THE HIGH COURT
AN ARD-CHÚIRT

[2023] IEHC 29

[2021 No. 250 EXT]

IN THE MATTER OF AN APPLICATION UNDER S. 16(2) OF THE EUROPEAN ARREST WARRANT ACT 2003, AS AMENDED.

BETWEEN

THE MINISTER FOR JUSTICE

APPLICANT

AND

ABDERRAHMAN YAHIAOUI
(OTHERWISE KNOWN AS ('AKA') YOUCEF MADANI)

RESPONDENT

JUDGMENT of Mr Justice David Keane delivered on the 19 January 2023

Introduction

1. The Minister for Justice ('the Minister') applies under s. 16(2) of the European Arrest Warrant Act 2003, as amended ('the Act of 2003') for an order directing the surrender of Abderrahman Yahiaoui to the French Republic ('France'), pursuant to a European Arrest Warrant ('the EAW') issued on 17 September 2019 by an identified deputy prosecutor on behalf of the Anti-terrorist Public Prosecutor at the Tribunal de Grande Instance of Paris ('the anti-terrorist public prosecutor'), as the issuing judicial authority in that Member State.

Background

2. The EAW seeks the surrender of Mr Yahiaoui to serve a sentence of imprisonment of 6 years imposed upon him in his absence by the Tribunal de grande instance (Regional Court) in Paris on 30 November 2001 for an offence of participating in a group formed, or association established, to prepare acts of terrorism, specifically through acts done in Marseille, France, and Assen, the Netherlands, between 1996 and 1998 (inclusive) by producing forged identity documents for illegal immigrants from Algeria and, later, by trafficking weapons from the Netherlands. The EAW recites that the entire duration of that six-year sentence remains to be served.

3. Mr Yahiaoui was arrested and brought before the court (Humphreys J) on 11 September 2021 on foot of an alert ('the SIS II alert') issued on 24 September 2019 under the second generation of the Schengen Information System, established by Council Decision 2007/533/JHA ('the SIS II Decision'). The EAW was provided to the court (Paul Burns J) when Mr Yahiaoui was brought before it again on 23 September 2021. I am satisfied that the person before the court is the person in respect of whom the EAW was issued and Mr Yahiaoui raises no issue in that regard. Thus, while I am aware that he has expressed a preference to be addressed as Mr Madani and while I intend no discourtesy, I refer to him as Mr Yahiaoui throughout this judgment to limit the risk of confusion.

4. The issuing judicial authority provided additional information on 7 and 11 October 2021, in the form of relevant intelligence and police reports, to assist further in the identification of the person before the court as the person in respect of whom the EAW issued.

5. Points of Objection were filed on Mr Yahiaoui's behalf on 2 December 2021. Jean-Charles Teissedre, an advocate at the Bar of Montpellier, whom Mr Yahiaoui has appointed to represent his interests in the event of his surrender to the French authorities, swore affidavits on 29 October 2021, 25 March 2022 and 12 May 2022, in support of certain of those points of objection, ostensibly to prove certain elements of French law as an independent expert.

6. By letters dated 23 November 2021 and 7 April 2022, the High Court, through the Minister as the Central Authority in the State, requested the issuing judicial authority to provide it with certain additional information. The issuing authority responded to those requests by letters dated 3 December 2021 and 13 April 2022, and the Directorate of Criminal Affairs and Pardons of the French Ministry of Justice provided information on conditions of detention by letter dated 12 January 2022.

The issues

7. Mr Yahiaoui puts the Minister on strict proof of the matters that it is necessary to establish under s. 16(2) of the Act of 2003 and, in addition, advances a range of disparate objections to his proposed surrender. Shortly put, Mr Yahiaoui submits that his surrender must be refused for each of the following reasons:

   (a) The EAW is invalid because the anti-terrorist public prosecutor is not a judicial authority within the meaning of Article 6(1) of Council Framework Decision 2002/584/JHA, as amended, ('the Framework Decision') or s. 2(1) of the Act of 2003 since the decision of that authority to issue the EAW is not susceptible to court proceedings that amount to the effective judicial protection of the respondent's rights, due to the absence of the necessary dual level of protection in relation to that decision and the underlying national decision (in this instance to

convict and sentence, rather than issue an arrest warrant), which absence of protection follows, at least in part, from the State's opt-out from Directive 2013/48/EU ('the Criminal Legal Aid Directive') on the right of access to a lawyer in criminal and EAW proceedings ('the issuing judicial authority objection').

(b) Surrender is prohibited under s. 45 of the Act of 2003 because the condition indicated at paragraph (d) of the EAW – that, in the event of his surrender, the respondent (who did not appear in person at the trial resulting in the decision) will be accorded a right of retrial or appeal in which he will have the right to participate and which will allow the merits of the case, including fresh evidence, to be re-examined, and which may lead to the original decision being reversed – will not be met or, in the alternative, surrender is prohibited under s. 37 of the Act of 2003 because the retrial or appeal available would breach the respondent's right to a fair trial under Article 6 of the European Convention on Human Rights ('the ECHR') and Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter') ('the no fair retrial objection').

(c) Surrender is prohibited under s. 44 of the Act of 2003 because the offence or offences identified in the EAW was or were committed in a place other than France and the act or omission of which that offence or each of those offences consists does not, by virtue of having been committed in a place other than the State, constitute an offence under the law of the State ('the extraterritoriality objection').

(d) The EAW is invalid because it does not provide the necessary clarity about the number of offences for which the surrender of the respondent is sought, nor does it properly specify the nature and classification under the law of France of the offence or offences concerned ('the failure to properly identify the offence objection').

(e) Surrender is prohibited under s. 37 of the Act of 2003 because the surrender of the respondent would expose him to a real risk of imprisonment in conditions that would amount to a breach of his right to life and right not to be subjected to inhuman or degrading treatment or punishment under Articles 2 and 3 of the ECHR and Articles 2 and 4 of the Charter and a breach of his right to bodily integrity under Article 40.3.1 of the Constitution of Ireland ('the Constitution') ('the prison conditions objection').

(f) Surrender is prohibited under s. 37 of the Act of 2003 because the surrender of the respondent would expose him to a real risk of imprisonment in conditions that would amount to a breach of his right to life, right not to be subjected to inhuman or degrading treatment or punishment, and right to respect for his private and family life, under Articles 2, 3 and 8 of the ECHR, Article 40.3.1 of the Constitution, and Articles 2, 4 and 8 of the Charter, due specifically to his medical condition ('the medical care objection').

(g) Surrender is prohibited under s. 37 of the Act of 2003 as a disproportionate interference with the rights of the respondent or of his family, or both (as the case

may be), to respect for their private and family life under Article 8 of the ECHR, Articles 40.3.1, 40.4.1 and 41.1 of the Constitution, and Articles 6, 7 and 24 of the Charter ('the family life objection').

8. I will address each of those arguments in turn.

The issuing judicial authority objection

9. In advancing the argument that the anti-terrorist public prosecutor is not a judicial authority within the meaning of Article 6(1) of Council Framework Decision 2002/584/JHA, as amended, ('the Framework Decision') or s. 2(1) of the Act of 2003, Mr Yahiaoui does not dispute that the concept of 'judicial authority' within the meaning of Article 6(1) of the Framework Decision is capable of including authorities of a Member State which, although not necessarily judges or courts, participate in the administration of justice in that Member State (see, for example, judgment of 27 May 2019, *PF (Prosecutor General of Lithuania)*, Case C-509/18, EU:C:2019:457 ('PF') (at paragraph 30). Nor does Mr Yahiaoui dispute that the office of the anti-terrorism public prosecutor acts independently in the execution of the responsibilities which are inherent in the issuing of a European arrest warrant and, in doing so, meets the requirement that there are statutory rules and an institutional framework capable of guaranteeing that it is not exposed, when adopting a decision to issue such an arrest warrant, to any risk of being subject, inter alia, to an instruction in a specific case from the executive (see, for example, judgment of 12 December 2019, *JR and YC (Public Prosecutors at the tribunal de grande instance at Lyon and Tours)*, C-566/19 PPU and C-626/19 PPU, EU:C:2019:1077, ('JR and YC'), paragraph 32).

