

## THE HIGH COURT

2009 739 SS

## IN THE MATTER OF ARTICLE 40.4.2 OF THE CONSTITUTION

Between:

Zigmars Strazdins

Applicant

And

The Governor of Cloverhill Prison

Respondent

**Judgment of Mr Justice Michael Peart delivered on the 17th day of July 2009:**

On the 11th March 2009, the applicant consented under the provisions of s.15 of the European Arrest warrant Act, 2003, as amended ("the Act") to his surrender to the authorities in Latvia under a European arrest warrant issued there on the 19th March 2007. Thereupon this Court made an order for that surrender and for the committal of the applicant to prison pending the implementation of his surrender. In addition, the Court made an order under s. 18 of the Act postponing surrender since the applicant was at that time the subject of domestic charges under the Road Traffic Acts which had yet to be disposed of in the District Court. The terms of the postponement appear in the perfected order as follows:

*"AND IT IS FURTHER ORDERED PURSUANT TO Section 18 of the European Arrest Warrant Act 2003 as amended that the surrender of the said Zigmars Strazdins be postponed until the said Zigmars Strazdins is no longer required in connection with the prosecution at present pending at the suit of Garda David T Connolly before the Dublin Metropolitan District Court in connection with Section 13 of the Road Traffic Act 1994."*

Having made the order for surrender on that date and the order for the applicant's committal, a Committal Warrant was signed by me. The Committal Warrant was prepared by the Court's Registrar prior to its signature in order to reflect the postponement of the order for surrender. The relevant part of the Committal Warrant states:

*"THIS IS TO COMMAND YOU ...to lodge the said Zigmars Strazdins in the prison at Cloverhill there to be detained by the Governor thereof until the date of his delivery as aforesaid and for any further period as may be necessary under law, the said surrender being postponed pursuant to Section 18 of the said Act until he is no longer required in connection with a prosecution case now pending before Dublin Metropolitan District Court under Section 13 of the Road Traffic Act 1994 as amended." (my emphasis)*

On foot of this warrant the applicant was held in custody awaiting, firstly, the completion of the prosecution, and, secondly, the implementation of his surrender thereafter.

On the 23rd April 2009 the District Court prosecution concluded by same being "struck out".

At the heart of the present application for the release of the applicant from custody is the fact that he was not surrendered immediately upon the conclusion of the prosecution on the 23rd April 2009, as some time elapsed before the necessary arrangements for his surrender were completed between the Central Authority here and the Latvian authorities.

There was, as the oral evidence before me has shown, some delay in notifying the Central Authority of the fact that the District Court proceedings had concluded. His surrender was arranged to take place on the 9th May 2009, by agreement between the Central Authority and the Latvian authorities reached on the 5th May 2009. That time-frame, the wording of the committal warrant and the provisions of s. 18(4) of the Act are relevant and have to be considered in order to reach a conclusion as to whether or not the detention of the applicant was unlawful by the time the present application for his release came before me on the 8th May 2009.

At the conclusion of this application before me on the afternoon of the 8th May 2009, and because the flight to Latvia for the purpose of surrendering the applicant was scheduled to leave Dublin at 1.05am on the 9th May 2009, I gave an ex tempore judgment and refused the order for his release. However, I indicated that I would give a written judgment setting out my reasons.

Some twelve days after the striking out of the domestic proceedings against the applicant, his solicitor wrote to the Chief State Solicitor to enquire as to why the respondent had not been surrendered to the Latvian authorities on foot of the order of this Court made on the 11th March 2009. He wrote also to the respondent seeking a copy of the Committal Warrant holding the applicant. On the following day he contacted the respondent to inform him that it was his understanding that the applicant should have been surrendered to the Latvian authorities within a period of ten days from the 23rd April 2009, being the date upon which the order for surrender took effect upon the completion of the domestic charge. In that regard I should set out at this point the relevant provision of s. 18 of the Act (the postponement section):

*"(4) Subject to subsection (5), a person to whom this section applies shall be surrendered to the issuing state not later than 10 days after such date (being a date that falls after the date specified in subsection (1) or subsection*

*(3)(i) or (ii), as the case may be) as may be agreed by the Central Authority in the State and the issuing state.”*  
(my emphasis)

