Neutral Citation Number: [2011] IEHC 287

THE HIGH COURT

2010 258 EXT

IN THE MATTER OF THE EUROPEAN ARREST WARRANT ACT 2003

BETWEEN

THE MINISTER FOR JUSTICE AND EQUALITY

APPLICANT

AND

PAWEL TREPIAK

RESPONDENT

JUDGMENT of Mr. Justice Edwards delivered on the 12th day of July, 2011

Introduction:
The respondent is the subject of a European Arrest Warrant issued by the Kingdom of the Netherlands on the 10th May 2010. The said warrant was endorsed by the High Court on the 23rd of June 2010 pursuant to s. 13 of the European Arrest Warrant Act 2003 as amended (hereinafter "the Act of 2003"). The respondent was then arrested in this jurisdiction on foot of that warrant on the 6th of September 2010 and on the following day the 7th of September 2010 he was brought before the High Court pursuant to s.13 of the Act of 2003 on which occasion an initial date was fixed for the purposes of s.16 of that Act. Subsequently, on the 3rd of November 2010, the High Court (Peart J) made an Order pursuant to s.16 aforesaid directing that the respondent be surrendered to such person as was duly authorised by the issuing state to receive him. I understand that the respondent was in fact surrendered on the 12th of November 2010.

The matter now comes before the Court again on foot of a request made by the issuing judicial authority on behalf of the issuing state, seeking the High Court's consent to proceedings being brought against the respondent in the issuing state for an offence which was not covered by the said European Arrest Warrant, which request is made pursuant to s.22(7) of the 2003 Act. Such an application is, in effect, an application by the issuing state for a waiver of specialty in circumstances where Ireland has chosen not to opt out of the specialty provisions contained in the Framework Decision. That being so, the default position is that the rule of specialty applies unless, in response to a request in writing from the issuing state, it is waived by the High Court pursuant to the provisions of s.22(7) and (8) of the 2003 Act.

Relevant provisions in statute law and in the Framework Decision
To assist the reader in a better understanding of the legal issues in the case it is appropriate for the Court to set out at this stage the relevant provisions of the Act of 2003 (as amended) and of the underlying Framework Decision.

S. 22(7) and (8) of the 2003 Act provide respectively:

> "(7) The High Court may, in relation to a person who has been surrendered to an issuing state under this Act, consent to —
>
> (a) proceedings being brought against the person in the issuing state for an offence,
>
> (b) the imposition in the issuing state of a penalty, including a penalty consisting of a restriction of the person's liberty, in respect of an offence, or
>
> (c) proceedings being brought against, or the detention of, the person in the issuing state for the purpose of executing a sentence or order of detention in respect of an offence,
>
> upon receiving a request in writing from the issuing state in that behalf.
>
> (8) The High Court shall not give its consent under subsection (7) if the offence concerned is an offence for which a person could not by virtue of Part 3 or the Framework Decision (including the recitals thereto) be surrendered under this Act."

The corresponding relevant provisions of the underlying Framework Decision are contained in Article 27 thereof, and in particular in Article 27(4).

Article 27 (to the extent relevant) is in the following terms:

> "1. Each Member State may notify the General Secretariat of the Council that, in its relations with other Member States that have given the same notification, consent is presumed to have been given for the prosecution, sentencing or detention with a view to the carrying out of a custodial sentence or detention order for an offence committed prior to his or her surrender, other than that for which he or she was surrendered, unless in a particular case the executing judicial authority states otherwise in its decision on surrender.

2. Except in the cases referred to in paragraphs 1 and 3, a person surrendered may not be prosecuted, sentenced or otherwise deprived of his or her liberty for an offence committed prior to his or her surrender other than that for which he or she was surrendered.

3. Paragraph 2 does not apply in the following cases:

(g) where the executing judicial authority which surrendered the person gives its consent in accordance with paragraph 4.

4. A request for consent shall be submitted to the executing judicial authority, accompanied by the information mentioned in Article 8(1) and a translation as referred to in Article 8(2). Consent shall be given when the offence for which it is requested is itself subject to surrender in accordance with the provisions of this Framework Decision. Consent shall be refused on the grounds referred to in Article 3 and otherwise may be refused only on the grounds referred to in Article 4. The decision shall be taken no later than 30 days after receipt of the request."

Article 3 of the Framework Decision (which the Court does not consider it necessary to reproduce) sets out the grounds for mandatory non-execution of the European arrest warrant and all of these are incorporated in Part 3 of the Act of 2003.

Article 4 of the Framework Decision (which, again, the Court does not consider it necessary to reproduce) sets out the grounds for optional non-execution of the European arrest warrant, some of which, but not all of which, the Oireachtas has opted to also include within Part 3 of the Act of 2003.