10. Rather, Mr Yahiaoui submits that the anti-terrorist public prosecutor is not a 'judicial authority' within the meaning of that term in the Framework Decision because, as he contends, the decision of that authority to issue the EAW in this case occurred in circumstances where he was denied effective judicial protection of his procedural and fundamental rights.

11. In its judgment of 12 December 2019 in *JR and YC* (at paragraphs 59 and 60) the Court of Justice reiterated the requirements of effective judicial protection in respect of the issue of a valid EAW:

> '59 The European arrest warrant system entails a dual level of protection of procedural rights and fundamental rights which must be enjoyed by the requested person, since in addition to the judicial protection provided at the first level, at which a national decision such as a national arrest warrant, is adopted, there is the protection that must be afforded at the second level, at which a European arrest warrant is issued, which may occur, depending on

the circumstances, shortly after the adoption of the national judicial decision (judgment of 27 May 2019, *OG and PI (Public Prosecutor's Office in Lubeck and Zwickau)*, C-508/18 PPU and C-82/19 PPU, EU:C:2019:456, paragraph 67 and the case-law cited).

60 Thus, as regards a measure, such as the issuing of a European arrest warrant, which is capable of impinging on the right to liberty of the person concerned, that protection means that a decision meeting the requirements inherent in effective judicial protection should be adopted, at least, at one of the two levels of that protection (judgment of 27 May 2019, *OG and PI (Public Prosecutor's Office in Lubeck and Zwickau)*, C-508/18 PPU and C-82/19 PPU, EU:C:2019:456, paragraph 68).

61. In particular, the second level of protection of the rights of the person concerned requires that the issuing judicial authority review observance of the conditions to be met when issuing a European arrest warrant and examine objectively – taking into account all incriminatory and exculpatory evidence, without being exposed to the risk of being subject to external instructions, in particular from the executive – whether it is proportionate to issue the warrant (see, to that effect, judgment of 27 May 2019, *OG and PI (Public Prosecutor's Office in Lubeck and Zwickau)*, C-508/18 PPU and C-82/19 PPU, EU:C:2019:456, paragraphs 71 and 73).

62 Furthermore, where the law of the issuing Member State confers competence to issue a European arrest warrant on an authority which, whilst participating in the administration of justice in that Member State, is not itself a court, the decision to issue such an arrest warrant and, inter alia, the proportionality of such a decision must be capable of being the subject, in the Member State, of court proceedings which meet in full the requirements inherent in effective judicial protection (judgment of 27 May 2019, *OG and PI (Public Prosecutor's Office in Lubeck and Zwickau)*, C-508/18 PPU and C-82/19 PPU, EU:C:2019:456, paragraph 75).

63 Such proceedings against a decision to issue a European arrest warrant taken by an authority which, whilst participating in the administration of justice and having the necessary independence from the executive, does not constitute a court serve to ensure that the monitoring of compliance with the conditions to be met when issuing a European arrest warrant in connection with criminal proceedings and, in particular, the proportionality of such a warrant is carried out in a procedure which complies with the requirements inherent in effective judicial protection.

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

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

12. These requirements of effective judicial protection apply differently where a European arrest warrant issues for the purpose of executing a sentence, rather than for the purpose of conducting criminal proceedings. As the Court of Justice explained in its judgment of 12 December 2019, *ZB (Public Prosecutor's Office in Brussels)*, Case C-627/19 PPU, EU:C:2019:1079 ('ZB') (at paragraphs 33 to 38):

'33 In this case, unlike the situations giving rise to the judgments of 27 May 2019, *OG and PI (Public Prosecutor's Office in Lubeck and Zwickau*) (C-508/18 and C-82/19 PPU, EU:C:2019:456), and of 27 May 2019 *PF (Prosecutor General of Lithuania)* (C-509/18, EU:C:2019:457), which concerned European arrest warrants issued for the purposes of conducting criminal proceedings, the main proceedings concern a European arrest warrant issued for the purposes of executing a sentence.

34 In that regard, such a warrant is, as is apparent from Article 8(1)(c) and (f) of Framework Decision 2002/584, based on an enforceable judgment imposing a custodial sentence on the person concerned, by which the presumption of innocence enjoyed by that person is rebutted in judicial proceedings that must meet the requirements laid down in Article 47 of the Charter of Fundamental Rights.

35 In such a situation, the judicial review referred to in paragraph 75 of the judgment of 27 May 2019, *OG and PI (Public Prosecutor's Offices in Lubeck and Zwickau)* (C-508/18 and C-82/19 PPU, EU:C:2019:456), which meets the need to ensure effective judicial protection for the person requested, on the basis of a European arrest warrant issued for the purposes of executing a sentence, is carried out by the enforceable judgment.

36 The existence of earlier judicial proceedings ruling on the guilt of the requested person allows the executing judicial authority to presume that the decision to issue a European arrest warrant for the purposes of executing a sentence is the result of a national procedure in which the person in respect of whom an enforceable judgment has been delivered has had the benefit of all safeguards appropriate to the adoption of that type of decision, including those derived from the fundamental rights and fundamental legal principles referred to in Article 1(3) of Framework Decision 2002/584.

37 Moreover, the provisions of Framework Decision 2002/584 themselves provide for a procedure that complies with the requirements of Article 47 of the Charter of Fundamental Rights, regardless of the methods of implementing that framework decision chosen by the Member States (judgment of 30 May 2013, *F*, C-168/13 PPU, EU:C:2013:348, paragraph 47).

> 38 Furthermore, where a European arrest warrant is issued for the purposes of executing a sentence, it follows that it is proportional from the sentence imposed, which, as is clear form Article 2(1) of Framework Decision 2002/584, must consist of a custodial sentence or a detention order of at least four months.'

13. Mr Yahiaoui accepts that, as the issuing judicial authority confirms in the additional information that it provided on 3 December 2021, the EAW in this case issued for the purpose of executing the decision of 30 November 2001 by the 16th Chamber of the Paris Correctional Court, composed of three judges, who assessed all the elements for the prosecution and the defence before convicting Mr Yahiaoui and imposing a sentence of six-years imprisonment upon him on that date.

14. Further, it is common case that, in conformity with the terms of paragraph (d) of Article 4a of the Framework Decision, as amended by Council Framework Decision 2009/299/JHA, reflected in the requirements of s. 45 of the Act of 2003, the EAW confirms in the material part of paragraph (d) – point 3.4 - that:

> 'the [requested] person was not personally served with the decision but,
> - the person will be personally served with this decision without delay after the surrender, and
> - when served with the decision, the person will be expressly informed of his right to a retrial or appeal, in which he has the right to participate and which allows the merits of the case, including fresh evidence, to be re-examined, and which may lead to the original decision being reversed; and
> - the person will be informed of the timeframe within which he has to request a retrial or appeal, which will be 10 days.
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> In the event that the person would appeal against the judgment, the original judgment will be cancelled and he will be retried for the charges against him. The person will be presented to a judge, the liberty and custody judge (juge des libertés et de la detention) who will decide whether he shall remain or not in custody until the new hearing, on the basis of the arrest warrant.'

15. Against that background, Mr Yahiaoui seeks to distinguish ZB, in reliance on the judgment of 21 October 2010, *IB*, Case C-306/09, EU:C:2010:626 ('IB'). That judgment concerned the proper interpretation of Article 5(3) of the Framework Decision, whereby, where the surrender of a person who is a national or resident of the executing Member State is sought 'for the purposes of prosecution', that State may impose a condition on surrender that, after being heard, the person is returned to that State to serve there the custodial sentence imposed on him by the issuing Member State, given that, where the surrender of a person is sought 'for the purposes of executing a sentence' imposed after a trial in

absentia of which the requested person had not been informed , Article 5(1), as it then stood, allowed an executing Member State to impose as a condition the provision of an assurance that the person would have the opportunity to apply for a retrial, and given also that Article 4(6) permits an executing Member State to refuse surrender of a requested person who is sought 'for the purposes of the execution of a custodial sentence' where that person is staying in, or is a national or resident of, that State and where that State undertakes to execute the sentence in accordance with its domestic law.

16. The specific question posed in *IB*, as identified by the Court of Justice (at paragraph 48), was whether Articles 4(6) and 5(3) of the Framework Decision may be interpreted as meaning that the execution of a European arrest warrant issued for the purpose of the execution of sentence imposed in absentia within the meaning of Article 5(1), as it then stood, may be subject to the condition that the person concerned, a national or resident of the executing Member State, should be returned to the executing State in order, as the case may be, to serve there the sentence passed against him following a new trial organised in his presence in the requested State.

