that there were no grounds for refusing to surrender the respondent. That case was analysed by the Supreme Court in the judgment of MacMenamin J. in *Vestartas* and I will refer to it in more detail when considering the *Vestartas* decision.

31. The judgment of Edwards J. in *Minister for Justice and Equality v. T.E.* was delivered subsequent to the *Ostrowski* decision by the Supreme Court. In his judgment Edwards J. availed of the considerable assistance provided by the observations of McKechnie J. on the approach to Article 8 objections while saying they were arguably *obiter dicta*.

JAT (No. 2)

32. Following a finding by the High Court that the request to surrender amounted to an abuse of process, the Minister appealed to the Supreme Court. Two judgments were delivered; that of Denham C.J. and O'Donnell J.. In his judgment, O'Donnell J. indicates he was in agreement with the order proposed. Denham C.J. and the remaining two judges are recorded on the Court Service website as agreeing with O'Donnell J.. At the start of his judgment, O'Donnell J. records that in light of the views of his colleagues he will not dissent. It seems therefore that the judgment of the Chief Justice was a central component of the decision in that case.

33. From the outset it must be noted that the Supreme Court did not interfere with the finding of the High Court that there had been an abuse of process, particularly in the circumstances of a repeat request for surrender and the respondent's family circumstances. These included the fact that the respondent's son suffered from schizophrenia, the respondent was his son's primary carer and the respondent's wife was not in a position to be their son's primary carer.

34. Denham C.J. considered the respondent's family circumstances (para. 79). She noted that the obligation to surrender was not absolute and cited recital 12 of the 2002/584/JHA: Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (hereinafter, "the Framework Decision"), which specifically states that it respects fundamental rights and observes the principles recognised by Article 6 of the Treaty on European Union and reflected in the Charter of Fundamental Rights of the European Union. Having set out Article 8, she referred to the UK Supreme Court decision of *H.H. v. Genoa* and briefly recounted the facts. Denham C.J. described that case as a "relevant authority". Denham C.J. stated that as a result of s. 37 of the 2003 Act, the family factors were relevant. Denham C.J. concluded that while no single factor governed the appeal, the factors taken cumulatively did warrant the finding of abuse of process.

35. O'Donnell J. also agreed that the factors taken cumulatively amounted to an abuse of process. O'Donnell made reference to *H.H. v Genoa* and its refinement in *Polish Judicial Authority v. Celinski* [2016] WLR 551 but did not deem it appropriate to address those cases in circumstances where those cases were not argued before the Court. O'Donnell J. agreed with the trial judge in the High Court that the circumstances of the respondent's family alone would not have been enough to refuse surrender in and of themselves. O'Donnell J. rejected the idea that exceptionality was a test but described it as a "*useful description*" (para. 1).

36. O'Donnell J. addressed the family factors under a heading Article 8. There is nothing in that section to suggest that he was of the view that Article 8 grounds could never result in surrender. On the contrary, at that point in his judgment he says that the respondent's family circumstances would not in themselves have been enough to prevent surrender. He viewed as relevant that it was a second application for surrender, that there had been avoidable delay on the part of the authorities in both jurisdictions in the preparation, submission, and execution of the second warrant, even though the evidence of the respondent's circumstances, and those of his son, had been adduced in the first EAW proceedings. He acknowledged that those 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, were powerful. Even then he said it was open to doubt that these matters would be sufficient to prevent surrender for very serious crimes of violence. In the view of O'Donnell J. this illustrated that the decision in this case was exceptional, and even then, close to the margin.

37. O'Donnell J. then stated at para. 11:-

"In any future case, where all or any of the above factors may be relied on, it would not, in my view, be necessary to carry out any elaborate factual analysis or weighing of matters unless it is clear that the facts come at least close to a case which can be said to be truly exceptional in its features. Even in such cases, which must be rare, it is important that the considerations raised are scrutinised rigorously."

38. Immediately after this passage, O'Donnell J. stated that he agreed that the real issue in that case was whether an abuse of process has been established. I consider therefore that his earlier comments were addressed to Article 8 considerations.

