THE HIGH COURT

[RECORD NO. 2015 254 EXT]

BETWEEN

THE MINISTER FOR JUSTICE AND EQUALITY

APPLICANT

AND

T. M

RESPONDENT

JUDGMENT of Ms. Justice Donnelly delivered on the 1st day of June, 2018

1. This judgment raises a highly unusual question: is the High Court, as executing judicial authority, entitled, *of its own motion*, to consider granting bail to a person sought for surrender pursuant to a European Arrest Warrant ("EAW")? This question arises in circumstances where this respondent, who was arrested on 3rd May 2017 on an EAW issued by a judicial authority in the United Kingdom ("the UK") seeking his surrender for the purpose of criminal prosecution, has never made an application for bail.

2. The case has been adjourned pending the outcome of the case of *Minister for Justice and Equality v. O'Connor* (Supreme Court [2017] IEHC 518). In that case the Supreme Court made a referral to the Court of Justice of the European Union ("The CJEU") seeking a preliminary ruling on the impact on surrender procedures of the triggering by the UK of the withdrawal mechanism set out in Article 50 of the Treaty on the European Union. The respondent has requested that his case be adjourned to await the decision of the Supreme Court.

3. At an early stage in these proceedings, the respondent's then counsel requested the Court to seek a psychiatric report on the respondent as his legal representatives were having difficulties obtaining instructions. A psychiatric report was duly ordered and was provided by Dr. Francis John Kelly, Consultant Forensic Psychiatrist, at the Central Mental Hospital in Dundrum. It is unnecessary to go into the details of that report but Dr. Kelly concluded that he could find no evidence of a major mental illness. His mental state was stable, he was able to give a coherent account of himself and his current thoughts, and he viewed the respondent as having capacity to understand, retain and use information given to him to reach an informed opinion and decision. In terms which were more applicable to a criminal trial, he found that in his opinion, the respondent was fit to attend court and stand trial.

4. When the medical report was presented to the Court, there was no request that a formal capacity hearing should take place and the Court did not consider it necessary of its own motion to have a formal capacity hearing. During the course of the proceedings, the respondent changed solicitor and counsel. His new solicitor and counsel also did not press for any capacity hearing. Neither his previous solicitor and counsel, nor his present solicitor and counsel, made any application for bail on behalf of the respondent; they have never been instructed to do so.

5. As the respondent is sought for prosecution in the UK, the principles set out in *Attorney General v. O'Callaghan* [1966] IR 501 would apply to any considerations as to whether he should be granted bail. In essence, the presumption of innocence leads to a presumption of entitlement to bail. In the usual course where an application for bail is made, it would be for the State to show that there is likelihood of flight or interference with witnesses and that bail should not be granted.

6. The respondent is now remanded in custody to a date in June 2018, and his case will almost certainly be further remanded after that date. As a result, this Court had grave concerns about whether it should continue to remand him in custody, in circumstances where no inquiry has ever been made by the Court as to whether he is a person entitled to bail. At first view, this may seem an abstract or moot concern of the Court because it may be that even if bail is granted he would not take it up. Despite the potential for the respondent not to take up court granted bail, the responsibility of the High Court to protect the right to liberty and/or the extent of that responsibility, is nonetheless important to clarify where such a fundamental right is at stake.

Submissions

7. Counsel for the respondent submitted that the issue of whether the Court had jurisdiction of its own motion to grant bail was one for the Court to determine but thereafter made no further submissions. Counsel for the respondent again clarified to the Court that no application for bail was being pursued.

8. From the outset, the minister adopted the position that the Court had no jurisdiction to grant bail in the absence of an application for bail. Counsel submitted that it was for the respondent to apply for bail. He was a person with autonomy and it was his responsibility and his entitlement to apply for bail. In the absence of an application for bail, the only role of the Court was to remand him in custody. Counsel submitted that he had been unable to find any legal authority that a judge could grant bail in the absence of it being predicated on an application for bail.