17. The court of justice answered that question in the affirmative, providing the following three reasons for that determination (at paragraphs 57 to 59):

> '57 Given that the situation of a person who was sentenced in absentia and to whom it is still possible to apply for a retrial is comparable of that of a person who is the subject of a European arrest warrant for the purposes of prosecution, there is no objective reason precluding an executing judicial authority, which has applied Article 5(1) of Framework Decision 2002/584 from applying the condition contained in Article 5(3) of that framework decision.
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> 58 Furthermore, such an interpretation is the only one which, currently, offers a real possibility of reintegrating into society for a person resident in the executing Member State who, having been sentenced by a judgment which is not yet enforceable, may be retried in the issuing Member State.
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> 59 Finally, the interpretation also makes it possible, as emphasised, in particular, by the Swedish Government, to avoid constraining the person sentenced in absentia to waive a retrial in the issuing Member State in order to ensure that his sentence may, pursuant to Article 4(6) of Framework Decision 2002/584, be executed in the Member State where he is resident within the meaning of the relevant provisions of that Framework Decision.'

18. Mr Yahiaoui argues that the same comparison - between a person entitled to a retrial and a person facing prosecution - should govern the distinct question of the nature and scope

of the dual level of protection of fundamental and procedural rights that must attend the issue of an EAW to enable the public prosecutor who issues it to qualify as a 'judicial authority' within the meaning of Article 6(1) of the Framework Decision and, hence, s. 2(1) of the Act of 2003. That is to say, Mr Yahiaoui submits that, in considering the question of whether a person whose surrender is requested for the purpose of the execution of a sentence already imposed but who is entitled to a retrial has received effective judicial protection of his fundamental and procedural rights, that person should be treated as though he has not been the subject of earlier judicial proceedings ruling on his guilt but is instead a person whose surrender is being sought for the purposes of judicial proceedings to determine his guilt or innocence. But Mr Yahiaoui does not explain why that should be so in the context of determining whether there has been effective judicial protection.

19. When considering the proper interpretation of the terms of Article 5(3) of the Framework Decision, which is what was at issue in *IB*, there is an obvious comparison to be drawn between the position of a person already sentenced but entitled to a retrial and that of a person facing prosecution. But when considering whether there has been effective judicial protection of the fundamental and procedural rights of a requested person in the issue of a European arrest warrant, which was the matter at issue in *ZB* and is the matter at issue here, there is an even more obvious distinction to be drawn between the position of a person already tried and sentenced in earlier judicial proceedings but entitled to a retrial and that of a person whose surrender is sought for the purpose of prosecution. It follows that the analysis of the Court of Justice in *ZB* is directly applicable in the circumstances of the present case, whereas that of the Court of Justice in *IB* has no relevance here, since the proper interpretation of Article 5(3) of the Framework Decision is not in issue.

20. Applying the analysis of the Court of Justice in *ZB* to the evidence before me, I conclude as follows.

21. First, the EAW in this case is based on an enforceable judgment imposing a custodial sentence on Mr Yahiaoui, by which the presumption of innocence enjoyed by him has been rebutted in judicial proceedings that there is no evidence to suggest failed to meet the requirements of Article 47 of the Charter.

22. Second, the decision of 30 November 2001 by the 16th Chamber of the Paris Correctional Court, composed of three judges, who assessed all the elements for the prosecution and the defence before convicting Mr Yahiaoui and imposing a sentence of six-years imprisonment upon him on that date, in itself constituted the judicial review necessary to

ensure effective judicial protection of the fundamental and procedural rights of Mr Yahiaoui in respect of the decision to issue a European arrest warrant for the purposes of executing that sentence.

23. Third the existence of those earlier judicial proceedings ruling on the guilt of Mr Yahiaoui allows me to presume that the decision to issue a European arrest warrant for the purposes of executing that sentence is the result of a national procedure in which Mr Yahiaoui has had the benefit of all safeguards appropriate to the adoption of that type of decision, including those derived from the fundamental rights and fundamental legal principles referred to in Article 1(3) of Framework Decision.

24. Fourth, the provisions of the Framework Decision themselves provide for a procedure that complies with the requirements of Article 47 of the Charter of Fundamental Rights, regardless of the methods of implementing that framework decision chosen by the Member States (judgment of 30 May 2013, *Jeremy F*, C-168/13 PPU, EU:C:2013:348, paragraph 47).

25. Fifth, as the European arrest warrant in this case issued for the purposes of executing a sentence, it follows that it is proportional from the sentence imposed, which, as is clear from Article 2(1) of the Framework Decision, must consist of a custodial sentence or a detention order of at least four months. In this case, the sentence imposed was one of 6 years imprisonment.

26. Sixth, while there can be no doubt that the European arrest warrant system entails a dual level of protection of procedural rights and fundamental rights whereby, in addition to the judicial protection provided at the first level, at which a national decision, such as a national arrest warrant (or an enforceable judgment imposing a criminal sentence) is adopted, there is the protection that must be afforded at the second level, at which a European arrest warrant is issued, it is equally clear that what is required is that a decision meeting the requirements inherent in effective judicial protection should be adopted, at least, at one of those two levels (PF (paragraphs 45 and 46); *OG and PI* (paragraph 68); judgment of 12 December 2019, *XD*, Case C-625/19 PPU, EU:C:2019:1078 (paragraphs 38 and 39)). Hence, the issue of the EAW in this case has been attended by the necessary dual level of protection of procedural rights and fundamental rights.

27. I am reinforced in that conclusion by a consideration of the relevant part of the additional information provided by the anti-terrorist public prosecutor on 13 April 2022 in respect of the operation of the right to a retrial procedure for persons tried in absentia under French law:

> 'It should be noted that, after the judgment has been served, the convicted person may oppose it by any means – statement to the head of the prison, letter to the French public prosecutor etc. This opposition renders the original judgment 'null and void in all its provisions' under Article 49 of the French Code of Criminal Procedure ['the CCP']
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> The person concerned would then possibly be remanded in custody, placed under judicial supervision or left fully free by a liberty and custody judge and would be able to make any application for release in accordance with the common law.
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> ...
>
> The annulment of the judgment of conviction effectively allows the convicted person to exercise all remedies, to sue for nullity, and also to appeal if conviction is handed down.
>
> Thus,,, if the High Court is legitimately seeking confirmation that the person concerned can indeed act in nullity and if it is true that Article 170 of [the CCP] normally concerns the investigation phase, the person convicted in absentia can indeed act in nullity before the criminal court.
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> Indeed, Article 385 of [the CCP] specifies that the criminal court does not traditionally have the power to note procedural nullities when it is seized by a referral ordered by an examining magistrate or an examining chamber, the nullities having been examined in principle before this referral.
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> However, paragraph 3 of the same article states 'Where the order for referral by the investigating judge has been made without the conditions provided for in Article 175 having been met, the parties shall remain entitled, notwithstanding the provisions of the first paragraph, to raise the nullity of the proceedings before the criminal court.'
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> In this situation, the individual was referred to the criminal court after the investigating judge issued an arrest warrant, which resulted in an unsuccessful search, and which 'constitutes an indictment' under Article 134 of [the CCP].
>
> However, as the latter was not located and could never be notified of the end of the judicial investigation in accordance with Article 175 of the French Code of Criminal Procedure, he was not able to make any requests or to act to nullify the proceedings at that time.

> If Article 175 of [the CCP] has not been respected, the person lodging the opposition may bring an action for nullity before the criminal court for all of the acts of the proceedings.
>
> Thus, in the event of a failure to inform the interested party, therefore not allowing him to usefully contest the procedural irregularities, and if this failure is not the result of a manoeuvre on his part or of his negligence, the nullity action is still open under French law.
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> Once handed over to France, Abderrahman Yahiaoui will therefore be able to bring an action for annulment of all procedural acts that he considers irregular, he will be able to request his release with the benefit of an effective judicial remedy, and if he opposes his conviction he will have his case fully re-examined in a criminal court in the first instance, and will also be able to appeal in the event of a new conviction.'