Article 8(1) of the Framework Decision provides:

"The European arrest warrant shall contain the following information set out in accordance with the form contained in the Annex:

(a) the identity and nationality of the requested person;

(b) the name, address, telephone and fax numbers and e-mail address of the issuing judicial authority;

(c) evidence of an enforceable judgment, an arrest warrant or any other enforceable judicial decision having the same effect, coming within the scope of Articles 1 and 2;

(d) the nature and legal classification of the offence, particularly in respect of Article 2;

(e) a description of the circumstances in which the offence was committed, including the time, place and degree of participation in the offence by the requested person;

(f) the penalty imposed, if there is a final judgment, or the prescribed scale of penalties for the offence under the law of the issuing Member State;

(g) if possible, other consequences of the offence."

Finally, as the submissions on behalf of the respondent also make reference to ss.10, 15(1) and 16(1) of the Act of 2003 it is appropriate to set out these provisions as well.

S. 10 of the 2003 Act (to the extent relevant) provides:

"10.—Where a judicial authority in an issuing state duly issues a European Arrest Warrant in respect of a person—

(a) …..

(b) …..

(c) …..

(d) …..

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

S. 15(1) of the 2003 Act (to the extent relevant) provides:

"15—(1) Where a person is brought before the High Court under section 13 , he or she may consent to his or her being surrendered to the issuing state and, where he or she does so consent, the High Court shall, if it is satisfied that—

(a) …..

(b) …..

(c) …..

(d) …..

make an order directing that the person be surrendered to such other person as is duly authorised by the issuing state to receive him or her."

S. 16(1) of the 2003 Act (to the extent relevant) provides:

> "16—(1)Where a person does not consent to his or her surrender to the issuing state, the High Court may, upon such date as is fixed under section 13 , make an order directing that the person be surrendered to such other person as is duly authorised by the issuing state to receive him or her provided that—
>
> (a) …..
>
> (b) …..
>
> (c) …..
>
> (d) …..
>
> (e) ….."

The offences for which the respondent was surrendered
The European Arrest Warrant dated the 10th of May 2010 sought the surrender of the respondent for prosecution in relation to three offences particularised in the warrant. Paragraph 2 of Article 2 of the Framework Decision was validly invoked in respect of each of those offences by the ticking of the box in Part E.1. of the warrant relating to " kidnapping, illegal restraint and extortion" in circumstances where minimum gravity requirements were satisfied in each case i.e., each of the offences carried a potential maximum sentence of either 8, 12 or 15 years imprisonment.

The s. 22(7) request
There is no prescribed form in which a s.22(7) request must be framed. However, it clear from a reading of ss.22(7) and (8) of the Act of 2003 and Article 27(4) of the Frame Decision that at a minimum (a) it must be in writing, (b) it must be made on behalf of the issuing State, and (c) it must be submitted to the executing judicial authority and (d) it must be accompanied by accompanied by the information mentioned in Article 8(1) of the Framework Decision and a translation as referred to in Article 8(2).

In the present case the issuing State, in the absence of any prescribed form for the making of a request for consent to further prosecute the respondent, has adopted the expedient of effectively splicing the original European Arrest Warrant with its request for consent. Accordingly it has forwarded a document to this Court via the Irish Central Authority which is rather unfortunately entitled "Additional European Arrest Warrant" and which contains all of the detail that was contained in the original European Arrest Warrant dated the 10th May 2010 plus information relating to the offence for which it is now proposed to further prosecute the respondent in Holland if this Court's consent is forthcoming.

The document entitled "Additional European Arrest Warrant" was accompanied by a letter from the Public Prosecutor for the District of Hertogenbosch (who was in fact the issuing judicial authority in respect of the original European Arrest Warrant) on behalf of the issuing State and addressed to the Irish Central Authority. This letter, which is dated 30th December 2010 states (*inter alia*):

> "By means of this letter I provide you with two additional European Arrest Warrants concerning the suspects [a named person] and Pawel Trepiak. Both suspects have already been handed over to the Netherlands by your authorities.
>
> However, these additional arrest warrants concern new criminal offences which have been revealed after the suspects have been handed over by your authorities. Since I intend to prosecute the suspects as regards these new facts as well, I request your permission pursuant to art 27, paragraph 2 of the Framework Decision on the European Arrest Warrant."

It is necessary in the circumstances of the case to review the document entitled "Additional European Arrest Warrant" for the purpose of disentangling the actual s.22(7) request from what comprised the original European Arrest Warrant.

The document commences with the heading "*Additional European Arrest Warrant*" underneath which it is stated:

> "This present warrant has been issued by a competent judicial authority. I hereby request the apprehension and extradition of the individual named here and after for the purpose of criminal prosecution and the execution of a custodial sentence or a detention order."

Part A then is in standard terms setting out details concerning the requested person's identity.