9. Counsel referred to s. 13(5) of the European Arrest Warrant Act, 2003 as Amended ("the Act of 2003"). Section 13(5) of the Act of 2003 provides:

> "A person arrested under a European arrest warrant shall, as soon as may be after his or her arrest, be brought before the High Court, and the High Court shall, if satisfied that that person is the person in respect of whom the European arrest warrant was issued—
>
> (a) *remand the person in custody or on bail (and, for that purpose, the High Court shall have the same powers in relation to remand as it would have if the person were brought before it charged with an indictable offence)* [emphasis added],
>
> (b) fix a date for the purpose of section 16 (being a date that falls not later than 21 days after the date of the person's arrest),
>
> and
>
> (c) …."

10. Counsel thereafter referred to the Bail Act, 1997 ("the Act of 1997"), which, in his submission, was replete with references to "application for bail". He referred to the position in s. 1(A) of the Act of 1997 which provides that a person who is applying for bail must provide a statement outlining certain matters. He referred to s. 2 of the Act of 1997, which deals with the objections to obtaining bail in circumstances where an application for bail has been made. Section 3 of the Act of 1997 refers to a renewal of a bail application which has previously been refused under s. 2 of that Act. He also referred to s. 28(3) of the of the Criminal Procedure Act of 1967 ("the Act of 1967"), which refers to an applicant for bail. He referred also to the provisions of O. 84 r. 15(1) of the Rules of the Superior Court which refers to an application for bail.

11. Counsel submitted that those legal provisions demonstrated that a person in custody must apply for bail. Absent such an application, there was no jurisdiction for the High Court to intervene. He acknowledged that s. 5 and 6 of the Act of 1997 referred to a court admitting a person in custody to bail and did not refer to an actual application for bail having been made. Those sections of the Act of 1997 refer to payment of moneys into court and conditions of bail. Counsel also referred to the case of *Rice v. Mangan* [2009] 3 IR 1 which indicates that a judge can, of his or her own motion, revoke bail or impose conditions on to bail where they have not been sought by the prosecution. However, he submitted that it cannot be used to set out a principle that a judge can grant bail of their own accord.

12. Counsel also recognised the impact of the decision in Case C 237/15 PPU *Minister for Justice and Equality v. Lanigan* (16th July 2015) given by the Court of Justice of the European Union ("CJEU"). Article 12 of the framework decision relates to keeping the person in detention and provides as follows:

> "Where a person is arrested on the basis of a European Arrest Warrant, the executing judicial authority shall take a decision on whether the requested person should remain in detention, in accordance with the law of the executing member state. The person may be released provisionally at any time in conformity with the domestic law of the executing member state, providing that the competent authority of the member state takes all the measures it deems necessary to prevent the person absconding."

13. Counsel referred to paras 52-63 of *Lanigan*. It is appropriate to quote from the relevant parts of those paragraphs. The CJEU stated as follows:

