Neutral Citation Number: [2009] IEHC 442

THE HIGH COURT

STATE SIDE

2005 13 EXT

IN THE MATTER OF AN APPLICATION FOR AN INQUIRY PURSUANT TO ARTICLE 40.4.2° OF THE CONSTITUTION OF IRELAND

BETWEEN

S. M. R.

APPLICANT

AND

THE GOVERNOR OF WHEATFIELD PRISON

RESPONDENT

JUDGMENT of Mr. Justice William M. McKechnie delivered on the 28th day of May, 2009

1. The issue in this case arises under the Council's Framework Decision 'on the European arrest warrant and the surrender procedures between Member States' and the European Arrest Warrant Act 2003, as amended (the "2003 Act"). It is a difficult issue and has an importance outside the facts of the instant case. It occurs in this way; under the law of England and Wales, a domestic warrant must exist before a European arrest warrant can issue, whereby the surrender of a person is sought for the purposes of facing trial on criminal charges. Having been so issued and subsequently endorsed for execution in this country and following the person's arrest, an application must then be made to the High Court for the surrender of that person under s. 16 of the 2003 Act. The issue in question is whether if, at the date of such application, the domestic warrant is no longer in existence can this Court adjudicate on what effect, if any, that has on the European arrest warrant: or, subject to any other legal constraint, must it still order the surrender of the affected person?

2. The background circumstances giving rise to these proceedings are as follows:-

June 2000 – September 2001: It is alleged that the applicant (Mr. R) committed three acts of indecent assault against a nine year old.

14th January 2003: Hendon Magistrates Court issues a warrant for his arrest on the resulting charges: (the "Hendon Warrant" or the "Domestic Warrant").

17th February 2005: Bow Street Magistrates Court issues a Part 3 Warrant in respect of the applicant. (the "Part 3 Warrant" or the "European arrest warrant" (E.A.W.))

18th April 2005: Applicant is arrested in this jurisdiction on foot of the said E.A.W.

19th April 2005: Applicant is released on bail by the High Court awaiting the hearing of an application under s. 16 of the 2003 Act. In such proceedings the Minister for Justice, Equality and Law Reform (the "Central Authority") is the applicant and Mr. R is the respondent.

11th October 2005: This application is heard by the High Court.

15th November 2005: Peart J. refuses to order his surrender and dismisses the application.

December 2005: The Minister for Justice, Equality and Law Reform, appeals to the Supreme Court: the applicant cross appeals.

8th February 2007: The appeal is heard by the Supreme Court and judgment reserved.

17th July 2007: The "Hendon Warrant" is withdrawn by order of the Hendon Magistrates Court.

15th November 2007: The Minister's appeal is allowed and the cross appeal is dismissed. The applicant's surrender to England is ordered and he is remanded in custody to await the formal execution of that order.

23rd November 2007: The Supreme Court, on being told that the applicant consents, orders his immediate surrender. He is further detained in custody to await the necessary arrangements.

27th November 2007: At 2.00pm the Supreme Court is informed that on the 17th July 2007, the Hendon Warrant was withdrawn by judicial authority. No such warrant, therefore, existed as of the 15th November 2007, the operative date.

28th November 2007: Hendon Magistrates Court issues a second warrant, in exactly the same terms, as the "Hendon Warrant" of 14th January 2003.

3. Having had this situation outlined to it, the Supreme Court heard a submission on behalf of Mr. R that in the

circumstances prevailing, the European arrest warrant was invalid and no order for his surrender could or should have been made. In response, the Minister alleged that the absence of the Hendon Warrant was irrelevant for the purpose of this Court's (or the Supreme Court's) jurisdiction under s. 16 of the European Arrest Warrant Act 2003. An issue was thus raised which required determination: the Supreme Court decided that if Mr. R wished to pursue the point he could apply to the High Court for an order of *habeas corpus* under Article 40.4.2° of the Constitution and if successful all matters would be remitted to that Court for hearing. In such special circumstances the Supreme Court also decided that this Court would have full jurisdiction to review all issues between the parties, including the validity of its own orders dated the 15th and 23rd November 2007. Some short time thereafter such an application was successfully made and the applicant was admitted to bail pending a determination of the issues. It is in respect of this *habeas corpus* application, where Mr. R was the applicant, that I am now giving judgment.

4. Given the way in which this case has come before the Court, it is technically correct to say that this is not a s. 16 hearing, but rather is simply a *habeas corpus* application. Because of that the Governor of Wheatfield Prison had to be named as a respondent and in accordance with usual practice he has certified the grounds of the applicant's detention. In so doing he has relied upon the Supreme Court's Order of 15th November 2007: that Order was made on appeal from a s. 16 hearing. Therefore in essence all arguments open on such a hearing are also open on this application. In this regard nothing turns on the fact that the Minister is not named as a respondent. In effect, he was the *legitimus contradictor.*

The Framework Decision

5. The relevant legislative provisions, both in this jurisdiction and in the UK, stem from the Council's Framework Decision 'of the 13th June 2002, on the European arrest warrant and the surrender procedures between Member States'. From its recitals, the aims and objectives of that Decision can be seen. These involve and/or include the following:-

(i) The existing multilateral extradition arrangements between Member States are to be replaced by a system of surrender between judicial authorities: this, unlike the existing regime, should be simple, speedy and effective. It is based on the free movement of judicial decisions in criminal matters and applies to all persons wanted in connection with criminal charges or to serve, the whole or the residue of, an imposed sentence.

(ii) Such arrangements are based on and implement the principle of mutual recognition which is the cornerstone of judicial co-operation.

(iii) The mechanism to achieve this is the European arrest warrant which is also based on a high level of confidence between Member States.

(iv) Fundamental rights must be respected as well as the constitutional rules of Member States.

6. There are a number of Articles that should briefly be referred to:-

(i) Article 1.1 – declares that a European arrest warrant is a judicial decision issued by a Member State for the arrest and surrender of a requested person.

(ii) Article 1.2 – obliges Member States to execute the warrant on the basis "of the principle of mutual recognition and in accordance with the provisions of this Framework Decision".

(iii) Article 1.3 – specifies that the obligations mentioned in Article 6 of the Treaty on European Union (T.E.U.) in respect of fundamental rights and legal principles are not affected by the Decision.

(iv) Article 3 – sets out a number of grounds, which if established, absolutely prohibit the executing judicial authority from executing the warrant.

(v) Article 4 – sets out grounds, which if established, confer a discretion on the executing judicial authority to refuse to execute the said warrant.

(vi) Article 8 – outlines the information which must be contained in the warrant and this includes:-

> "1.(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;
>
> 2. ….