39. The appellant submits that neither Denham C.J. nor O'Donnell J. sought to correct, in any way, the High Court's approach to the test to be applied in considering an Article 8 objection, namely that the test was one of proportionality not exceptionality. That is correct,

but it must be understood that the balancing exercise that was referred to in separate ways in each of the judgments was a weighing up of the competing claims *i.e.* the public interest in Ireland complying with its obligation to extradite in accordance with the relevant international obligations and the private rights of the individual. That balance will only favour refusal to surrender when the circumstances are such that they can be said to be “truly exceptional”. It is explicit within the judgment of O’Donnell J. that the Court will only engage in an elaborate weighing or balancing exercise on Article 8 issues where it is obvious that the facts come close to the truly exceptional.

Vestartas

40. In this case the High Court refused surrender in somewhat unusual circumstances. The High Court considered that certain matters (the actions or inactions of the requesting state, the purpose of the request for surrender, the nature of the sentence originally imposed, the extent of the sentence served, the young age of the respondent at the time of the many offences of which he was convicted and the nature of his breach of parole) meant that the public interest in surrender was lower than it might otherwise have been (summarised at paras. 27 & 28 of the Supreme Court judgment). Referring back to the decision in *Ostrowski*, the Supreme Court (MacMenamin J.) rejected the idea that such an objection to surrender might be considered on the basis of an “‘*open-ended*’ balancing process” (para. 48) and said that approach of balancing public interest factors against private interests had been clearly rejected by the Supreme Court in *Ostrowski* (para. 49).

41. The Supreme Court provided an analysis of the judgments in *Ostrowski* having stated that the *ratio* of each judgment was the same. MacMenamin J. in *Vestartas* then referred to that part of the judgment of McKechnie J. dealing with the balancing of rights. At para. 59, MacMenamin J. emphasised the following *dicta* of McKechnie J.:-

“[i]n summary, where resistance is offered by virtue of a Convention or Constitution right, the court must conduct a fact-specific enquiry into all relevant matters so that a fair balance can be struck between the rights of the public and those of the person in question” (Emphasis in original)

From that *dicta*, there was a clear distinction between the test to be adopted by a court in finally determining whether or not to order surrender (where the question of proportionality did not arise) and the antecedent proportionality test which might be applied when raising a rights-based defence. MacMenamin J. summarises it as follows at para. 60:-

“There is a subtle, but important, difference in meaning and effect. McKechnie J. was not speaking of a defence to surrender, but rather the fact-specific enquiry on the antecedent question of resistance being offered by virtue of a Convention or Constitution right. It was in that context that a proportionality test would arise. It was in that process the court must strike a “fair balance” between public and private interests and rights.”

42. MacMenamin J. concluded that the High Court had, incorrectly, elided the two tests and so misapplied the judgment in *Ostrowski* (para. 66). He said at para. 67 that:-

“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 ss4A,10 and 37(1) of the 2003 Act, as explained in Ostrowski.”

43. MacMenamin J. then contrasted the evidence in *JAT (No. 2)* with that in *Vestartas*. MacMenamin J. stated at para. 91 that the evidence of Mr. Vestartas attracted sympathy but beyond that *“the evidence simply does not go”*. MacMenamin J. found that the evidence fell very far short of that described in *JAT (No. 2)*. He further found that the consequences for the

children of Mr. Vestartas made clear the lack of exceptionality and lack of cogent evidence, which he said distinguished the case from *JAT (No. 2)*.

44. Finally, it should be noted that MacMenamin J. also made reference to the *H.H. v. Genoa* and its refinement in *Polish Judicial Authority v. Celinski*. MacMenamin J. concluded at para. 77 that:-

“While persuasive judgments from the neighbouring jurisdiction will always be illuminating, it is important to emphasise that the terms of the U.K. Extradition Act, 2003, and the duties of a court in considering such applications, are very different from those contained in the Irish Act of 2003.”

The approach to be taken when a violation of Article 8 is claimed

45. The three questions posed by the High Court are all directed to determining the correct approach of the High Court where an Article 8 rights-based objection to surrender is raised pursuant to s. 37(1) of the 2003 Act. The first question raises the straight forward question of whether personal or family circumstances, *in and of themselves*, may provide a basis upon which surrender might be prohibited.