> 52. "It follows that Article 12 of the Framework Decision, read in conjunction with Article 17 thereof, must be interpreted as not precluding, in principle, the executing judicial authority from holding the requested person in custody, in accordance with the law of the executing Member State, after the time-limits stipulated in Article 17 of the Framework Decision have expired, even if the total duration for which that person has been held in custody exceeds those time-limits.
>
> 53. However, Article 1(3) of the Framework Decision expressly states that the decision is not to have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 EU and reflected in the Charter of Fundamental Rights of the European Union ('the Charter'), an obligation which moreover concerns all the Member States, in particular both the issuing and the executing Member States (see, to that effect, judgment in F., C-168/13 PPU, EU:C:2013:358, paragraphs 40 and 41).
>
> 54. Article 12 of the Framework Decision must, therefore, be interpreted in conformity with Article 6 of the Charter, which provides that everyone has the right to liberty and security of person.
>
> ….
>
> 58. Therefore, given that the issuing of a European arrest warrant cannot, as such, justify the holding of the requested person for a period the total duration of which exceeds the time necessary to execute that warrant, the executing judicial authority may decide to hold that person in custody, in accordance with Article 6 of the Charter, only in so far as the procedure for the execution of the European arrest warrant has been carried out in a sufficiently diligent manner and in so far as, consequently, the duration of the custody is not excessive.
>
> 59. In order to ensure that that is indeed the case, the executing judicial authority will be required to carry out a concrete review of the situation at issue, taking account of all of the relevant factors with a view to evaluating the justification for the duration of the procedure, including the possible failure to act on the part of the authorities of the Member States concerned and any contribution of the requested person to that duration. The sentence potentially faced by the requested person or delivered in his regard in relation to the acts which justified the issuing of the European arrest warrant in his respect, together with the potential risk of that person absconding, must also be taken into consideration.
>
> 60. Against that background, the fact that the requested person has been held in custody for a period the total of which greatly exceeds the time-limits stipulated in Article 17 of the Framework Decision is also relevant, in so far as those time-limits are, in principle, sufficient, in the light, inter alia, of the essential role of the principle of mutual recognition in the system put in place by the Framework Decision, for the executing judicial authority to carry out checks prior to the execution of the European arrest warrant and to adopt the decision on the execution of such a warrant.
>
> 61. In any event, if the executing judicial authority concludes, following the review referred to in paragraphs 58 to 60 above, that it is required to bring the requested person's custody to an end, it is then required, pursuant to Articles 12 and 17(5) of the Framework Decision, to attach to the provisional release of that person any measures it deems necessary so as to prevent him from absconding and to ensure that the material conditions necessary for his effective surrender remain fulfilled for as long as no final decision on the execution of the European arrest warrant has been taken.
>
> 62. In the light of the foregoing, the questions referred are to be answered as follows: First, Articles 15(1) and 17 of the Framework Decision must be interpreted as meaning that the executing judicial authority remains required to adopt the decision on the execution of the European arrest warrant after expiry of the time-limits stipulated in Article 17.
>
> 63. Second, Article 12 of the Framework Decision, read in conjunction with Article 17 thereof and in the light of Article 6 of the Charter, must be interpreted as not precluding, in such a situation, the holding of the requested person in custody, in accordance with the law of the executing Member State, even if the total duration for which that person has been held in custody exceeds those time-limits, provided that that duration is not excessive in the light of the characteristics of the procedure followed in the case in the main proceedings, which is a matter to be ascertained by the national court. If the executing judicial authority decides to bring the requested person's custody to an end, that authority is required to

> attach to the provisional release of that person any measures it deems necessary so as to prevent him from absconding and to ensure that the material conditions necessary for his effective surrender remain fulfilled for as long as no final decision on the execution of the European arrest warrant has been taken".

14. Counsel submitted that the CJEU judgment envisages that the High Court may review the respondent's detention where it exceeds the time limit set out in the Framework Decision. He submitted that the extent of that review is not set out and it is contended that such a review can be satisfied by enquiring from the parties, including the respondent, as to whether he desires to be at liberty or not. He submitted there is nothing in the CJEU judgment that requires the High Court to grant the respondent bail of its own motion.

The Court's Queries

15. This Court raised with counsel for the minister the meaning of s. 13(5) of the Act of 2003, in so far as it refers to powers to remand. The Court also raised the provisions of s. 1(A)(14) of the Act of 1997 which states that "[n]othing in the subsection limits the jurisdiction to grant bail". In passing, the Court observes that it may not be easy to transpose the provisions of s.1A of the Act of 1997, which refer to persons charged with a serious offence, to the situation of those arrested on foot of European arrest warrants. Difficulties for the High Court in EAW matters may arise in seeking to establish whether a serious offence is at stake; an obvious issue is whether the offence must be serious according to the law of the issuing state or of this State.

16. In terms of the necessity for a bail application to be made before a court may determine an issue of bail, the Court also drew attention to the provision in s. 28 of the Act of 1967 which states that "the District Court or a peace commissioner shall admit to bail a person charged before him with an offence, other than an offence to which section 29 applies, if it appears to him to be a case in which bail ought to be allowed".

