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THE HIGH COURT

2010 257 EXT

IN THE MATTER OF THE EUROPEAN ARREST WARRANT ACT 2003

BETWEEN

THE MINISTER FOR JUSTICE AND EQUALITY

APPLICANT

AND

MICHAL ZMYSLOWSKI

RESPONDENT

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

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

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

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

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

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

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

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

> "1. Each Member State may notify the General Secretariat of the Council that, in its relations with other Member States that have given the same notification, consent is presumed to have been given for the prosecution, sentencing or detention with a view to the carrying out of a custodial sentence or detention order for an offence committed prior to his or her surrender, other than that for which he or she was surrendered, unless in a particular case the executing judicial authority states otherwise in its decision on surrender.
>
> 2. Except in the cases referred to in paragraphs 1 and 3, a person surrendered may not be prosecuted, sentenced or otherwise deprived of his or her liberty for an offence committed prior to his or her surrender other than that for which he or she was surrendered.

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

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

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

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

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

Article 8(1) of the Framework Decision provides:

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

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

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

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

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

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

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

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

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

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

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

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

"By means of this letter I provide you with two additional European Arrest Warrants concerning the suspects Michal Zmyslowski and [a named person]. Both suspects have already been handed over to the Netherlands by your authorities.

However, these additional arrest warrants concern new criminal offences which have been revealed after the suspects have been handed over by your authorities. Since I intend to prosecute the suspects as regards these new facts as well, I request your permission pursuant to art 27, paragraph 2 of the Framework Decision on the European Arrest Warrant."

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

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

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

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

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

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

> "Furthermore, I kindly request by means of this present judicial European Arrest Warrant to authorise extradition of the above mentioned individual for the purpose of criminal prosecutions, or the execution of custodial sentence or detention order as regards the following criminal offences as well:
>
> - Using or holding a fabricated or falsified travel document, punishable by a prison sentence not exceeding 6 years
>
> - Theft by two or more individuals in association by means of burglary and/or breaking and entering, punishable by a prison sentence not *exceeding 6 years."*

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

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

> "This present arrest warrant concerns a total of two (2) criminal offence, i.e.:
>
> - theft by two or more individuals in association by means of burglary and/or breaking and entering, punishable by law in article 311 of the Dutch Penal Code;
>
> - using or holding a fabricated or falsified travel document, punishable by law in article 231 of the Dutch Penal Code ."

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

> "The concerned investigation has also revealed that, during the period between 10 November 2009 and 20 June 2010, the suspect Zmyslowski has, at several occasions, or at least once, intentionally used a travel document which was not issued to his own name, i.e. a Polish passport by the name of Tomasz Trepiak
>
> Upon his arrest in the Netherlands, Zmyslowski gave permission to perform a DNA – analysis on the grounds of article 151a paragraph 1 Dutch Code of criminal Proceedings. Said DNA – analysis has resulted in a match with DNA – trace that was found at the scene of a burglary committed by means of breaking and entering on 26 October 2007 in Geldrop (the Netherlands)".

Part E also contains the following details under a subheading entitled "[*n]ature and legal qualification of the criminal offences and the applicable legal provision/code*":

> In addition to the fact that Zmyslowski is under suspicion of [the offences the subject matter of the original European Arrest Warrant] he is also suspected of having,
>
> on or around the period of 10 November 2009 until 20 June 2010, in Eindhoven and/or Soerendonk (the Netherlands), or at least in the district of 's Hertogenbosch or at least in the Netherlands, together and in association with one or several other person (s), or at least alone, at several occasions, or at least once (at all times) intentionally, used her travel document which was not issued to his name, i.e. a Polish passport issued to the name and person of Tomasz Trepiak, which use consisted of the suspect identifying himself or about 15 February 2010 using her travel document issued to the name of Tomasz Trepiak and/or the suspect has, on 15 February 2010, used a boarding pass issued by the airline Ryanair (flight FR 4536) to Tomasz Trepiak on a travel document which the suspect provided to Ryanair in which documents the name Tomasz Trepiak was mentioned falsely and contrary to the truth and/or which document was falsely or unlawfully issued to the name of Tomasz Trepiak, with the purpose of using said travel document as if it were true and authentic and/or as if it were issued to the aforementioned suspect; which is punishable by law in article 231 of the Dutch Criminal Code,
>
> and of having,
>
> on or around 26 October 2007, in Geldrop, in the community of Geldrop-Mierio, together and in association with (an) other person (s), or at least alone, with the purpose of unlawful appropriation in/from a store (Sanders Byoux) situated at the Llangstraat nr. 16, taking a number of jewels including amongst other things bracelets and/or earrings, at least some property partially or entirely owned by J.A. Walravens, or at least by (an) other person (s) than the suspect and/or his co-perpetrator(s), at which occasioned the suspect and/or he is co-perpetrator(s) has/have gained access to the scene of the crime and/or has/have placed the property under his/their reach by breaking and entering and/or climbing, by means of forcing and/or destroying and/or opening a roll down shutter and/or by means of breaking the window of an access door and/or by means of breaking and/or smashing show windows and/or cabinets;
>
> art. 311 paragraph 1 sub 4 and 5 Dutch Criminal Code."