46. The appellant questioned whether the Minister accepted that proposition and also whether the High Court judge had accepted it; indeed, it was submitted that the fact that the question was raised was an indication that the judge had not so accepted. In truth however, both parties agree in principle that personal or family circumstances, in and of themselves, can indeed provide a basis upon which surrender might be prohibited pursuant to s. 37 of the 2003 Act. If there ever was a doubt about that proposition, and I do not consider that there was, the judgment of the Supreme Court in *Vestartas* expressly clarifies, that personal and family rights *i.e.* the rights protected by Article 8, in principle may be relied upon to demonstrate that surrender is prohibited as being incompatible with the State’s obligation under the Convention.

47. The real difference between the parties on this first issue was one of degree. The Minister's submits that "it may be that circumstances could arise where substantial, cogent Article 8(1) evidence might overwhelm the provisions of Article 8(2) so as to provide for a Section 37 refusal of surrender on foot of an EAW." The Minister's emphasis is on the second paragraph of Article 8 *i.e.* the grounds on which interference with the right to respect for family and personal rights may be justified. The appellant on the other hand emphasises (to the extent of not engaging to any significant degree with the second paragraph) the interference with family life and particularly in this case, that extradition involves.

48. Section 37 prohibits surrender *inter alia*, where "surrender would be incompatible with the State's obligations under the Convention". Article 8 ECHR para. 1 provides, *inter alia*, that everyone has the right to respect for his or her private life. The provisions of para. 2 permit interference with the exercise of this right but placing parameters on the circumstances in which such limitations may be justified. All such limitations must be in accordance with law, necessary in a democratic society and be for one or more of the purposes set out in the paragraph. Those purposes are the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others. As MacMenamin J. observed in *Vestartas* at para. 23: "[t]he terms of Article 8(2) are, therefore, sufficiently broad to encompass orders for extradition, or in this case, surrender."

49. The decision in *Vestartas* is a very recent, in depth analysis of the protection of Article 8 rights in the context of surrender. As referred to above, the main point in the case was identified as to whether surrender would be incompatible with the State's obligations under the Protocols. In its more recent decision in *Minister for Justice Equality and Law Reform v. Smits* [2021] IESC 27, the Supreme Court commented on its decision in *Vestartas*. The issue in *Smits* was not that of Article 8 rights; it concerned the consequences of a delay between the issue of

an EAW and its execution and the inability of the executing state to address that delay by way of review of the sentence. O'Malley J. in surveying the case law on the protection of fundamental rights in extradition matters, had this to say in respect of *Vestartas* at paras. 61 and 62: -

“Moving on to consideration of the Article 8 issues, MacMenamin J. noted the presumption, set out in s. 4A of the Act, that the issuing State will comply with the Framework Decision. McKechnie J. had not suggested in Ostrowski that the High Court should in general apply a proportionality test and had indeed stated that such would not be possible. The outcome of Ostrowski was clear – to be successful, an Article 8 claim must cross a high threshold. If there is cogent evidence of non-compliance, then the Irish court may have to address the issues arising and apply a proportionality test in that context. In so doing the court must commence on the basis of a presumption that the issuing State will comply with the Framework Decision and, thus, that the rights of the individual are appropriately protected. It must also have regard to the limitation contained in Article 8(2) of the Convention and to the public interest considerations inherent in the Framework Decision and the Act. The judgment also refers in some detail to the ‘almost unique’ personal circumstances of the appellant in JAT (No. 2) and to the particular and specific factors that led to the Court’s conclusion in that case.

Dealing with the issue of the elapse of time, MacMenamin J. noted indications that the trial judge might have thought this could in itself suffice to defeat an EAW application, by reference to the decision of this Court in Finnegan. However, the decision in Finnegan had clearly been limited to the unusual facts of that case. Delay could not alter the public interest considerations unless it reached a point where it was so lengthy and unexplained as to amount to an abuse of process, or to raise other

constitutional or ECHR issues. On the facts in Vestartas, delay was a matter of legitimate concern but was to be viewed against the background of private and family circumstances that fell very far short of those in JAT (No.2).”

50. The parties agree that the case of *Smits* was not directly on point. The fact that O’Malley J. with whose judgment her colleagues agreed, synthesised the views expressed in *Vestartas*, however lends even greater clarity, if any were needed, as to the Supreme Court’s view of Article 8 rights in the context of surrender.