Part B purports to set out "[t]he decision that is at the base of this arrest warrant" and sets out two things. First, it particularises the domestic warrant underlying the original European Arrest Warrant. Secondly, it refers to "[a]dditional facts with regard to the European Arrest Warrant dated 10th May 2010, issued at the request of the public prosecutor [name supplied] on 29 December 2010."

Part C purports to set out "[d]ata regarding the sentence term". It proceeds to set out the maximum terms of custodial sentences which may be imposed for hostage taking, robbery with violence alternatively extortion, and illicit restraint of liberty. It is clear that all of this relates to the offences that were the subject of the original European Arrest Warrant and it is merely a reproduction of what was contained in this part of that original warrant in regard to those offences. However, the following material is then added:

> "Furthermore, I kindly request by means of this present judicial European Arrest Warrant to authorise extradition of the above mentioned individual for the purpose of criminal prosecutions, or the execution of custodial sentence or detention order as regards the following criminal offences as well:
>
> - prison sentence not exceeding two years, or a fine of the second category will be imposed on any evaluation of Article 3, sub B and/or C of the Opium Act."

Part D is not relevant as there is no question of there having been a trial in absentia.

Part E is then headed "Criminal Offences" and commences:

> "This present arrest warrant concerns a total of one (1) criminal offence, i.e.:

- violation of article 3 sub B and/or C of the Dutch Opium Act."

It then purports to set out "a description of the circumstances under which the criminal offence(s) has/have been committed, including the time, place and level of involvement of the requested person as regards to the criminal offence(s)" What follows immediately thereafter is a lengthy narrative the majority of which relates to the offences particularised in the original European Arrest Warrant, and is a reproduction of what was contained in regard thereto in that original warrant. However, it also contains the following additional material:

> "During the investigation it appeared that Trepiak was under suspicion of being involved in the exploitation of a hemp plant which was found in Helmond on 1 November 2008. A total of 23 kilograms of cannabis and/or 72 kilograms of hemp were found at the plant. The premises in which these goods were found, was being let by the suspect Trepiak. Effective that time, the suspect was listed for the purpose of apprehension by order of the public prosecutor".

In Part E. 1 of the document the box relating to "kidnapping, illegal restraint and extortion" is ticked. However, it becomes clear that this relates solely to the offences that were the subject of the original European Arrest Warrant because the following is stated in the Part E. 2 of the present document, in circumstances where the corresponding portion of the original European Arrest warrant was not filled in:

> "Art 3. Dutch Opium Act (Opiumwet):
>
> With regard to any substance as meant in the list II annexed to this Law and/or designated on the grounds of article 3a, fifth paragraph it is prohibited to
>
> A. import or export these into or from the Dutch territory
>
> B. grow, prepare, work, process, sell, deliver, provide or transport them
>
> C. have them present
>
> D. fabricate/cultivate these."

Parts F, G, and H of the document are unremarkable and of no relevance in the present case.

Finally, Part I which identifies and particularises the issuing judicial authority is in identical terms to that in the original European Arrest Warrant save for the following paragraph which is added:

> "The suspect has already been turned over to the custody of the Dutch authorities; this is an additional European Arrest Warrant regarding an elaboration of facts."

The document is dated 30th of December 2010.

Additional information
As this Court has pointed out in its judgment in *Minister for Justice, Equality and Law Reform v. O'Sullivan* (Unreported, High Court, Edwards J., 2nd June, 2011) there are no published Rules of Court covering proceedings based upon a s. 22(7) request and accordingly the Court is free, in the exercise of its inherent jurisdiction to regulate its own process, to direct its own procedure in such proceedings. The practice which has developed, and in respect of which this Court expressly indicated its approval in the *O'Sullivan* case, is that applicant (i.e. the Irish Central Authority), upon receipt of a s. 22(7) request from an issuing state, attends *ex parte* before a judge of the High Court, who is usually the judge in charge of the European Arrest Warrant list, although it may be any High Court judge, for the purpose of bringing the request to the Court's attention and thereafter seeking the Court's directions as to service on the respondent and also concerning how the matter should progressed thereafter. That procedure was followed in the present case. However, in this instance, before attending before this Court *ex parte*, the applicant, who was concerned about whether correspondence with an offence under Irish law would be demonstrable with respect to the new matter for which consent to prosecute was being sought, requested additional information from the issuing state concerning that matter. The Court is satisfied that this was an appropriate step for the applicant to take in the particular circumstances of this case. In response to that request additional information was duly furnished by the issuing state and following receipt of same the applicant then attended *ex parte* before this Court, furnished the Court with the documents consisting of the "Additional European Arrest Warrant", the accompanying letter dated 30th December 2010, and a further letter containing the said additional information dated the 14th of February 2011, and sought the Court's directions as to notification of interested parties and concerning how the matter should be further progressed.