By letter dated 6th May 2009 the Chief State Solicitor’s Office wrote to the applicant’s solicitor enclosing a copy of the Committal Order and stating:

*“You will note that a surrender having been postponed pursuant to Section 18 of EAW Act as amended [it] falls to the Central Authority pursuant to section 18(4) of the EAW Act to agree a new date with the issuing judicial authority.*

*I confirm that arrangements are in place to effect surrender of the respondent to the requesting state on the 9th May 2009.”*

By letter dated 6th May 2009 the applicant’s solicitor inquired as to the date upon which this surrender date was agreed with the Latvian authorities and was informed by letter dated 7th May 2009 that agreement as to date for surrender was reached on the 5th May 2009. During the course of oral evidence on the present application an official from the Central Authority handed to the Court a copy of a letter dated 5th May 2009 from the Latvian authority to the Central Authority which confirms their agreement to the surrender of the applicant taking place on Saturday the 9th May 2009.

The applicant has complained that there was no reason for the delay from the 23rd April 2009 to the agreement on the 5th May 2009 (which is outside a period of ten days from 23rd April 2009), and that his surrender ought to have taken place therefore not later than the 3rd May 2009. This submission is dependent upon a conclusion that the provisions of s. 18(4) of the Act require that surrender take place not later than ten days from the taking effect of the order for surrender on the 23rd April 2009, and/or that the Committal Warrant was not worded in a way which permitted detention beyond the period of postponement. I will come to that.

I heard oral evidence on this application from John Davis, an executive officer at the Department of Justice, Equality and Law Reform (the Central Authority) and who has responsibilities in relation to European arrest warrants transmitted to this country and to surrender arrangements following the making of an order of surrender. He was involved in this case and was the person who engaged with the Latvian authorities in relation to the surrender of the applicant in the aftermath of the striking out of the District Court charge. In his evidence he stated that the first occasion on which he became aware that this charge had been struck out, bringing the postponement of the surrender order to an end, was when he received an e-mail from the Garda Extradition Unit on the 29th April 2009, which was six days thereafter. He thereupon wrote to the Latvian authorities informing them of this and stating that surrender had to take place within ten days of the 29th April 2009. That is clearly in my view not correct information, and in due course I will explain why, but be that as it may that is what was stated to the Latvian authority.

By e-mail sent to the Garda Extradition branch on 30th April 2009 the Latvian authorities informed that the only date which could be arranged for this surrender to occur was by a flight on the 9th May 2009 at 1.05am, as “it is the only direct flight from Dublin to Riga carried out by AirBaltic next week”, and they asked for confirmation that this was acceptable and that the applicant had a valid travel document. On the 1st May 2009, the Extradition Branch of An Garda Síochána replied stating “*the handover of [the applicant] must take place by midnight on the 7th of May 2009*” and inquired if there was any possibility that surrender could be completed on or before that date, to which the Latvian authority replied by e-mail dated 5th May 2009 that the said flight on the 9th May 2009 was the only possibility, and sought agreement to the handover of the applicant at that time.

Following this exchange of correspondence, which was copied to the Central Authority here, Mr Davis sent a letter on the 5th May 2009 in which he sought confirmation from the Latvian authorities that they “*are in agreement with the surrender taking place on Saturday the 9th May 2009*”, and by faxed letter of the same date that confirmation was given.

#### **Applicant’s submissions:**

Micheál P. O’Higgins SC for the applicant has submitted that the relevant statutory provisions must be interpreted in a way which results in the least restriction on the applicant’s liberty. He submits that not only has there been any credible evidence that there would have been any problem in having the applicant’s surrender implemented prior to the 9th May 2009, but that there is actual evidence through Mr Davis’s evidence of at least a six day unexplained delay from the 23rd April 2009 when the District Court prosecution concluded until Mr Davis was informed of that fact, only following which efforts were made to agree a date for surrender with the Latvian authorities. He submits that the s. 18 of the Act should be interpreted as not permitting the detention under which the applicant continued to be held up to the date of this application before me on the 8th May 2009, and that it permitted the detention of the applicant only for a period of ten days from the 23rd April 2009, surrender being required to be implemented within that period.