28. In response to that additional information, Mr Yahiaoui now argues, in reliance upon an argument to that effect subsequently advanced in the third affidavit of Mr Teissedre, sworn on 12 May 2022, that the qualification upon his prospective right to contest procedural irregularities in his original criminal prosecution, whereby his earlier failure to do so must not be the result of 'a manoeuvre on his part or of his negligence', amounts to a disproportionate restriction on his fair trial rights under Article 6 of the Convention (thereby depriving Mr Yahiaoui of the effective judicial protection of his fundamental and procedural rights). By reference to the very limited evidence before me I cannot accept that argument. For my part, I find it difficult to imagine how any state's system of criminal justice could function on the basis of according absolute procedural rights to a suspect or accused person that cannot be subject to limitation or qualification where there has been a material abuse of process, or culpable failure to comply with the applicable procedural rules, by that person.

29. Nor can I pass from this aspect of the case without expressing disapproval of the way in which Mr Yahiaoui purported to present expert evidence of French law in this case. In each of the three affidavits that he has sworn, Mr Teissedre has been candid in acknowledging that he has been appointed as Mr Yahiaoui's advocate (i.e. legal representative) in France. Nonetheless, Mr Teissedre has also been presented as an independent legal expert on foreign law (in this instance, French law) based on his status and experience as a French advocate who specialises in criminal matters and, in that guise, has included in each of the three affidavits that he has sworn the necessary acknowledgment, pursuant to Order 39, rule 57 of the Rules of the Superior Courts, as amended, that it is his overriding duty as an expert to assist the court on the matters within his expertise. The role of a (properly) partisan advocate and that of an impartial expert cannot be combined in the interests of the same party, because the primary duty of an expert to assist the court entails a duty to provide independent assistance and not

to adopt the role of advocate (see, for example, Mark Tottenham, Emma Jane Prendergast, Ciaran Joyce and Hugh Madden, *A Guide to Expert Witness Evidence*, (Bloomsbury Professional 2019) (at paras. 3.13 to 3.17). Mr Teissedre has thus been placed in an invidious position and the contents of the three affidavits that he has sworn are much more obviously the stuff of advocacy than they are the presentation of an impartial exposition of the relevant aspects of French criminal law and procedure. For that reason, I have been unable to accord that evidence any significant weight. It was a regrettable feature of the present application that much avoidable delay resulted from the time taken to prepare and file each of the affidavits concerned.

30. Seventh, there is nothing in the chronology of events in this case that alters the conclusion that I have already reached. It is true that, as Mr Yahiaoui points out, the offence alleged, the national warrant for his arrest, and his conviction each predate the entry into force of the Framework Decision and of the Act of 2003. However, s. 4 of the Act of 2003 confirms that it applies in relation to any offence committed, or alleged to have been committed, before or after its commencement. Further, in giving judgment for the Supreme Court in *Minister for Justice and Equality v Smits*, [2021] IESC 27, (Unreported, Supreme Court, 15 April 2021), O'Malley J concluded:

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

31. Eighth, I have no hesitation in rejecting Mr Yahiaoui's argument that the application of the Criminal Legal Aid Directive in the State is vital – in effect, a condition precedent - to the status of the anti-terrorist public prosecutor as an issuing judicial authority within the meaning of Article 6(1) of the Framework Decision and s. 2(1) of the Act of 2003. Of course, as recital 58 of the Criminal Legal Aid Directive acknowledges, the State did not take part in its adoption and is not bound by, or subject to, its application.

32. The argument relies on the recognition by the Court of Justice in JR and YC (at paragraphs 72 and 73) that the Framework Decision forms part of a comprehensive system of safeguards relating to effective judicial protection provided by other EU rules

adopted in the field of judicial cooperation in criminal matters, which contribute to helping a requested person exercise his rights even before his surrender, and that, in particular, Article 10 of the Criminal Legal Aid Directive requires the competent authority in the executing Member State to inform a requested person without undue delay after he has been deprived of his liberty that he has a right to appoint a lawyer in the issuing Member State.

33. However, it is noteworthy that, in the preceding paragraph of its judgment in JR and YC (para. 71), the Court of Justice had already concluded that the French legal system 'meets the requirement of effective judicial protection' by reference to the procedural rules that it applies. Thus, it is simply not possible to view that judgment as authority for the proposition that the relevant rule is a vital component of, rather than a useful contribution to, the exercise of the fundamental rights and procedural rights that are necessary to meet the requirements of effective judicial protection.

34. Moreover, on the evidence before me, Mr Yahiaoui has already appointed a lawyer in France, the issuing Member State. He has, of course, been represented at all material times in these proceedings by both solicitor and counsel, so that it would be – to use a neutral expression – surprising if he had not been informed of his right to do so. Thus, it is entirely unsurprising that no evidence has been produced of any prejudice caused by the failure of the competent authority within the State to inform Mr Yahiaoui of that right. Thus, there is nothing to distinguish this case from that of *Minister for Justice and Equality v Mroz* (Unreported, High Court, Coffey J (ex tempore), 9 March 2021) and no basis to demur from the conclusion reached by Coffey J in that case that Article 10(4) of the Criminal Legal Aid Directive does not and cannot of itself operate as a bar to surrender, a fortiori, where, as in this case, the respondent is legally represented in the State, is aware of his right to appoint a lawyer in the issuing Member State (and has, in fact, done so), and cannot advance evidence of prejudice of any kind.

35. Hence, for the reasons I have given, I am satisfied that the issue of the EAW in this case was attended by the effective judicial protection of the respondent's rights, in the context of the applicable dual level of protection of those rights, and that, in consequence, the anti-terrorist public prosecutor is a judicial authority within the meaning of Article 6(1) of Council Framework Decision 2002/584/JHA, as amended, ('the Framework Decision') and s. 2(1) of the Act of 2003. It follows that I must reject Mr Yahiaoui's first ground of objection to his surrender.

The no fair retrial objection

36. Mr Yahiaoui argues that his surrender is prohibited under s. 45 of the Act of 2003 because the condition that he will be accorded a right to a fair and proper retrial will not be met

or, in the alternative, that his surrender is prohibited under s. 37 of the Act of 2003 because the retrial available to him would breach his fair trial rights under Article 6 of the Convention and Article 47 of the Charter.

37. That argument is based on the assertion by Mr Teissedre that Mr Yahiaoui 'will not be able to challenge the acts made by the examining judge before the trial and the sentence' and the submission that Mr Yahiaoui's position is therefore analogous to that of the applicant to the European Court of Human Rights in the case of *Abdelali v France* (application no. 43353/07), and not to that of the applicant in the subsequent case of *Ait Abbou v France* (application no. 44921/13). That argument implies that, in flagrant disregard of the decision of the European Court of Human Rights in the former case, Mr Yahiaoui will be deprived of his right to a fair trial under Article 6 of the Convention by being refused the right to bring a plea of nullity in respect of any acts carried out during the judicial investigation phase.

38. On the limited evidence before me, that argument amounts to a bare assertion. Moreover, that issuing judicial authority has provided an express assurance that, once surrendered to the French authorities, Mr Yahiaoui will be able to bring an action for annulment of all procedural acts that he considers irregular; will be able to request his release with the benefit of an effective judicial remedy; will, if he opposes his conviction, have his case fully re-examined in a criminal court in the first instance; and will also be able to appeal in the event of a new conviction.

39. For those reasons, Mr Yahiaoui's second ground of objection fails.

The extraterritoriality objection

40. Mr Yahiaoui submits that his surrender is prohibited under s. 44 of the Act of 2003 because the offence identified in the EAW was committed in a place other than France and the act or omission of which that offence consists does not, by virtue of having been committed in a place other than the State, constitute an offence under the law of the State.

41. That objection fails in limine because I am satisfied that the offence identified in the EAW was committed in France. In describing the circumstances in which the offence was committed, including the time, place and degree of participation in the offences by Mr Yahiaoui, the EAW recites at paragraph (e):

'Author of acts committed in Marseille (13 – FRANCE), in any event in the French territory, and in ASSEN (Netherlands), in 1996-1997-1998, in any event at a date not subject to statutory limitation.