In Part E. I. of the document the boxs relating to "kidnapping, illegal restraint and extortion" and "forgery of administrative documents

and trafficking therein" are ticked. However, it seems clear that the former relate solely to the offences that were the subject of the original European Arrest Warrant, and that the latter can only relate to one of the additional offences viz "using or holding a fabricated or falsified travel document" contrary to "article 231 of the Dutch Penal Code".

However, Part E. II. of the document relating to "[a] full description of the additional criminal offence(s) that/which is/are not included in the criminal offences kisted under point (I)", specifies:

> " Art. 311. 1 At prison sentence not exceeding six years or a fine of the fourth category shall be awarded for:
>
> Sub 1 theft of cattle out of the meadow;
>
> Sub 2 theft on the occasion of fire, explosion, flood, shipwreck, running aground, railroad accident, riot, mutiny or wartime;
>
> Sub 3 theft at night, in a residence or on an enclosed property on which a residence is built, by someone present at that place without knowledge or against the will of the appropriate person;
>
> Sub 4 theft by two or more persons in conspiracy;
>
> Sub 5 theft on the occasion of which the culprit has gained access to the scene of the crime or has brought the good to be appropriated within his reach, by means of burglary, housebreaking, false keys, a false order or a false suit of clothes.
>
> Sub 6 theft with the objective of preparing or facilitating a terrorist crime.
>
> 2. When the tests described under sub 3 is accompanied by one of the circumstances described under 4o or 5 o, at prison sentence not exceeding nine years or a fine of the fifth category shall be awarded.
>
> Art. 231.
>
> 1 A prison sentence not exceeding six years or a fine of the fifth category shall be awarded to any person who fabricates or falsifies a travel document, or has a third-party providing such a document based on false information, or who makes a travel document which was issued to himself or to any other person available to a third person, with the purpose of allowing said third person the use of said document as if it were his/her own.
>
> 2 The same punishment applies to any person holding a travel document of which he/she knows or should reasonably suspect that it has been fabricated or falsified, or to any person intentionally using any travel document which was not issued to his/her name."

In circumstances where offences under both article 311 and article 231, respectively, of the Dutch Penal Code are specified in the Part E. II of the present document, and where the corresponding portion of the original European Arrest Warrant was not filled in, there is an ambiguity as to whether paragraph 2 of article 2 of the Framework Decision is being relied upon with respect to the passport offence. In the circumstances the Court considers that it is safest, as indeed is urged by counsel for the applicant Mr Remy Farrell B.L., to approach the matter on the basis that correspondence requires to be demonstrated with respect to both of the new matters.

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

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

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

The document is dated 30th of December 2010.

The uncontroversial issues of correspondence and minimum gravity
Counsel for the applicant has suggested, and the respondent has not sought to dispute that suggestion, that in the case of the offence contrary to article 231 of the Dutch Penal Code (the passport offence) correspondence can be demonstrated with the offence under Irish law of deceiving another person, contrary to s. 6 of the Criminal Justice (Theft and Fraud) Offences Act, 2001, alternatively using a false document, or possession of a false document, both contrary to s.26 of the Criminal Justice (Theft and Fraud) Offences Act, 2001. In the case of the offence contrary to article 311 of the Dutch Penal Code (the burglary/breaking and entering offence), it is suggested that correspondence can be demonstrated with burglary contrary to s.12 of the Criminal Justice (Theft and Fraud) Offences Act, 2001. The Court is satisfied as to correspondence in each case and having regard to the available maximum sentences for each offence the requirements of s.38(1)(a)(i) of the Act of 2003 with respect to minimum gravity are also clearly met.