17. Finally, the Court also referred to s. 8 of the Act of 1997 which allows the District Court to endorse a warrant of arrest with conditions of bail. The point of this reference was to demonstrate that the ability of a court to make a decision on entitlement to bail without an application for bail being made to it was not unknown to the law.

18. Counsel for the minister considered the matter further and made further submissions. Counsel referred to the jurisdiction of the Central Criminal Court pursuant to Courts of Justice Act, 1926 ("the Act of 1926"). The Courts (Supplemental Provisions) Act, 1961 ("the Act of 1961") now forms the legislative basis of the exercise by the High Court of its criminal jurisdiction and it re-enacted in very similar terms the provisions of the Act of 1926. Under s. 11(1) of the Act of 1961, the High Court exercising criminal jurisdiction shall be known as an Phríomh Chúirt Choiriúil (the Central Criminal Court). Section 11(3) of the Act of 1961 provides that:

> "every person lawfully brought before the Central Criminal Court may be indicted before and tried and sentenced by that Court, wherever it may be sitting, in like manner in all respects as if the crime with which such person is charged had been committed in the county or county borough in which the said Court is sitting."

19. Counsel submitted that the High Court is of course invested with full original jurisdiction and power to determine all matters and questions, whether civil or criminal, in accordance with Article 34.3.1 of the Constitution. Counsel submitted that he could not find any other reference to the remand powers of the High Court (Central Criminal Court). He submitted that there has to have been a capacity to grant bail because of the power to indict, try, and sentence a person brought before it.

20. In terms of s. 28 of the Act of 1967, counsel submitted that the reference to "shall admit to bail" in subsection 1 thereof had to be read in the context of the references to an application for bail in the lower sections. In respect of s. 8 of the Act of 1997, he submitted that this was rarely used but more importantly it was a very specific power and could not restrict the general principle that bail was only granted after an application for bail had been made. He also submitted that s. 1(A)(14) of the Act of 1997 was simply declaratory of the position and it did not give a power to grant bail.

21. I raised with counsel the case of (*Minister for Justice, Equality and Law Reform v Zielinski* [2011] IEHC 1354 and *Minister for Justice, Equality and Law Reform v Fustiac* [2011] IEHC 134). These decisions, which are cited to the High Court on a regular basis in EAW bail cases, are lengthy and detailed examinations of the right to bail. In those cases, the High Court (Edwards J), stated that the jurisdiction to grant bail in both extradition and rendition matters was an inherent jurisdiction of the High Court. However, in neither of those judgments are the specific provisions of s. 13(5) of the Act of 2003 mentioned.

22. Counsel for the minister submitted that he stood over his submission that the jurisdiction to grant bail in EAW cases was grounded in the Act of 2003. He submitted that while there was a constitutional right to bail, the manner in which it was given effect was set out in s. 13(5) of the said Act and can be traced through the relevant statutes and rules as previously submitted.

The Court's Analysis and Determination

The jurisdiction to grant bail

23. The issue of whether the High Court, as executing judicial authority, may consider granting bail of its own motion requires an analysis of the High Court's jurisdiction to grant bail in surrender cases under the Act of 2003. The starting point is necessarily the Act of 2003. Section 13(5)(a) of that Act declares affirmatively that the "High Court *shall*…remand the person in custody *or* on bail (and, for that purpose, the High Court shall have the same powers in relation to remand as it would have if the person were brought before it charged with an indictable offence) [emphasis added]". It is not immediately obvious what specific meaning is to be given to "powers in relation to remand".

24. It is useful however to compare how other legislation treats the concept of "powers in relation to remand". The precise phrase, "powers in relation to remand", is used in a number of sections of the Act of 2003 and is not to be found in other legislation. Since the amendment of the Extradition Act, 1965, by the European Arrest Warrant (Application to Third Countries and Amendment) and Extradition (Amendment) Act, 2012, s. 28 of the Act of 1965 gives the High court "the same powers of remand" as if the person were before it and charged with an indictable offence.