Abderrahmane YAHIAOUI has been sentenced for participating in a group formed or in an association established in order to prepare, as established by one or more material proofs, one of the acts of terrorism referred to in Article 421-1 of the French Criminal Code, in this case for his active participation within the Al Baqoun Al Ahd movement. He is described as having been part of the hard core of the movement in Marseille, describing himself as wanted in Algeria due to activities in relation to the Armed Islamic Group (GIA) or the violent Islamic movement, particularly specialised in the production of forged identity documents of illegal immigrants from Algeria, and then continuing his activities in weapons trafficking from the Netherlands where he took refuge after being remanded in custody in January 1997 within the framework of the present case.'

42. Thus, the offence concerned consisted, at least in part, of acts committed in Marseille, France, so that Mr Yahiaoui cannot meet the first requirement under s. 44 of the Act of 2003 in asserting that the section prohibits his surrender. In turn, that makes it unnecessary to consider the second requirement under s. 44 because, as Denham CJ reiterated in *Minister for Justice and Equality v Egharevba* [2015 IESC 55], (Unreported, Supreme Court, 25 June 2015) (at para 15), those requirements are conjunctive.

43. For those reasons, I reject Mr Yahiaoui's third ground of objection.

The offence not properly identified objection

44. Mr Yahiaoui argues that EAW is invalid because, as he asserts, it does not provide the necessary clarity about the number of offences for which his surrender is sought, nor does it properly specify the nature and classification under the law of France of the offence or offences concerned.

45. In advancing that argument, Mr Yahiaoui relies on the following four matters:

(a) Paragraph (e) of the warrant states that it relates, in total, to one offence.

(b) In describing the circumstances in which the offence was committed, paragraph (e) identifies Mr Yahiaoui as the 'author of acts committed 'in Marseille (13 – FRANCE), in any event in the French territory, and in ASSEN (Netherlands)'.

(c) Having described the nature and legal classification of the offence as 'criminal organisation to prepare acts of terrorism', paragraph (e) goes on to identify the applicable statutory provisions or code as:

'Acts provided for and punishable under Articles 421-1, 421-2-1, 421-3, 421-5 of the French Criminal Code and Articles 203 and 706-16 and seq. of the French Code of Criminal Procedure.'

(d) Mr Teissedre has averred that Articles 421-1 and 421-2-1 'are two separate offences.'

(e) In the list of offences that are punishable in the issuing Member State by a maximum prison sentence of at least 3 years and that do not require verification of double criminality, the issuing judicial authority has ticked the box beside 'Participation in a criminal organisation' and the box beside 'Terrorism'.

46. On that basis, Mr Yahiaoui submits that the EAW fails to comply with what the Supreme Court (per Hardiman J in *Minister for Justice and Equality v Connolly* [2014] 1 IR 720 at 733) described as the 'mandatory requirement of the European arrest warrant procedure that there be unambiguous clarity about the number and nature of the offences for which the person sought is so sought.'

47. In light of those concerns, further information was sought from the issuing judicial authority on the number of offences to which the warrant relates, and the nature and classification of each.

48. The issuing judicial authority provided further information in response on 3 December 2021, stating (in material part):

> 'We confirm that Abderrahman YAHIAOU is only wanted for one offence: his participation in a criminal terrorist organisation. This offence punishes a conspiracy established or a group formed with a view to the preparation, characterised by one or more material facts, of an act of terrorism as provided for in Article 421-1.
>
> Thus, Article 421-2-1 defines what a terrorist conspiracy (association de malfaiteurs terroriste) is, and Article 421-1 provides for the limited list of offences that the conspiracy (association de malfaiteurs) seeks to commit – in particular, intentional attacks on life and limb.
>
> If we mention in our European arrest warrant that this corresponds to both participation in a criminal organisation and acts of terrorism, it is precisely because terrorist conspiracy (association de malfaiteurs terroriste) is the French offence that incriminates participation in a criminal organisation with a terrorist vocation, i.e. with the aim of seriously disturbing public order through intimidation or terror.

The reason why we also mention in our European arrest warrant, Articles 421-3 and 421-5 of the Criminal Code is that these two articles provide for the possible punishment of the offence of terrorist conspiracy (association de malfaiteurs terroriste).

Articles 203 and 706-16 of the Code of Criminal Procedure are also mentioned; they provide for certain specific features of the criminal procedure applicable to terrorist matters (centralisation of proceedings in Paris, competence of the anti-terrorist public prosecutor, specialisation of the actors in the procedure, etc) but do not, strictly speaking, participate in the definition of the offence in question.'

49. In my view, the additional information provided is sufficient to dispel any ambiguity there might have been about the number and nature of the offences for which Mr Yahiaoui's surrender is sought by confirming that it is for one offence of participation, contrary to Article 421-2-1 of the Criminal Code, in a criminal organisation (in this instance, a terrorist organisation) which seeks to commit one of the limited list of offences set out in Article 421-1 of the same code, for which single offence he has already been tried, convicted and sentenced in absentia to six years imprisonment, subject to his right to a retrial, should he request one.

50. For that reason, I reject this ground of objection.

The prison conditions objection

51. Mr Yahiaoui submits that his surrender is prohibited under s. 37 of the Act of 2003 because it would expose him to a real risk of imprisonment in conditions that would amount to a breach of his right to life and right to freedom from inhuman or degrading treatment or punishment under Articles 2 and 3 of the ECHR and Articles 2 and 4 of the Charter, as well as a breach of his right to bodily integrity under Article 40.3.1 of the Constitution.

52. In *Minister for Justice v Angel* [2020] IEHC 699, (Unreported, High Court, 15 December 2020) (at para. 45), Paul Burns J identified the following non-exhaustive list of principles that apply to objections to surrender based on an asserted risk of breach of fundamental rights and, in particular, of subjection to inhuman or degrading treatment or punishment in that event:

'(a) the cornerstone of the Framework Decision is that member states, save in exceptional circumstances, are required to execute any European arrest warrant on the basis of the principles of mutual recognition and mutual trust;

(b) a refusal to execute a European arrest warrant is intended to be an exception;

(c) one of the exceptions arises when there is a real or substantial risk of inhuman or degrading treatment contrary to article 3 ECHR or article 4 of the Charter of Fundamental Rights of the European Union ("the Charter");

(d) the prohibition of surrender where there is a real or substantial risk of inhuman or degrading treatment is mandatory. The objectives of the Framework Decision cannot defeat an established risk of ill-treatment;

(e) the burden rests upon a respondent to adduce evidence capable of proving that there are substantial/reasonable grounds for believing that if he or she were returned to the requesting country, he or she will be exposed to a real risk of being subjected to treatment contrary to article 3 ECHR;

(f) the threshold which a respondent must meet in order to prevent extradition [or surrender] is not a low one. There is a default presumption that the requesting country will act in good faith and will respect the requested person's fundamental rights. Whilst the presumption can be rebutted, such a conclusion will not be reached lightly;

(g) in examining whether there is a real risk, the Court should consider all of the material before it and if necessary, material obtained of its own motion;

(h) the Court may attach importance to reports of independent international human rights organisations or reports from government sources;

(i) the relevant time to consider the conditions in the requesting state is at the time of the hearing;

(j) when the personal space available to a detainee falls below 3m2 of floor surface in multi-occupancy accommodation in prisons, the lack of personal space is considered so severe that a strong presumption of a violation of article 3 ECHR arises. The burden of proof is then on the issuing state to rebut the presumption by demonstrating that there are factors capable of adequately compensating for the scarce allocation of personal space, and this presumption will normally be capable of being rebutted only if the following factors are cumulatively met:-

(1) the reductions in the required minimum personal space of 3m2 are short, occasional and minor;

(2) such reductions are accompanied by sufficient freedom of movement outside the cell and adequate out-of-cell activities; and

(3) the detainee is confined to what is, when viewed generally, an appropriate detention facility, and there are no aggravating aspects of the conditions of his or her detention;

(k) a finding that there is a real risk of inhuman or degrading treatment by virtue of general conditions of confinement in the issuing member state cannot lead, in itself, to the refusal to execute a European arrest warrant. Whenever the existence of such a risk is identified, it is then necessary for the executing judicial authority to make a further assessment, specific and precise, of whether there are substantial grounds to believe that the individual concerned will be exposed to that risk. The executing judicial authority should request of the issuing member state all necessary supplementary information on the conditions in which it is envisaged that the individual concerned will be detained;

(l) an assurance provided by the competent authorities of the issuing state that, irrespective of where he is detained, the person will not suffer inhuman or degrading treatment is something which the executing state cannot disregard and the executing judicial authority, in view of the mutual trust which must exist between the judicial authorities of the member states on which the European arrest warrant system is based, must rely on that assurance, at least in the absence of any specific indications that the detention conditions in a particular detention centre are in breach of article 3 ECHR or article 4 of the Charter; and

(m) it is only in exceptional circumstances, and on the basis of precise information, that the executing judicial authority can find that, notwithstanding such an assurance, there is a real risk of the person concerned being subjected to inhuman or degrading treatment because of the conditions of that person's detention in the issuing member state.'