The additional information contained in the letter of the 14th of February 2011 was as follows:

> "1. Suspect Pawel Trepiak is suspected of having jointly and in conjunction an amount of approximately 100 kilograms of cannabis on 1 November 2008. The reason for this additional request for mutual legal assistance is that I have the intention to prosecute the suspect regarding the aforementioned criminal fact.
>
> 2. a. Supplementary to (send to you on 13 January 2011) my additional European Arrest Warrant, the fact was already reported that there was no talk of a suspicion of the presence of a cannabis plantation but just of jointly and in conjunction having in possession a large amount of cannabis, namely approximately 100 kilograms of cannabis.
>
> b. hemp is the same as cannabis,
>
> c. hemp is the same as cannabis. From cannabis/hemp active substances are extracted namely marijuana (dried hemp/cannabis) and hash (compressed cannabis/hemp).
>
> d. suspect Pawel Trepiak was the tenant of a house situated at Cortenbachstraat 41 in Helmond, the Netherlands where on 1 November 2008 ass a result of reports from the neighbourhood in respect to a cannabis smel, the police instituted an investigation.
>
> During this investigation it was concluded that in the side building of the house three holes were made in the exterior wall, via these holes warm air was removed. The reporting officers who executed the investigation also saw and smelled that

on the roof of the side building an air exhaust was present, the air which exhausted from there smelled like fresh cannabis.

The house was rented by Pawel Trepiak under a false identity, namely Wiktor Plaksiuk, born on 4 July 1979, Trepiak has also used a false proof of identity in the name of Wiktor Plaksiuk for that. The false identity Wiktor Plaksiuk was also used by Pawel Trepiak during the hostage investigation.

As a result of the investigation and the observed cannabis smell permission was provided on 1 November 2006 by the Public Prosecutor, Lukowski LL M to enter the house on grounds of the Opium Act. During this investigation 2 suspects tried to run but were arrested during the escape (Tomasz Trepiak and Jerzy Zmyslowski), both suspects were already on 12 March 2009 sentenced with imprisonment of not more than 6 months for deliberately stocking approximately 100 kilograms of cannabis. In the house rented by Pawel Trepiak several pictures of Trepiak were found. These pictures were shown to several witnesses (local residents) they stated that the person on the pictures (namely Pawel Trepiak) is the person who actually resides in the house.

Onto December 2010 suspect Pawel Trepiak states that he has rented the house at the Cortenbachstraat 41 in Helmond under the false name Wiktor Plaksiuk for the duration of 1 year. He used this name because he had problems in Poland, he has lived in the house at the Cortenbachstraat 41 in Helmond for 8 till 12 months. He has handed over the key of the house to Jerzy Zmyslowski when he returned to Poland to work there. At that time several personal stuff were left behind in the house. After approximately 3 weeks he learned that cannabis was found in his house and that Jerzy was arrested. Pawel Trepiak supposed to have nothing to do with it. ”

The uncontroversial issues of correspondence and minimum gravity
Counsel for the applicant has suggested, and the respondent has not sought to dispute that suggestion, that in the case of the offence contrary to Article 3 Sub B and/or C of the Dutch Opium Act correspondence can be demonstrated with an offence under Irish law of possession of a controlled drug, contrary to s.3 of the Misuse of Drugs Act, 1977. The Court is satisfied as to correspondence in this case and having regard to the available maximum sentence of two years imprisonment the requirements of s.38(a)(i) of the Act of 2003 with respect to minimum gravity are also clearly met.

Submissions on behalf of the respondent
The respondent contends that for a number of reasons it is not appropriate for the Court to give its consent to the proposed further prosecution of the respondent by the issuing state.

The first and primary argument put forward by Mr Robert Barron S.C., on the respondent’s behalf, is that s. 22(7) purports to give the Court an arbitrary, unfettered discretion as to whether or not it will consent to the prosecution of the respondent for the additional offence amounting, in effect, to an unauthorised delegation of legislative power to the Court. It is urged that in the circumstances there is no basis upon which the High Court can give its consent.

In written submissions filed on behalf of the respondent he refers to Article 15.2.1 of the Constitution which provides that the sole and exclusive power of making laws in the State is vested in the Oireachtas and that no other legislative authority has the power to make laws for the State. In *Cityview Press v An Chomhairle Oiliuna* [1980] IR 381 the Supreme Court (at p. 399) formulated the rule it would apply in assessing whether subordinate rule-making activities were an unauthorised delegation of legislative power and expressed it as follows:

> ‘In the view of the court, the test is whether that which is challenged as an unauthorised delegation of parliamentary power is more than a mere giving effect to principles and policies which are contained in the statute itself. If it be, then it not authorised, for such would constitute a purported exercise of legislative power by an authority which is not empowered to do so under the Constitution. On the other hand, if it be within the permitted limits – if the law is laid down in the statute and details are only filled in or completed by the designated Minister or subordinate body – there is no unauthorised delegation of legislative power.’