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

The first submission made by counsel for the respondent is that the "documentation" received by the Irish Central Authority and forwarded to the Court is, and must be treated as being, a European Arrest Warrant albeit one that is incapable of execution, and that it cannot therefore be regarded as being a s. 22(7) request for consent by an issuing state. The following points are made in support of this submission.

First, both the covering letter, and the substantive document accompanying it, speaks of an additional European Arrest Warrant. Moreover the substantive document is entitled "*Additional European Arrest Warrant*".

Secondly, the first paragraph of the document entitled "*Additional European Arrest Warrant*" says "This present warrant has been issued by a competent judicial authority. I hereby request the apprehension and extradition of the individual named here and after for the purpose of criminal prosecution and the execution of a custodial sentence or a detention order." The nature of the request made

is clear and unambiguous. It seeks the apprehension and extradition of the individual named in the warrant.

Thirdly, the document entitled "Additional European Arrest Warrant" is set out in the form prescribed by, and is particularised as required in, the Annex to the Framework Decision, and it therefore also complies with the requirements of s. 11 of the Act of 2003.

Fourthly, s. 12(8) of Act of 2003 provides:

> "(8) In proceedings to which this Act applies, a document that purports to be—
>
> (a) a European Arrest Warrant issued by a judicial authority in the issuing state,
>
> (b) [not relevant]
>
> (c) a translation of a European Arrest Warrant or [not relevant] under this Act, or
>
> (d) a true copy of such a document,
>
> shall be received in evidence without further proof."

In this case the document entitled "*Additional European Arrest Warrant*" ***purports*** to be a European Arrest Warrant, and on account of that has the status of a European Arrest Warrant such that it is receivable in evidence without further proof.

Fifthly, the mutual respect between member states, and the mutual trust and confidence enjoined upon both issuing and executing judicial authorities by the Framework Decision, demands that a choice made by a judicial authority be respected. The issuing judicial authority chose to issue an additional European Arrest Warrant. It may have been the wrong choice, but that choice must be respected.

Sixthly, in circumstances where the document entitled "*Additional European Arrest Warrant*" clearly purports to be a European Arrest Warrant, the Irish Central Authority had no right to place it before the High Court for any purpose other than for endorsement. In that regard, s.13 of the Act of 2003 requires the Central Authority on receipt of a European Arrest Warrant to apply to the High Court to have it endorsed. The words adopted by the Oireachtas in this section are very explicit. The Oireachtas expressly requires the Central Authority to apply to the High Court to have the warrant endorsed. The Central Authority has refused or failed to have this warrant endorsed by the High Court. In doing so the Central Authority has usurped the function of the executing judicial authority and exceeded its role as provided for in Section 6 of the 2003 Act and Recital 9 of the Framework Decision. The Central Authority in listing the European Arrest Warrant before the High Court for a purpose other that of having it endorsed for execution, acted outside the procedures prescribed by statute

In further support of this sixth point the respondent relies upon the following passage from the judgment of the Chief Justice in the Supreme Court in *Rimsa v Governor of Cloverhill Prison* [2010] IESC 47:

> "At this point I think it is appropriate to refer briefly to the role conferred on the Central Authority of the member states by the Framework Decision.
>
> Recital 9 of the preamble to the Framework Decision states 'The role of central authorities in the execution of a European Arrest Warrant must be limited to practical and administrative assistance.' [*Emphasis added*]
>
> In giving substantive effect to that recital, article 7 of the Framework Decision provides that 'Each Member State may designate a central authority or, when its legal system so provides, more than one central authority to assist the competent judicial authorities.' Paragraph (2) of article 7 then goes on to provide that 'A Member State may, if it is necessary as a result of the organisation of its internal judicial system, make its central authority (ies) responsible for the administrative transmission and reception for European Arrest Warrants as well as for all other official correspondence relating thereto.'
>
> It may be seen therefore that the Framework Decision intends that the role of any central authority, which, in contrast to a judicial authority referred to in the Framework Decision, belongs to the executive arm of a state, is confined to assisting the competent judicial authority and may also, if necessary, have responsibility for the administrative transmission and reception of European Arrest Warrants and related official correspondence.
>
> This limitation placed on the role of the central authorities of the member states, in contrast to that of a judicial authority, is of importance when one considers an objective of the Framework Decision, as set out at recital (5) of the preamble, is the establishment of an area, within the Union, of freedom, security and justice which would lead to the abolition of extradition between member states and replace it 'by a system of surrender between judicial authorities.' [*Emphasis added*]
>
> Recital (6) of the Framework Decision speaks of the measure being '…the first concrete measure in the field of criminal law implementing the principle of mutual recognition which the European Council referred to as the "cornerstone" of judicial cooperation.'
>
> Recital (8) states: 'Decisions on the execution of the European Arrest Warrant must be subject to sufficient controls, which means that the judicial authority of the Member State where the requested person has been arrested will have to take the decision on his or her surrender'.
>
> Thus, as has been pointed out in several judgments of this Court concerning the application of the Act of 2003, mutual cooperation and recognition of judicial decisions between judicial authorities of the member states are fundamental to the operation of the new system of 'surrender' on foot of the European Arrest Warrant."