53. In seeking to make out this ground of objection, Mr Yahiaoui relies on various aspects of the judgment of the European Court of Human Rights in the case J.M.B. and Others v. France, App no. 9671/15 and 31 others, (Chamber judgment, 30 January 2020) ('JMB'); the Council of Europe Committee of Ministers' report at its 1411th meeting, 14-16 September 2021, on the supervision of the execution of that judgment (CM/Notes/1411/H46-12); the executive summary of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment ('CPT') report on its periodic visit to France between 4 and 18 December 2019 (CPT/Inf (2021) 14); the annual reports of the Chief Inspector of Places of Deprivation of Liberty ('Le Contrôleur Général des Lieux de Privation de Liberté') for 2018 and 2019 ('the Chief Inspector's Reports'); and the European Union Agency for Fundamental Rights report entitled 'Criminal detention conditions in the European Union: rules and reality' (Publications Office of the European Union, 2019). Very helpfully, Mr Yahiaoui's legal representatives prepared a précis of the specific matters addressed in those documents upon which he relies in asserting that there are substantial or reasonable grounds for believing that if he is surrendered to France he will be exposed to a real risk of detention in conditions that would amount to inhuman or degrading treatment or punishment ('the précis').

54. In the headnote to the press release issued by the Registrar of the European Court of Human Rights on the judgment in JMB (in circumstances where no English language translation of the judgment itself is available), the following summary is provided:

> 'In today's Chamber judgment in the case of *J.M.B. and Others v. France* (application no. 9671/15 and 31 others) the European Court of Human Rights held, unanimously, that there had been: a violation of Article 13 (right to an effective remedy) of the European Convention on Human Rights, and a violation of Article 3 (prohibition of inhuman or degrading treatment).
>
> The 32 cases concerned the poor conditions of detention in the following prisons: Ducos (Martinique), Faa'a Nuutania (French Polynesia), Baie-Mahault (Guadeloupe), Nîmes, Nice and Fresnes, as well as the issue of overcrowding in prisons and the effectiveness of the preventive remedies available to the prisoners concerned.
>
> The Court considered that the personal space allocated to most of the applicants had fallen below the required minimum standard of 3 sq. m throughout their period of detention; that situation had been aggravated by the lack of privacy in using the toilets. With regard to the applicants who had more than 3 sq. m of personal space, the Court held that the prisons in which they had been or continued to be held did not, generally speaking, provide decent conditions of detention or sufficient freedom of movement and activities outside the cell.
>
> The Court further held that the preventive remedies in place – an urgent application to protect a fundamental freedom and an urgent application for appropriate measures – were ineffective in practice, and found that the powers of the administrative judges to make orders were limited in scope. Furthermore, despite a positive change in the case-law, overcrowding in prisons and the dilapidated state of some prisons acted as a bar to the full and immediate cessation of serious breaches of fundamental rights by means of the remedies available to persons in detention.
>
> Under Article 46 the Court noted that the occupancy rates of the prisons in question disclosed the existence of a structural problem. The Court recommended to the respondent State that it consider the adoption of general measures aimed at eliminating overcrowding and improving the material conditions of detention, while putting in place an effective preventive remedy.'

55. Principally, therefore, Mr Yahiaoui relies on the finding by the European Court of Human Rights on the conditions of detention in those prisons, as well as certain criticisms of conditions of detention within the French prison system more generally that are contained in the various reports already mentioned, to submit that he has discharged the heavy onus of establishing reasonable or substantial grounds for believing that he would be

exposed to a real risk of imprisonment in conditions of inhuman or degrading treatment or punishment if surrendered to France.

56. Assuming, without deciding, that the material concerned may amount to objective, reliable, specific and properly updated evidence on detention conditions in France that demonstrates systemic or generalised deficiencies, it is necessary to determine whether, in the specific circumstances of this case, there are substantial grounds to believe that, following the surrender of Mr Yahiaoui to France, he will run a real risk of being subject in that Member State to inhuman or degrading treatment, within the meaning of Article 4 of the Charter (judgment of 12 December 2019, *Aranyosi and Căldăru*, Cases C-404/15 and C-659/15 PPU, EU:C:2016:198 ('Aranyosi') (at paragraph 94).

57. To that end, the court requested further information from the issuing judicial authority on the conditions it which it is envisaged Mr Yahiaoui will be detained if surrendered to France. The issuing judicial authority replied on 3 December 2021, indicating that it had requested the French Ministry of Justice, which is responsible for the administration of prisons, to provide a substantive response.

58. The French Ministry for Justice responded directly on 12 January 2022, stating in material part as follows:

> *'Foreseeable place of detention*
>
> Subject to the sovereign decision of the judicial authority, the wanted person shall be assigned to the Villepinte detention centre.
>
> Prior to this, it must be reminded that in France cell assignment is carried out according to the sex, the age, the penal situation and the personal assessment of the detained persons. The separation man/woman, minor/major and accused/convicted person is de facto guaranteed.
>
> The legal and regulatory provisions applicable to all the French prison guarantee inmates to benefit from an individual bed.
>
> These provisions also allow detained persons to be regularly released from their cell to participate in activities (work in concession workshops, work for the benefit of general service, training and teaching, cultural and sports workshops, participation in the religious services, etc), to access health care services or parlours. They also benefit from daily access to the courtyards, the number and duration of which differ from one institution to another.

The persons detained in French prisons are therefore not in a detention regime that requires them to remain locked up in a cell for the entire period. The duration of night confinement is also limited to 12 hours.

Description of the conditions of detention in the prison of Villepinte

Compared to 2017, the Villepinte prison has seen a very significant reduction in its number of detainees, from 1133 persons housed in 2017 to 979 person housed on 6 January 2022.

The establishment has 583 theoretical places.

This decrease is due to a programme of transfers carried out by the Prison Administration, by the opening of the Paris la Santé facility and the adoption in 2020 of specific measures related to the health crisis.

480 single cells have a surface are of 9 to 10 m2 including sanitary facilities. These toilets have a surface area of 1 m2, the persons accommodated have a minimum individual space of 4 m2 when the cells themselves are doubled. In the event of three people occupying the same cell, this personal space is 2.67 m2.

40 double cells have a surface area of 11 to 12 m2, i.e. 5 m2 of personal space for each person when the cell is double and 3 m2 per person if the cell is tripled.

Showers are not available in the cells, but in specific rooms on each floor.

While the prison of Villepinte had 57 mattresses on the floor in 2017 and 90 triple cells, this establishment now has only 34 triple cells as of 6 January 2022.

For the men's detention centre, the occupation is as follows:

30 single cells occupied by a single person i.e. 9 m2 per person;

378 single cells occupied by 2 persons i.e. 4 m2 per person;

1 single cell occupied by 3 persons i.e. 2.67 m2 per person;

1 double cell occupied by one person i.e. 10 m2 per person;

3 double cells occupied by 2 persons, i.e. 5 m2 per person;

34 double cells occupied by 3 persons, i.e. 3.33 m2 per person.

The inmates currently incarcerated in Villepinte, with the exception of the three inmates currently occupying a single triple cell, thus have a personal space excluding sanitary facilities of more than 3 m2.

Medical care

The prison administration guarantees that the care of the detainee shall be taken in charge in accordance with the law of 18 January 1994 on public health and social protection, and the prison law of 23 November 2009.

The methodological guide, drawn up jointly by the Ministry of Justice and the Ministry of Social Affairs and Health, ensures that detainees have access to care of a quality equivalent to that of the general population.

For the Villepinte prison, the health facility is the Robert Ballanger intercommunal hospital (CHIRB) in Aulnay sous Bois.