51. I return now to the second overarching submission of the appellant regarding the difference between extradition and domestic prosecutions. The outcome of the consideration of personal and family factors, *in and of themselves*, which would render it incompatible with Article 8 rights in an extradition or a prosecution may not be far apart. The case of *Smits*, in dealing with the decision of *Finnegan v. Superintendent of Tallaght Garda Station* [2019] IESC 31 (where the applicant was not to be required to serve his sentence having lived openly for many years subsequent to absconding from an open prison), suggests that Irish constitutional protections in respect of domestic matters might be higher than protections under Article 8 in respect of those same matters. On the other hand, I also accept that at a factual level, the international dimension could lend extra weight to the claim that surrender was incompatible with those rights. It would seem however that there is no doubt that there is a closer analogy to be drawn between the analysis of claims involving domestic criminal proceedings and extradition/surrender cases than there is between extradition/surrender and deportation cases (as per O’Donnell J. in *JAT (No. 2)*).

52. Even if the decision in *Vestartas* on Article 8 is strictly speaking *obiter dictum* in the context of a “pure” claim under Article 8, a proposition with which I do not agree for the reasons set out above, I do not see any basis for concluding that the principles set out therein are wrongly decided or somehow inapplicable. Nothing in the submissions of the appellant

address specifically why they might be supposed to be incorrect. The appellant is mainly concerned that the rights based proportionality test in an Article 8 claim be given centrality. I consider that the judgment in *Vestartas* which also examined the earlier decision of the Supreme Court in *JAT (No. 2)*, describes the general approach that must be taken when faced with an Article 8 objection. The duty to surrender is and must be a primary consideration for the court hearing the application.

53. It is also worthy of note that the decision of the Supreme Court in *Minister for Justice, Equality and Law Reform v. Rettinger* [2010] 3 I.R. 783 (hereinafter, “*Rettinger*”), which dealt with an objection based upon the Article 3 right not to be subjected to torture or inhuman or degrading treatment, also set out the procedural framework for adjudicating on rights based objections. Those aspects of the principles are of relevance in this adjudication also.

54. The case of *Rettinger* is one of considerable importance; it represents a major building block in how to approach s. 37 objections. The Supreme Court laid down the parameters under which surrender could be refused based on considerations related to the absolute prohibition on inhuman and degrading treatment (set out in Article 3 ECHR). Much of the Supreme Court’s findings were to find an echo in the CJEU decision of *Aranyosi and Caldaru* (*Case C - 404/15*) which set down EU wide principles for dealing with an objection raised on those grounds. Apart from the general prohibition on surrender which was incompatible with the State’s obligations under the Convention, there was an express prohibition on, *inter alia*, where the person would be tortured or subjected to other inhuman or degrading treatment. As Fennelly J. pointed out the fact that this prohibition was added separately with particular wording was a strong indication from the Oireachtas to give effect to the interpretation adopted by the European Court of Human Rights. The Supreme Court had been asked to look at the standard of proof required in that case. The ECHR case law pointed to the standard of

establishing on substantial grounds of a “real risk” of being subjected to such prohibited treatment.

55. Denham C.J. (with whom Finnegan J. agreed) set out various principles to be applied in that case. The judgment of Fennelly J. does not in any way dissent from these principles (and Finnegan J. also agreed with his judgment). It is unnecessary to set out all those principles as many are Article 3 specific. Of particular relevance is that Denham C.J. stated that the Court should examine whether there is a real risk of inhuman and degrading treatment in a rigorous manner and that the burden rested upon the requested person to adduce evidence capable of proving his or her objection. As MacMenamin J. pointed out in *Vestartas* there are real distinctions between the two sets of circumstances. Article 3 is an absolute right while Article 8 rights are subject to the qualifications set out in Article 8(2).

56. Returning to the questions upon which leave was granted in this case, on one view these are questions that seek straightforward answers. The answer to the first question might be “yes, family and personal circumstances, in and of themselves may provide a basis for refusing surrender”. The answer to the second question might also be answered by the straightforward statement that “the test for whether the Article 8 objective has been sustained is whether surrender is incompatible with the State’s obligations under the Convention”. The third question could be answered by simply applying the same test *i.e.* “the appropriate test to apply is whether surrender is incompatible with the State’s obligations under the Convention.” None of these answers, while perfectly correct, will provide guidance to a court as to the approach to take when an Article 8 objection to surrender is made.