In the event that the Court is disposed to treat the documents dated the 30th of December 2010 as a request pursuant to s.22(7), Counsel for the respondent, Ms Iseult O'Malley S.C., relies upon a second and alternative submission. Ms O'Malley submits that there is no presumption in favour of the granting of a s. 22(7) request. Indeed, she contends that arguably there is a presumption against the granting of such a request. The basis for this submission is that, in so far as s. 16 surrender applications are concerned , the Act

of 2003 provides that certain things are not to happen and, accordingly, the Court will not make a primary order unless it is satisfied that those things will not happen. For example, faced with a routine s. 16 application the Court will not order a respondent's surrender unless it is satisfied that the respondent will not be prosecuted for offences not covered by the warrant. Equally the Court will not make the order unless it is satisfied that the respondent will not be forwarded to a third country. Counsel for the respondent submits that in those circumstances a request to the High Court by an issuing state under s. 22(7) and (8) for consent to further prosecute the respondent for an offence not covered by the original European Arrest Warrant should give a reason or reasons as to why the Court should accede to the request. That might, for example, involve furnishing an explanation to the Court as to why the charge at issue wasn't included within the original European Arrest Warrant. Counsel submits that more is required than a bald assertion by the issuing state that the respondent committed the offence and that "we now wish to prosecute him". In the present case the Court has not been provided with any reason or explanation as to why the offences for which permission is now sought to prosecute the respondent were not included in the original European Arrest Warrant. Moreover, Ms O'Malley S.C. makes the point that certain of the particulars concerning the new matters contained within the document entitled "Additional European Arrest Warrant" suggest that these new matters were known about by the Dutch police authorities long before this Court ordered the surrender of the respondent. She submits that in the circumstances some explanation is called for as to why these were not acted upon sooner, and in particular why they were not made the subject of a new or further European Arrest Warrant before this Court made its s. 16 Order on the 3rd of November 2010.

Counsel for the respondent makes the further point that a s.22(7) request should provide the same information that would be required if it were a European Arrest Warrant, including details of the domestic arrest warrant or equivalent judicial decision. Ms O'Malley has submitted that in this case all that is referred to at Part B of the document entitled "Additional European Arrest Warrant" is ""[a]dditional facts with regard to the European Arrest Warrant dated 10th May 2010, issued at the request of the public prosecutor [name supplied] on 29 December 2010" and that issuing of "additional facts" does not constitute the issuance of an arrest warrant or equivalent judicial decision.

For these reasons, the respondent urges upon the Court that the High Court should refuse to give consent under S. 22(7) to the prosecution of the respondent for the additional offences.

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

Counsel for the respondent has indicated that in addition to the arguments just rehearsed, her client also wishes to rely upon and to adopt the arguments of the respondent in the related case of *Minister for Justice & Law Reform v. Trepiak, Record No 2010/258 EXT*, (which for efficiency and convenience was heard at the same time as this case) and which are set out in detail in the Court's judgment of today's date in that matter.

Submissions on behalf of the applicant
Counsel for the applicant rejects the submission that the document dated the 30th of December 2010, and entitled "Additional European Arrest Warrant" constitutes an actual European Arrest Warrant. He poses the question "what is a European Arrest Warrant" and submits that the answer is to be found in section 2 of the Act of 2003 which provides the following definition:

> ""A warrant, order or decision of a judicial authority of a Member State, issued under such laws as give effect in the Framework Decision in that Member State for the arrest and surrender by that 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."