The European Arrest Warrant Act 2003

7. This Framework Decision is binding in its effect, but not in its implementing means: it does not have direct effect as a matter of Community Law (Art. 34(2)(b)) of T.E.U. as amended by the Amsterdam Treaty). Therefore, each Member State is free to enact its own legislative provisions in respect thereof, but is mandated to achieve the required result. No reference to the European Court of Justice (E.C.J.) can be made, as Ireland has not made the required Declaration for this purpose. (Art. 35.2 of T.E.U.) In this jurisdiction the 2003 Act was enacted to meet the country's obligations under the Decision. Before referring to some of its more important provisions, I should firstly give a brief overview as to how the Act is structured, confining it to extradition from this State. When a Member State issues an European arrest warrant, it is transmitted to the Minister for Justice, Equality and Law Reform who is the Central Authority in this State for the purposes of the Act. As soon as may be after receiving the warrant, the Minister must apply to the High Court under s. 13 of the Act for its endorsement so that the warrant may be executed ("High Court endorsement"). The suspect person is then arrested by An Garda Síochána who must, again as soon as may be after the arrest, bring that person before the

High Court: he is then remanded either in custody or on bail pending either his voluntary surrender to the requesting State, or the hearing of an application under s. 16 of the Act. Under this section the High Court may, subject to certain conditions being satisfied and certain safeguards met, order the surrender of the person in question. These safeguards prohibit extradition in a number of circumstances, including where that would be in breach of the State's obligations under the European Convention on Human Rights or would violate the person's constitutional rights, or, would result in any of the forms of discrimination mentioned in s. 37(1)(c) of the Act. Subject to compliance with these and other provisions, the person before the court, being that named on the warrant, is then formally handed over to the requesting State.

8. It seems to me that within this scheme and the national legislation giving effect to it, there are three critical stages involved in the process. The first is the issue of the European arrest warrant, the second, is the endorsement for its execution by the executing judicial authority, and the third, is the surrender decision. One could add the arrest and the formal handing over, but as these steps are the direct consequences of court orders, I have not done so. Arguably, from a suspect's point of view the third is the most important; this because he is being forcibly removed from one jurisdiction to another. But of course all such steps have their individual importance.

9. In the 2003 Act:-

> * 'European arrest warrant' means "a warrant, order or decision of a judicial authority of a Member State, issued under such laws as give effect to the Framework Decision in that Member State, for the arrest and surrender by the State to that Member State of a person in respect of an offence committed or alleged to have been committed by him or her under the law of that Member State" (s. 2(1)).
>
> * 'issuing judicial authority' means, "the judicial authority in the issuing state that issued the European arrest warrant concerned" (s. 2(1)).
>
> * 'judicial authority' means, "the judge, magistrate or other person authorised under the law of the Member State concerned to perform functions the same as or similar to those performed under section 33 by a court in the State" (s. 2(1)).
>
> * 'executing judicial authority' for the purposes of the Framework Decision is the High Court (s. 9).

10. The following sections of the Act, which have been amended by the Criminal Justice (Terrorist Offences) Act 2005 (the "2005 Act"), must be noted and their provisions outlined:-

Section 4A (inserted by s. 69 of the 2005 Act):-

> "4A – It shall be presumed that an issuing state will comply with the requirements of the Framework Decision, unless the contrary is shown."

11. Section 10 (substituted by s. 71 of the 2005 Act):-

> "10 – Where a judicial authority in an issuing state duly issues a European arrest warrant in respect of a person –
>
> (a) against whom that state intends to bring proceedings for the offence to which the European arrest warrant relates,
>
> (b) who is the subject of proceedings in that state for an offence to which the European arrest warrant relates,
>
> (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."

12. Section 11: (As amended by s. 72 of the 2005 Act):-

> "11(1) A European arrest warrant shall, insofar as is practicable, be in the form set out in the Annex to the Framework Decision.
>
> (1A) Subject to subsection 2(A), a European arrest warrant shall specify,
>
> (a) …
>
> (b) …
>
> (c) …
>
> (d) …
>
> (e) that a conviction, sentence or detention order is immediately enforceable against the person, or that a warrant for his or her arrest, or other order of a judicial authority in the issuing state having the

same effect, has been issued in respect of the offence,

(f) …

(g) …

(2A) If it is not practicable for any of the information to which subsection 1(A) … applies to be specified in the European arrest warrant, it may be specified in a separate document."

13. Section 13:-

"13(1) The Central Authority … shall, as soon as may be after it receives a European arrest warrant … apply … to the High Court for the endorsement by it of the European arrest warrant … for execution of the European arrest warrant concerned.

(2) If, upon an application under subsection (1), the High is satisfied that, in relation to the European arrest warrant, there has been compliance with the provisions of this Act, it may endorse –

(a) The European arrest warrant for execution, or

(b) …

(3) A European arrest warrant may, upon there being compliance with subsection (2), be executed by a member of An Garda Síochána…

(4) …

(5) 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 the person is the person in respect of whom the arrest warrant was issued,

(a) remand the person in custody or on bail…

(b) fix a date for the purposes of section 16…

(c) …"

14. Section 16: (amended by s. 76 of the 2005 Act):-

"16(1) Where a person does not consent to his … surrender … the High Court may, … 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) the High Court is satisfied that the person before it is the person in respect of whom the European arrest warrant was issued,

(b) the European arrest warrant … has been endorsed in accordance with section 13 for execution of warrant,

(c) where appropriate, an undertaking under section 45…is provided to the court,

(d) the High Court is not required, under section 21A, 22, 23 or 24 (inserted by sections 79, 80, 81 and 82 of the Criminal Justice (Terrorist Offences) Act 2005), to refuse to surrender the person under this Act, and

(e) the surrender of the person is not prohibited by Part 3 or the Framework Decision (including the recitals thereto)."

15. The only prohibitory provision of relevance in the Act is that as set out in s. 37(1)(b) which reads:-

"A person shall not be surrendered under this Act if –

(a) …

(b) his or her surrender would constitute a contravention of any provision of the Constitution (other than for the reason that the offence specified in the European arrest warrant is an offence to which s. 38(1)(b) applies)."

Why the "Hendon Warrant" was withdrawn

16. Following the issue of the Hendon Warrant on the 14th January, 2003, details of the applicant, as a wanted person, were circulated on the police national computer. With every such entry there is added, in accordance with UK policy, "a weed by date", which in effect is a review date. The reason for this is to prevent the repeated circulation of a person's details when the police no longer have any interest in that person. In the case of the Mr. R the appropriate date was the 30th January, 2007.