Mr O’Higgins has also submitted that when this Court made the order for surrender on the 11th March 2009, and the order for postponement on the same date, the Court stated that at the time when making these orders that surrender would occur “immediately on the expiration of the postponement”. I have not seen the transcript of what was stated on that occasion, but have no reason to believe that I would not have said those words. However, it is the perfected order which must be taken to be the record of the Court’s order, and that is worded as I have set forth, namely that the order for surrender is postponed until the applicant is no longer required in connection with the prosecution pending at that time in the District Court, and the Committal Warrant as prepared and signed is the authority to the respondent to detain the applicant, and the latter authorised the detention until the date of delivery and for any further period “*as may be necessary under law*”. The question is what is embraced by that phrase, and whether it can include all of the period which passed from the 23rd April 2009 to the date of the application before me on the 8th May 2009.

The relevant provisions of s. 18 of the Act are as follows:

*“18.— (3) Subject to section 19, where a person to whom an order under section 15 or 16 applies—*  
*(a) is being proceeded against for an offence in the State, or*

*(b) (i) has been sentenced to a term of imprisonment for an offence of which he or she was convicted*

in the State, and

(ii) is required to serve all or part of that term of imprisonment,

the High Court may direct the postponement of that person's surrender to the issuing state until—

(i) in the case of a person who is being proceeded against for an offence, the date of his or her acquittal or conviction (where he or she is not required to serve a term of imprisonment), or

(ii)

(ii) in the case of a person who is required to serve all or part of a term of imprisonment, the date on which he or she is no longer required to serve any part of that term of imprisonment.

(4) Subject to subsection (5), a person to whom this section applies shall be surrendered to the issuing state not later than 10 days after such date (being a date that falls after the date specified in subsection (1) or subsection (3)(i) or (ii), as the case may be) as may be agreed by the Central Authority in the State and the issuing state." (my emphasis)

Mr O'Higgins made a preliminary point that the "strike out" of domestic charges is not in fact referred to in s. 18(3) of the Act, and that the Court cannot make an order of postponement other than until an acquittal, or a conviction in respect of which there is a sentence to be served. I do not need to dwell on that point. The making of the postponement order is not under challenge, but in any event the order of postponement made in this case was until the applicant "is no longer required in connection with the prosecution [in question]". In my view that adequately covers the situation of a 'strike out' of the charge.

Mr O'Higgins main point is that a constitutional interpretation of s. 18(4) of the Act must be the least restrictive interpretation in terms of the applicant's detention, and that it is clear that what the Oireachtas intended by this provision is that only if surrender cannot be achieved within ten days of the conclusion of the domestic prosecution may the Central Authority agree a later date with the authorities in the requesting state. He submits that such an agreement must be reached within the said ten day period even if the surrender may occur thereafter. In the present case he notes that the date on which a surrender date was agreed, namely the 5th May 2009, was outside a period of ten days from the 23rd April 2009.

He has referred to the Supreme Court's judgments in *Dundon v. Governor of Cloverhill Prison* [2006] 1 IR. 518, wherein, inter alios, Denham J. stated at p.531:

*"...the national court when applying the national law should do so as far as possible in the light of the Council Framework Decision, to attain the result sought. This can not be done if it is contrary to the national law, but the national court should consider the whole of the national law to see if it can be applied so as not to produce a result contrary to the council framework decision."*

In the same case, Fennelly J. stated at p. 539:

*"As a general proposition I would agree with counsel for the applicant that, where there is an ambiguity in legislation as to whether the Oireachtas intended, in a given instance, detention or freedom, there is a prima facie presumption in favour of an interpretation involving freedom. But just because some particular aspect is not spelled out does not mean that there is an ambiguity as far as interpretation is concerned. There is a duty on the courts to read the Act as a whole and interpret it."*

He went on at p. 541 to state that:

*"... if there was inordinate delay prejudicial to the rights, including fundamental rights, of an arrested person, that person might be entitled to be discharged and released."*

The *Dundon* case, of course, was not addressing the provisions of s. 18(4) of the Act, but rather the 60 day and 90 day limits referred to in the Framework Decision for the making of a decision on the application for surrender.