57. On the other hand, while not wishing to be unfair to the appellant, there is a hint of an implication that his expectations are that the answers to the questions will provide a test akin to some kind of check list which can be applied to a given set of facts. Such a test would require the identification of facts that would fall on one side or other of a “*hard-edged or*

bright-line” rule (McKechnie J. in *Ostrowski* para. 51) delineating cases requiring surrender from those requiring refusal of surrender. Given the myriad of possible scenarios, a small sample of which can be seen in the case-law referred to above, it appears impossible to define a test that will neatly shoehorn each imagined (and those that are as yet unimagined) possibility on either side of that clear, hard or bright line. Notwithstanding that, there are however some vital considerations which must be borne in mind by a court deciding on whether to surrender in accordance with the 2003 Act. Most importantly, as MacMenamin J. stated in *Vestartas*, in carrying out the test for surrender under s. 16 of the 2003 Act:

*“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.” (**Emphasis** in original).

58. Based upon the case law to date, it is possible to state the principles which must guide a court in making a determination as to whether or not surrender of the requested person would be “incompatible” with the State’s obligations under the Convention to respect the person’s personal and family rights. That is what the various Supreme Court cases referred to above have done, they have given guidance as to how to approach an objection based upon Article 8. The appellant’s view that the 22 principles set out by Edwards J. in *Minister for Justice and Equality v. T.E.* is not one that has found favour with the Supreme Court, despite the issue being revisited by the Supreme Court since. Those principles stress and indeed commence with the importance of the proportionality test in the application to “*future Article 8 cases*”. The approach indicated in the cases of *Ostrowski*, *JAT (No. 2)* and *Vestartas* is to emphasize the centrality of the duty to surrender in accordance with the Act. While the Supreme Court accepts that exceptionality is not the test, the clear view is that Article 8 will only be successful in a rare case. As McKechnie J. observed in *Ostrowski*, “*a successful reliance on Article 8 will not be easy*”. He could not identify a successful case from the European Court of Human Rights. His view was that this was “*a powerful reflection of the positioning of the public interest in this process.*” The subsequent cases of *JAT (No. 2)* and *Vestartas* also referred to the strength of the public interest in surrender demonstrating that there is a high threshold to reach before incompatibility will be demonstrated.

59. I am of the view that the Supreme Court, most particularly in *Vestartas*, have given guidance from which it is possible to glean certain principles. I would identify these as follows:

- (i) In an application for surrender, the court is not carrying out a general proportionality test on the merits of the application. The court should apply the

specific terms of the 2003 Act, albeit subject to a careful consideration of whether, if necessary, applying a proportionality test to Article 8 Convention rights, 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. (*Vestartas*).

- (ii) Surrender (or extradition) presupposes an impact on the personal or family life of a requested person. Having regard to Article 8(2), surrender (or extradition) carried out pursuant to legislation is in principle an acceptable interference with the right to respect for those rights. (*Ostrowski, JAT (No. 2), Vestartas*).
- (iii) When faced with an Article 8 objection to surrender, the function of the Court is to decide if the surrender is *incompatible* with the State's obligation under the European Convention on Human Rights. That requires a very high threshold. Any inquiry must bear in mind that s. 10 requires a court to surrender in accordance with the provisions of the 2003 Act and s. 4A of that Act obliges the court to presume that the issuing state has complied and will comply with its fundamental rights obligations. (*Vestartas*).
- (iv) The evidential burden of proving incompatibility lies on the requested person. (*Rettinger and Vestartas*).
- (v) The assessment of the claimed impact of surrender on personal and family rights must be a rigorous one. (*Rettinger and JAT (No. 2)*).
- (vi) The evidence must be cogent and must reach the level of incompatibility (*Vestartas*).
- (vii) Exceptionality is not the test for incompatibility, but it will only be in a truly exceptional case that surrender will be found to be incompatible with the State's obligations under Article 8 of the Convention. (*JAT No. 2 and Vestartas*).