Laurentiu v Minister for Justice [2000] 1 ILRM 1 was cited to the Court as an example of a case in which the Supreme Court held unconstitutional a legislative provision for non-compliance with Article 15.2.1. The case concerned the validity of S5(1)(e) of the Aliens Act 1935, which allowed the Minister to ‘make provision for the exclusion or the deportation’. The Supreme Court affirmed the reasoning of Geoghegan J in the High Court who had characterised the effect of the relevant section as being one in which the Oireachtas did not legislate for deportation but merely permitted the Minsister for Justice to legislate for deportation (at 47).

The respondent complains that in s.22(7) and (8) of the Act of 2003 (as amended) there are no criteria set, or principles laid down, to govern the exercise of the discretion reposed in the Court, and it is left to the Court to decide how the discretion granted is to be exercised. The respondent submits that, as is apparent from Articles 27 and 4, the Framework Decision laid down the grounds upon which each Member State might decide that its executing judicial authority would not consent to a prosecution for other offences. It was thus for the Oireachtas to legislate as to which of those options or indeed any other (if, for example, it considered there were grounds flowing from recital (12) that might preclude consent) it considered ought to be included in Irish law. However, the Oireachtas did not do so in s.22(7). Rather, it left the High Court with an entirely unfettered discretion. The respondent submits that this is wrong in law. In order for the Court to justly exercise its discretion it requires the guidance and direction of principles and policies laid down by the Oireachtas which it would then seek to consistently apply. Unfortunately, the Court has been given no such guidance and direction.

In further support of this argument counsel for the respondent contends that although mandatory language, and in particular the word “*shall*”, is used in Article 27(4) of the Framework Decision, the Oireachtas was nonetheless free to depart from the Framework Decision. He claims that it did so in s. 22(7) by the use of permissive language rather than mandatory language and by specifying instead that “*the High Court may*” consent, thereby investing it with discretion.

Counsel for the respondent accepts that the Courts have sometimes held in interpreting a particular statutory provision that “may” is to be read as “shall”, but he contends that it is inappropriate to do that here as s.22(7) is to be regarded as a penal provision and is, accordingly, to be strictly interpreted. He acknowledges that the word “may” is used in s.16 of the Act of 2003 whereas the word “shall” is used in s. 15, and that it has been held that the word “may” in s. 16 is to be read as meaning “shall”. However he contends that this interpretation was the inevitable consequence of the use of the word “shall” in s. 10 of the Act of 2003 because s.16 has to be read in conjunction with s. 10. However, he says, there is nothing to constrain the Court from attributing to the word “may” its

ordinary meaning in the context in which it is used in s. 22(7).

He further submits that notwithstanding that, in the interpretation of a provision of domestic legislation intended to implement European law, regard must be had to the *Pupino* principle which requires a conforming interpretation to be adopted if all possible (providing it does not lead to a *contra legem* result), the *Pupino* principle is only an aid to the construction of words contained within the domestic legislation. However, it cannot be employed to add something which is not there.

Counsel for the respondent recognises that it might be argued that subsection (8) of s.22 provides a partial answer to his suggestion that the High Court is given an arbitrary, unfettered discretion by s. 22(7), inasmuch as it indicates circumstances in which the High Court shall not give its consent. However, he contends that at most they comprise only the mandatory grounds under the Act for not consenting. The respondent submits that they give no indication as to what optional grounds may exist nor indeed on what basis the High Court would give its consent in one case where those unspecified optional grounds exist and not in another. Indeed, the respondent says, the meaning of subsection (8) is quite unclear. The Framework Decision provides just three circumstances in which surrender must be refused under Article 3, of which only the first concerns the "offence". Part 3 of the Act of 2003 contains a number of further grounds for mandatory refusal but, again, while a number of these relate to characteristics of the "offence" (e.g. lack of correspondence), other grounds, notably those specified in s.37, are unrelated to the nature or characteristics of the offence. In this regard, the respondent emphasises that the word "offence" has a generic meaning throughout the Act as held by the Supreme Court in *Minister for Justice v. S.M.R.* [2008] 2 I.R. 242 (at 260).

The respondent submits for the High Court to now give consent to the prosecution of the respondent for the additional offence would involve it implicitly legislating for the circumstances in which it may or may not consent. Counsel for the respondent submits that it would be wrong in law to do so, and hence the subsection is inoperable. This does not make it unconstitutional, as it would otherwise be, because the High Court can proceed on the basis that the non specification by the legislature of principles and policies to guide and direct the exercise of the Court's discretion simply means that it is required to refuse consent.