Mr O'Higgins referred also to the Supreme Court's judgment (Fennelly J.) in *Ó Fallúin v. Governor of Cloverhill Prison* [2007] 3 IR. 414, which considered the meaning to be given to the provisions of s. 16 (7) of the Act, which are importantly different to those of s. 18(4) thereof. The former provided that "... a person who is not surrendered to the issuing state ... shall be released from custody immediately upon the expiration of the 10 days referred to in subsection (5), unless, upon such expiration, proceedings referred to in subsection (6) [i.e. under Article 40 of the Constitution] are pending."

Section 16 (5) of the Act, relevant also in *Ó Fallúin*, provides that "... a person to whom an order for the time being in force under this section applies shall be surrendered to the issuing state not later than 10 days after (a) the expiration of the period specified in subsection (3) [15 days from the date of making of the order] or such date (being a date that falls after the expiration of that period) as may be agreed by the Central Authority in the State and the issuing state."

However, s. 18(4) is somewhat different, and provides, as set forth already:

(4) Subject to subsection (4), a person to whom this section applies shall be surrendered to the issuing state not later than 10 days after such date (being a date that falls after the date specified in subsection (1) or subsection (3)(i) or (ii), as the case may be) as may be agreed by the Central Authority in the State and the issuing state." (my emphasis)

Mr O'Higgins has submitted that whereas in *Dundon* the time limits under consideration in that case were regarded as being aspirational in nature, those in the context of the present case are stricter since it is not simply a limit for the

making of a decision, and relates to the detention of the arrested person pending his surrender. In circumstances of unexplained or justified delay from the 23rd April 2009, he submits that the applicant's surrender was mandated immediately upon the conclusion of the District Court proceedings and certainly not later than ten days thereafter. He goes on to submit that an agreement on a surrender date which was reached outside that ten day period cannot cure the unlawfulness of the detention following the 23rd April 2009 or after ten days thereafter. He has referred also to the judgment of this Court in *Rimsa v. Governor of Cloverhill Prison*, unreported, High Court, 2nd May 2008, which arose from an application for release under Article 40 of the Constitution on the basis that the provisions of s. 16(5)(b) of the Act were unconstitutional. That application was refused, but Mr O'Higgins has referred to a passage in my judgment on p. 17:

*"It is of course a necessary presumption inherent in the presumption of constitutionality of the Act, following East Donegal Livestock Mart Ltd v. The Attorney General ... and McDonald v. Bord na gCon ... that those in whose power or discretion it is to make those administrative arrangements necessary for surrender to take place, will exercise that power and discretion in good faith and in accordance with constitutional principles, such as that the detention will be for no period longer than is reasonably necessary for the purpose of achieving a successful surrender."*

He suggests that the delay of six days from the 23rd April 2009 to the 29th April 2009 before Mr Davis was notified of the conclusion of the District Court proceedings offends that concept of "reasonably necessary", particularly in circumstances where it has not been explained, much less justified, and that s. 18(4) should not be interpreted in such a way as meaning that it does not matter.

Tom O'Connell SC for the respondent has made a very brief submission to the effect that the provisions of s. 18 are very clear and unambiguous and that what occurred is entirely within that meaning, and that what determines the time within which surrender must be effected is the date on which the Central Authority here reaches an agreement with the issuing state for an agreed date for surrender, and that the detention of the applicant in this case until surrender on the 9th May 2009 was in accordance with law.

Article 23 of the Framework Decision provides:

*Article 23 Time limits for surrender of the person:*

- 1. The person requested shall be surrendered as soon as possible on a date agreed between the authorities concerned.*
- 2. He or she shall be surrendered no later than 10 days after the final decision on the execution of the European arrest warrant.*
- 3. If the surrender of the requested person within the period laid down in paragraph 2 is prevented by circumstances beyond the control of any of the Member States, the executing and issuing judicial authorities shall immediately contact each other and agree on a new surrender date. In that event, the surrender shall take place within 10 days of the new date thus agreed.*
- 4. The surrender may exceptionally be temporarily postponed for serious humanitarian reasons, for example if there are substantial grounds for believing that it would manifestly endanger the requested person's life or health. The execution of the European arrest warrant shall take place as soon as these grounds have ceased to exist. The executing judicial authority shall immediately inform the issuing judicial authority and agree on a new surrender date. In that event, the surrender shall take place within 10 days of the new date thus agreed.*
- 5. Upon expiry of the time limits referred to in paragraphs 2 to 4, if the person is still being held in custody he shall be released." (my emphasis)*