17. If standard practice had been adhered to what should have happened was that on the 30th January 2007, the

applicant's warrant would have been reviewed. In fact, no such review took place until April (or July) of that year, when his name was removed from the national computer and when instructions were given to have the warrant cancelled. At that time the most up-to-date information available to the police was the High Court's rejection of the extradition request, with no mention of the appeal or the fact that some months earlier the Supreme Court had reserved judgment on that appeal. Believing, therefore, that the extradition process was at an end, the relevant police officer gave authority for the warrant to be withdrawn. This was done by Hendon Magistrates Court on the 17th July, 2007, and confirmation received by the police on the 26th July, 2007.

18. The explanation given to this Court for the withdrawal of the warrant was that it was "due to failure in communication" (affidavit of Alison Claire Riley) or that it was "as a result of a misunderstanding in relation to the process before the Irish Courts"; so says Jan Taylor, the investigating officer in relation to the underlying offences.

19. In Ms. Taylor's affidavit she also makes a number of other points:-

> (i) that given the nature of the offences, the applicant, if within the United Kingdom, could be arrested at common law without any necessity for a court warrant;
>
> (ii) that there was never an intention to discontinue the attempted prosecution of Mr. R: on the contrary at all stages it was the wishes of the victim's family and of the police that he should be prosecuted; and
>
> (iii) that on the 27th November, 2007, a second domestic warrant, in exactly the same terms as the original warrant, was issued by the Hendon Magistrates. That warrant remains live to this day.

The Law of England and Wales

20. Three affidavits have been filed relating to the law of England and Wales on the point at issue. There was one, from John Patrick King, a barrister, sworn on behalf of the applicant, and two on behalf of the respondent, one sworn by Alison Claire Riley, a lawyer in the Crown Prosecution Service ("C.P.S.") and the other, by Madeline Cumberland, a member of the English Bar. What emerges from their content is a sharp conflict between Mr. King on the one hand, who voiced the opinion that once the Hendon Warrant was withdrawn, the European arrest warrant was no longer valid: and Ms. Riley and Ms. Cumberland on the other, who took the contrary view. Notices to cross-examine all three persons were served. However, Peart J. decided, in a judgment delivered on the 13th June, 2008, that such cross-examination would not be permitted. Accordingly, all matters of UK law must now be decided, howsoever, on their affidavit evidence only.

The Evidence of Mr. King

21. The relevant English legislation, giving effect to the Framework Decision, is the Extradition Act 2003, and in particular, Part 3 thereof which is headed "Extradition from Category 1 Territories", of which Ireland is one. A warrant issued under this Part is known as a "Part 3 Warrant" whilst the phrase "European arrest warrant" is not used anywhere in the legislation. Under s. 142(2), an appropriate judge may issue a Part 3 Warrant where a domestic warrant has been issued in respect of the person concerned, and where there are reasonable grounds for believing:-

> "(a) That the person has committed an extradition offence, or
>
> (b) That the person is unlawfully at large after conviction of an extradition offence by a court in the United Kingdom."

22. There is no dispute but that these conditions were satisfied, when on the 17th February, 2005 an "appropriate judge" (Judge Timothy Henry Workman) issued the "Part 3 Warrant" in respect of Mr. R. That warrant contained the relevant information demanded by both the 2003 Act and the Framework Decision. There is only one section of it that needs referring to: that is section (b) which reads as follows:-

"(b) Decision(s) on which the warrant is based:-

1. Arrest warrant(s) or judicial decision(s) having the same effect: Warrant of arrest issued at Hendon Magistrates Court, 14th January 2003.

Type (accused or convicted): Accused

2. Enforceable judgement(s): Not applicable.

3. Reference (if applicable): Not applicable."

Accordingly the Part 3 Warrant, also referred to in this judgment as the European arrest warrant (E.A.W.), was based on the Hendon Warrant of the 14th January, 2003.

23. Mr. King acknowledges that there is no provision in the Extradition Act 2003, to the effect that the European arrest warrant becomes invalid on the withdrawal of the underlying domestic warrant. Neither is there any case law on the point. He says, however, that as a matter of construction this must be so. As the existence of a domestic warrant is a necessary pre-condition for the issue of a valid E.A.W., it follows in his opinion that "the continued existence of that domestic warrant is an essential aspect of the continued validity of such a European arrest warrant". Furthermore, whilst there is no express provision in the 2003 Act or indeed elsewhere, dealing with the withdrawal of a Part 3 Warrant, there is such a provision dealing with domestic warrants; section 125 of the Magistrates Act 1980. Of this situation he says "it was not thought necessary for the legislation to include a mechanism for the withdrawal of European arrest warrants as the above power to withdraw domestic warrants is sufficient to achieve the same results". His conclusion, therefore, by

deduction rather than by reference to any statutory provision or case law is that, as a matter of English law, the existence of the underlying warrant is critical for the continuing validity of the European arrest warrant. As a result his cordial invitation to this Court is that at the time of the s. 16 decision, whether at first instance or on appeal, there must be in existence such a warrant so as to underpin the E.A.W. As the Hendon Warrant had been withdrawn by judicial order some months before the 15th November, 2007, it followed, that as of such date, there was no longer in existence a valid Part 3 Warrant.

Incidentally I should say that Mr. King in his Affidavit addressed a second point which has no application in this hearing.

Ms. Melanie Cumberland

24. The core point made by Ms. Cumberland is that once a Part 3 Warrant has been validly issued then "it has independent legal effect which is unrelated to the continuing existence or validity of the underlying domestic warrant of arrest". As in the instant case, since the European arrest warrant has been properly issued, its continuing validity is therefore, determined by reference to the Extradition Act 2003, or by its equivalent or other statutory provision in Irish law. There is nothing in the Extradition Act that would affect the validity of the arrest warrant in this case. Accordingly, as a matter of English Law, it remains operative to this day.

25. This witness contrasts a Part 3 Warrant with a Part 1 Warrant which governs proceedings where extradition is sought by another Category 1 Territory from the United Kingdom. Where that process is invoked, there are detailed statutory provisions governing the withdrawal of a European arrest warrant. (Sections 41-43) Where such a warrant is withdrawn, the judge must order the person's discharge and in accordance with s. 213(1) of the Extradition Act 2003, that "disposes" of the E.A.W. Thereafter, it has no legal effect. In Ms. Cumberland's view, when both Parts of the Act are contrasted, it is clear that the omission to have a comparable provision in respect of a Part 3 Warrant was deliberate: and was designed to implement the objectives of the Framework Decision; in that, once validly issued an E.A.W. has an existence independent of the pre-conditions necessary for its issue.

26. In her view, it must be presumed that where the requesting state no longer wishes to pursue the extradition of a person, that State "in the spirit of good faith and comity" will immediately inform the requested country and therein have the E.A.W. withdrawn.