It was submitted that this was the approach taken by the Supreme Court in *Aamand v. Smithwick* [1995] 1 ILRM 61, in circumstances where that Court was of the view that Article 7.2 of the European Convention on Extradition formed part of Irish law having been directly incorporated into law by the provisions of the Extradition Act 1965. Article 7.2 of the European Convention on Extradition provided as follows:-

> 2. When the offence for which extradition is requested has been committed outside the territory of the requesting party, extradition may only be refused if the law of the requested party does not allow prosecution of the same category of offence when committed outside the latter party's territory or does not allow extradition for the offence concerned.

On the facts of *Aamand v. Smithwick* it was open to the Court to refuse the applicant's extradition under article 7.2 since the offence for which extradition was requested had been alleged to have been committed outside the requesting country's territory and the law of Ireland does not allow prosecution for such an offence when committed outside the territory of Ireland. The Supreme Court held that although expressed in the negative, Art 7.2 must be construed as being mandatory in effect, the reason being the absence of any basis consistent with justice upon which the High Court might refuse to extradite in one case but consent to do so in another (at 68 per Finlay C.J.):-

> 'I am therefore satisfied that the provisions of Article 7.2 of the convention are applicable to this case. I accept the submission that although expressed in a negative form they must be construed as being mandatory in effect. There are no grounds on which it is possible in the provisions of this sub-article of the convention to ascertain any basis consistent with justice in which a court would have as it were a discretion to refuse extradition under the circumstances provided for in article 7.2 in one case and grant it in another. A decision of such a kind would seem to me of necessity to be arbitary and having regard again to the fact that this is a penal statute and that the article of the convention concerned affords a clear protection in certain circumstances to an individual against the detention and extradition which is provided for in the scheme, I am satisfied that the court must grant the protection and would have no grounds consistent with justice to refuse it.'

For these reasons, the respondent urges upon the Court that there is no basis upon which the High Court can give consent under S. 22(7) to the prosecution of the respondent for the additional offence.

Adoption of respondent's arguments in *Min for Justice & Law Reform v. Zmyslowski*

Counsel for the respondent has indicated that in addition to the arguments just rehearsed, his client also wishes to rely upon and to adopt the arguments of the respondent in the related case of *Minister for Justice & Law Reform v. Zmyslowski*, *Record No 2010/257 EXT*, (which for efficiency and convenience was heard at the same time as this case) and which are set out in detail in the Court's judgment of today's date in that matter.

Submissions on behalf of the applicant
Counsel for the applicant, Mr Remy Farrell, B.L. has made the following submissions in reply to those of the respondent. It is his contention that in substance the argument being made on behalf of the respondent is to the effect that the s. 22(7) is unconstitutional. In his submission it is unreal for the respondent to suggest that, in circumstances where the relevant provision is said to confer an unfettered discretion on the High Court to such an extent that it represents the unauthorised delegation of legislative power, the Court could simply ignore the relevant provision without a determination of its constitutionality. He rejects such a position as being untenable and inherently self contradictory. He further contends that the Court should not entertain "the argument not made", or obliquely made, in circumstances where the Attorney General has not been put on notice and the applicant was given no, or certainly insufficient, advance notice was given of an intention to raise, even indirectly, a constitutional issue.

Interpretation of Section 22
Dealing first with the respondent's suggested interpretation of s.22, the applicant contends that the respondent's argument fails to take any account of the actual principles and policies underlying the 2003 Act. Counsel submits that it might well be observed that there are few pieces of legislation the underlying principles of which have been as extensively discussed as those of the 2003 Act. The argument which the respondent seeks to make effectively ignores the policy as set out in the Framework Decision and does not in any sense engage with the doctrine of conforming interpretation.

Counsel for the applicant has submitted that the provision in question must be interpreted in light of the decision of ECJ in *Pupino* (Case C-105/03) [2005] E.C.R. 1-05285 and in particular the following (at para 45):

> "The obligation on the national court to refer to the content of a Framework Decision when interpreting the relevant rules of its national law ceases when the latter cannot receive an application which would lead to a result compatible with that envisaged by that Framework Decision. In other words, the principle of interpretation in conformity with Community law cannot serve as the basis for an interpretation of national law *contra legem*. That principle does, however, require that, where necessary, the national court consider the whole of national law in order to assess how far it can be applied in such a way as not to produce a result contrary to that envisaged by the framework decision."