Each establishment has a health unit within the structure. These units are open every working day of the week. With regard to access to treatment, depending on the situation and developments in the organisation of these units, they can either have a pharmacist on site every day of the week, or have treatments prepared within the hospital home centre.

As far as these treatments are concerned, they come from the hospital's pharmacy and are distributed by the paramedical staff on doctor's prescriptions.

This distribution can take place either within the health unit (prisoners with a lack of good compliance, opiate substance treatment, etc) or on a daily or weekly basis in the cell.

Recent developments in the right to an effective right of appeal

An appeal is available to detainees to challenge the conditions of detention. Indeed, person who claim to be detained in unworthy conditions now have a judicial remedy under French law, introduced by law no 2021-403 of 8 April 2021 tending to guarantee the right to respect for dignity in detention, published in the Journal Officiel de la République of 9 April 2021.

This text inserts a new article 803-8 into the Criminal Procedure Code, which sets out the conditions and modalities according to which a detainee can refer to the judicial judge (Juge des libertés et de la detention in the case of pre-trial detention, or Juge de l'application des peines in the case of conviction) when he/she considers being held in unworthy conditions of detention, so that they can be ended.

The detainee's allegations must be "detailed, personal and current".

If the application is admissible, the judge makes the necessary checks and collects the observations of the prison administration within 10 days.

If the judge considers the application to be well-founded, he or she shall ask the prison administration to remedy the undignified conditions of detention that have

been found within a maximum of one month, in particular by transferring the prisoner.

If the problem has not been resolved by the prison administrator within the prescribed period, the judge may put an end to the undignified conditions of detention:

- by ordering the transfer of the prisoner;

- by ordering the release of the person remanded in custody, possibly subject to judicial supervision or house arrest with electronic monitoring;

- by ordering a modification of the sentence if the person is definitively convicted, provided that he or she is eligible.

The judge's decision may be appealed, within 10 days, either before the President of Chambre de l'instruction or the President of the Chambre de l'application des peines.

To assess the unworthy nature of the conditions of detention, the judge will take into account the requirements of Article 3 of the European Convention on Human Rights and European Prison Rules of the Committee of Ministers of the Council of Europe of 11 January 2006.

Decree No. 2021-1194 of 15 September 2021 specifies the terms of application of this new procedure, in particular as regards the conditions how to refer the case to the judge and the nature of the checks the judge may order.

The decree also provides for an obligation on the part of the head of the institution to inform the detainees of the possibility of lodging an appeal on the basis of article 803-8 of the Criminal Procedure Code.

As a result, Mr YAHIAOUI will be able to lodge an appeal if he considers that these conditions do not meet the requirements.

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In addition, the Ministry of Justice also wishes to point out that following the decision of the European Court of Human Rights [in] JMB of 30 January 2020, the French authorities have adopted an action plan aimed at defining and implementing measures to put an end to the findings of the said decision.

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The French Ministry of Justice considers the European standards of detention, as defined by Article 3 of the European Convention on Human Rights and Fundamental Freedoms, the European Prison Rules of the Council of Europe and the case law of the European Courts (ECHR and EUCR), are respected within the Villepinte prison.'

59. Having considered the additional information provided I cannot accept that there are substantial grounds to believe that Mr Yahiaoui will be exposed to a real risk of inhuman or degrading treatment or punishment by virtue of the general conditions of confinement that exist in the Villepinte detention centre to which he will be assigned. I have reached that conclusion for the following reasons.

60. First, on the question of the person space available to Mr Yahiaoui in a cell in the men's detention centre there, the information available suggests that 895 (or over 99.6%) of the occupants have personal space excluding sanitary facilities of more than 3 m2 or, differently put, only 3 (or less than 0.34%) of the occupants have personal space of less than 3 m2 (specifically, the 3 occupants of a single cell who have 2.67 m2 of personal space). 793 (or over 88% of the occupants) have personal space of 4 m2 or more. Thus, even if I were to assume without deciding, by reference to the material upon which Mr Yahiaoui relies, that there are deficiencies in the French prison system as a whole that are general or systemic concerning personal cell space, there is no basis to conclude that any such deficiency exists for the overwhelming majority of the occupants of the men's detention centre at Villepinte. Certainly, there are no substantial grounds to believe that Mr Yahiaoui will be exposed to a real risk of having personal cell space of less than 3 m2.

61. Second, on the broader issue of conditions more generally in the men's detention centre at Villepinte, the additional information provided establishes that neither the sanitation; hygiene; medical care; degree of freedom of movement; nor access to an effective judicial remedy against unlawful prison conditions, provides grounds to believe that Mr Yahiaoui will be exposed to a real risk of inhuman or degrading treatment.

62. Third, the additional information provided includes assurances from the French Ministry of Justice that Mr Yahiaoui will be assigned to the Villepinte detention centre and that the standards of detention required under Article 3 of the Convention and Article 4 of the Charter are respected there. Only in exceptional circumstances, which do not arise here, and on the basis of precise information, could I find that notwithstanding such assurances, there is a real risk of Mr Yahiaoui being subjected to inhuman or degrading treatment or punishment, within the meaning of Article 4 of the Charter, because of the conditions of his detention in the issuing Member State (see, for example, judgment of 15 October 2019*, Dumitru-Tudor Dorabantu*, Case C-128/18, paragraph 69) ('Dorabantu').

63. Mr Yahiaoui points out that the anti-terrorist public prosecutor is the issuing judicial authority and not the French Ministry for Justice. Thus, he submits, the assurances of the

latter should be attributed little or no weight in the overall assessment of whether there are grounds to believe that Mr Yahiaoui will be exposed to a real risk of inhuman or degrading treatment or punishment, if surrendered.

64. However, as already noted, in its letter of 3 December 2021, the issuing judicial authority stated that it had requested the French Ministry of Justice, which is responsible for the administration of prisons, to provide a substantive response to the request for information on the prison conditions under which Mr Yahiaoui would be held. In the opening lines of its letter dated 12 January 2022, the Directorate of Criminal Affairs and Pardons within the French Ministry of Justice, confirmed that:

> 'The French Ministry of Justice, acting as the central authority for judicial cooperation in criminal matters, intends to respond to the High Court's questions....'

65. In Dorabantu, the Court of Justice explained (at paragraph 68):

> 'When the assurance that the person concerned will not suffer inhuman or degrading treatment on account of the actual and precise conditions of his detention, irrespective of the prison in which he is detained in the issuing Member State, has been given, or at least endorsed, by the issuing judicial authority, if need be after the assistance of the central authority, or one of the central authorities, of the issuing Member State, as referred to in Article 7 of Framework Decision 2002/584, has been requested, the executing judicial authority must rely on that assurance, at least in the absence of any specific indications that the detention conditions in a particular detention centre are in breach of Article 4 of the Charter (see, to that effect, judgment of 25 July 2018, Generalstaatsanwaltschaft (Conditions of detention in Hungary), C 220/18 PPU, EU:C:2018:589, paragraph 112).'

66. In advancing his argument, Mr Yahiaoui relies on the judgment of 25 July 2018, *ML*, Case C-220/18 PPU, EU:C:2018:589 ('ML'), in which the Court of Justice noted that an assurance given by the Hungarian Ministry of Justice that the requested person in that case would not be subjected to any inhuman or degrading treatment or punishment in the conditions of his detention in Hungary was neither provided nor endorsed by the issuing judicial authority, 'as the Hungarian Government expressly confirmed at the hearing' (paragraph 113). Thus, the court of justice concluded that, as the guarantee represented by such an assurance had not been given by the issuing judicial authority, it would have to be evaluated by carrying out an overall assessment of the information available to the executing judicial authority (paragraph 114), before going on to observe that the

assurance given appeared to be borne out by the information available (paragraph 115), with the result that the requested person concerned could be surrendered (paragraph 116).

67. In this case, there is no express confirmation by the French government that the anti-terrorist public prosecutor, which is the issuing judicial authority, has not endorsed the relevant assurances given by the French Ministry of Justice, which is the central authority in that issuing Member State, and much reason to believe, in light of the train of correspondence I have already described, that the anti-terrorist public prosecutor has provided implicit, if not explicit, endorsement of those assurances.

68. But even if that were not so, the evaluation of those assurances (as those of an authority other than the issuing judicial authority) - in the form of an overall assessment of the available information - would not alter the result.