27. She gives an illustration to show how this principle works. Recently she was involved in a Belgian case where a person was convicted in his absence. A Part 1 Warrant was sent to the United Kingdom for execution: pending that, the suspect person successfully appealed against his conviction in Belgium: as a result the domestic warrant was, according to Belgian Law, a nullity. Notwithstanding, "all parties" proceeded on the basis that this had no impact on the E.A.W. This is evidenced by the fact that the C.P.S. asked the issuing judicial authority whether in these circumstances it still wished to seek the suspect's extradition: it said no, and gave instructions to have it withdrawn: it duly was under s. 41 of the Extradition Act 2003 Act. By analogy, therefore, it was her view, that the withdrawal of the Hendon Warrant was not an impacting event on the continuing validity of the E.A.W.

28. Ms. Reilly who swore the other affidavit on behalf of the requesting country does not go into any detail and simply asserts a view that the withdrawal of the domestic warrant left unaffected the European arrest warrant.

Submission of the Applicant

29. The applicant's central contention is that since at the date of the s. 16 decision the domestic warrant had been withdrawn, there was no underlying warrant to validate the E.A.W.: this despite the stated intention of the Crown Prosecution Service to continue with the pending prosecution. Specific attention was drawn to Article 8 of the Annex to the Framework Decision and to ss. 10 and 11 of the European Arrest Warrant Act 2003. The case of the *Minister for Justice, Equality and Law Reform v. Altaravicius* [2006] 3 I.R. 148, was relied upon as clarifying the relationship between the Framework Decision and the 2003 Act, as well as having laid down the principle that, when interpreting and applying national provisions which give effect to the Framework Decision, the courts "must do so as far as possible in the light of the wording and purpose of the Framework Decision in order to attain the result which it pursues". He points out, however, that this rule of construction cannot operate *contra legem*. Therefore, if the 2003 Act permits of no interpretation which conforms with the Framework Decision, the National Court must apply the Act as the interpretation permits.

30. It is further asserted on behalf of Mr. R, that *Altaravicius* is an authority for the proposition that where there is cogent evidence of non-compliance with the relevant legislation in the issuing state, the executing judicial authority is permitted to examine the matter further and to ascertain whether that legislation has been complied with; this is critical as the personal rights of the subject citizen must be upheld. Attention was drawn, in particular, to para. 36 of the judgment of the Chief Justice which reads:-

> *"36. The judicial authority of the issuing state has stated in the European arrest warrant that such a warrant was issued, the date it was issued, the court by which it was issued and its reference number. That information is evidence of the existence of an enforceable warrant against the person in question. In reality what the Framework Decision requires is that information is given as to existence of an underlying domestic warrant or judgment, where this exists, including information concerning the nature or type of warrant of judgment. This has been complied with."*

Based on this passage and the words of Denham J. (with whom Hardiman J. agreed), who spoke of a presumption that the "underlying documents are in order", it was submitted that the Supreme Court has clearly ruled that at all stages the domestic warrant must be enforceable against the named individual. That being so it follows on the uncontested evidence in this case, that at the time of the s. 16 decision, the underlying warrant was no longer in force and, therefore, neither was the European arrest warrant. In such circumstances the order for *habeas corpus* should be made absolute.

Submission of the Respondent
31. The respondent contends that the Hendon Warrant was withdrawn because of the "weed by date" policy, in circumstances where the police were unaware of any appeal having been taken from the High Court's rejection of the extradition request. It is said that the warrant was not withdrawn at the behest of the Crown Prosecution Service, which at no time had or evinced an intention to discontinue the prosecution against the applicant. Once the error was discovered, a new domestic warrant was applied for and issued on the 27th November, 2007.

32. Having thus explained the above circumstances the respondent's principal submission was that the E.A.W., issued by Bow Street Magistrates Court on the 17th February, 2005, was the operative "judicial decision", and not the underlying domestic warrant. At all stages of any interpretative process, the Framework Decision should be given a purposeful construction as should its recitals. Continuing compliance with Article 8 was not a pre-condition to the exercise by the executing judicial authority of its power to order surrender. In particular, Article 8(c) simply requires the giving of information as to the existence of an underlying warrant "at the time of issue", but imposes no further obligation in respect of it, thereafter. Once duly issued the warrant, in its own right, was valid thereafter.

33. The respondent further contends that nowhere in the Framework Decision is there a requirement that the domestic warrant must continue in existence once the E.A.W. has been granted. All that is required is that the E.A.W. state on its face, as of the date of issue, certain facts including the existence of a valid domestic warrant. That requirement is merely to confirm the existence of a lawful intention on the part of the issuing state to arrest and detain the person sought for an appropriate offence. Once this is shown to exist the E.A.W. is a separate and independent judicial decision, and must be given effect to, irrespective of the continuing existence or otherwise of the original domestic warrant. The Minister, in effect the respondent, also submits that it would not be proper for this Court to consider the validity of the E.A.W. under UK Law. The question of whether an E.A.W. is valid under the law of the issuing state is not a relevant consideration, either under the European Arrest Warrant Act 2003, or the Framework Decision, when enforcing that warrant. If contrary to this submission this Court should make such a decision, it would effectively be endeavouring to quash the warrant issued by Bow Street Magistrates Court. That should not be done. If there is an issue of English law properly to be determined, that should be resolved by way of judicial review proceedings in England. In the absence of such a proceeding, this Court is free to and should exercise its jurisdiction under s. 16 of the Irish 2003 Act.

34. Finally, it was stated that it is a matter of established principle that there should be mutual recognition of decisions issuing between the judicial authorities of different Member States. Such recognition is inconsistent with this Court entering into an inquiry as to whether the decision of Bow Street Magistrates Court is valid as a matter of English law. The executing judicial authority is obliged to operate on the basis that the E.A.W. remains in existence, it being an undoubted fact that the prosecuting authorities in the requesting state still seek the return of Mr. R. The executing court should not look beyond the E.A.W..

Decision
35. As previously stated, the Framework Decision is not as a matter of community law directly binding in this jurisdiction, but by express legislative incorporation (described by Murray C.J. in *Altaravicius* [2006] 3 I.R. 148 at 155 as "a*n idiosyncratic method of legislating"*), it, or a good deal of it, must be applied much like national law. This results from, *inter alia*, ss. 10, 11 and 16 of the 2003 Act. Therefore, it is not only the Act of 2003 which is relevant, but so also the Framework Decision including its recitals. (See also Fennelly J., in *Dundon v. Governor of Cloverhill Prison* [2006] 1 I.R. 518 where further interpretive problems are highlighted.)