Counsel for applicant submits that in the present case nobody is suggesting for a moment that the purpose of the document before the Court is to arrest the respondent. Further, nobody is suggesting that the purpose of it is to arrange for his transfer or conveyance from Ireland to Holland, because he is already in Holland. The respondent is not capable of being arrested and surrendered to the Dutch authorities because that has already happened. He is presently in the custody of the Dutch authorities. Counsel submits this really boils down to an exercise in absurd form, where it is clear that the document in question cannot be a warrant, cannot be endorsed as a warrant and cannot be executed as a warrant. Indeed, he submits that although there is no question of it being used as an arrest warrant even in a theoretical legal fashion, the argument is still being made by the respondent that because it arguably "purports" to be a warrant that it must be regarded as such and therefore can't amount to a request under Section 22. In counsel for the applicant's submission that is an untenable proposition. He submits that while the approach of the Dutch authorities in drafting their s. 22(7) request as though it were a European Arrest Warrant is not ideal, we should not be all that surprised that they adopted that approach because (a) there is no prescribed form for a section 22(7) request and (b) s. 27(4) of the Framework Decision requires the request to contain all of the information mentioned by Article 8(1) which in turn deals with the content and form of the European Arrest Warrant.

Counsel for the applicant further does not accept or agree with the respondent's submission that there is a presumption against the giving of consent on an application such as this. On the contrary, he submits that when s.22(7) and (8) are given a conforming interpretation in accordance with the *Pupino* principle, and indeed when the Act of 2003 is viewed as a whole as is required by s. 5 of the Interpretation Act 2005, it is clear that the Court is obliged to obliged to give its consent unless consent ought to be refused on Part 3 grounds. In particular he reiterated the arguments made by him in the related case of *Minister for Justice & Law Reform v. Trepiak,* Record No 2010/258 EXT and which are quoted in this Court's judgment, also of today's date. The Court summarised his argument thus:

> "It has been submitted on behalf of the applicant that when one turns to the relevant part of the Framework Decision it becomes entirely apparent that the Court is not given a free rein by the provisions of S. 22 in that the governing rule is that the Court must give its consent unless there is some impediment in terms of the mandatory grounds for refusing surrender under Article 3 or one of the optional grounds under Article 4:
>
> > '27.4. A request for consent shall be submitted to the executing judicial authority, accompanied by the information mentioned in Article 8(1) and a translation as referred to in Article 8(2). ***Consent shall be given when the offence for which it is requested is itself subject to surrender in accordance with the provisions of this Framework Decision***. Consent shall be refused on the grounds referred to in Article 3 and otherwise may be refused only on the grounds referred to in Article 4. The decision shall be taken no later than 30 days after receipt of the request.'
>
> (*emphasis added*)
>
> The applicant's contention is that when s. 22(7) &(8) are considered in light of the Framework Decision it is clear that the Court in fact has almost no discretion on an application by an issuing state for its consent to the further prosecution of a respondent who has already been surrendered. The parameters circumscribing such an application are that the High Court

must grant consent save in very precisely defined circumstances, namely if the offence concerned is an offence for which a person could not by virtue of Part 3 of the Act of 2003 or the Framework Decision (including the recitals thereto) be surrendered.

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

For these reasons it is neither necessary nor desirable for this Court to examine, much less adjudicate on, the reasons why the offences in respect of which it is now sought to further prosecute the respondent were not included in the original European Arrest Warrant, or why a further such warrant was not issued before an Order was made by this Court for the respondent's surrender. Moreover, a requirement to do so would be inconsistent with the notions of trust and confidence on foot of which the system is based, and would place this Court in the invidious position of having to adjudicate on the actions of officialdom in another member state. Any attempt to do so would be fraught with difficulty, impractical and probably unworkable having regard to systemic, prosecutorial, procedural and evidential differences between the criminal justice systems of different member states.

Finally, Counsel for the applicant rejects the alternative argument that even if the document entitled "*Additional European Arrest Warrant*" is properly to be regarded as a s.22(7) request, that it is deficient in content and should not be acted upon because it does not, in so far as the offences in respect of which the request is made is concerned, set out details of a domestic arrest warrant or equivalent judicial decision. Mr Farrell B.L. has submitted that in relation to a s. 22(7) request the applicant does not need to demonstrate the existence of a domestic warrant or equivalent judicial decision because that is to put the cart before the horse. Indeed, on one view of it the issuance of a domestic warrant or equivalent judicial decision before consent has been sought and received would be premature and would arguably offend against the rule against specialty. All he is required to demonstrate is that the issuing state has expressed its wish or desire to further prosecute the respondent, but it is not necessary, or even desirable, that steps in furtherance of that should have been taken by the requesting state until such consent has been sought and obtained.