25. Section 21 of the Act of 1967 states "[w]here an accused person is before the District Court in connection with an offence the Court may, subject to the provisions of this Part, remand the accused from time to time as occasion requires." There is no reference in the particular section to "power to remand". However the marginal note refers to "power to remand". Although the marginal note may not be used in the interpretation of the section, it is clear from the wording of that section that it provides for the jurisdiction of the District Court to remand, in the sense of adjourn, cases. Section 22 of the Act of 1967 then makes provision for that power to remand when it provides that, where the District Court remands, it may do so on bail or in custody. Section 24 of the same Act provides for the period (or length) of the remand which varies according to the particular circumstances of the case. Therefore, the power to remand of the District Court is one that may be on bail or in custody but is circumscribed as to its length dependent on the

circumstances of the case.

26. Section 13(3) of the Act of 2003 grants the same powers of remand to the High Court in EAW matters that it would have if the person were before it charged with an indicatable offence. Those are the powers that the Central Criminal Court would have when hearing an indicatable offence. However, the subsection itself grants the High Court the specific power to remand on bail or in custody. The powers of remand of the Central Criminal Court are not circumscribed in the manner in which the District Court powers of remand are by the Act of 1967, or indeed by any other piece of legislation. As a matter of practice, the Central Criminal Court exercises wide powers to remand on bail or in custody for such length of time as that Court deems necessary in a given case. Thus for example, a defendant in a case returned to the Central Criminal Court, may, on its first mention before that Court, be remanded for trial, on bail or in custody to a date many months in advance. Furthermore, unlike the legislation regarding the District Court, there is no specific legislation dealing with the powers of the Central Criminal Court as to remand on bail or in custody. It also appears that the Circuit Court has been given no express statutory power to remand either in custody or on bail. Every day however, the Circuit Court exercises power of remand either in custody or on bail of those who appear before it on indictment.

27. Counsel for the minister appears to accept that the powers of remand of the Central Criminal Court are not legislatively defined as he referred in his supplemental oral submissions to the powers of the Central Criminal Court stemming from Article 34.3.1 of the Constitution whereby the High Court has full original jurisdiction in all matters whether civil or criminal. Indeed, the Central Criminal Court has jurisdiction over bail as a trial court from the time the case appears before it, to the end of the trial (including sentence). In the minister's submission, the capacity to grant bail arises from the power to indict, try and sentence, which is set out in statute. If that be the case, it appears that the power of the Central Criminal Court to grant bail is an inherent power of that court arising out of its trial functions.

28. The above demonstrates that the "power to remand" refers to the ability to adjourn, and the "powers in relation to remand" refer in the first place to the power to adjourn a case, whereas the second refers to the surrounding powers of that adjournment. Unlike the Act of 1967, which in s. 21 granted the power to adjourn and then granted in a later section the power to do so on bail, s.13(5) had already granted the power to remand either on bail or in custody. The "same powers in relation to remand" that the Central Criminal Court has for the purpose of remanding a person in custody or on bail relate to the length of that adjournment because the power to either remand in custody or on bail has already been granted. The length of time for such an adjournment is not set out in statute.

29. Even if I am incorrect in that view, I do not accept that s.13(5) amounts to the creation of a purely statutory basis for the High Court's jurisdiction to grant bail. As stated in Walsh on Criminal Procedure (Walsh, 2nd Ed, Round Hall 2016): "A court's jurisdiction to grant bail is as old as the common law itself." Professor Walsh goes on to state that this jurisdiction is exercisable by the District Court, trial judges in the Circuit Court and Central Criminal Court, the Special Criminal Court, the High Court, the Court of Appeal and the Supreme Court, although he recognises that the scope of the jurisdiction and the procedure applicable differs from one authority to another. It is important therefore to repeat the jurisdiction of the High Court and the Central Criminal Court in relation to bail. The jurisdiction of the High Court to grant bail had been memorably affirmed by Walsh J. in his judgment in that case when he stated at p 511 as follows:

> "The jurisdiction of the High Court to grant bail is an original jurisdiction and is in no sense a form of appeal from the District Court or from any other Court which may have dealt with the question of the bail of the applicant…That the High Court has this jurisdiction in full cannot be doubted. Not only has it had transferred to it the jurisdiction which at the commencement of the State was vested in or capable of being exercised by the then High Court of (*sic*) the Supreme Court of Judicature in Ireland or any division or judge thereof but is, by the very words of the Constitution itself in Article 34, invested with full original jurisdiction in all matters whether *of law or fact*, civil or criminal".