The principle of conforming interpretation was endorsed by the Supreme Court in *Minister for Justice, Equality and Law Reform v. Altaravicius* [2006] 3 I.R. 148 (at p.156):

> "When applying and interpreting national provisions giving effect to a Framework Decision the Courts "… must do so as far as possible in this light of the wording and purpose of the Framework Decision in order to attain the result which it pursues …" (C-105/03 *Pupino* ECJ 16th June, 2005). The principle of conforming interpretation is limited, as the Court of Justice has pointed out in *Pupino* and other cases, to the extent that it is possible to give such an interpretation. It does not require a national court to interpret national legislation *contra legem*. If national legislation, having been interpreted as far as possible in conformity with community legislation to which it purports to give effect, but still falls short of what is required by the latter, a national Court must, as a general principle, apply that legislation as interpreted although there may be other consequences for a Member State which has failed to fully implement a Directive or Framework Decision."

To the extent that the respondent relies in part on the submission that the relevant parts of the Act must be interpreted strictly and in that regard cites the case of *Aamand v. Smithwick*, counsel for the applicant urges upon the Court that the remarks relied upon were obiter; that the context was radically different thereby rendering that case wholly distinguishable; that in any event matters have moved on very considerably since that decision which was delivered in 2004 (with the development of a separate and discrete jurisprudence specifically relating to the European Arrest Warrant), and that a strict interpretation of the Act of 2003 has never been adopted by the courts. It was further submitted on behalf of the applicant that the following passage from *Minister for Justice, Equality and Law Reform v. Biggins* [2006] IEHC 351 summarises the up to date position in relation to interpretation of the Act of 2003:

> "…the obligation to strictly construe penal statutes or statutory provisions which have the capacity to deprive a person of his or her liberty must be kept in context. While I appreciate that some of the decisions refer specifically to an extradition context, it must be recalled that such context was at a time prior to 1st January 2004, when the European Arrest Warrant Act, 2003 came into law giving effect to the new surrender arrangements set forth in the Framework Decision. That Framework Decision has introduced a fundamental change in the nature of the process undertaken when one Member State seeks the surrender of a person resident in another Member State. Those arrangements have replaced former extradition procedures with a process of surrender for the purpose of the mutual recognition of arrest warrants issued in the requesting Member State. In so doing, fundamental rights are respected, and certain safeguards have been included in order to protect the constitutional and Convention rights of persons whose surrender is sought. But it is expressly stated in the Preamble to the Framework Decision at Recital (10) that "the mechanism of the European Arrest Warrant is based on a high level of confidence between Member States", and "that its implementation may be suspended only in the event of a serious and persistent breach by one of the Member States of the principles of Article 6(1) of the Treaty on European Union.....". This cannot be simply regarded as an empty formula. The Framework Decision is to be referred to when interpreting and construing the legislation."

It has been submitted on behalf of the applicant that when one turns to the relevant part of the Framework Decision it becomes entirely apparent that the Court is not given a free rein by the provisions of S. 22 in that the governing rule is that the Court must give its consent unless there is some impediment in terms of the mandatory grounds for refusing surrender under Article 3 or one of the optional grounds under Article 4:

> "27.4. A request for consent shall be submitted to the executing judicial authority, accompanied by the information mentioned in Article 8(1) and a translation as referred to in Article 8(2). ***Consent shall be given when the offence for which it is requested is itself subject to surrender in accordance with the provisions of this Framework Decision.*** Consent shall be refused on the grounds referred to in Article 3 and otherwise may be refused only on the grounds referred to in Article 4. The decision shall be taken no later than 30 days after receipt of the request."
>
> (*emphasis added*)

The applicant's contention is that when s. 22(7) &(8) are considered in light of the Framework Decision it is clear that the Court in fact has almost no discretion on an application by an issuing state for its consent to the further prosecution of a respondent who has already been surrendered. The parameters circumscribing such an application are that the High Court must grant consent save in very precisely defined circumstances, namely if the offence concerned is an offence for which a person could not by virtue of Part 3 of the Act of 2003 or the Framework Decision (including the recitals thereto) be surrendered.

It was further submitted that were the provisions of Article 27 not sufficiently clear and unambiguous the Recitals to the Framework Decision make it perfectly plain that the presumption, indeed the general rule, must be in favour of surrender, or the granting of consent.

Constitutionality – the argument not made.
It was further urged upon the Court on behalf of the applicant that as the issue raised is in reality an issue of constitutionality the Court should have regard to the long established convention that issues of constitutionality should be considered last. It was submitted that the Court should proceed in the first instance on the basis of the presumption of constitutionality. Accordingly it should consider the correct interpretation of s.22 on the basis that it is to be presumed to be constitutional, and in particular consider what parameters must govern an application for consent made under subss (7) & (8) thereof. The argument raised by the respondent only actually arises if the court concludes that it has an entirely unfettered and un-circumscribed discretion available to it on such an application. The applicant's submission is that for the reasons rehearsed above the Court could not possibly reach such a conclusion.