36. As with all pieces of national legislation which are enacted to give effect to Directives, this Court "must apply and interpret them so far as possible in the light of the wording and purpose of the Framework Decision in order to attain the results which it pursues". See criminal proceedings against *Pupino* (Case C-105/03) [2005] E.C.R. I-5285: and *Von Colson and Kamann v. Land Nordrhein–Westfalen* (Case 14/83) [1984] E.C.R. 1891. This principle, however, has its limitations: it applies only insofar as the language permits. No interpretation *contra legum* is allowed. If as a result the only permissible interpretation falls short of giving effect to an instrument, such as the Framework Decision, then steps at executive level may be required to address that *lacuna*. This Court, however, will have reached the limits of its interpretative ability. Accordingly, a purposeful interpretation, embracing the objectives and aims of the Framework Decision should be given to the 2003 Act, if that is possible within the confines above described.

37. There are quite a few, and a growing number of, cases in this jurisdiction in which judgments have been given on matters arising out of the 2003 Act. The following are those of the most relevance to this case: *Fallon*, *Altaravicius* and *Stapleton.*

***Minister for Justice, Equality and Law Reform v. Fallon* [2005] IEHC 321:**
38. On the 16th December, 2003, a warrant for the arrest of Mr. Fallon was issued by Bow Street Magistrates Court. On the 2nd January, 2004, it was endorsed by the Assistant Commissioner for execution in this State. On the 8th January, Mr. Fallon was duly arrested. These steps were taken under the Extradition Act 1965. However, following the Supreme Court's decision in *O'Rourke v. Governor of Cloverhill Prison* [2004] 2 I.R. 456 (delivered on the 13th May, 2004), it was found that such warrants were unlawful because following the enactment of the 2003 Act, the 1965 Act had been repealed since the 1st January, 2004. In light of this, the UK police obtained a European arrest warrant from Bow Street Magistrates Court on the 21st June, 2004, which was based on the domestic warrant of the 16th December, 2003. As pointed out above (see para. 21 *supra.*), the existence of such a valid "domestic warrant" is a necessary pre-condition for the issue of a European arrest warrant under s. 142(2) of the Extradition Act 2003. The question therefore before the court was whether the European arrest warrant could have been properly grounded on the warrant of the 16th December, 2003: it having been executed by the gardaí on the 8th January, 2004.

39. An essential issue in the case was whether the High Court as the executing judicial authority was prohibited from examining the validity of the domestic warrant, so as to satisfy itself that the statutory pre-conditions necessary for the issue of a valid European arrest warrant were satisfied (see para. 21 *supra*.). Finlay Geoghegan J. decided that it was not. She relied on s. 10 of the 2003 Act as an express basis for so deciding. That section reads:-

"Where a judicial authority in an issuing state duly issues a European arrest warrant in respect of a person –

(a) …

(b) …

(c) 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." (emphasis added)

Accordingly, the phrase "duly issues" conferred jurisdiction on this Court to make the inquiry sought.

40. There was a second and "distinct ground" also relied upon by the learned judge as justifying the approach taken by her. Section 16(1)(e) of the Act requires the High Court to be satisfied that the surrender of a person is not prohibited by Part 3 of the Act. That Part contains s. 37(1)(b), which expressly states that a person shall not be surrendered if:-

"(b) His or her surrender would constitute a contravention of any provision of the Constitution."

Article 40.4.1° of the Constitution states:-

"No citizen shall be deprived of his personal liberty save in accordance with law."

By the issue of the European arrest warrant, and following its endorsement for execution by the High Court, Mr. Fallon had been deprived of his personal liberty. On his surrender that right would continue to be denied to him. In such circumstances the learned judge held, that if he was surrendered on foot of a European arrest warrant which had not duly issued within the meaning of s. 10 of the Act of 2003,

"… this Court would be acting in breach of the rights of the respondent under Article 40.4.1° of the Constitution and hence his surrender is prohibited by Part 3 of the Act of 2003.ö

Accordingly, there were two reasons to justify the High Court's inquiry into the validity of the E.A.W., as issued.

41. As it happened, she went on to hold, in a supplemental judgment delivered on 14th October, 2005 ([2005] IEHC 322), that as a matter of English law for the purposes of s. 142(2) of the Extradition Act 2003, the warrant of the 16th December, 2003, was not spent by its execution in this country. It therefore remained valid in England and accordingly, in June 2004 it was available as a necessary proof in the application for a Part 3 Warrant. Mr. Fallon accordingly lost this challenge.

Minister for Justice, Equality and Law Reform v. Altaravicius **[2006] 3 I.R. 148:**

42. The respondent, a Lithuanian, was a person in respect of whom that country had issued a European arrest warrant. Having been endorsed for execution in this jurisdiction, he was arrested pursuant thereto. For the purposes of the s. 16 hearing, he served Points of Objection under Order 98 of the Rules of the Superior Courts. One such objection was to the effect that the warrant was not in accordance with law, was void and of no effect. To support this vague and unspecified assertion, he sought a copy of the domestic warrant without giving any reasons why that might be relevant. He succeeded in the High Court which in effect took the view that as a matter of principle, such a warrant should always accompany a European arrest warrant. On appeal the Supreme Court, through the judgments of Murray C.J. and Denham J., reversed that decision and found that no such requirement was justified either under the Framework Decision or the 2003 Act.

43. The core point of the case was whether a person, the subject matter of a European arrest warrant, could demand as of right a copy of the domestic warrant which had issued in the requesting state. The Supreme Court firmly rejected the existence of any such proposition, and found that the respondent had put no material or evidence from which even an inference of inconsistency between both warrants could be established. The *Fallon* case was clearly distinguishable in that Mr. Fallon placed before the High Court evidence, which if established as a matter of probability, was sufficient to prove that the European arrest warrant was not issued in accordance with the Framework Decision, and the national law of the requesting state giving effect to that Decision. In *Altaravicius* there was no such evidence. His move in seeking such documentation was purely speculative. He had no grounds, much less grounds of a *prima facie* nature, to challenge the European arrest warrant. In such circumstances his application was purely a fishing expedition and could not be entertained.

44. In the course of his judgment Murray C.J., in giving an overview of the relationship between the Framework Decision and the 2003 Act, pointed out that the objective of the Decision was to remove the complexities inherent in existing bi-lateral and multi-lateral extradition agreements, and to replace it with a new, more simplified system of surrender. He also alluded to the basis of the new system, being one based on mutual respect and recognition of judicial decisions between Member States. Mutuality was a cornerstone of the process. (Recital 6 and Article 1.2 of the Decision)

45. When dealing with certain legal arguments the learned judge held:-

(a) that the 2003 Act must be interpreted in light of the Framework Decision which it implements, having regard, in particular, to the objectives which it seeks to achieve.