Walsh J also completely rejected "for being without foundation in law, history or reason the submission made to [the Supreme Court] that bail is a privilege only."

30. Hardiman J in *Maguire v DPP* [2004] 3 IR 241 outlined the long history of bail in the common law and stated: "It is therefore clear that the jurisdiction to grant bail is an ancient one, exercised in classical times and in the earliest period of the common law for which there is any surviving evidence." It is not insignificant that Hardiman J quotes from Blackstone's Commentaries on the Laws of England dealing with a civil case and the jurisdiction to grant bail can also apply in respect of any relevant civil matter.

31. Both of those cases were cited by the Supreme Court in the case of *Butenas v Governor of Cloverhill* [2008] 4 IR 189. In that case, the original provisions of s. 16(4) of the Act of 2003, which provided for a consequential order committing a person wanted for surrender to prison to be made after the making of an order for surrender, were challenged as unconstitutional as it precluded the possibility of release on bail pending that surrender. The judgment records that "both parties acknowledge that the power of the high Court to grant bail in lieu of exercising a power to remand a person derives from its inherent jurisdiction." The Supreme Court (Murray C.J.) went on to state:

> "It is an inherent discretionary power that is exercised when a court is considering whether imprisonment is require, not for its own sake, as in the case of imposing a sentence as a punishment after conviction, but for an ulterior or collateral purpose, such as to prevent the evasion of justice by a person absconding, whether in criminal or extradition proceedings. Generally speaking, bail may be granted where the court is satisfied that admitting the person to bail, subject to appropriate conditions, will be sufficient to ensure that that ulterior purpose can be served without depriving the person concerned of his or her liberty."

32. The Supreme Court also noted that both parties "acknowledged that the power to grant bail is one which is essential to the safeguarding of the right to liberty of an individual who has not been convicted of any offence and is a protection for the citizen from unnecessary or arbitrary loss of that liberty." In referring to the *O'Callaghan* and *Maguire* cases, the Supreme also stated "that the inherent jurisdiction of the courts to grant bail has for centuries been fundamental to the jurisdiction of the courts to protect the liberty of the individual." The power to grant bail was so fundamental to the historic and common law jurisdiction of the courts that the Supreme Court held that "it has in our modern law constitutional characteristics, since it is inextricably linked to the protection of the constitutional right to liberty, as the judgments in [O'Callaghan] makes clear."

33. The Supreme Court identified the question it was being asked as one whether the section ousted the inherent jurisdiction of the High Court to grant bail. In holding that it did, not the Supreme Court stated "[a] statute which confers a power on the High Court to deprive an individual of his or her liberty, particularly when the imprisonment as such is not the object of the provision, must be strictly interpreted." The Supreme Court was of the view that if the Oireachtas had intended to oust the inherent jurisdiction of the High Court to grant bail in all cases where an order for surrender has been made, irrespective of the circumstances, it would have

explicitly and unambiguously done so.

34. The Supreme Court was specifically asked to address arguments that the express provision for bail in other sections was an ousted of bail in this section. The Supreme Court trenchantly rejected this argument stating:

> "To conclude that the Oireachtas, by omitting to make an express provision permitting the High Court to grant bail, thereby ousted its inherent jurisdiction to do so would be akin to treating the grant of bail as a privilege to be conferred by the State, contrary to the dicta of Walsh J, cited above. The historic jurisdiction of the High Court to grant bail is not dependant on express statutory provisions. Accordingly, the court is of the view that the fact that other sections of the Act make express provision for bail is not in itself sufficient to justify a decision that a section which is silent as to bail was necessarily intended to oust what the court has already described as a fundamental and inherent jurisdiction of the High Court."