- (viii) For an Article 8 objection to succeed, there must be clear cogent evidence sufficient to rebut the presumption in s. 4A of the 2003 Act. (*Vestartas*).
- (ix) No elaborate factual analysis or weighing of matters is necessary unless it is clear that the facts come close to a case which would be truly exceptional in nature thereby engaging the possibility that surrender may be incompatible with the State's obligations under the Convention. (*JAT (No.2)*).
- (x) The requirement that the circumstances must be shown to render the order for surrender incompatible with the State's obligations under Article 8 necessitates that the incursion into the private and family rights referred to in Article 8(1) is 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. (*Vestartas*).
- (xi) Where the facts, assessed as set out above, come close to being truly exceptional in nature thereby engaging the possibility that surrender might be incompatible with the State's obligations, the Court will engage in a proportionality test of whether the high public interest in the prevention of disorder and crime (and the protection of the rights of others) is overridden by the personal and family circumstances (taken where appropriate with all the cumulative circumstances) of the requested person. That is a case-specific analysis which will be required in very few cases.

The application of the principles to this appeal

60. The appellant relies upon the unique impact that surrender would have on his family that it would be incompatible with the State's obligations to so surrender him. He submits that this puts him into that truly exceptional category. He also said that it was highly relevant that the request arises in the light of the fact that the offences are said to have occurred 20 – 23

years ago before the appellant's son was born. He says that the medical evidence was uncontroverted.

61. Undoubtedly there will be hardship for the appellant and particularly for his wife and son if he is surrendered. Hardship is not however sufficient to render surrender incompatible with the State's obligations to respect personal and family rights. Incompatibility requires a very high threshold.

62. The High Court judge did not find that surrender was incompatible with Article 8 obligations. I consider that the High Court judge accepted the principle that Article 8 personal and family factors could in principle require the refusal of surrender. The appellant's point is that the High Court judge went further than the personal and family rights at issue and sought support from others. I do not accept that this is a correct interpretation of what he did. In my view he was seeking to judge if the facts in this case reached the high level to establish incompatibility. The factors he referred to in para. 38 were the type of factors that O'Donnell J. had pointed to in *JAT (No. 2)* as being cumulatively considered as to why that case might be considered a truly exceptional one. The issue in any event for this Court is to consider as a matter of law whether the circumstances require surrender to be refused on the grounds that to so order would be incompatible with the State's obligations under Article 8 of the Convention.

63. It would seem that the High Court judge entered into a consideration of the proportionality aspect of Article 8 without necessarily making a prior decision as to whether such an analysis was required in this case. He referred to the strong public interest in surrender. It cannot be doubted that this is true. As the case law has made clear there is a strong public interest in Ireland fulfilling its obligation to surrender as set out in the 2003 Act. If this case required an elaborate balancing act, the fact that these were offences alleging child sexual abuse, the public interest in surrender could only be considered at the highest possible level. There was no culpable delay, as the trial judge noted. The lapse of time in this case is,

unfortunately, typical of many allegations of child sexual abuse and of itself would not affect the public interest in the surrender of the appellant.

64. The issue comes down to whether the fact that the appellant is at present the sole carer of his wife and child sufficient to bring this case close to the margin of being a truly exceptional case which would require surrender to be refused. The High Court judge noted that the circumstances would not be a bar to prosecution in this jurisdiction. It must of course be acknowledged that here there is an added dimension of forcible surrender abroad where he may or may not be remanded in custody or at the very least prohibited from leaving the jurisdiction if granted bail. Perhaps a better way would be to ask whether his circumstances would be a bar to imprisonment (either on remand or sentenced) in this jurisdiction. It might be a factor in the assessment of whether to grant or refuse bail or to impose a custodial or non-custodial sentence, but I do not accept that it would *per se* be a bar to imprisonment.

65. The fact of a criminal prosecution or the fact of surrender presupposes an impact on the personal or family life. The impact of surrender in this case may be significant but that does not mean surrender is incompatible with the State's obligations. Although there was a certain lack of engagement with the HSE by the appellant, the evidence discloses that the HSE are willing to be involved; his wife and child are on a waiting list. I accept that the High Court judge pointed out that they must operate within the finite resources available. Although the appellant is the sole carer at present, the involvement of the HSE remains a possibility. It will be recalled that the family circumstances in *JAT (No. 2)* were particularly difficult where not only was care of that requested person's son an issue but detriment to his condition was also a factor. There were also other aspects in the case which raised the impact on personal and family life. Those other factors are missing in this case.