Reply to the arguments advanced by the respondent in the *Trepiak* case.

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

Decision
The Court is satisfied to accept counsel for the applicant's submission that the documents dated the 30th of December 2010 are properly to be considered as a request under s. 22(7) of the Act of 2003 and that the document entitled "*Additional European Arrest Warrant*" is not, and is not to be treated as, a European Arrest Warrant. The Court has no hesitation in accepting the correctness of this submission, particularly when both documents dated the 30th of December 2011 are read together. It is quite clear from the terms of the letter that accompanied the "*Additional European Arrest Warrant*" document that a request for consent to prosecute was being made. That letter expressly states:

> "Since I intend to prosecute the suspects as regards these new facts as well, I request your permission pursuant to art 27, paragraph 2 of the Framework Decision on the European Arrest Warrant."

Moreover, even the "*Additional European Arrest Warrant*" document itself, at Part C thereof, makes it clear that consent to further prosecution is being requested. It states:

> "Furthermore, I kindly request by means of this present judicial European Arrest Warrant to authorise extradition of the above mentioned individual for the purpose of criminal prosecutions, or the execution of custodial sentence or detention order as regards the following criminal offences as well:
>
> - Using or holding a fabricated or falsified travel document, punishable by a prison sentence not exceeding 6 years
>
> - Theft by two or more individuals in association by means of burglary and/or breaking and entering, punishable by a prison sentence not exceeding 6 years."

The Court is completely satisfied that in circumstances where, as is conceded by counsel for the respondent, nobody is suggesting for a moment that the purpose of the document before the Court is to arrest the respondent, or for the purpose of arranging for his transfer or conveyance from Ireland to Holland, and where both the document entitled "*Additional European Arrest Warrant*", and the letter accompanying it, expressly seek this Court's consent to the further prosecution of the respondent, in circumstances where he has already been surrendered, it is not correct or accurate to say that the document entitled "*Additional European Arrest Warrant*" purports to be an actual European Arrest Warrant. The Court is satisfied that notwithstanding the unhappy terms of its title and the first paragraph thereof, it does not in reality purport to be any such thing.

The Court also does not accept the submission by counsel for the respondent that there is an effective presumption against the giving of consent, and that the Court requires to be satisfied for the purpose of exercising its discretion in favour of the granting of consent that there was a legitimate and good reason as to why the additional matters were not included in the original European Arrest Warrant, or made the subject of another European Arrest Warrant, before the respondent was surrendered. The Court agrees with the submission in regard to that made by counsel for the applicant and in particular accepts that it is clear from the terms of Article 27(4) of the Framework Decision, to which this Court is entitled to have regard in interpreting s. 22(7) and (8) of the Act of 2003, that the Court has very little discretion in the matter of whether or not it gives its consent. The Court is satisfied that it is solely concerned with whether the offence concerned is an offence for which a person could not by virtue of Part 3 of the Act of 2003 or the Framework Decision (including the recitals thereto) be surrendered.

The Court further accepts that in the context of a request for consent to the further prosecution of a respondent there does not have to be an underlying arrest warrant or equivalent judicial decision. It is sufficient that the issuing state has expressed its wish or desire to further prosecute the respondent.

To the extent that the respondent has adopted, and seeks to rely upon, the arguments advanced by the respondent in the related case of *Minister for Justice & Law Reform v. Trepiak,* Record No 2010/258 EXT the Court also rejects those arguments, in so far as they relate to this respondent, for the same reasons as it has rejected those arguments in so far as they relate to Mr Trepiak and as set in this Court's judgment of today's date in the *Trepiak* case.

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

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

For the further avoidance of doubt the offences in question are those particularised in the document entitled "Additional European Arrest Warrant" dated 30th of December 2010 and relating to the respondent, consisting of (i) theft by two or more individuals in association by means of burglary and/or breaking and entering, punishable by law in article 311 of the Dutch Penal Code, and (ii) using or holding a fabricated or falsified travel document, punishable by law under article 231 of the Dutch Penal Code.