35. From the foregoing, the position as to the inherent jurisdiction of the High Court to grant bail is clear. It is not a privilege that can be taken away, but is a power with constitutional characteristics. If the legislature wishes to circumscribe this ancient, fundamental, constitutional jurisdiction of the High Court to grant bail, it must do so in the clearest circumstances. Thus, if the Act of 2003 is to strip away that inherent jurisdiction it must do so in express terms. It does not do so. The minister submitted that the jurisdiction to grant bail is that of the Central Criminal Court. The minister has not however shown that the Central Criminal Court which is the High Court exercising criminal jurisdiction, does not exercise an inherent jurisdiction when granting bail. Indeed, in light of the jurisprudence emanating from the Supreme Court, (and indeed in light of the concessions made by the Attorney General in the case of Butenas), the submission that the High Court in extradition, or indeed criminal, cases is not exercising its inherent jurisdiction in granting bail is a radical departure from what has been understood as the norm.

36. The acceptance in *Fustiac* and *Zielinski* by Edwards J that the jurisdiction to grant bail in extradition cases is an inherent one was a simple restatement of what had been accepted and understood as the law in this area. Indeed, those cases have been regularly cited by the minister since they were delivered without any suggestion that the reference to inherent jurisdiction was mistaken.

37. The minister submitted that the Bail Act of 1997 circumscribed and delineated the jurisdiction to grant bail. That submission does not bear scrutiny. There is nothing in that Act which limits that jurisdiction of the High Court either generally or in respect of surrender cases under the Act of 2003. As stated by Edwards J in *Zielinski* and *Fustiac*, the Act of 1997 does not apply to the High Court when hearing surrender cases under the Act of 2003. This is because the High Court in EAW cases is not exercising criminal jurisdiction and in the Act of 1997 a "court" is "any court exercising criminal jurisdiction but does not include court martial". Merely providing the High Court with the same powers in relation to remand as it would have if the person were brought before it charged with an indictable offence, does not turn the High Court into a court exercising criminal jurisdiction.

38. Perhaps even more fundamentally, I am satisfied that, even if the provisions of the Act of 1997 were somehow applicable to the High Court exercising its functions under the Act of 2003, there is nothing in the Act of 1997 to circumscribe the ancient, fundamental and inherent jurisdiction of the High Court to grant bail. Section1A(14) of the Act of 1997, which refers to a person charged with a serious offence and applying for bail, expressly states that the section does not limit the jurisdiction of the court to grant bail. No other section or part of the Act of 1997 purports to restrict the jurisdiction of the High Court (or the Central Criminal Court) in respect of bail; there are no provisions stating that the jurisdiction to grant bail is only to be exercised in accordance with the provisions of that Act. Indeed, the long title of the Act states: "An Act to make further provision in relation to bail, to amend the Criminal Procedure Act, 1967, and to provide for related matters" (emphasis added). In my view, the common law jurisdiction of the High Court with respect to bail has not been curtailed by the Act of 1997 except to the extent that is expressly provided for in the Act.

The High Court's power to grant bail "of its own motion"

39. Neither *O'Callaghan* nor *Maguire* dealt with the problem with which this Court is faced; whether there is jurisdiction for the High Court to enquire into, and grant bail, even without an application for bail. Perhaps at this point it should be made clear that the Court has used the phrase "grant bail" in the sense of "the release of a person from custody subject to an undertaking to surrender to custody at a court….at an appointed time in the future" (Dermot Walsh, *Walsh on Criminal Procedure*, 2nd Ed, Roundhall 2016, p 1059). The issue of the nature of that undertaking, whether by recognisance or otherwise, would be a matter for the decision of the High Court, if the bail enquiry was to proceed of the Court's own motion and which resulted in bail terms being set in principle.