Further, the applicant has submitted that the position adopted by the respondent is little more than a device to avoid the effect of the presumption of constitutionality. Whilst the respondent suggests that the court could find that the provisions of S. 22, and in particular s. 22(7) & (8), offend against the provisions of Article 15 of the Constitution as amounting to an impermissible delegation of the legislative function without proceeding to hold same unconstitutional, counsel for the applicant maintains that such a contention is inherently self contradictory. He urges that even if the Court considered that a substantial argument had been raised in relation to the issue of constitutionality it would, nonetheless, be bound to presume and consider the provision constitutional for the purpose of

the present application. The suggestion that the Court could simply ignore the relevant provision without a determination of its constitutionality does not stand up to scrutiny.

Moreover, it is not open to the respondent to challenge the provision on the instant application. From a purely procedural point of view the relevant parties have not been notified (i.e. the Attorney General). The applicant submits that if the issue of constitutionality is to argued then it ought to be argued in a full and detailed manner on another day, and only following proper and adequate notice to all relevant parties.

Reply to the arguments advanced by the respondent in the Zmyslowski case.
The applicant's response to the arguments advanced by the respondent in the *Zmyslowski* case (which have also been relied upon and adopted by the respondent in this case) is as set out in the Court's judgment of today's date in the *Zmyslowski* case.

Decision
The Court does not agree with the submissions of the respondent to the effect that s.22 (7) and (8) confer an arbitrary, unfettered discretion on the Court, or that there are no criteria set, or principles laid down, to govern the exercise of the discretion reposed in the Court, and that it is left to the Court alone to decide how the discretion granted is to be exercised. That is simply not the case. The Court does not accept that s.22(7) and (8) are to be regarded as penal provisions such that they are to be afforded a strict interpretation. Rather, a teleological approach to their interpretation is required and in so far as possible they must, as required by *Pupino*, be afforded an interpretation that conforms with the Framework Decision. When s.22(7) and (8) are considered in the light of the Act of 2003 as a whole, interpreted in the light of the Framework Decision (to which instrument the Act specifically provides that regard may be had in interpreting the Act), the Court is satisfied that those provisions are capable of being given a conforming interpretation in accordance with the principles laid down in *Pupino*. When they are interpreted in manner suggested it is clear that any discretion reposed in the Court is in fact greatly circumscribed and, as has been pointed out by counsel for the applicant, that the governing rule is that the Court must give its consent unless there is some impediment to doing so in terms of the mandatory grounds for refusing surrender under Article 3 or one of the optional grounds under Article 4.

It should incidentally be emphasised here that when we speak of optional grounds under Article 4 the "option" referred to is not the Court's option, but rather the option of a member state to incorporate some or all of the grounds identified in Article 4 into domestic legislation to be enacted for the purpose of implementing the Framework Decision, which not being directly effective requires to be specifically implemented by each member state. Ireland has, in enacting the Act of 2003 (as amended), opted in to some, but not all, of the optional grounds identified in Article 4.

In circumstances where the Court is not satisfied that the effect of s.22 (7) and (8) is to confer an arbitrary, unfettered discretion on the Court the question of an unauthorised delegation of legislative power does not arise. Accordingly, no issues of a constitutional nature arise for the Court's consideration and the Court also does not need to engage with the suggestion made by the respondent that the High Court can proceed on the basis that the alleged non specification by the legislature of principles and policies to guide and direct the exercise of the Court's discretion simply means that it is required to refuse consent.

To the extent that the respondent has adopted, and seeks to rely upon, the arguments advanced by the respondent in the related case of *Minister for Justice & Law Reform v. Zmyslowski, Record No 2010/257 EXT* the Court also rejects those arguments, in so far as they relate to this respondent, for the same reasons as it has rejected those arguments in so far as they relate to Mr Zmyslowski and as set in this Court's judgment of today's date in the *Zmyslowski* case.

The Court is therefore satisfied that as the offence the subject matter of the issuing state's request is not an offence for which a person could not by virtue of Part 3 of the Act of 2003, or the Framework Decision (including the recitals thereto), be surrendered under the Act of 2003, it is appropriate that the Court should grant the consent sought to the further prosecution of the respondent for that offence before the Courts of the issuing state. Accordingly the Court hereby consents to the further prosecution of the respondent before the Courts of the issuing state for the offence the subject matter of the issuing state's request dated 30th December 2010.

For the avoidance of doubt the Court is satisfied that that request is lawfully and validly made, and contained within, the two documents (which must be read together) consisting of (i) the document entitled "Additional European Arrest Warrant" dated 30th of December 2010 and relating to the respondent; and (ii) the accompanying letter, also dated 30th December 2010 from the Public Prosecutor for the District of Hertogenbosch addressed to the Irish Central Authority.

For the further avoidance of doubt the offence in question is that particularised in the document entitled "Additional European Arrest Warrant" dated 30th of December 2010 and relating to the respondent, consisting of a violation of Article 3 sub B and/or C of the Dutch Opium Act.