(b) that there is no distinction of any meaning between Article 8(1)(c) of the Decision (referring to "evidence" of a judgment or warrant) and s. 11(1A)(e) of the 2003 Act (where the corresponding provision speaks of "information" and makes no mention of "evidence"), as to what information should be contained in a European arrest warrant.

(c) that s. 4A (see para. 10 *supra*) applied to the requirements of the Directive, subsequent to the making of a s.

16 Order for Surrender, and

(d) that "*the operative document in an application for surrender pursuant to the Act is the European arrest warrant issued by a judicial authority of the issuing state within the meaning of the Framework Decision. That is the essential basis on which the High Court is required to act in an application pursuant to s. 16 of the Act of 2003.*" (*ibid*. at 163)

46. In her concurring judgment Denham J. made a number of observations at p. 169 of the Report, to include:-

"The Act of 2003 sets out what should be in the European arrest warrant. The whole process is hinged on the European arrest warrant. It is a development from international co-operation at governmental level to international co-operation between the judiciary. It is part of a growth in the European Union of the concepts of mutual trust and judicial co-operation."

The learned judge also said:-

"The European arrest warrant represents a scheme for rendition, intended to be simple and intended to be on foot of a single warrant, the European arrest warrant, and not a national warrant."

Having referred to the presumption set out at s. 4A of the 2003 Act, she continued:

"A person may seek to rebut the presumption, however it is for that person to present legal reasons or evidence as to why the presumption should be rebutted."

Finally she also points out that:-

"In addition, the courts have an inherent power to protect the constitutional rights of a person sought to be surrendered. This includes the protection of fair procedures." (ibid. at 170, para. 89*)*

Minister for Justice, Equality and Law Reform v. Stapleton **[2008] 1 I.R. 669:**
47. The principal issue in that case was to what extent the Irish courts should, when dealing with a s. 16 request, apply relevant Irish case law where the resisting ground was one of delay. As part of that issue, or as a secondary issue, the court was obliged to deal with the submission made on behalf of the applicant that "adjudication on lapse of time is a matter for the issuing Member State", and since, in accordance with the evidence, there existed in England "procedures entitling the respondent to a hearing on that issue" his rights ought to be fully protected in that, rather than in this, jurisdiction.

48. As in many other cases, Fennelly J., giving the judgment of the court, once again emphasised the "mutuality" of respect between judicial authorities, which underpins the whole programme; referring to it, as Recital 6 does, as being the "cornerstone of judicial co-operation". Dealing with the protection of fundamental human rights, and with what trust should be exhibited between a requesting and a requested state in that area, the learned judge at p. 689 of the report said:-

"It follows, in my view, that the courts of the executing Member State, when deciding whether to make an order for surrender must proceed on the assumption that the courts of the issuing Member State will, as is required by Article 6.1 of the Treaty on European Union 'respect … human rights and fundamental freedoms'. Article 6.2 provides that the Union is itself to 'respect fundamental rights, as guaranteed by the European Convention on Human Rights and fundamental freedoms … and as they result from the constitutional traditions common to the Member States, as general principles of community law.'"

49. The court also held that even where possible differences exist between the level of protection afforded in different Member States, neither extradition law under the repealed regime or the surrender process under the present one, demanded parity of criminal procedure between states. The court referred to its earlier decision in *Minister for Justice, Equality and Law Reform v. Brennan* [2007] 3 I.R. 732, as clearly establishing this proposition. Being satisfied *"[o]n the facts of this case, [that] there is available to the respondent a procedure which will enable him, on surrender to the issuing Member State to seek a remedy based on the very long period of time which has elapsed since the alleged commission and the offences*" ([2008] 1 I.R. 669 at 692), the court refused to prohibit the respondent's surrender on this ground.

50. The cases which I have mentioned are deemed by the parties to be the most relevant available, regarding the issues in question. Whilst I have no doubt that this may be so and whilst each, in its own right, has established points of substance, nevertheless they are also clearly distinguishable from the instant case.

51. In *Fallon*, the court was concerned with the validity of the European arrest warrant at date of issue: the suggestion being that at such date the domestic warrant no longer had any legal existence. Clearly if established, an E.A.W. issued on the basis of a non-existent warrant could not comply with the Framework Decision. To examine that submission the Court relied upon s. 10 of the 2003 Act as giving it express power to so do. Although it also relied upon s. 37 of the Act, the provisions of which must be available at all stages of the executing process, such use of s. 37 is not of direct relevance to this case. The reason is that; if Mr. Fallon's surrender was refused on constitutional grounds, this would have stemmed from the invalidity of the European arrest warrant, at <u>date of issue</u>. That is not the difficulty in this case, it being accepted by all that as of the relevant date (17th February 2005), the warrant, in respect of the applicant, was

validly issued by Bow Street Magistrates Court. So neither the issue in *Fallon* or the Court's approach to it are directly on *par* with this case.

52. Before leaving *Fallon,* however, the other point raised dealt with the level, standard, or cogency, of evidence which an applicant had to establish before the relevant threshold would be reached: thus justifying the court in making the investigation sought. No such difficulty arises at any remove in the instant case, as it is accepted by all, as undoubtedly correct, that the Hendon Warrant was withdrawn in July 2007.

53. Although *Altaravicius* is an important decision setting out the relationship between the Framework Decision and the 2003 Act, it does not, as the issue did not arise, deal with the point in question facing this Court. That decision was principally concerned with a finding made by the High Court, described by it as having universal effect, that the underlying domestic warrant should, as a matter of course travel with the European arrest warrant. The Supreme Court rejected that point as a matter of principle. In refusing to compel production of the warrant on evidential grounds it approved, or at least did not demur, from the approach adopted by Finlay Geoghegan J. in *Fallon*, in that regard. In essence it established that there was no duty to investigate whether such requirements were satisfied. The Court went on, once again, to emphasise the basis upon which the new system must operate, namely mutuality of respect and recognition between judicial authorities. As with *Fallon*, the very issue raised in *Altaravicius* related to date of issue and not to any other stage in the arrest and surrender process.

54. *Stapleton* on the other hand did not involve a date of issue point: rather, the respondent was relying on s. 37 of the 2003 Act. He alleged that his surrender should be prohibited because of the undoubted delay which had occurred since the dates of the alleged offences. The real issue however was which court should adjudicate on that complaint: should it be that of the requesting country, or that of the requested country. At p. 692 of the Report, Fennelly J. said:-

> *"On the facts of this case, there is available to the respondent a procedure which will enable him, on surrender to the issuing Member State, to seek a remedy based on the very long period of time which has elapsed since the alleged commission of the offences. Moreover, on the facts of the case, it is demonstrably more efficient and more convenient that those matters be debated before the courts of the country where the respondent is to be tried."*

For those reasons, the respondent's surrender was not prohibited, with the Court being satisfied that the applicant would get a fair trial.