Section 16(5) of the Act, as amended gives effect to Article 23 paragraphs 1,2 and 3 by providing:

*"(5) Subject to subsection (6) and section 18, a person to whom an order for the time being in force under this section applies shall be surrendered to the issuing state not later than 10 days after—*

*(a) the order takes effect in accordance with subsection (3), or*

*(b) such date (being a date that falls after the expiration of that period) as may be agreed by the Central Authority in the State and the issuing state."*

Clearly, while these provisions require in the first instance that surrender take place no later than 10 days from the date on which the order for surrender takes effect, the possibility exists under (b) for some later date to be agreed for surrender if there are circumstances which exist which prevent surrender from being implemented within that 10 day period. That flexibility is consistent with Article 23.3 of the Framework Decision which allows for some later date to be agreed in those circumstances. The Framework Decision is silent as to any time within which surrender must be completed outside the 10 day period provided for in Article 23.2. It would appear that a margin of appreciation is allowed when the Central Authority and the issuing state are agreeing a later date.

Article 24.1 of the Framework Decision provides for arrangements where surrender has been postponed, as in the present case:

*"Article 24 Postponed or conditional surrender:*

- 1. The executing judicial authority may, after deciding to execute the European arrest warrant, postpone the surrender of the requested person so that he or she may be prosecuted in the executing Member State or, if he or she has already been sentenced, so that he or she may serve, in its territory, a sentence passed for an act*

*other than that referred to in the European arrest warrant."*

Since Article 24 makes no reference to any separate time limit for surrender following the completion of any domestic prosecution which has necessitates postponement, it is reasonable to have regard to Article 23. As already set forth, s. 18 (4) provides for what is to happen once a domestic prosecution has concluded, bringing to an end the postponement of surrender.

For the purposes of the present case, the provisions of s. 18 (4) require that surrender must take place not later than 10 days after the conclusion of the District Court proceedings on the 23rd April 2009, or not later than 10 days after the date "agreed by the Central Authority in the State and the issuing state". The meaning of that provision is unambiguous. It must mean what it says, although I must confess that I am unclear why it was so worded, since it seems to clearly mean that if the Central Authority and the issuing state agree that surrender is to take place, say, on the 9th May 2009, that surrender can in fact take place on some later date provided that it is not longer than 10 days later. It is hard to see the logic of that if an actual date for surrender has been agreed. However that is by the way perhaps.

Just as in s. 16(5) where the section is silent, as is the Framework Decision (Article 23) as to the timeframe for surrender where a later date must to be agreed between the Central Authority and the issuing state beyond the initial 10 days, s. 18(4) is similarly silent, as is Article 24 of the Framework Decision, save in the case of s. 18(4) that surrender must be effected not later than ten days after a surrender date has been agreed. The meaning of the words used is clear, and leaves no room for doubt.

What occurred in the present case is that the domestic proceedings concluded on the 23rd April 2009. In accordance with s. 18(4) the Central Authority sought agreement on a new date with the issuing state. Clearly, though on a wrong basis, the Central Authority felt that surrender had to be effected no later than the 7th May 2009, but in any event a date for surrender was agreed by letter dated 5th May 2009. Six days were lost by a delay in letting the Central Authority know that these domestic proceedings had concluded, but that in my view is not fatal to the Committal Warrant in this case. It is not so long an unexplained delay as to lead to an unlawfulness of detention, given the way in which the Framework Decision has been worded in relation to the matter, and the provisions of s. 18. A reasonable margin of appreciation must be allowed when it is necessary to put in place necessary travel arrangements which can be dependent upon the availability of flights from and to the issuing state.

The fact is that an agreement was reached on the 5th May 2009, and the section clearly states that surrender must be effected no later than 10 days thereafter. The date for surrender taking place was the 9th May 2009. In my view the Act has been complied with, and the detention of the applicant was at the date of hearing before me in accordance with law.