66. In the present case, the family factors are difficult, but they are not such as to reach the high threshold to demonstrate that they are close to the margin where surrender might be said

to be incompatible with the State's obligations to respect personal and family life.

Conclusion

67. The questions certified by the High Court were as follows: *“In the context of proceedings under the European Arrest Warrant Act 2003 as amended, where a respondent objects to surrender on the basis that same is precluded by s. 37 of the said Act as it would be in breach of the respondent's rights under art. 8 ECHR and having particular regard to the provisions of art. 8(2) ECHR:*

1. *Can personal or family circumstances, in and of themselves, provide a basis upon which surrender might be precluded by s. 37 of the Act of 2003?*
2. *What is the appropriate test to be applied by the Court in determining whether such an objection is sustained and that surrender should be refused?*
3. *In so far as exceptionality may be a relevant factor in determining such an objection, what is the appropriate test to be applied by the Court in determining whether the circumstances found to exist are so exceptional as to justify refusal of surrender”*

For the reasons set out in this judgment, it is appropriate to answer all three questions by repeating the principles set out at para 59 above:

- (i) *In an application for surrender, the court is not carrying out a general proportionality test on the merits of the application. The court should apply the specific terms of the 2003 Act, albeit subject to a careful consideration of whether, if necessary, applying a proportionality test to Article 8 Convention rights, 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. (Vestartas).*
- (ii) *Surrender (or extradition) presupposes an impact on the personal or family life of a requested person. Having regard to Article 8(2), surrender (or extradition)*

carried out pursuant to legislation is in principle an acceptable interference with the right to respect for those rights. (Ostrowski, JAT (No. 2), Vestartas).

- (iii) *When faced with an Article 8 objection to surrender, the function of the Court is to decide if the surrender is incompatible with the State's obligation under the European Convention on Human Rights. That requires a very high threshold. Any inquiry must bear in mind that s. 10 requires a court to surrender in accordance with the provisions of the 2003 Act and s. 4A of that Act obliges the court to presume that the issuing state has complied and will comply with its fundamental rights obligations. (Vestartas).*
- (iv) *The evidential burden of proving incompatibility lies on the requested person. (Rettinger and Vestartas).*
- (v) *The assessment of the claimed impact of surrender on personal and family rights must be a rigorous one. (Rettinger and JAT (No. 2)).*
- (vi) *The evidence must be cogent and must reach the level of incompatibility (Vestartas).*
- (vii) *Exceptionality is not the test for incompatibility, but it will only be in a truly exceptional case that surrender will be found to be incompatible with the State's obligations under Article 8 of the Convention. (JAT No. 2 and Vestartas).*
- (viii) *For an Article 8 objection to succeed, there must be clear cogent evidence sufficient to rebut the presumption in s. 4A of the 2003 Act. (Vestartas).*
- (ix) *No elaborate factual analysis or weighing of matters is necessary unless it is clear that the facts come close to a case which would be truly exceptional in nature thereby engaging the possibility that surrender may be incompatible with the State's obligations under the Convention. (JAT (No.2)).*
- (x) *The requirement that the circumstances must be shown to render the order for*

surrender incompatible with the State's obligations under Article 8 necessitates that the incursion into the private and family rights referred to in Article 8(1) is 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. (Vestartas).

- (xi) *Where the facts, assessed as set out above, come close to being truly exceptional in nature thereby engaging the possibility that surrender might be incompatible with the State's obligations, the Court will engage in a proportionality test of whether the high public interest in the prevention of disorder and crime (and the protection of the rights of others) is overridden by the personal and family circumstances (taken where appropriate with all the cumulative circumstances) of the requested person. That is a case-specific analysis which will be required in very few cases.*

68. On the application of those principles to this appeal, the factors relied upon by the appellant are not such as to reach the high threshold to demonstrate that they are close to the margin where surrender might be said to be incompatible with the State's obligations to respect personal and family life.

69. I would therefore dismiss this appeal.