55. It is undoubtedly the case that a court, whether exercising its s. 13 or s. 16 jurisdiction, can examine the validity of the European arrest warrant at date of issue. This is evident from ss. 10 and 13 of the Act which make the point clear, and if *Fallon* is correct, as I respectfully so believe, it is confirmed by that decision. Therefore a challenge on this ground is available throughout the entire execution process. Section 10 of the 2003 Act also expressly provides that the arrest and surrender of a person can only be ordered "subject to and in accordance with the provisions of this Act and the Framework Decision". What this means in specific terms for a surrender hearing is that; if the High Court is satisfied that the arrested person is the person being sought, that the warrant has been endorsed for execution and that any undertakings requested have been furnished, it will make an extradition order unless it is prohibited from so doing by virtue of:-

> (i) ss. 21A, 22, 23 or 24 (inserted by ss. 79, 80, 81 and 82 of the Criminal Justice (Terrorist Offences) Act 2005), of the 2003 Act, or
>
> (ii) the provisions of Part 3 of that Act, or
>
> (iii) by the Framework Decision including the Recitals thereto. (s. 16(1))

56. Apart from s. 21A, which possibly could involve the validity of the European arrest warrant (see Article 1.1 of the Framework Decision), neither s. 22 (Rule of Speciality), s. 23 (Surrender of Person by issuing state to other Member States), or s. 24 (Extradition of Persons by issuing state to third States), necessarily involve a "*per se*" challenge to the validity of such a warrant. Part 3 of the 2003 Act covers ss. 37 to 46 inclusive. To successfully resist surrender under any of these provisions, a respondent would not have to prove that the E.A.W. is directly and inherently invalid. Of course, if for example, such a warrant was issued to prosecute a person for reasons relating to their sex, race, religion *etc*., it could be said that it was invalid for those reasons: but a finding of invalidity is not required, even in those circumstances, before a surrender may be prohibited.

57. Although many of the Articles of the Framework Decision have been given specific effect to by the 2003 Act, with the result that the common subject matter is covered in both, nevertheless even if one looks at provisions like Article 3 (grounds for mandatory non-execution of the European arrest warrant) and Article 4 (grounds for optional non-execution of the European arrest warrant), the same observations can be made, namely that giving effect to these provisions would not necessarily involve a finding of invalidity, *vis-à-vis*, the warrant. So once validly issued, surrender can be refused in several instances where the warrant remains valid, or at least where its invalidity has not been established.

58. In this case, given the specific ground of complaint, a finding of invalidity is, however, essential if Mr. R is not to be surrendered. Otherwise his detention in this jurisdiction and the likely continuation of that in England, if surrendered, could not be said to violate Article 40.4.1° of the Constitution. He would be detained in accordance with law. Can this court, therefore, determine whether, by reason of the withdrawal of the Hendon Warrant, the E.A.W. is valid?: it being an entirely separate question as to whether it is or is not. Before answering that however, a further word about the circumstances of the Hendon withdrawal.

59. The evidence in this regard is unsatisfactory and patently incomplete. The investigating officer says that, in or about October 2005 (*sic.),* she was told of the High Court's decision to refuse extradition (delivered on the 15th November 2005). At a review date in 2007, there was no further information available to her. So, there was, in her words, a

misunderstanding in relation to the Irish process. Ms. Reilly from the Crown Prosecution Service, who added nothing to this, simply says that there was a failure of communication. There is no evidence, therefore, as to whether the C.P.S. knew of the appeal having been lodged, or of the Supreme Court's hearing in February 2007 or the fact that its judgment was awaited. It would be difficult to see or understand how it would not have this information. If it did therefore have such knowledge, did it pass it on or not? If not, why not?

60. From the point of view of the police, the most recent information available to them at review date, being either April or July 2007, was sourced from November 2005. Why did not the police search out what the up-to-date position was? And what steps have been taken by either or both bodies to ensure that what caused this type of failure has been addressed? At stake is not simply a domestic warrant, but a warrant that had been used to ground an international warrant. So this jurisdiction undoubtedly had as much an interest in the legal process as our neighbours had, and yet really no information of any meaning has been given to this Court. This executing authority in my view is entitled to expect more than what it received.

61. Whilst I do not wish to overstate the point, nevertheless mutual recognition is essentially built on trust, derived over time from confidence gained by experiencing the practical operation of the system. This new regime applies to countries, far distant apart, whose systems of law, substantive and procedural, are strikingly different from our system. So, therefore, it is critical to maintain, by correct practice, the high level of confidence necessary to ensure its unhesitant application. Circumstances should not arise where undue concern will be felt by Member States. Whilst I am not suggesting that an isolated incident, like the present one, has damaged this Court's undoubted confidence in the English system, nevertheless complacency cannot be tolerated; vigilance must be high at all times. It is, therefore, surprising to me and a little disappointing that a proper explanation has not been forthcoming from the requesting State, nor has this court been told of what (if any) appropriate safeguards have been put in place to prevent a re-occurrence.

62. Whilst the matters of concern were different, the House of Lords in *R(Hilali) v. Governor of Whitemoor Prison* [2008] 2 WLR 299 made mention of the importance of high standards in the operation of both the Decision and the relevant national legislation. Referring to the authorities in both Spain (the requesting state) and England, Lord Hope said at para. 25 of the judgment that:

> *"The whole point of the Framework Decision, as recital (5) explains, was to remove the complexity and potential for delay inherent in the previous extradition procedures. That aspiration is unlikely to be achieved if the judicial authorities on whose co-operation the system depends do not carefully observe the procedures that the Framework Decision lays down. Failure to do this may lead to delay and misunderstanding…"*

And at para. 30 he added:

> *"The right to liberty is at stake in these matters. The importance of accuracy and attention to detail in the preparation of the European arrest warrant and of any order that is made to give effect to it cannot be over-emphasised."*

Therefore it is of the first importance for both states to ensure that no avoidable or unnecessary concern is caused to either.

63. The Framework Decision is an unusual instrument in that it does not have the same effect as, for example, treaty provisions: indeed also because it does not have direct effect it must give way, on the *contra legum* principle, to any conflicting domestic provision. And yet it is the bedrock of a highly persuasive aspect of a safe, law abiding and secure Union; namely the arrest and surrender of proven or suspected criminals. It must, at least in broad terms, have a uniformity of application throughout different communities and varying legal systems. For the instrument to bring society any utility it has got to be respected at a level above purely that of the national level. As Baroness Hale said in *Hilali:*

> *"For better or worse, we have committed ourselves to this system and it is up to us to make it work."*

We should, in her view, approach it in:

> *"a spirit of mutual trust and respect and not in a spirit of suspicion and disrespect." (ibid. at 310)*

I respectfully agree with these views.