69. As Donnelly J explained in *Minister for Justice and Equality v Harrison* [2020] IECA 159, (Unreported, Court of Appeal, 12 June 2020) ('Harrison') (at paragraph 81):

> 'It is of course the position that the CJEU in ML specifically referred to mutual trust in the context of information coming from the issuing judicial authority and stated that it must be relied upon. In the context of an assurance coming from another source, the executing judicial authority had to carry out its assessment in light of all the information presented to it. That is not a statement by the CJEU that mutual trust does not apply between Member States. On the contrary, the difference in the approach between the judicial assurance and the assurance by a State organ reflects the uniqueness of the mutual recognition system which operates at a high level of mutual trust between judicial authorities. There is always a level of mutual trust between Member States, but a Member State is bound to give information provided by a non-judicial authority greater scrutiny than information provided by another judicial authority.'

70. In Harrison, the trial court had sought additional information concerning an EAW that had issued by an issuing judicial authority in the United Kingdom. In reply, information was provided through the UK central authority by way of a letter that enclosed a response from a member of the UK Crown Prosecution Service ('CPS'). The trial judge ultimately directed the surrender of the requested person, who appealed on the ground, amongst others, that, in considering the information provided by the CPS, the trial judge had wrongly placed reliance on the principal of mutual confidence, referred to by Fennelly J in the Supreme Court in *Minister for Justice v Stapl*eton [2008] 1 IR 669 and reflected in

recital 10 of the Framework Decision, citing *ML* as authority for the proposition that the principle of mutual confidence could not extend to information provided by an authority within an issuing Member State other than the issuing judicial authority. The Court of Appeal concluded (at paragraph 84) that there was an artificiality about that argument since the High Court was obliged, in accordance with ML and the judgment of 1 June 2016, *Niculaie Aurel Bob-Dogi*, C-241/15, EU:C:2016:385 ('Bob-Dogi'), to consider the information before it, before adding that, in the absence of any challenge whatsoever to the bona fides of the CPS, there was simply no reason to reject it.

71. The position in that regard in this case is, in my judgment, precisely the same. In the absence of any challenge whatsoever to the bona fides of the French Ministry of Justice, there is no reason to reject the information it has provided. That information is specific and precise in confirming that Mr Yahiaoui will be assigned to the Villepinte detention centre and in describing the conditions of detention there, thus permitting, if not mandating, the positive evaluation of the accompanying assurances that the French Ministry of Justice has provided.

72. For those reasons, I reject this ground of objection.

The medical care objection

73. Mr Yahiaoui argues that his surrender is prohibited under s. 37 of the Act of 2003 because it would expose him to a real risk of imprisonment in conditions that would amount to a breach of his right to life, right to freedom from inhuman or degrading punishment or treatment and right to respect for his private and family life, under Articles 2, 3 and 8 of the ECHR, Article 40.3.1 of the Constitution, and Articles 2, 4 and 8 of the Charter, due specifically to his medical condition.

74. There is a makeweight quality to both this objection and the next one, because neither is addressed in Mr Yahiaoui's written submissions and neither is the subject of any evidence adduced in the context of the present application. Instead, Mr Yahiaoui submits that I should have regard to the short affidavit that he swore on 29 September 2021 in support of his application for bail, which contains averments about both his medical condition and his family circumstances.

75. On his medical condition, Mr Yahiaoui has averred broadly as follows. In September 2021, he was 53 years of age. He has been on disability benefit since 2018, due to the loss of his left eye. He now wears a prosthetic in that eye, and the vision in his right eye

is very poor. He suffers from arthritis and has been receiving treatment for that condition for the past decade. Prior to being granted disability benefit, he was diagnosed with cancer of the skull, for which disease he completed his final radiotherapy treatment in March 2018.

76. In the absence of written submissions or oral argument directly on the point, I am left to infer that, in support of this ground of objection, Mr Yahiaoui is relying on those parts of the précis of material on prisons conditions, prepared on his behalf, that comprise criticisms of the level and standard of healthcare available within the French prison system and, in particular, on the relevant extracts from the CPT and Prison Inspector's reports.

77. However, as specific and precise additional information has now been provided on Mr Yahiaoui's assignment to Villepinte detention centre and on the level and standard of medical care available there, Mr Yahiaoui has failed to satisfy me that there are substantial or reasonable grounds for believing that if surrendered to France, he will be exposed to a real risk of being subjected to inhuman or degrading treatment or punishment, or will have his right or that of his family members to respect for their family and private life infringed, due specifically to his medical condition.

78. Hence, I reject this ground of objection to Mr Yahiaoui's surrender.

The disproportionate interference with family life objection

79. Finally, Mr Yahiaoui submits that his surrender is prohibited under s. 37 of the Act of 2003 as a disproportionate interference with his rights or those of his family members, as the case may be, to respect for their private and family life under Article 8 of the ECHR, Articles 40.3.1, 40.4.1 and 41.1 of the Constitution, and Articles 6, 7 and 24 of the Charter.

80. The relevant averments in the affidavit that Mr Yahiaoui swore on 29 September 2021 in support of his application for bail would appear to be these. He was then a 53-year-old Algerian national. He moved to Ireland with his wife and first child in 2000 and has lived in the State continuously ever since. He then had four children, each of whom was living in the family home. His youngest child was then 16 years old and attending secondary school. He is very close to his family and, in particular, to his youngest child who has had mental health problems. His wife had recently spent time in hospital with a blood clot on

her lung, and he was providing support for her in the home. He took responsibility for household administration, including the payment of bills.

81. As this ground of objection was not dealt with at all in Mr Yahiaoui's written submissions and only briefly mentioned in the oral submissions put forward on his behalf, I do not propose to address it any great length.

82. The principles that govern the assessment of an objection to surrender, under s. 37 of the Act of 2003 on the ground that it would be in breach of the rights of the requested person or of his family members to respect for his or their private and family life under Article 8 of the Convention were recently reiterated by Donnelly J *Minister for Justice and Equality v D.E.* [2021] IECA 188, (Unreported, Court of Appeal, 1 July 2021) (at paragraph 59). They are 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. (*Minister for Justice and Equality v Vestartas*, [2020] IESC 12 ('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. (*Minister for Justice and Equality v Ostrowski*, [2013] 4 IR 206 ('Ostrowski'); *Minister for Justice and Equality v JAT (No. 2)* [2016] 2 ILRM 262 ('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. (*Minister for Justice, Equality and Law Reform v Rettinger*, [2010] 3 IR 783; Vestartas).

(v) The assessment of the claimed impact of surrender on personal and family rights must be a rigorous one. (Rettinger; 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; 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.

83. By reference to the very limited evidence adduced on this ground, Mr Yahiaoui has failed to satisfy me that his surrender to France, in accordance with the requirements of Article 10 of the Act of 2003, would involve a violation of the right to family life under Article 8 of the Convention to the extent that it would be incompatible with the State's obligations under the Convention. This is not a truly exceptional case. There is no clear or cogent evidence that is sufficient to rebut the presumption under s. 4A of the Act of 2003 that the issuing Member State will comply with the requirements of the Framework Decision.

84. Hence, this ground of objection must also fail.

The necessary proofs under s. 16(2) of the Act of 2003

85. On the evidence before me and based on the conclusions set out above, I am duly satisfied that:

(a) the EAW, including the matters required by s. 45 of the Act of 2003, has been provided to the court,

(b) the person before the court is the person in respect of whom the EAW issued,

(c) I am not required under s. 21A, 22, 23 or 24 of the Act of 2003 to refuse to surrender Mr Yahiaoui under the Act of 2003, and,

(d) the surrender of Mr Yahiaoui is not prohibited under any of the provisions of Part 3 of the Act of 2003. In that context, and solely for completeness, I should state I am satisfied that the offence concerned meets the minimum gravity requirement of s. 38(2) of the Act of 2003 in that a term of imprisonment of 6 years (thus, plainly one of not less than 4 months) has been imposed on Mr Yahiaoui in respect of the offence in France, and he is required under the law of France to serve all or part of that period of imprisonment.

Conclusion

86. It follows that, having due regard to the obligation to surrender under s. 10 of the Act of 2003, I will make an order under s. 16(2) of that Act, directing the surrender of Mr Yahiaoui to such person as is duly authorised by France to receive him.