40. It must also be noted that the process of extradition is *sus generis*; it is neither wholly criminal nor civil. This uniqueness grants this Court certain inquisitorial powers and that is also a factor in a consideration of the High Court's jurisdiction to grant bail of its own motion.

41. The minister has referred to the *Lanigan* case and to extensive parts of the judgment of the CJEU as set out above. In particular, at para 59 of that judgment, the CJEU referred to the duty of the executing judicial authority to carry out a concrete review of the situation at issue, taking account of all the relevant factors with a view to evaluating the justification for the duration of the proceedings. If following the review, the Court concludes that it is necessary to bring the requested person's custody to an end, it is required to attach to the provisional release any measures deemed necessary to prevent him absconding.

42. The minister has submitted that a simple enquiry into whether the person wishes to make a bail application is sufficient review. From the plain language of the CJEU, it is evident that such a review would be insufficient. A concrete review is the opposite of a simple enquiry.

43. The right to liberty is a fundamental right. The High Court, pursuant to common law, under the Constitution and also by virtue of its responsibilities under the Framework Decision, has a duty to protect that right. The minister's objection to this Court raising the issue of bail of its own motion is based upon the lack of jurisdiction of this Court to do so. The minister submits there is no legal provisions *permitting* the Court to do so. In my view, the correct approach is to consider the ancient and fundamental jurisdiction as regards the granting of bail that the High Court exercises at common law and under the Constitution; a jurisdiction that the Act of 1997 has not curtailed. The High Court is also exercising an inherent jurisdiction to grant bail in cases of surrender under the Act of 2003. There is no legal provision, whether legislative, at common law or constitutional, which prevents the High Court from exercising this power of its own motion. That is an important consideration.

44. Furthermore, the High Court has already held in *Rice v Mangan* that the District Court can revoke or amend bail without an application from the prosecution (or any party). The reasoning behind that finding was that there was nothing in the Act of 1967 which prevented the District Court from so doing. That reasoning applies with even greater force to the High Court where the bail legislation does not prevent such an exercise of jurisdiction, where the High Court's jurisdiction as regards bail is recognised under the Constitution and at common law, and where the High Court exercises inherent jurisdiction in granting bail in extradition cases.

45. If the High Court can amend or revoke bail of its own motion, there is no principled reason why it cannot grant bail of its own motion. Indeed, where the High Court has been granted a power to remand on bail or in custody (as in the Act of 2003), in the absence of clear legislative provision to the contrary, the High Court could not restrict its power to ensure that no person is deprived of their liberty save in accordance with law. Fundamentally therefore, in the absence of express provision to the contrary, the constitutional protection of the right to liberty and the overall jurisdiction of the High Court as regards bail matters, permits the High Court in a case before it to enquire of its own motion about bail and indeed, in certain cases, may compel the High Court to make such enquiry.

46. Naturally, the High Court must act judicially and in accordance with fair procedures in granting bail of its own motion and it would have to invite the prosecution (or moving party) to give evidence or make submissions as to why bail should not be granted. In an appropriate case, an adjournment would have to be granted to permit such evidence to be put before the court.

47. In my view, the High Court's duty to protect the right to liberty in the present case requires it to make a full enquiry into whether it is necessary to continue to remand this respondent in custody without consent to bail. His case is being adjourned for a period of time in significant excess of the periods of time set out in the Framework Decision. It is unconscionable that this Court would continue to remand a person in custody whose surrender for criminal prosecution is sought for the length of time at issue in these proceedings without any concrete enquiry into whether he should have consent to bail.

48. I am therefore satisfied that in accordance with the ancient jurisdiction of the High Court to grant bail, the full original jurisdiction of the High Court in both civil and criminal matters and the powers of the High Court in respect of applications for surrender on EAWs, the High Court has jurisdiction to enquire into whether this respondent should continue to be remanded in custody.

49. Although the respondent may not take up this bail, the fact that he would be in custody with consent to bail may mean, that should he change his mind, his entitlement to be at liberty can be vindicated without delay.

50. In light of the findings above, I will proceed to hear from the minister the grounds upon which the minister asserts that he should be refused bail.