64. In implementing its values therefore and those of the 2003 Act, it seems to me that if a European arrest warrant is validly issued according to the Framework Decision, it is intended to be a stand alone instrument capable of securing the arrest and surrender of a person; subject only to that Decision and to the national legislation giving effect to it. Because of its international dimension, it must have an independent status subject only to the constraints which I have mentioned. It is an autonomous document within these stated confines and must be treated as such. It is, in the words of *Altaravicius,* the "*operative document*", the document upon which "*the whole process hinged*": that single warrant is the "*essential basis*" of the system. Therefore, whether under the recitals and/or the Articles of the Decision, or by virtue of s. 4A of the 2003 Act; or even indeed more broadly on the basis of mutuality, it ought to be accepted that the relevant judicial decisions are presumptively correct, and are made within due process and in accordance with the laws of the State in question. That presumption, which involves a rule of non-inquiry, may be called into question, but only within the legal scaffolding upon which the system stands. This system involves a new dawn and with it, a new approach. Therefore, the former mindset which drove extradition law must yield and give way: respect and confidence replacing distrust and misgiving.

65. This is not to suggest for a moment, that it has a life of its own, untrammelled by rules or regulations. That is simply not so: it must operate within a legal framework. As Fennelly J. said in *Dundon v. Governor of Cloverhill Prison* [2005] IESC 83:

"The European arrest warrant is designed to operate, fundamentally within a judicial process. This essential aspect of the procedure is not merely a recognition that its execution 'must be subject to sufficient controls,' as is stated in the eighth recital, but of the principle of legality. Persons cannot be surrendered compulsorily from one Member State to another except in accordance with an open and transparent judicial procedure which guarantees respect for fundamental human rights."

So whilst this process must be given due respect in the manner which I have described, nevertheless all persons subject to its operation must be afforded proper protection and safeguarded. This however must be achieved by and within the legal structure, partially Union-based and partially national-based, upon which it survives.

66. To answer the question posed at para. 58 *supra*., I must firstly find an entry point of challenge which is legally available. Dealing with the European dimension it seems to be that the only instrument, to which recourse can be made, is the Framework Decision. That Decision has no express provision giving an answer to the problem raised in this case. However, by reference to its terms, the warrant in question, when issued, complied fully with the Article 8 requirements and the offences specified in it, clearly come within the scope of Article 2. None of the grounds for either mandatory or optional non-execution apply (Articles 3 and 4 respectively): indeed it is not suggested they do. The Recitals have not been relied upon as having any particular, as distinct from general, significance. As no other reliance has been placed on the Decision, including the recitals, it appears to me that unless the provisions of the 2003 Act afford justification for intervention, this Court cannot do so.

67. In the domestic context it should immediately be noted that the 2003 Act has no provision dealing with the withdrawal of an E.A.W., whether Ireland is the requesting or the requested state. Nor has it any provision governing the problem in this case. Therefore recourse can only be had to its more general provisions. As previously stated, s. 10 of the 2003 Act, *inter alia*, allows intervention to see if the E.A.W. has been validly issued by the requesting state. Once satisfied as to that requirement, can the phrase be interpreted as permitting this Court to inquire into the E.A.W.'s continuing validity at all times thereafter? The relevant phrase is part of an Act of the Oireachtas and therefore the standard rules of construction apply (see *Howard v. Commissioner of Public Works* [1994] 1 I.R. 101). The words to my mind are clear and unambiguous and permit of no meaning save that which is obvious. Once satisfied that the E.A.W. has been "duly issued" I cannot see how that part of s. 10 has any further application. Whilst I have no doubt but that the Court when making a s. 13 Order (endorsement to execute) or a surrender order under s. 16, can operate the provisions of s. 10, it is still confined by the recited wording to the same event; namely validity at date of issue. As that inquiry has no relevance to this case I cannot, therefore, find an entry point *via* this route.

68. Section 10 however also requires compliance with the following sections of the 2003 Act and with the provisions of Part 3 before an the arrested person can be validly surrendered. Apart from s. 21A, ss. 22, 23 and 24 of the 2003 Act (see paras. 55 and 56 *supra*.) can have no application: indeed it is not suggested that they have. Section 21A prohibits surrender if the Court is satisfied that a decision has not been made to charge and try the suspect person with the offence(s) specified in the E.A.W. Even without recourse to the presumption in subs. (2) of that section, the evidence is strongly to the contrary: at all times since the original decision was made, it has and remains the intention of the issuing state to prosecute Mr. R in respect of the offences in question. Therefore the applicant is evidentially excluded from benefiting from s. 21A of the Act. This conclusion in my view is not disturbed by the circumstances in which the Hendon Warrant was withdrawn, it being clear that howsoever caused, the withdrawal was an erroneous one.

69. The only provision of Part 3 of the Act which has been relied upon is s. 37(1)(b): it forming the basis for asserting that Mr. R's surrender would contravene his constitutional rights and therefore his present detention is unlawful. The fact that he has not been in custody during the currency of these *habeas corpus* proceedings, does not affect this submission. This point can only succeed if firstly I am permitted to look behind the E.A.W. and examine its validity on the ground complained of, and secondly, if I am, that a finding of its invalidity is made on that basis. As I have previously stated, it is my belief that the E.A.W., when validly made, is separate and distinct from the underlying warrant; as a result I cannot go behind it unless permitted to do so by either the Framework Decision or the 2003 Act. As I am unable to establish a legal basis within either for so doing I must conclude that Mr. R has been unable to satisfy me that his detention pursuant to the E.A.W. is unlawful.

70. I have arrived at this decision notwithstanding the real difficulty facing the applicant should he decide to mount a challenge to the warrant in England. He would have to do so *in absentia* because once physically within that jurisdiction he can be arrested at common law for these offences. If such circumstances occurred, all issues regarding the E.A.W. would become moot. This case, in this respect, is therefore quite unlike *Stapleton*, where the delay point could be as cogently argued in the English Courts as in the Irish courts. Despite this problem, and whilst acknowledging its existence, I do not believe that it can affect the overall decision.

71. I would also like to add that this judgment cannot be seen as one which renders immune from judicial challenge in this jurisdiction, unacceptable laxity by requesting states. Such practice if it became widespread would affect trust, confidence and recognition. If that occurred remedies would be made available.

72. By reason of the aforesaid, it is unnecessary to consider whether as a matter of English law the E.A.W. fell with the withdrawal of the Hendon warrant. If this issue had to be looked at, great difficulty would have been encountered as there was a diametric clash between the affidavit evidence: this may have required a re-assessment of the cross-examination issue. That however does not now arise for the reasons above given.

73. Therefore this challenge must fail.